After last year’s leadership changes at the U.S. Securities and Exchange Commission (SEC), both at the Chairman level and at the top of the Enforcement Division, we are now seeing new initiatives take hold and the enforcement staff’s focus sharpen. What does this mean for public companies and regulated entities? This panel of expert SEC practitioners, from the SEC and private sector — in-house and law firms — will examine what this means for the future of SEC enforcement. We will examine the recent high-profile focus of the SEC on market integrity issues, including examination of High Frequency Traders and the markets after the release of Michael Lewis’ book: “Flash Boys.” We will discuss the status of the highly publicized STOCK Act (Stop Trading on Congressional Knowledge). We will discuss the Commission’s creation of “Operation Broken Gate” designed to focus on gatekeepers like auditors and whether this initiative has the potential to uncover the next big Enron. We will discuss the SEC’s continued focus, with the Department of Justice, on enforcement of the Foreign Corrupt Practices Act, including some of the largest settlements to date. And no discussion about the SEC is complete without an update on the Dodd Frank Act Whistle Blower provision.

Program Chair & Moderator:
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Jessie K. Liu, Partner, Jenner & Block LLP
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FCPA Compliance in India: Making Headlines for the Right Reasons

By: Vasu B. Muthyala and Ronak D. Desai

Shortly after making headlines for its involvement in a major bribery scandal in Mexico, Walmart announced the establishment of a special anti-corruption compliance team led by KPMG to train its India-based personnel. The purpose of training, the company explained in an internal e-mail to its employees at Bharti Walmart and Walmart India, the firm’s Indian subsidiaries, was to familiarize them “with the basics of [the Foreign Corrupt Practices Act] and provide a forum for discussion and clearing any doubts or queries.”

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Enacted in 1977, the Foreign Corrupt Practices Act (FCPA) is a criminal statute that prohibits companies from paying bribes to foreign government officials and political figures for the purpose of obtaining or retaining business. The FCPA has two primary provisions. The first prohibits U.S. persons, entities, or any issuers of U.S. securities, from making and offering to make payments to foreign government officials to obtain or retain business or a business advantage. The second requires that issuers maintain accurate books and records and internal controls. The FCPA is enforced by the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). Penalties for FCPA violations range from millions of dollars in fines to lengthy jail sentences.

Walmart’s decision to ensure its employees in India are compliant with U.S. anti-corruption laws is a prudent one, although hardly surprising, given the corruption investigation it is now facing from the DOJ and SEC for its operations in Mexico. The subsidiary, Walmex, is alleged to have made millions of dollars in questionable payments to local officials in exchange for permission to build stores around the country and expedite their construction. To make matters worse, top Walmart officials apparently were informed of the questionable payments being made to Mexican officials, but failed to adequately report the unlawful payments to the proper authorities. Against such a backdrop, it is understandable that Walmart fears that what happened in Mexico could happen again in India, and it wants to take steps to prevent that from occurring.

Such a fear is not unfounded. On one hand, the last decade has witnessed India’s increasing attractiveness as a destination for U.S. companies eager to invest and do business in the world’s largest democracy. With its large population of English speakers, its position as the second most important market for foreign direct investment (FDI) after China, and growth rates consistently averaging well above 8%, India’s economy is full of potential for American businesses.

On the other hand, however, despite such promise, U.S. companies face a host of risks in doing business with India. Like Mexico, India has a longstanding culture of corruption which affects virtually every level of the government. India’s notorious bureaucratic makes it difficult to obtain the necessary approvals to conduct business in the country, while its byzantine regulations have resulted in procedures that are opaque. India’s extensive and ubiquitous corruption problem was captured recently by Transparency International’s Corruption Perceptions Index, which ranks countries from highly clean (10) to highly corrupt (0). In 2011, India ranked 95th out of 183 countries with a score of 3.1 — barely better than Mexico’s score of 3 — putting into sharp focus the extent to which corruption plagues the country.

To avoid FCPA violations, firms must first assess the risk unique to each country before undertaking an investment there. Given the high level of corruption afflicting India, American companies who want to do business there face a very acute and genuine risk of violating American anti-corruption laws. Unsurprisingly, there have already been FCPA enforcement actions by the DOJ and SEC which have focused on payments to government officials in India.

For Example:

- On August 16, 2012, Oracle Corporation, the California-based enterprise systems firm, agreed to pay $2 million in penalties to the SEC for violating the FCPA. The SEC alleged that Oracle failed to prevent a subsidiary in India from secretly setting aside money off the company’s books that was eventually used to make unauthorized payments to phony vendors in India. The SEC did not allege that any payments were made to government officials, rather they only alleged that the third-party payments created the risk that the funds could be used for illicit purposes such as bribery or embezzlement. The SEC complaint alleged that Oracle violated the FCPA books and records provision and internal controls provision.

- In 2011, London-based liquor manufacturer Diageo plc paid more than $16 million to settle FCPA-related offenses it committed in several Asian countries including India. According to the SEC, Diageo paid $1.7 million in bribes to Indian government officials “responsible for purchasing or authorizing the sale of its beverages in India.”

- In 2010, Houston-based Pride International paid $51 million as part of settlements with the DOJ and SEC for FCPA violations it committed in India, Mexico, and Venezuela. In India the company paid more than half a million dollars in bribes to government officials to secure a favorable decision relating to a customs dispute for a drill rig imported into the country.

- In 2009, Control Components, Inc., a valve manufacturer, pled guilty to criminal charges and paid a fine of $18.2 million for paying millions in bribes to employees of state-owned companies in 36 countries, including in India to the Maharashtra State Electricity Board.

- In 2008, Westinghouse Air Brake Technologies entered into settlement agreements with the DOJ and SEC and paid almost $700,000 after making illicit cash payments totaling approximately $137,000 to the Indian Railway Board in order to obtain contracts, schedule inspections, obtain certificates, and avoid tax audits.
• In 2007, Dow Chemical, one of the world’s largest chemical manufacturers, settled with the SEC and agreed to pay a $325,000 civil penalty after its subsidiary made an estimated $200,000 in payments and gifts to Indian government officials including a Central Insecticides Board official to expedite registration of products.

• In 2007, Electronic Data Systems, one of the largest service companies in the world, settled with the SEC and paid $491,000 after one of its subsidiaries paid $720,000 to senior employees of two Indian government-owned energy companies to prevent them from cancelling existing contracts and to award additional contracts.

• In 2007, York International Corp., a global provider of heating, cooling, and refrigeration products and services paid $22 million to settle FCPA-related offenses committed around the world including in India. According to the SEC, York paid $132,500 in the form of cash and gifts to Indian Navy officials, through an agent, to secure approximately $2.4 million of business.

• In 2007, Textron Inc., an industrial pumps, gears, and parts manufacturer, entered settlements with the DOJ and the SEC and agreed to pay more than $4.5 million for making illicit payments to the Iraqi government in the U.N. Oil for Food Program and to officials of state-owned companies in India and other countries.

• In 2001, Baker Hughes Inc., an oilfield services company, reached a settlement with the SEC for making improper payments to government officials in Indonesia, Brazil and India. In India, Baker Hughes made illicit payments to the Indian Director General of Shipping to obtain a shipping permit.

In addition to these cases, Kraft Foods Inc. last year disclosed that the SEC was investigating potential FCPA violations relating to its Cadbury facility in India. And two years ago, Tata Communications Ltd. publically disclosed and voluntarily informed the DOJ and SEC that its own internal investigation uncovered that a reseller for one of its subsidiaries may have made improper payments to government officials in Southeast Asia. It is unclear what actions, if any, the SEC or DOJ are taking based on this information. But it is not unusual for regulators to take years to resolve such investigations.

Except for the most recent Oracle settlement, the cases mentioned here have been part of broader investigations spanning several different countries. Given India’s growth and acute corruption problem, it is only a matter of time, however, until another U.S. company operating in India makes headlines like Walmart in Mexico. As a result, it is important for U.S. companies operating in India to take adequate measures to ensure they do not run afoul of the FCPA. With penalties ranging from millions of dollars in fines to extensive prison time, every company seeking to conduct business in India should ensure it has an adequate compliance regime in place. The question that naturally arises is what are the elements of an effective compliance program?

Crafting a Compliance Program for Indian Operations

An effective anti-corruption compliance program for companies seeking to do business in India, and one that will stand up to the scrutiny of the DOJ and SEC, will take into account at least six elements. These elements are: 1) clear articulation of policies; 2) accountability and high-level involvement; 3) training; 4) effective auditing and risk assessment; 5) enforcement and discipline; and finally 6) prevention and reassessment. Recently, Morgan Stanley & Co. Inc. avoided prosecution in an FCPA case by having an effective compliance program that took into account all these factors. A former Morgan Stanley executive, Garth Peterson, however, did not fare so well. He pled guilty to violating the FCPA by conspiring to circumvent Morgan Stanley’s internal controls. But to date, neither the DOJ nor SEC have specifically enumerated the benefits a company can expect for having a compliance plan designed to prevent fraud or detect it early. Recently, the U.S. Attorney General promised that the much-anticipated DOJ guidance on the criminal and civil enforcement provisions of the FCPA would include clarification about the potential benefits for implementing a good corporate compliance program. The enumerated guidelines are expected later this year.

The first component of an effective compliance program is a clear, written, exposition of a company’s policies regarding permissible versus impermissible behavior under the FCPA. Governing standards must be clear and specifically tailored to a company’s desired activities in India, and must focus on reducing any potential violations of law. A good policy will include a duty to report known violations despite the level of severity. A critical component of such a policy is a requirement of supervisory review and escalation. Walmart may have been spared significant legal trouble in Mexico had it enumerated a clear policy like the one described above. Instead, the apparent conspicuous absence of any explicit reporting and escalation procedures resulted in reports of unlawful payments to Mexican authorities going unheeded.

Accountability and involvement by high-level company executives also known as a top level commitment is the second component of an effective compliance program. Fostering a culture that encourages
a commitment to compliance is a hallmark of this element. The question is what is the tone at the top? Lower-level employees, the ones most susceptible to violating the corruption and bribery laws, will not abide by the best and most carefully crafted policies if they do not see that senior management is following these policies and finds them important. A clear way for senior management to demonstrate their commitment is to have a consistently applied enforcement policy — no matter who the offender.

The next dimension of an effective compliance program is comprehensive training. This entails disseminating carefully crafted relevant policies for the parent company and each one of its Indian subsidiaries. Companies must ensure that all aspects of these policies, which should not be too complicated or technical, are translated and made easily accessible to all employees firmwide. Policies should be translated to local languages. Specifically in a country like India, with a multitude of languages, the need for more than one translation should be analyzed. Companies should also require training sessions with periodic refresher courses, and mandate additional trainings for key risk employees like those who would be based in India and exposed to government officials there.

The fourth component of an effective compliance program focuses on auditing and risk assessment. In India, this means robust due diligence of intermediaries acting on behalf of a company. This includes customs brokers, freight forwarders, and outside attorneys, to name a few. Obtain representations from these third parties that they have not made payments to government officials and check reliable databases to confirm their past compliance. This component also includes an adequate detection system capable of identifying potential FCPA violations. Critical features of such a detection system include global hotlines with multilingual operators to receive anonymous tips about possible misconduct, whistleblower protections, electronic mail monitoring, and periodic, unannounced audits. Robust internal audit mechanisms can help drive effective firmwide FCPA compliance as internal auditors can test and confirm that FCPA controls are working as intended. Additionally, companies should have in place mechanisms capable of tracking complaints about potential violations, reviewing them, and providing final dispositions.

Enforcement and discipline are the fifth component of an adequate compliance program. Simply put, violations of compliance policies and procedures must be addressed promptly and consistently. Companies can find themselves in worse trouble with regulators when they learn of FCPA violations yet fail to address them adequately, as is likely to be the situation with Walmart. Lack of enforcement serves to undermine the potency and efficacy of the very compliance program aimed at minimizing potential FCPA violations.

The final element of an effective compliance program is detection and remediation. For a high-risk environment like India, the need for periodic, focused on-site FCPA compliance examinations should be explored. There is no substitute for being on the ground examining records and talking directly to employees. This can result in fruitful returns including uncovering fraud, detecting weak controls, and demonstrating to employees that the company takes its compliance function very seriously. In those instances where a violation of an established policy is uncovered, corrective action must be swift and effective. The DOJ and SEC have in the past demonstrated a willingness to forego FCPA prosecutions or reach some other less severe settlement where the offending companies have taken prompt remedial measures including terminating those responsible, strengthening compliance procedures, and enhancing their detection program.

Adopting each one of these six steps into a comprehensive compliance program will help companies navigate the challenges of conducting business in corruption-rich India, and go a long way in avoiding headlines like the ones Walmart received for its conduct in Mexico.

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**Place of Provision of Service Rules 2012 — A Welcome Step**

*By: Abilasha Singh and Mekhla Anand*

The Finance Act, 2012 is an inflexion point in the 18-year-old history of service tax. The government has substantially reinvented service tax laws by moving from a selective approach of taxing services to taxing all services except those specified in the negative list or specifically exempted. In addition, the government has replaced the existing rules governing import and export of services with the Place of Provision of Services Rules, 2012 (PPS Rules).

The PPS Rules specify the manner of determining the taxing jurisdiction for a particular service through introducing a single point of determining the taxability; i.e., the place of provision of the service. This article discusses the scheme of the PPS Rules and analyzes certain substantive aspects thereof. However, before going into detail with respect to the rules, it is important to understand that the fundamental principle on which the PPS Rules are based is that only those services rendered in the taxable territory are subject to service tax.

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Once Powerful, Mary Jo White’s S.E.C. Is Seen as Sluggish and Ineffective

By JESSE EISINGER

August 13, 2014 12:00 pm

The Trade

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- Timeline: Mary Jo White – From Prosecutor to Regulator

Mary Jo White took the helm of the Securities and Exchange Commission facing high hopes that she could turn around the once-proud agency. More than a year into her tenure, she has disappointed a wide swath of would-be allies.

Over the last several weeks, I’ve been talking to fellow regulators, administration officials, current and former S.E.C. staff members, financial reform advocates and people on Capitol Hill whose opinions of Ms. White’s performance range from dissatisfied to infuriated.

Traditionally, the S.E.C. has been seen as something of a regulatory jewel.

“The commission’s reputation as tough, independent and public spirited is its lifeblood,” said Damon Silvers, the A.F.L.-C.I.O.’s policy director and a specialist in financial regulation. In Mr. Silvers’s view, George W. Bush’s last chairman, Christopher Cox, damaged the morale and effectiveness of the agency, issues that remain unaddressed. If the S.E.C. is seen as no better, or even less effective than the Treasury and the Fed, he said that “means grave trouble for both the commission and the investing public.”
Look, this is not an easy job. Ms. White has struggled with a House of Representatives that is hostile to financial overhaul and is perennially wielding budget cuts. She has also had to deal with a divided and contentious commission, an enormous workload to put into effect Dodd-Frank and other rules and the constant threat of lawsuits challenging any rule that encroaches on Wall Street’s prerogatives.

Even so, the chairwoman has made some unnecessary foes while her agency has bungled several significant rules.

An Obama appointee, Ms. White seems most at odds not with her Republican commissioners, but with Kara M. Stein. Ms. Stein came from the office of Senator Jack Reed, Democrat of Rhode Island, and was an important architect of the Dodd-Frank rules. She should be Ms. White’s firmest ally, the in-house expert on policy, which isn’t the chairwoman’s forte. In recent months, Ms. Stein has been increasingly vocal in criticizing the S.E.C.’s ineffectual rules and weak enforcement and has cast dissenting votes. The unmistakable conclusion is that Ms. Stein believes the commission is taking a wrong turn.

She is not alone. Ms. White’s S.E.C. irritated the White House, the Treasury and the Financial Stability Oversight Council when it undermined the council’s authority on the question of whether to designate large asset managers as posing a potential risk to the financial system. The S.E.C.’s view — that the way to reduce systemic risks is through regulating products and practices, not the companies themselves — has some merit. But the regulators need to work together and not allow industries to exploit regulatory turf battles.

On yet another front, the S.E.C. is embroiled in a quiet fight with the Public Company Accounting Oversight Board, the accounting industry regulator created after the Enron-era scandals. The accounting board has hardly been a regulatory terror, but it’s been getting resistance from the S.E.C. for even modest initiatives.

For years, the board has pushed for the lead audit partner to have to sign company audits. Wow. Big Step. Put your name to your work. Sadly and predictably, the industry has fought it in what can only be interpreted as cowardly refuge in anonymity. And the S.E.C. leans toward the industry.
“The profession feels that I am a proactive regulator,” James R. Doty, the chairman of the accounting oversight board, told me.

Of the S.E.C. and the topic of agency rivalry, Mr. Doty said, “Robust and vigorous debates are important in this area.” He praised Ms. White as constructive and a pleasure to work with. But his organization lost the fight. Audit partners will not be required to sign the statements, but can if they want to. I can imagine how many auditors will voluntarily put their heads on the block.

Obama’s S.E.C. has even alienated Democrats in Congress. Carl Levin, the Democratic senator from Michigan, who is retiring this year, met with Ms. White a few weeks ago to express his concerns about the pace and strength of Dodd-Frank rules. And in late July, 11 liberal senators sent a letter to express their annoyance about the agency’s new regulations for credit rating agencies and structured securities, the complex bundles of investments that blew up the financial world in 2008. One gripe: Dodd-Frank bars financial firms from betting against the securities they created, as Goldman Sachs and Magnetar did. Four years later, the rules that would turn this law into reality remain stalled in the S.E.C.’s bureaucracy.

There have been several weak Dodd-Frank rules from the agency. Take money market fund overhauls. Corporations use money market funds for their cash as needed. Individuals use them like checking accounts. This is a Big Lie, however. The funds are supposed to be as accessible as a passbook savings account, yet pay higher interest. What that means is there is hidden risk embedded in the product, a fact that became painfully clear in the fall of 2008 when one leading fund announced that a dollar in savings was worth less than a dollar. After years of rule-making negotiations and after the S.E.C. dragged its feet despite former Chairwoman Mary L. Schapiro’s efforts, the agency finally came up with a rule.

But it’s a bad one. Part of its solution is to have the value of the funds for institutional investors float, but not retail investor funds. The institutions will know if their dollar is worth a dollar or a little bit less in times of trouble. A second change is that funds, in those times of trouble, will have extra fees and gates, preventing withdrawals. What this means in the real world is that the smart
money will get out at the first sign of trouble, trapping retail investors in their funds when the gates come down and the fees kick in.

This is upside down. The gates and fees take care of industry’s problem, not the retail investor’s. The S.E.C. contends its rules are rightly focused on institutional investors because they have run on money market funds in the past, not retail investors.

Consumer and investor advocates have also been disappointed. Critics see an ideological link between the staff hired by Mr. Cox and today’s agency.

“When the chair doesn’t have a strong policy background, she is extremely dependent on her staff,” said Barbara Roper, the director of investor protection at the Consumer Federation of America. “Is there anyone on the staff in a high position in leadership, a single person to point to who has reform credentials, who isn’t someone from the industry?”

The S.E.C. says that its rule-making pace is up from the previous administration’s and that it is making rules that will survive court challenges and that are both strong and enduring. It says that Ms. White has surrounded herself not with ideologues but the most qualified people and that she expects the staff to provide her with the full range of views.

Over in enforcement, things are brighter, but still a mixed bag. Ms. White started off promisingly. She demanded and obtained guilty pleas, getting rid of the default settlement without any admission of wrongdoing. And the pace of enforcement is up.

But Ms. White and the S.E.C.’s actions on high-frequency trading have been lacking. Michael Lewis’s book “Flash Boys” was excellent, but merely a popularization of a well-known problem in the markets. For years, the S.E.C. has stood idly by, and Ms. White’s recent comments don’t suggest she will tackle the issue aggressively.

The deep problem with the capital markets is that the public has lost faith. People believe the system is rigged. It has always been thus, but after two major
bubbles, the feeling is more pervasive. It’s not an easy job to clean the markets up and restore confidence, but it’s the one Ms. White signed up for.

So far, she hasn’t delivered.

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SEC Strikes Fear With First Award To Compliance Pro

By Ed Beeson

Law360, New York (September 03, 2014, 4:13 PM ET) -- The U.S. Securities and Exchange Commission’s first-ever whistleblower bounty to a compliance professional is a reminder to companies that they need robust processes for both reporting and responding to claims of internal wrongdoing, lest their gatekeepers become SEC informers.

Friday’s announcement that the SEC had awarded a compliance and audit staffer at a company $300,000 for bringing to its attention information that led to an enforcement action was an inevitable turn of events, professionals in the field say. When the agency passed rules three years ago to set up its whistleblower program, it somewhat controversially extended eligibility for the rewards program to these personnel.

Before, it was a theoretical concern, said Steven Pearlman of Proskauer Rose LLP: Would the very workers tasked with keeping their company aboveboard turn to the SEC if they found wrongdoing?

"Now we see the rubber has hit the road," said Pearlman, co-head of his law firm's whistleblowing and retaliation group.

The SEC’s whistleblower program, a requirement of the Dodd-Frank Act, pays tipsters who give the agency original information that leads to an enforcement action netting more than a $1 million in sanctions. The bounties are worth 10 to 30 percent of the amount collected and are determined after a review by agency staff. So far, the staff has denied more whistleblower claims than approved — at least 18 denials compared to nine awards, according to SEC records.

While most anyone can become an SEC whistleblower, there are certain limitations on compliance, in-house auditors and other so-called gatekeepers. In most cases, they must wait at least 120 days after they have sounded the alarm to a top legal or compliance officer before they head to the SEC. Other types of insiders do not have an internal reporting requirement.

The cooling-off period was a factor in Friday’s whistleblower announcement. The SEC said the individual who received the award had reported the matter to "appropriate" personnel at the company, including a supervisor. After the company took no action on the matter for 120 days, the employee turned to the SEC.

The SEC gave no information about the nature of the whistleblower’s tips, though it inadvertently published, and later retracted, information that could be used to identify the tipster’s employer. An SEC spokesman declined to comment on the gaffe.
The fact that the whistleblower apparently was frustrated in his or her attempts to get the company to act on a matter speaks volumes of the need for companies to have developed channels for reporting issues and procedures for promptly responding to them, said Carrie Penman, chief compliance officer of Navex Global, a compliance consulting and advisory firm.

“We shouldn’t lose sight of the fact that employees have the right to take things out of the company,” she said, referring to tips about wrongdoing. “It’s in best interest of a company to create multiple avenues for internal reporting and to act on them.”

Among other things, firms need systems to track and flag internal reports, with an aim to close most cases within 30 days and escalate ones that remain open after that time, she said.

Companies also need to consider how they are communicating with the internal reporter about the issue, as feedback is critical to see whether the tip is being taken seriously or being brushed under the rug. “When people raise an issue, they are going to worry about what’s going to happen as a result of that,” she said.

 Appropriately training supervisors on their responsibilities when an employee says he or she has spotted possible wrongdoing is another key issue companies need to grapple with, Penman said. Most workers just want to raise issues to their manager and have it fixed, but at times that’s the quickest way for a complaint to get quashed.

“The supervisor can be a weak link, yet we tell employees to talk to your manager,” she said.

Attorneys said they expect an uptick in auditors and compliance officers becoming SEC whistleblowers, but they had differences of opinion as to their motivations.

“The popular perception of an SEC whistleblower is it’s all about the money,” said Jordan Thomas, chair of the whistleblower representation practice at Labaton Sucharow LLP. But for in-house auditors and compliance officers, the rules requiring them to report problems internally first are an important control.

“They can only be whistleblowers if the company didn’t do the right thing. I find that pretty compelling,” Thomas said.

The only exceptions to the waiting period are for occasions when the compliance officer or auditors has a reasonable basis to believe investors or an entity itself are at substantial risk of harm or that steps are being taken that would hinder an investigation.

But defense counsel worry that the SEC will be relying too heavily on the word of the compliance officer or auditor about what they did to raise a concern internally. “That person has a financial interest in saying, ‘No, I got blown off,’” Pearlman said.

Their tip also may not accurately reflect the company’s actions in response to the matter. The SEC “may be operating without a line of sight as to what the company did” with the whistleblower’s information, Pearlman said. Clients have become “hypervigilant” about addressing and responding to internal reports of wrongdoing since the SEC passed its whistleblower rules, he added.

Still, the SEC made it clear on Friday that it sees internal auditors and compliance staffers as a conduit of information to its enforcement program — and a conduit it will be willing to pay for.

“They often are privy to the very kinds of specific, timely and credible information that can
prevent an imminent fraud or stop an ongoing one,” Sean McKessy, chief of the SEC’s whistleblower program, said in a statement, before noting the awards such tipsters can gain from their information.

Whistleblowing gatekeepers may very well come to play a big role in another SEC enforcement effort: its announced plans to crack down on financial reporting and auditing frauds.

The agency last year formed a task force under former Vinson & Elkins LLP partner David Woodcock to root out accounting and reporting schemes that once were its bread-and-butter enforcement cases.

Given that focus, Thomas said, “I would be very surprised if they are not working hard to develop cases around accounting whistleblowers.”

--Editing by Jeremy Barker and Philip Shea.
A Resource Guide to the U.S. Foreign Corrupt Practices Act

By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission
This guide is intended to provide information for businesses and individuals regarding the U.S. Foreign Corrupt Practices Act (FCPA). The guide has been prepared by the staff of the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission. It is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. It is not intended to substitute for the advice of legal counsel on specific issues related to the FCPA. It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.

Companies or individuals seeking an opinion concerning specific prospective conduct are encouraged to use the U.S. Department of Justice’s opinion procedure discussed in Chapter 9 of this guide.

This guide is United States Government property. It is available to the public free of charge online at www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml.
A RESOURCE GUIDE TO THE
U.S. FOREIGN CORRUPT PRACTICES ACT

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission
FOREWORD

We are pleased to announce the publication of A Resource Guide to the U.S. Foreign Corrupt Practices Act. The Foreign Corrupt Practices Act (FCPA) is a critically important statute for combating corruption around the globe. Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education, and infrastructure. When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage—and consumers lose. For these and other reasons, enforcing the FCPA is a continuing priority at the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

The Guide is the product of extensive efforts by experts at DOJ and SEC, and has benefited from valuable input from the Departments of Commerce and State. It endeavors to provide helpful information to enterprises of all shapes and sizes—from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The Guide addresses a wide variety of topics, including who and what is covered by the FCPA’s anti-bribery and accounting provisions; the definition of a “foreign official”; what constitute proper and improper gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. On these and other topics, the Guide takes a multi-faceted approach, setting forth in detail the statutory requirements while also providing insight into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases.

The Guide is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities. We are proud of the many lawyers and staff who worked on this project, and hope that it will be a useful reference for companies, individuals, and others interested in our enforcement of the Act.

Lanny A. Breuer
Assistant Attorney General
Criminal Division
Department of Justice

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Securities and Exchange Commission

November 14, 2012
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Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.¹

—United States Senate, 1977
Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.\textsuperscript{2}

The FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses (domestic concerns), U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business. The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority and are committed to fighting foreign bribery through robust enforcement. An important component of this effort is education, and this resource guide, prepared by DOJ and SEC staff, aims to provide businesses and individuals with information to help them abide by the law, detect and prevent FCPA violations, and implement effective compliance programs.

The Costs of Corruption

Corruption is a global problem. In the three decades since Congress enacted the FCPA, the extent of corporate bribery has become clearer and its ramifications in a transnational economy starker. Corruption impedes economic growth by diverting public resources from important priorities such as health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law.\textsuperscript{3} And it threatens stability and security by facilitating criminal activity within and across
borders, such as the illegal trafficking of people, weapons, and drugs. International corruption also undercuts good governance and impedes U.S. efforts to promote freedom and democracy, end poverty, and combat crime and terrorism across the globe.

Corruption is also bad for business. Corruption is anti-competitive, leading to distorted prices and disadvantaging honest businesses that do not pay bribes. It increases the cost of doing business globally and inflates the cost of government contracts in developing countries. Corruption also introduces significant uncertainty into business transactions: Contracts secured through bribery may be legally unenforceable, and paying bribes on one contract often results in corrupt officials making ever-increasing demands. Bribery has destructive effects within a business as well, undermining employee confidence in a company’s management and fostering a permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement, financial fraud, and anti-competitive behavior. Bribery thus raises the risks of doing business, putting a company’s bottom line and reputation in jeopardy. Companies that pay bribes to win business ultimately undermine their own long-term interests and the best interests of their investors.

Historical Background

Congress enacted the FCPA in 1977 after revelations of widespread global corruption in the wake of the Watergate political scandal. SEC discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas. SEC reported that companies were using secret “slush funds” to make illegal campaign contributions in the United States and corrupt payments to foreign officials abroad and were falsifying their corporate financial records to conceal the payments.

Congress viewed passage of the FCPA as critical to stopping corporate bribery, which had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets. As Congress recognized when it passed the FCPA, corruption imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses. By enacting a strong foreign bribery statute, Congress sought to minimize these destructive effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery. The Act also prohibited off-the-books accounting through provisions designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.”

In 1988, Congress amended the FCPA to add two affirmative defenses: (1) the local law defense; and (2) the reasonable and bona fide promotional expense defense. Congress also requested that the President negotiate an international treaty with members of the Organisation for Economic Co-operation and Development (OECD) to prohibit bribery in international business transactions by many of the United States’ major trading partners. Subsequent negotiations at the OECD culminated in the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention), which, among other things, required parties to make it a crime to bribe foreign officials.

No problem does more to alienate citizens from their political leaders and institutions, and to undermine political stability and economic development, than endemic corruption among the government, political party leaders, judges, and bureaucrats.

— USAID Anti-Corruption Strategy
In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention. These amendments expanded the FCPA’s scope to: (1) include payments made to secure “any improper advantage”; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of “foreign official”; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies. The Anti-Bribery Convention came into force on February 15, 1999, with the United States as a founding party.

National Landscape: Interagency Efforts

DOJ and SEC share enforcement authority for the FCPA’s anti-bribery and accounting provisions. They also work with many other federal agencies and law enforcement partners to investigate and prosecute FCPA violations, reduce bribery demands through good governance programs and other measures, and promote a fair playing field for U.S. companies doing business abroad.

Department of Justice

DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers, directors, employees, agents, or stockholders acting on the issuer’s behalf. DOJ also has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns”—which include (a) U.S. citizens, nationals, and residents and (b) U.S. businesses and their officers, directors, employees, agents, or stockholders acting on the domestic concern’s behalf—and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States. Within DOJ, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters. FCPA matters are handled primarily by the FCPA Unit within the Fraud Section, regularly working jointly with U.S. Attorneys’ Offices around the country.

DOJ maintains a website dedicated to the FCPA and its enforcement at http://www.justice.gov/criminal/fraud/fcpa/. The website provides translations of the FCPA in numerous languages, relevant legislative history, and selected documents from FCPA-related prosecutions and resolutions since 1977, including charging documents, plea agreements, deferred prosecution agreements, non-prosecution agreements, press releases, and other relevant pleadings and court decisions. The website also provides copies of opinions issued in response to requests by companies and individuals under DOJ’s FCPA opinion procedure. The procedures for submitting a request for an opinion can be found at http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf and are discussed further in Chapter 9. Individuals and companies wishing to disclose information about potential FCPA violations are encouraged to contact the FCPA Unit at the telephone number or email address above.

Securities and Exchange Commission

SEC is responsible for civil enforcement of the FCPA over issuers and their officers, directors, employees, agents,
or stockholders acting on the issuer’s behalf. SEC’s Division of Enforcement has responsibility for investigating and prosecuting FCPA violations. In 2010, SEC’s Enforcement Division created a specialized FCPA Unit, with attorneys in Washington, D.C. and in regional offices around the country, to focus specifically on FCPA enforcement. The Unit investigates potential FCPA violations; facilitates coordination with DOJ’s FCPA program and with other federal and international law enforcement partners; uses its expert knowledge of the law to promote consistent enforcement of the FCPA; analyzes tips, complaints, and referrals regarding allegations of foreign bribery; and conducts public outreach to raise awareness of anti-corruption efforts and good corporate governance programs.

The FCPA Unit maintains a “Spotlight on FCPA” section on SEC’s website at http://www.sec.gov/spotlight/fcpa.shtml. The website, which is updated regularly, provides general information about the Act, links to all SEC enforcement actions involving the FCPA, including both federal court actions and administrative proceedings, and contains other useful information.

Individuals and companies with information about possible FCPA violations by issuers may report them to the Enforcement Division via SEC’s online Tips, Complaints and Referral system, http://www.sec.gov/complaint/tipscomplaint.shtml. They may also submit information to SEC’s Office of the Whistleblower through the same online system or by contacting the Office of the Whistleblower at (202) 551-4790. Additionally, investors with questions about the FCPA can call the Office of Investor Education and Advocacy at (800) SEC-0330.

For more information about SEC’s Whistleblower Program, under which certain eligible whistleblowers may be entitled to a monetary award if their information leads to certain SEC actions, see Chapter 8.

Law Enforcement Partners

DOJ’s FCPA Unit regularly works with the Federal Bureau of Investigation (FBI) to investigate potential FCPA violations. The FBI’s International Corruption Unit has primary responsibility for international corruption and fraud investigations and coordinates the FBI’s national FCPA enforcement program. The FBI also has a dedicated FCPA squad of FBI special agents (located in the Washington Field Office) that is responsible for investigating many, and providing support for all, of the FBI’s FCPA investigations. In addition, the Department of Homeland Security and the Internal Revenue Service-Criminal Investigation regularly investigate potential FCPA violations. A number of other agencies are also involved in the fight against international corruption, including the Department of Treasury’s Office of Foreign Assets Control, which has helped lead a number of FCPA investigations.

Departments of Commerce and State

Besides enforcement efforts by DOJ and SEC, the U.S. government is also working to address corruption abroad and level the playing field for U.S. businesses through the efforts of the Departments of Commerce and State. Both Commerce and State advance anti-corruption and good governance initiatives globally and regularly assist U.S. companies doing business overseas in several

SEC Contact Information

FCPA Unit Chief
Division of Enforcement
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Online: Tips, Complaints, and Referrals website
http://www.sec.gov/complaint/tipscomplaint.shtml

Office of Investor Education and Advocacy:
(800) SEC-0330
important ways. Both agencies encourage U.S. businesses to seek the assistance of U.S. embassies when they are confronted with bribe solicitation or other corruption-related issues overseas.23

The Department of Commerce offers a number of important resources for businesses, including the International Trade Administration’s United States and Foreign Commercial Service (Commercial Service). The Commercial Service has export and industry specialists located in over 100 U.S. cities and 70 countries who are available to provide counseling and other assistance to U.S. businesses, particularly small and medium-sized companies, regarding exporting their products and services. Among other things, these specialists can help a U.S. company conduct due diligence when choosing business partners or agents overseas. The International Company Profile Program, for instance, can be part of a U.S. business’ evaluation of potential overseas business partners.24 Businesses may contact the Commercial Service through its website, http://export.gov/eac/, or directly at its domestic and foreign offices.25

Additionally, the Department of Commerce’s Office of the General Counsel maintains a website, http://www.commerce.gov/os/ogc/transparency-and-anti-bribery-initiatives, that contains recent articles and speeches, links to translations of the FCPA, a catalogue of anti-corruption resources, and a list of international conventions and initiatives. The Trade Compliance Center in the Department of Commerce’s International Trade Administration hosts a website with anti-bribery resources, http://tcc.export.gov/Bribery. This website contains an online form through which U.S. companies can report allegations of foreign bribery by foreign competitors in international business transactions.26 The Department of Commerce also provides information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws. For example, the Department of Commerce has included a new anti-corruption section in its Country Commercial Guides, prepared by market experts at U.S. embassies worldwide, that contains information on market conditions for more than 100 countries, including information on the FCPA for exporters.27

The Department of Commerce has also published a guide, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, which contains information about corporate compliance programs for businesses involved in international trade.28

The Departments of Commerce and State also provide advocacy support, when determined to be in the national interest, for U.S. companies bidding for foreign government contracts. The Department of Commerce’s Advocacy Center, for example, supports U.S. businesses competing against foreign companies for international contracts, such as by arranging for the delivery of an advocacy message by U.S. government officials or assisting with unanticipated problems such as suspected bribery by a competitor.29 The Department of State’s Bureau of Economic and Business Affairs (specifically, its Office of Commercial and Business Affairs) similarly assists U.S. firms doing business overseas by providing advocacy on behalf of U.S. businesses and identifying risk areas for U.S. businesses; more information is available on its website, http://www.state.gov/e/eb/cba/. Also, the Department of State’s economic officers serving overseas provide commercial advocacy and support for U.S. companies at the many overseas diplomatic posts where the Commercial Service is not represented.

The Department of State promotes U.S. government interests in addressing corruption internationally through country-to-country diplomatic engagement; development of and follow-through on international commitments relating to corruption; promotion of high-level political engagement (e.g., the G20 Anticorruption Action Plan); public outreach in foreign countries; and support for building the capacity of foreign partners to combat corruption. In fiscal year 2009, the U.S. government provided more than $1 billion for anti-corruption and related good governance assistance abroad.
The Department of State’s Bureau of International Narcotics and Law Enforcement Affairs (INL) manages U.S. participation in many multilateral anti-corruption political and legal initiatives at the global and regional level. INL also funds and coordinates significant efforts to assist countries with combating corruption through legal reform, training, and other capacity-building efforts. Inquiries about the U.S. government’s general anti-corruption efforts and implementation of global and regional anti-corruption initiatives may be directed to INL on its website, http://www.state.gov/j/inl/c/crime/corr/index.htm, or by email to: anticorruption@state.gov. In addition, the U.S. Agency for International Development (USAID) has developed several anti-corruption programs and publications, information about which can be found at http://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency. Finally, the Department of State’s brochure “Fighting Global Corruption: Business Risk Management,” available at http://www.ogc.doc.gov/pdfs/Fighting_Global_Corruption.pdf, provides guidance about corporate compliance programs as well as international anti-corruption initiatives.

International Landscape: Global Anti-Corruption Efforts

In recent years, there has been a growing international consensus that corruption must be combated, and the United States and other countries are parties to a number of international anti-corruption conventions. Under these conventions, countries that are parties undertake commitments to adopt a range of preventive and criminal law measures to combat corruption. The conventions incorporate review processes that allow the United States to monitor other countries to ensure that they are meeting their international obligations. Likewise, these processes in turn permit other parties to monitor the United States’ anti-corruption laws and enforcement to ensure that such enforcement and legal frameworks are consistent with the United States’ treaty obligations. U.S. officials regularly address the subject of corruption with our foreign counterparts to raise awareness of the importance of fighting corruption and urge stronger enforcement of anti-corruption laws and policies.

OECD Working Group on Bribery and the Anti-Bribery Convention

The OECD was founded in 1961 to stimulate economic progress and world trade. As noted, the Anti-Bribery Convention requires its parties to criminalize the bribery of foreign public officials in international business transactions. As of November 1, 2012, there were 39 parties to the Anti-Bribery Convention: 34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa). All of these parties are also members of the OECD Working Group on Bribery (Working Group).

The Working Group is responsible for monitoring the implementation of the Anti-Bribery Convention, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and related instruments. Its members meet quarterly to review and monitor implementation of the Anti-Bribery Convention by member states around the world. Each party undergoes periodic peer review. This peer-review monitoring system is conducted in three phases. The Phase 1 review includes an in-depth assessment of each country’s domestic laws implementing the Convention. The Phase 2 review examines the effectiveness of each country’s laws and anti-bribery efforts. The final phase is a permanent cycle of peer review (the first cycle of which is referred to as the Phase 3 review) that evaluates a country’s enforcement actions and results, as well as the country’s efforts to address weaknesses identified during the Phase 2 review. All of the monitoring reports for the parties to the Convention can be found on the OECD website and can be a useful resource about the foreign bribery laws of the OECD Working Group member countries.

The United States was one of the first countries to undergo all three phases of review. The reports and appendices can be found on DOJ’s and SEC’s websites. In its
Phase 3 review of the United States, which was completed in October 2010, the Working Group commended U.S. efforts to fight transnational bribery and highlighted a number of best practices developed by the United States. The report also noted areas where the United States’ anti-bribery efforts could be improved, including consolidating publicly available information on the application of the FCPA and enhancing awareness among small- and medium-sized companies about the prevention and detection of foreign bribery. This guide is, in part, a response to these Phase 3 recommendations and is intended to help businesses and individuals better understand the FCPA.37

**U.N. Convention Against Corruption**

The United States is a state party to the United Nations Convention Against Corruption (UNCAC), which was adopted by the U.N. General Assembly on October 31, 2003, and entered into force on December 14, 2005.38 The United States ratified the UNCAC on October 30, 2006. The UNCAC requires parties to criminalize a wide range of corrupt acts, including domestic and foreign bribery and related offenses such as money laundering and obstruction of justice. The UNCAC also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector. A peer review mechanism assesses the implementation of the UNCAC by parties to the Convention, with a focus in the first round on criminalization and law enforcement as well as international legal cooperation.39 The United States has been reviewed under the Pilot Review Programme, the report of which is available on DOJ’s website. As of November 1, 2012, 163 countries were parties to the UNCAC.40

The IACAC requires parties (of which the United States is one) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) monitors parties’ compliance with the IACAC. As of November 1, 2012, 31 countries were parties to MESICIC.

The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries’ compliance with the Council of Europe’s anti-corruption standards, including the Council of Europe’s Criminal Law Convention on Corruption.42 These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of November 1, 2012, GRECO member states, which need not be members of the Council of Europe, include more than 45 European countries and the United States.43

The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ’s website.

**Other Anti-Corruption Conventions**

The Inter-American Convention Against Corruption (IACAC) was the first international anti-corruption convention, adopted in March 1996 in Caracas, Venezuela, by members of the Organization of American States.41
THE FCPA: ANTI-BRIBERY PROVISIONS

The FCPA addresses the problem of international corruption in two ways: (1) the anti-bribery provisions, which are discussed below, prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business and (2) the accounting provisions, which are discussed in Chapter 3, impose certain record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer’s books and records or circumventing or failing to implement an issuer’s system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.

In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.44

Who Is Covered by the Anti-Bribery Provisions?

The FCPA’s anti-bribery provisions apply broadly to three categories of persons and entities: (1) “issuers” and their officers, directors, employees, agents, and shareholders; (2) “domestic concerns” and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Issuers—15 U.S.C. § 78dd-1

Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), which can be found at 15 U.S.C. § 78dd-1, contains the anti-bribery provision governing
**How Can I Tell If My Company Is an “Issuer”?**

- It is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or
- The company’s stock trades in the over-the-counter market in the United States and the company is required to file SEC reports.
- To see if your company files SEC reports, go to SEC’s website at http://www.sec.gov/edgar/searchedgar/webusers.htm.

A company is an “issuer” under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act. In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers. As of December 31, 2011, 965 foreign companies were registered with SEC.

**Territorial Jurisdiction—15 U.S.C. § 78dd-3**

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns. Since 1998, the FCPA’s anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States. Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA’s anti-bribery prohibitions.

**What Jurisdictional Conduct Triggers the Anti-Bribery Provisions?**

The FCPA’s anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines “interstate commerce” as “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof ...” The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality. Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.

Those who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of
whether they utilize the U.S. mails or a means or instrumentality of interstate commerce.59 Thus, for example, a foreign national who attends a meeting in the United States that further a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.60

In addition, under the “alternative jurisdiction” provision of the FCPA enacted in 1998, U.S. companies or persons may be subject to the anti-bribery provisions even if they act outside the United States.61 The 1998 amendments to the FCPA expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle.62 In particular, the 1998 amendments removed the requirement that there be a use of interstate commerce (e.g., wire, email, telephone call) for acts in furtherance of a corrupt payment to a foreign official by U.S. companies and persons occurring wholly outside of the United States.63

What Is Covered?—The Business Purpose Test

The FCPA applies only to payments intended to induce or influence a foreign official to use his or her position “in order to assist … in obtaining or retaining business for or with, or directing business to, any person.”64 This requirement is known as the “business purpose test” and is broadly interpreted.65

Not surprisingly, many enforcement actions involve bribes to obtain or retain government contracts.66 The FCPA also prohibits bribes in the conduct of business or

Hypothetical: FCPA Jurisdiction

Company A, a Delaware company with its principal place of business in New York, is a large energy company that operates globally, including in a number of countries that have a high risk of corruption, such as Foreign Country. Company A’s shares are listed on a national U.S. stock exchange. Company A enters into an agreement with a European company (EuroCo) to submit a joint bid to the Oil Ministry to build a refinery in Foreign Country. EuroCo is not an issuer.

Executives of Company A and EuroCo meet in New York to discuss how to win the bid and decide to hire a purported third-party consultant (Intermediary) and have him use part of his “commission” to bribe high-ranking officials within the Oil Ministry. Intermediary meets with executives at Company A and EuroCo in New York to finalize the scheme. Eventually, millions of dollars in bribes are funneled from the United States and Europe through Intermediary to high-ranking officials at the Oil Ministry, and Company A and EuroCo win the contract. A few years later, a front page article alleging that the contract was procured through bribery appears in Foreign Country, and DOJ and SEC begin investigating whether the FCPA was violated.

Based on these facts, which entities fall within the FCPA’s jurisdiction?

All of the entities easily fall within the FCPA’s jurisdiction. Company A is both an “issuer” and a “domestic concern” under the FCPA, and Intermediary is an “agent” of Company A. EuroCo and Intermediary are also subject to the FCPA’s territorial jurisdiction provision based on their conduct while in the United States. Moreover, even if EuroCo and Intermediary had never taken any actions in the territory of the United States, they can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under Pinkerton liability, namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.
to gain a business advantage. For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test.

In 2004, the U.S. Court of Appeals for the Fifth Circuit addressed the business purpose test in United States v. Kay and held that bribes paid to obtain favorable tax treatment—which reduced a company’s customs duties and sales taxes on imports—could constitute payments made to “obtain or retain” business within the meaning of the FCPA. The court explained that in enacting the FCPA, “Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.” The Kay court found that “[t]he congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement.” Accordingly, Kay held that payments to obtain favorable tax treatment can, under appropriate circumstances, violate the FCPA:

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

In 2010, a global freight forwarding company and six of its corporate customers in the oil and gas industry resolved charges that they paid bribes to customs officials. The companies bribed customs officials in more than ten countries in exchange for such benefits as:

- evading customs duties on imported goods
- improperly expediting the importation of goods and equipment
- extending drilling contracts and lowering tax assessments
- obtaining false documentation related to temporary import permits for drilling rigs
- enabling the release of drilling rigs and other equipment from customs officials

In many instances, the improper payments at issue allowed the company to carry out its existing business, which fell within the FCPA’s prohibition on corrupt payments made for the purpose of “retaining” business. The seven companies paid a total of more than $235 million in civil and criminal sanctions and disgorgement.
In short, while the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.73

What Does “Corruptly” Mean?

To violate the FCPA, an offer, promise, or authorization of a payment, or a payment, to a government official must be made “corruptly.”74 As Congress noted when adopting the FCPA, the word “corruptly” means an intent or desire to wrongfully influence the recipient:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.75

Where corrupt intent is present, the FCPA prohibits paying, offering, or promising to pay money or anything of value (or authorizing the payment or offer).76 By focusing on intent, the FCPA does not require that a corrupt act succeed in its purpose.77 Nor must the foreign official actually solicit, accept, or receive the corrupt payment for the bribe payor to be liable.78 For example, in one case, a specialty chemical company promised Iraqi government officials approximately $850,000 in bribes for an upcoming contract. Although the company did not, in the end, make the payment (the scheme was thwarted by the U.S. government’s investigation), the company still violated the FCPA and was held accountable.79

Also, as long as the offer, promise, authorization, or payment is made corruptly, the actor need not know the identity of the recipient; the attempt is sufficient.80 Thus, an executive who authorizes others to pay “whoever you need to” in a foreign government to obtain a contract has violated the FCPA—even if no bribe is ultimately offered or paid.

What Does “Willfully” Mean and When Does It Apply?

In order for an individual defendant to be criminally liable under the FCPA, he or she must act “willfully.”81 Proof of willfulness is not required to establish corporate criminal or civil liability,82 though proof of corrupt intent is.

The term “willfully” is not defined in the FCPA, but it has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose, i.e., with “knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law.”83 As the Supreme Court explained in *Bryan v. United States*, “[a] general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’ In other words, in order to establish a ‘willful’ violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.”84

Notably, as both the Second Circuit and Fifth Circuit Courts of Appeals have found, the FCPA does not require the government to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated the FCPA.85 To be guilty, a defendant must act with a bad purpose, i.e., know generally that his conduct is unlawful.

What Does “Anything of Value” Mean?

In enacting the FCPA, Congress recognized that bribes can come in many shapes and sizes—a broad range of unfair benefits—and so the statute prohibits the corrupt “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” a foreign official.86

An improper benefit can take many forms. While cases often involve payments of cash (sometimes in the guise of “consulting fees” or “commissions” given through intermediaries), others have involved travel expenses and
expensive gifts. Like the domestic bribery statute, the FCPA
does not contain a minimum threshold amount for corrupt
gifts or payments.\textsuperscript{88} Indeed, what might be considered a
modest payment in the United States could be a larger and
much more significant amount in a foreign country.

Regardless of size, for a gift or other payment to viol-
ate the statute, the payor must have corrupt intent—that is,
the intent to improperly influence the government official.
The corrupt intent requirement protects companies that
engage in the ordinary and legitimate promotion of their
businesses while targeting conduct that seeks to improp-
erly induce officials into misusing their positions. Thus, it
is difficult to envision any scenario in which the provision
of cups of coffee, taxi fare, or company promotional items
of nominal value would ever evidence corrupt intent, and
neither DOJ nor SEC has ever pursued an investigation
on the basis of such conduct. Moreover, as in all areas of
federal law enforcement, DOJ and SEC exercise discre-
 tion in deciding which cases promote law enforcement pri-
orities and justify investigation. Certain patterns, however,
have emerged: DOJ’s and SEC’s anti-bribery enforcement
actions have focused on small payments and gifts only when
they comprise part of a systemic or long-standing course of
conduct that evidences a scheme to corruptly pay foreign
officials to obtain or retain business. These assessments are
necessarily fact specific.

**Cash**

The most obvious form of corrupt payment is large
amounts of cash. In some instances, companies have main-
tained cash funds specifically earmarked for use as bribes.
One U.S. issuer headquartered in Germany disbursed cor-
rupt payments from a corporate “cash desk” and used off-
shore bank accounts to bribe government officials to win
contracts.\textsuperscript{89} In another instance, a four-company joint ven-
ture used its agent to pay $5 million in bribes to a Nigerian
political party.\textsuperscript{90} The payments were made to the agent in
suitcases of cash (typically in $1 million installments), and,
in one instance, the trunk of a car when the cash did not fit
into a suitcase.\textsuperscript{91}

**Gifts, Travel, Entertainment, and Other Things of Value**

A small gift or token of esteem or gratitude is often
an appropriate way for business people to display respect
for each other. Some hallmarks of appropriate gift-giving
are when the gift is given openly and transparently, properly
recorded in the giver’s books and records, provided only to
reflect esteem or gratitude, and permitted under local law.

Items of nominal value, such as cab fare, reasonable
meals and entertainment expenses, or company promo-
tional items, are unlikely to improperly influence an offi-
cial, and, as a result, are not, without more, items that have
resulted in enforcement action by DOJ or SEC. The larger
or more extravagant the gift, however, the more likely it was
given with an improper purpose. DOJ and SEC enforce-
cement cases thus have involved single instances of large,
extravagant gift-giving (such as sports cars, fur coats, and
other luxury items) as well as widespread gifts of smaller
items as part of a pattern of bribes.\textsuperscript{92} For example, in one
case brought by DOJ and SEC, a defendant gave a govern-
ment official a country club membership fee and a genera-	tor, as well as household maintenance expenses, payment
of cell phone bills, an automobile worth $20,000, and lim-
ousine services. The same official also received $250,000
through a third-party agent.\textsuperscript{93}

In addition, a number of FCPA enforcement actions
have involved the corrupt payment of travel and entertain-
ment expenses. Both DOJ and SEC have brought cases
where these types of expenditures occurred in conjunction
with other conduct reflecting systemic bribery or other
clear indicia of corrupt intent.

A case involving a California-based telecommuni-
cations company illustrates the types of improper travel
and entertainment expenses that may violate the FCPA.\textsuperscript{94}
Between 2002 and 2007, the company spent nearly $7 mil-
lion on approximately 225 trips for its customers in order to
obtain systems contracts in China, including for employees
of Chinese state-owned companies to travel to popular tour-
ist destinations in the United States.\textsuperscript{95} Although the trips
were purportedly for the individuals to conduct training at
Examples of Improper Travel and Entertainment

- a $12,000 birthday trip for a government decision-maker from Mexico that included visits to wineries and dinners
- $10,000 spent on dinners, drinks, and entertainment for a government official
- a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included $1,000 in “pocket money” for each official
- a trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle

Companies also failed to implement appropriate internal controls to monitor the provision of travel and other things of value to Chinese government officials.96

Likewise, a New Jersey-based telecommunications company spent millions of dollars on approximately 315 trips for Chinese government officials, ostensibly to inspect factories and train the officials in using the company’s equipment.97 In reality, during many of these trips, the officials spent little or no time visiting the company’s facilities, but instead visited tourist destinations such as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City.98 Some of the trips were characterized as “factory inspections” or “training” with government customers but consisted primarily or entirely of sightseeing to locations chosen by the officials, typically lasting two weeks and costing between $25,000 and $55,000 per trip. In some instances, the company gave the government officials $500 to $1,000 per day in spending money and paid all lodging, transportation, food, and entertainment expenses. The company either failed to record these expenses or improperly recorded them as “consulting fees” in its corporate books and records. The company also failed to implement appropriate internal controls to monitor the provision of travel and other things of value to Chinese government officials.99

Companies also may violate the FCPA if they give payments or gifts to third parties, like an official’s family members, as an indirect way of corruptly influencing a foreign official. For example, one defendant paid personal bills and provided airline tickets to a cousin and close friend of the foreign official whose influence the defendant sought in obtaining contracts.100 The defendant was convicted at trial and received a prison sentence.101

As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company’s directors, officers, employees, and agents. Though not necessarily appropriate for every business, many larger companies have automated gift-giving clearance processes and have set clear monetary thresholds for gifts along with annual limitations, with limited exceptions for gifts approved by appropriate management. Clear guidelines and processes can be an effective and efficient means for controlling gift-giving, deterring improper gifts, and protecting corporate assets.

The FCPA does not prohibit gift-giving. Rather, just like its domestic bribery counterparts, the FCPA prohibits the payments of bribes, including those disguised as gifts.

Charitable Contributions

Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens. Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.
For example, a pharmaceutical company used charitable donations to a small local castle restoration charity headed by a foreign government official to induce the official to direct business to the company. Although the charity was a bona fide charitable organization, internal documents at the pharmaceutical company’s subsidiary established that the payments were not viewed as charitable contributions but rather as “dues” the subsidiary was required to pay for assistance from the government official. The payments constituted a significant portion of the subsidiary’s total promotional donations budget and were structured to allow the subsidiary to exceed its authorized limits. The payments

Hypothetical: Gifts, Travel, and Entertainment

Company A is a large U.S. engineering company with global operations in more than 50 countries, including a number that have a high risk of corruption, such as Foreign Country. Company A’s stock is listed on a national U.S. stock exchange. In conducting its business internationally, Company A’s officers and employees come into regular contact with foreign officials, including officials in various ministries and state-owned entities. At a trade show, Company A has a booth at which it offers free pens, hats, t-shirts, and other similar promotional items with Company A’s logo. Company A also serves free coffee, other beverages, and snacks at the booth. Some of the visitors to the booth are foreign officials.

Is Company A in violation of the FCPA?

No. These are legitimate, bona fide expenditures made in connection with the promotion, demonstration, or explanation of Company A’s products or services. There is nothing to suggest corrupt intent here. The FCPA does not prevent companies from promoting their businesses in this way or providing legitimate hospitality, including to foreign officials. Providing promotional items with company logos or free snacks as set forth above is an appropriate means of providing hospitality and promoting business. Such conduct has never formed the basis for an FCPA enforcement action.

At the trade show, Company A invites a dozen current and prospective customers out for drinks, and pays the moderate bar tab. Some of the current and prospective customers are foreign officials under the FCPA. Is Company A in violation of the FCPA?

No. Again, the FCPA was not designed to prohibit all forms of hospitality to foreign officials. While the cost here may be more substantial than the beverages, snacks, and promotional items provided at the booth, and the invitees specifically selected, there is still nothing to suggest corrupt intent.

Two years ago, Company A won a long-term contract to supply goods and services to the state-owned Electricity Commission in Foreign Country. The Electricity Commission is 100% owned, controlled, and operated by the government of Foreign Country, and employees of the Electricity Commission are subject to Foreign Country’s domestic bribery laws. Some Company A executives are in Foreign Country for meetings with officials of the Electricity Commission. The General Manager of the Electricity Commission was recently married, and during the trip Company A executives present a moderately priced crystal vase to the General Manager as a wedding gift and token of esteem. Is Company A in violation of the FCPA?

No. It is appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude. It is important that such gifts be made openly and transparently, properly recorded in a company’s books and records, and given only where appropriate under local law, customary where given, and reasonable for the occasion.

During the course of the contract described above, Company A periodically provides training to Electricity Commission employees at its facilities in Michigan. The training is paid for by the Electricity Commission as part of the contract. Senior officials of the Electricity Commission inform Company A that they want to inspect the facilities and ensure that the training is working well. Company A pays for the airfare, hotel, and transportation for the
Electricity Commission senior officials to travel to Michigan to inspect Company A’s facilities. Because it is a lengthy international flight, Company A agrees to pay for business class airfare, to which its own employees are entitled for lengthy flights. The foreign officials visit Michigan for several days, during which the senior officials perform an appropriate inspection. Company A executives take the officials to a moderately priced dinner, a baseball game, and a play. Do any of these actions violate the FCPA?

No. Neither the costs associated with training the employees nor the trip for the senior officials to the Company’s facilities in order to inspect them violates the FCPA. Reasonable and bona fide promotional expenditures do not violate the FCPA. Here, Company A is providing training to the Electricity Commission’s employees and is hosting the Electricity Commission senior officials. Their review of the execution and performance of the contract is a legitimate business purpose. Even the provision of business class airfare is reasonable under the circumstances, as are the meals and entertainment, which are only a small component of the business trip.

Would this analysis be different if Company A instead paid for the senior officials to travel first-class with their spouses for an all-expenses-paid, week-long trip to Las Vegas, where Company A has no facilities?

Yes. This conduct almost certainly violates the FCPA because it evinces a corrupt intent. Here, the trip does not appear to be designed for any legitimate business purpose, is extravagant, includes expenses for the officials’ spouses, and therefore appears to be designed to corruptly curry favor with the foreign government officials. Moreover, if the trip were booked as a legitimate business expense—such as the provision of training at its facilities—Company A would also be in violation of the FCPA’s accounting provisions. Furthermore, this conduct suggests deficiencies in Company A’s internal controls.

Company A’s contract with the Electricity Commission is going to expire, and the Electricity Commission is offering the next contract through its tender process. An employee of the Electricity Commission contacts Company A and offers to provide Company A with confidential, non-public bid information from Company A’s competitors if Company A will pay for a vacation to Paris for him and his girlfriend. Employees of Company A accede to the official’s request, pay for the vacation, receive the confidential bid information, and yet still do not win the contract. Has Company A violated the FCPA?

Yes. Company A has provided things of value to a foreign official for the purpose of inducing the official to misuse his office and to gain an improper advantage. It does not matter that it was the foreign official who first suggested the illegal conduct or that Company A ultimately was not successful in winning the contract. This conduct would also violate the FCPA’s accounting provisions if the trip were booked as a legitimate business expense and suggests deficiencies in Company A’s internal controls.
also were not in compliance with the company’s internal policies, which provided that charitable donations generally should be made to healthcare institutions and relate to the practice of medicine.102

Proper due diligence and controls are critical for charitable giving. In general, the adequacy of measures taken to prevent misuse of charitable donations will depend on a risk-based analysis and the specific facts at hand. In Opinion Procedure Release No. 10-02, DOJ described the due diligence and controls that can minimize the likelihood of an FCPA violation. In that matter, a Eurasian-based subsidiary of a U.S. non-governmental organization was asked by an agency of a foreign government to make a grant to a local microfinance institution (MFI) as a prerequisite to the subsidiary’s transformation to bank status. The subsidiary proposed contributing $1.42 million to a local MFI to satisfy the request. The subsidiary undertook an extensive, three-stage due diligence process to select the proposed grantee and imposed significant controls on the proposed grant, including ongoing monitoring and auditing, earmarking funds for capacity building, prohibiting compensation of board members, and implementing anti-corruption compliance provisions. DOJ explained that it would not take any enforcement action because the company’s due diligence and the controls it planned to put in place sufficed to prevent an FCPA violation.

Other opinion releases also address charitable-type grants or donations. Under the facts presented in those releases, DOJ approved the proposed grant or donation,103 based on due diligence measures and controls such as:

- certifications by the recipient regarding compliance with the FCPA;104
- due diligence to confirm that none of the recipient’s officers were affiliated with the foreign government at issue;105
- a requirement that the recipient provide audited financial statements;106
- a written agreement with the recipient restricting the use of funds;107
- steps to ensure that the funds were transferred to a valid bank account;108
- confirmation that the charity’s commitments were met before funds were disbursed;109 and
- on-going monitoring of the efficacy of the program.110

Legitimate charitable giving does not violate the FCPA. Compliance with the FCPA merely requires that charitable giving not be used as a vehicle to conceal payments made to corruptly influence foreign officials.

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**Five Questions to Consider When Making Charitable Payments in a Foreign Country:**

1. What is the purpose of the payment?
2. Is the payment consistent with the company’s internal guidelines on charitable giving?
3. Is the payment at the request of a foreign official?
4. Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
5. Is the payment conditioned upon receiving business or other benefits?

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**Who Is a Foreign Official?**

The FCPA’s anti-bribery provisions apply to corrupt payments made to (1) “any foreign official”; (2) “any foreign political party or official thereof”; (3) “any candidate for foreign political office”; or (4) any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these three categories.111 Although the statute distinguishes between a “foreign official,” “foreign political party or official thereof,” and “candidate for foreign political office,” the term “foreign official” in this guide generally refers to an individual falling within any of these three categories.

The FCPA defines “foreign official” to include:

- 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 for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.\textsuperscript{112}

As this language makes clear, the FCPA broadly applies to corrupt payments to “any” officer or employee of a foreign government and to those acting on the foreign government’s behalf.\textsuperscript{113} The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.\textsuperscript{114}

The FCPA prohibits payments to foreign officials, not to foreign governments.\textsuperscript{115} That said, companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials.

**Department, Agency, or Instrumentality of a Foreign Government**

Foreign officials under the FCPA include officers or employees of a department, agency, or instrumentality of a foreign government. When a foreign government is organized in a fashion similar to the U.S. system, what constitutes a government department or agency is typically clear (e.g., a ministry of energy, national security agency, or transportation authority).\textsuperscript{116} However, governments can be organized in very different ways.\textsuperscript{117} Many operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.\textsuperscript{118} By including officers or employees of agencies and instrumentalities within the definition of “foreign official,” the FCPA accounts for this variability.

The term “instrumentality” is broad and can include state-owned or state-controlled entities. Whether a particular entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.\textsuperscript{119} A number of courts have approved final jury instructions providing a non-exclusive list of factors to be considered:

- the foreign state’s extent of ownership of the entity;
- the foreign state’s degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- the foreign state’s characterization of the entity and its employees;
- the circumstances surrounding the entity’s creation;
- the purpose of the entity’s activities;
- the entity’s obligations and privileges under the foreign state’s law;
- the exclusive or controlling power vested in the entity to administer its designated functions;
- the level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);
- the entity’s provision of services to the jurisdiction’s residents;
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions.\textsuperscript{120}

Companies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs.

DOJ and SEC have pursued cases involving instrumentalities since the time of the FCPA’s enactment and have long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government. For example, the second-ever FCPA case charged by DOJ involved a California company that paid bribes through a Mexican corporation to two executives of a state-owned
Mexican national oil company. And in the early 1980s, DOJ and SEC brought cases involving a $1 million bribe to the chairman of Trinidad and Tobago’s racing authority.

DOJ and SEC continue to regularly bring FCPA cases involving bribes paid to employees of agencies and instrumentalities of foreign governments. In one such case, the subsidiary of a Swiss engineering company paid bribes to officials of a state-owned and controlled electricity commission. The commission was created by, owned by, and controlled by the Mexican government, and it had a monopoly on the transmission and distribution of electricity in Mexico. Many of the commission’s board members were cabinet-level government officials, and the director was appointed by Mexico’s president. Similarly, in another recent case, Miami telecommunications executives were charged with paying bribes to employees of Haiti’s state-owned and controlled telecommunications company. The telecommunications company was 97% owned and 100% controlled by the Haitian government, and its director was appointed by Haiti’s president.

While no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares. However, there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership, which is reflected in the limited number of DOJ or SEC enforcement actions brought in such situations. For example, in addition to being convicted of funneling millions of dollars in bribes to two sitting presidents in two different countries, a French issuer’s three subsidiaries were convicted of paying bribes to employees of a Malaysian telecommunications company that was 43% owned by Malaysia’s Ministry of Finance. There, notwithstanding its minority ownership stake in the company, the Ministry held the status of a “special shareholder,” had veto power over all major expenditures, and controlled important operational decisions. In addition, most senior company officers were political appointees, including the Chairman and Director, the Chairman of the Board of the Tender Committee, and the Executive Director. Thus, despite the Malaysian government having a minority shareholder position, the company was an instrumentality of the Malaysian government as the government nevertheless had substantial control over the company.

Companies and individuals should also remember that, whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA’s accounting provisions, the Travel Act, anti-money laundering laws, and other federal or foreign laws. Any type of corrupt payment thus carries a risk of prosecution.

Public International Organizations

In 1998, the FCPA was amended to expand the definition of “foreign official” to include employees and representatives of public international organizations. A “public international organization” is any organization designated as such by Executive Order under the International Organizations Immunities Act, 22 U.S.C. § 288, or any other organization that the President so designates. Currently, public international organizations include entities such as the World Bank, the International Monetary Fund, the World Intellectual Property Organization, the World Trade Organization, the OECD, the Organization of American States, and numerous others. A comprehensive list of organizations designated as “public international organizations” is contained in 22 U.S.C. § 288 and can also be found on the U.S. Government Printing Office website at http://www.gpo.gov/fdsys/.

How Are Payments to Third Parties Treated?

The FCPA expressly prohibits corrupt payments made through third parties or intermediaries. Specifically, it covers payments made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly,” to a foreign official. Many companies doing business in a foreign country retain a local individual or company to help them conduct business. Although these foreign agents may provide entirely legitimate advice regarding local customs and procedures and may help facilitate business transactions,
companies should be aware of the risks involved in engaging third-party agents or intermediaries. The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability.\(^{131}\)

For instance, a four-company joint venture used two agents—a British lawyer and a Japanese trading company—to bribe Nigerian government officials in order to win a series of liquefied natural gas construction projects.\(^{132}\) Together, the four multi-national corporations and the Japanese trading company paid a combined $1.7 billion in civil and criminal sanctions for their decade-long bribery scheme. In addition, the subsidiary of one of the companies pleaded guilty and a number of individuals, including the British lawyer and the former CEO of one of the companies’ subsidiaries, received significant prison terms.

Similarly, a medical device manufacturer entered into a deferred prosecution agreement as the result of corrupt payments it authorized its local Chinese distributor to pay to Chinese officials.\(^{133}\) Another company, a manufacturer of specialty chemicals, committed multiple FCPA violations through its agents in Iraq: a Canadian national and the Canadian’s companies. Among other acts, the Canadian national paid and promised to pay more than $1.5 million in bribes to officials of the Iraqi Ministry of Oil to secure sales of a fuel additive. Both the company and the Canadian national pleaded guilty to criminal charges and resolved civil enforcement actions by SEC.\(^{134}\)

In another case, the U.S. subsidiary of a Swiss freight forwarding company was charged with paying bribes on behalf of its customers in several countries.\(^{135}\) Although the U.S. subsidiary was not an issuer under the FCPA, it was an “agent” of several U.S. issuers and was thus charged directly with violating the FCPA. Charges against the freight forwarding company and seven of its customers resulted in over $236.5 million in sanctions.\(^{136}\)

Because Congress anticipated the use of third-party agents in bribery schemes—for example, to avoid actual knowledge of a bribe—it defined the term “knowing” in a way that prevents individuals and businesses from avoiding liability by putting “any person” between themselves and the foreign officials.\(^{137}\) Under the FCPA, a person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if the person:

- is aware that [he] is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
- has a firm belief that such circumstance exists or that such result is substantially certain to occur.\(^{138}\)

Thus, a person has the requisite knowledge when he is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.\(^{139}\) As Congress made clear, it meant to impose liability not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge:

> [T]he so-called “head-in-the-sand” problem—variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance”—should be covered so that management officials could not take refuge from the Act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other “signaling device” that should reasonably alert them of the “high probability” of an FCPA violation.\(^{140}\)

Common red flags associated with third parties include:

- excessive commissions to third-party agents or consultants;
- unreasonably large discounts to third-party distributors;
- third-party “consulting agreements” that include only vaguely described services;
- the third-party consultant is in a different line of business than that for which it has been engaged;
- the third party is related to or closely associated with the foreign official;
• the third party became part of the transaction at the express request or insistence of the foreign official;
• the third party is merely a shell company incorporated in an offshore jurisdiction; and
• the third party requests payment to offshore bank accounts.

Businesses may reduce the FCPA risks associated with third-party agents by implementing an effective compliance program, which includes due diligence of any prospective foreign agents.

What Affirmative Defenses Are Available?

The FCPA’s anti-bribery provisions contain two affirmative defenses: (1) that the payment was lawful under the written laws of the foreign country (the “local law” defense), and (2) that the money was spent as part of demonstrating a product or performing a contractual obligation (the “reasonable and bona fide business expenditure” defense). Because these are affirmative defenses, the defendant bears the burden of proving them.

The Local Law Defense

For the local law defense to apply, a defendant must establish that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”141 The defendant must establish that the payment was lawful under the foreign country’s written laws and regulations at the time of the offense. In creating the local law defense in 1988, Congress sought “to make clear that the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense.”142 Thus, the fact that bribes may not be prosecuted under local law is insufficient to establish the defense. In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments. Nevertheless, if a defendant can establish that conduct that otherwise falls within the scope of the FCPA’s anti-bribery provisions was lawful under written, local law, he or she would have a defense to prosecution.

In United States v. Kozeny, et al.

In December 2011, the U.S. Court of Appeals for the Second Circuit upheld a conscious avoidance instruction given during the 2009 trial of a businessman who was convicted of conspiring to violate the FCPA’s anti-bribery provisions by agreeing to make payments to Azeri officials in a scheme to encourage the privatization of the Azerbaijan Republic’s state oil company. The court of appeals found that the instruction did not lack a factual predicate, citing evidence and testimony at trial demonstrating that the defendant knew corruption was pervasive in Azerbaijan; that he was aware of his business partner’s reputation for misconduct; that he had created two U.S. companies in order to shield himself and other investors from potential liability for payments made in violation of the FCPA; and that the defendant expressed concerns during a conference call about whether his business partner and company were bribing officials.

The court of appeals also rejected the defendant’s contention that the conscious avoidance charge had improperly permitted the jury to convict him based on negligence, explaining that ample evidence in the record showed that the defendant had “serious concerns” about the legality of his partner’s business practices “and worked to avoid learning exactly what [he] was doing,” and noting that the district court had specifically instructed the jury not to convict based on negligence.
Reasonable and Bona Fide Expenditures

The FCPA allows companies to provide reasonable and bona fide travel and lodging expenses to a foreign official, and it is an affirmative defense where expenses are directly related to the promotion, demonstration, or explanation of a company’s products or services, or are related to a company’s execution or performance of a contract with a foreign government or agency. Trips that are primarily for personal entertainment purposes, however, are not bona fide business expenses and may violate the FCPA's anti-bribery provisions. Moreover, when expenditures, bona fide or not, are misrepresented in a company's books and records, or where unauthorized or improper expenditures occur due to a failure to implement adequate internal controls, they may also violate the FCPA's accounting provisions. Purposeful mischaracterization of expenditures may also, of course, indicate a corrupt intent.

DOJ and SEC have consistently recognized that businesses, both foreign and domestic, are permitted to pay for reasonable expenses associated with the promotion of their products and services or the execution of existing contracts. In addition, DOJ has frequently provided guidance about legitimate promotional and contract-related expenses—addressing travel and lodging expenses in particular—through several opinion procedure releases. Under the circumstances presented in those releases, DOJ opined that the following types of expenditures on behalf of foreign officials did not warrant FCPA enforcement action:

- travel and expenses to visit company facilities or operations;
- travel and expenses for training; and
- product demonstration or promotional activities, including travel and expenses for meetings.

Whether any particular payment is a bona fide expenditure necessarily requires a fact-specific analysis. But the following non-exhaustive list of safeguards, compiled from several releases, may be helpful to businesses in evaluating whether a particular expenditure is appropriate or may risk violating the FCPA:

- Do not select the particular officials who will participate in the party's proposed trip or program or else select them based on pre-determined, merit-based criteria.
- Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.
- Do not advance funds or pay for reimbursements in cash.
- Ensure that any stipends are reasonable approximations of costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable.
- Ensure the expenditures are transparent, both within the company and to the foreign government.
- Do not condition payment of expenses on any action by the foreign official.
- Obtain written confirmation that payment of the expenses is not contrary to local law.
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.
- Ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in the company's books and records.

In sum, while certain expenditures are more likely to raise red flags, they will not give rise to prosecution if they are (1) reasonable, (2) bona fide, and (3) directly related to (4) the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.
What Are Facilitating or Expediting Payments?

The FCPA’s bribery prohibition contains a narrow exception for “facilitating or expediting payments” made in furtherance of routine governmental action.\(^{159}\) The facilitating payments exception applies only when a payment is made to further “routine governmental action” that involves non-discretionary acts.\(^{160}\) Examples of “routine governmental action” include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party.\(^{161}\) Nor does it include acts that are within an official’s discretion or that would constitute misuse of an official’s office.\(^{162}\) Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the FCPA’s anti-bribery provisions more generally, the facilitating payments exception focuses on the purpose of the payment rather than its value. For instance, an Oklahoma-based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately $166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company’s Venezuelan subsidiary had also paid Venezuelan customs officials approximately $7,000 to permit the importation and exportation of equipment and materials not in compliance with local regulations and to avoid a full inspection of the imported goods.\(^{163}\) In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totaling approximately $2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the reduction or elimination of customs duties.\(^{164}\)

Labeling a bribe as a “facilitating payment” in a company’s books and records does not make it one. A Swiss offshore drilling company, for example, recorded payments to its customs agent in the subsidiary’s “facilitating payment” account, even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the FCPA’s anti-bribery and accounting provisions.\(^{165}\)

Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD’s Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments, which the United States has done regularly.\(^{166}\) In addition, other countries’ foreign bribery laws, such as the United Kingdom’s, may not contain an exception for facilitating payments.\(^{167}\) Individuals and companies should therefore be aware that although true facilitating payments

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### Examples of “Routine Governmental Action”

An action which is ordinarily and commonly performed by a foreign official in—

- obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- processing governmental papers, such as visas and work orders;
- providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- actions of a similar nature.
are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer’s books and records.168

Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A’s vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this “grease” payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.

A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A $1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country’s Department of Natural Resources and that it would only take a modest cash payment to the director and the “problem would go away.” The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

Was the payment to the clerk a violation of the FCPA?

No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the FCPA’s anti-bribery provisions, it may violate other laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the FCPA’s books and records provision.

Was the payment to the director a violation of the FCPA?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe.
Does the FCPA Apply to Cases of Extortion or Duress?

Situations involving extortion or duress will not give rise to FCPA liability because a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business.169 In enacting the FCPA, Congress recognized that real-world situations might arise in which a business is compelled to pay an official in order to avoid threats to health and safety. As Congress explained, “a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose.”170

Mere economic coercion, however, does not amount to extortion. As Congress noted when it enacted the FCPA: “The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe.”171 The fact that the payment was “first proposed by the recipient ... does not alter the corrupt purpose on the part of the person paying the bribe.”172

This distinction between extortion and economic coercion was recognized by the court in United States v. Kozeny. There, the court concluded that although an individual who makes a payment under duress (i.e., upon threat of physical harm) will not be criminally liable under the FCPA,173 a bribe payer who claims payment was demanded as a price for gaining market entry or obtaining a contract “cannot argue that he lacked the intent to bribe the official because he made the ‘conscious decision’ to pay the official.”174 While the bribe payer in this situation “could have turned his back and walked away,” in the oil rig example, “he could not.”175

Businesses operating in high-risk countries may face real threats of violence or harm to their employees, and payments made in response to imminent threats to health or safety do not violate the FCPA.176 If such a situation arises, and to ensure the safety of its employees, companies should immediately contact the appropriate U.S. embassy for assistance.

Principles of Corporate Liability for Anti-Bribery Violations

General principles of corporate liability apply to the FCPA. Thus, a company is liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company.177 Similarly, just as with any other statute, DOJ and SEC look to principles of parent-subsidiary and successor liability in evaluating corporate liability.

Parent-Subsidiary Liability

There are two ways in which a parent company may be liable for bribes paid by its subsidiary. First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example, when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme.

Second, a parent may be liable for its subsidiary’s conduct under traditional agency principles. The fundamental characteristic of agency is control.178 Accordingly, DOJ and SEC evaluate the parent’s control—including the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent. Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent and subsidiary actually interact.

If an agency relationship exists, a subsidiary’s actions and knowledge are imputed to its parent.179 Moreover, under traditional principles of respondeat superior, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company.180 Thus, if an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary’s employees. For example, SEC brought an administrative action against a parent for bribes paid by the president of its indirect, wholly owned subsidiary. In that matter, the subsidiary’s president reported directly to the CEO of the parent issuer, and the issuer routinely identified
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the president as a member of its senior management in its annual filing with SEC and in annual reports. Additionally, the parent’s legal department approved the retention of the third-party agent through whom the bribes were arranged despite a lack of documented due diligence and an agency agreement that violated corporate policy; also, an official of the parent approved one of the payments to the third-party agent. Under these circumstances, the parent company had sufficient knowledge and control of its subsidiary’s actions to be liable under the FCPA.

Successor Liability

Companies acquire a host of liabilities when they merge with or acquire another company, including those arising out of contracts, torts, regulations, and statutes. As a general legal matter, when a company merges with or acquires another company, the successor company assumes the predecessor company’s liabilities. Successor liability is an integral component of corporate law and, among other things, prevents companies from avoiding liability by reorganizing. Successor liability applies to all kinds of civil and criminal liabilities, and FCPA violations are no exception. Whether successor liability applies to a particular corporate transaction depends on the facts and the applicable state, federal, and foreign law. Successor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA’s jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.

DOJ and SEC encourage companies to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition for a variety of reasons. First, due diligence helps an acquiring company to accurately value the target company. Contracts obtained through bribes may be legally unenforceable, business obtained illegally may be lost when bribe payments are stopped, there may be liability for prior illegal conduct, and the prior corrupt acts may harm the acquiring company’s reputation and future business prospects. Identifying these issues before an acquisition allows companies to better evaluate any potential post-acquisition liability and thus properly assess the target’s value. Second, due diligence reduces the risk that the acquired company will continue to pay bribes. Proper pre-acquisition due diligence can identify business and regional risks and can also lay the foundation for a swift and successful post-acquisition integration into the acquiring company’s corporate control and compliance environment. Third, the consequences of potential violations uncovered through due diligence can be handled by the parties in an orderly and efficient manner through negotiation of the costs and responsibilities for the investigation and remediation. Finally, comprehensive due diligence demonstrates a genuine commitment to uncovering and preventing FCPA violations.

In a significant number of instances, DOJ and SEC have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context. And DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition. In one case, a U.S.-based issuer was charged with books and records and internal controls violations for continuing a kickback scheme originated by its predecessor. Another recent case involved a merger between two tobacco leaf merchants, where prior to the merger each company committed FCPA violations through its foreign subsidiaries, involving multiple countries over the course of many years. At each company, the bribes were directed by the parent company’s senior management. The two issuers then merged to form a new public company. Under these circumstances—the merger of two public companies that had each engaged in
bribery—both the new entity and the foreign subsidiaries were liable under the FCPA. The new parent entered into a non-prosecution agreement with DOJ and settled a civil action with SEC, while the company’s subsidiaries, which also merged, pleaded guilty.\(^{188}\)

More often, DOJ and SEC have pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government’s investigation of the predecessor company preceded the acquisition. In one such case, an Ohio-based health care company’s due diligence of an acquisition target uncovered FCPA violations by the target’s subsidiary, and, before the merger was completed, the subsidiary’s violations were disclosed to DOJ and SEC. The subsidiary pleaded guilty and paid a $2 million criminal fine,\(^{189}\) the acquisition target settled with SEC and paid a $500,000 civil penalty,\(^{190}\) and no successor liability was sought against the acquiring entity. In another case, a Pennsylvania-based issuer that supplied heating and air conditioning products and services was subject to an ongoing investigation by DOJ and SEC at the time that it was acquired; DOJ and SEC resolved enforcement actions only against the predecessor company, which had by that time become a wholly owned subsidiary of the successor company.\(^{191}\)

DOJ and SEC have also brought actions only against a predecessor company where its FCPA violations are discovered after acquisition. For example, when a Florida-based U.S. company discovered in post-acquisition due diligence that the telecommunications company (a domestic concern) it had acquired had engaged in foreign bribery, the successor company disclosed the FCPA violations to DOJ. It then conducted an internal investigation, cooperated fully with DOJ, and took appropriate remedial action—including terminating senior management at the acquired

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**Practical Tips to Reduce FCPA Risk in Mergers and Acquisitions**

Companies pursuing mergers or acquisitions can take certain steps to identify and potentially reduce FCPA risks:

- **M&A Opinion Procedure Release Requests:** One option is to seek an opinion from DOJ in anticipation of a potential acquisition, such as occurred with Opinion Release 08-02. That case involved special circumstances, namely, severely limited pre-acquisition due diligence available to the potential acquiring company, and, because it was an opinion release (i.e., providing certain assurances by DOJ concerning prospective conduct), it necessarily imposed demanding standards and prescriptive timeframes in return for specific assurances from DOJ, which SEC, as a matter of discretion, also honors. Thus, obtaining an opinion from DOJ can be a good way to address specific due diligence challenges, but, because of the nature of such an opinion, it will likely contain more stringent requirements than may be necessary in all circumstances.

- **M&A Risk-Based FCPA Due Diligence and Disclosure:** As a practical matter, most acquisitions will typically not require the type of prospective assurances contained in an opinion from DOJ. DOJ and SEC encourage companies engaging in mergers and acquisitions to: (1) conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions; (2) ensure that the acquiring company’s code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities; (3) train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company’s code of conduct and compliance policies and procedures; (4) conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and (5) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities. DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions.
company. No enforcement action was taken against the successor, but the predecessor company pleaded guilty to one count of violating the FCPA and agreed to pay a $2 million fine. Later, four executives from the predecessor company were convicted of FCPA violations, three of whom received terms of imprisonment.

On occasion, when an enforcement action has been taken against a predecessor company, the successor seeks assurances that it will not be subject to a future enforcement action. In one such case, a Dutch predecessor resolved FCPA charges with DOJ through a deferred prosecution agreement. While both the predecessor and successor signed the agreement, which included a commitment to ongoing cooperation and an improved compliance program, only the predecessor company was charged; in signing the agreement, the successor company gained the certainty of conditional release from criminal liability, even though it was not being pursued for FCPA violations. In another case, after a Connecticut-based company uncovered FCPA violations by a California company it sought to acquire, both companies voluntarily disclosed the conduct to DOJ and SEC. The predecessor company resolved its criminal liability through a non-prosecution agreement with DOJ that included an $800,000 monetary penalty and also settled with SEC, paying a total of $1.1 million in disgorgement, pre-judgment interest, and civil penalties. The successor company proceeded with the acquisition and separately entered into a non-prosecution agreement with DOJ in which it agreed, among other things, to ensure full performance of the predecessor company’s non-prosecution agreement. This agreement provided certainty to the successor concerning its FCPA liability.

Importantly, a successor company’s voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program may also decrease the likelihood of an enforcement action regarding an acquired company’s post-acquisition conduct when pre-acquisition due diligence is not possible.
Hypothetical: Successor Liability Where Acquired Company Was Not Previously Subject to the FCPA

Company A is a Delaware corporation with its principal offices in the United States and whose shares are listed on a national U.S. exchange. Company A is considering acquiring Foreign Company, which is not an issuer or a domestic concern. Foreign Company takes no actions within the United States that would make it subject to territorial jurisdiction. Company A’s proposed acquisition would make Foreign Company a subsidiary of Company A.

Scenario 1:

Prior to acquiring Foreign Company, Company A engages in extensive due diligence of Foreign Company, including: (1) having its legal, accounting, and compliance departments review Foreign Company’s sales and financial data, its customer contracts, and its third-party and distributor agreements; (2) performing a risk-based analysis of Foreign Company’s customer base; (3) performing an audit of selected transactions engaged in by Foreign Company; and (4) engaging in discussions with Foreign Company’s general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other corruption-related issues that have surfaced at Foreign Company over the past ten years. This due diligence aims to determine whether Foreign Company has appropriate anti-corruption and compliance policies in place, whether Foreign Company’s employees have been adequately trained regarding those policies, how Foreign Company ensures that those policies are followed, and what remedial actions are taken if the policies are violated.

During the course of its due diligence, Company A learns that Foreign Company has made several potentially improper payments in the form of an inflated commission to a third-party agent in connection with a government contract with Foreign Country. Immediately after the acquisition, Company A discloses the conduct to DOJ and SEC, suspends and terminates those employees and the third-party agent responsible for the payments, and makes certain that the illegal payments have stopped. It also quickly integrates Foreign Company into Company A’s own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Foreign Company’s third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights.

Based on these facts, could DOJ or SEC prosecute Company A?

No. Although DOJ and SEC have jurisdiction over Company A because it is an issuer, neither could pursue Company A for conduct that occurred prior to its acquisition of Foreign Company. As Foreign Company was neither an issuer nor a domestic concern and was not subject to U.S. territorial jurisdiction, DOJ and SEC have no jurisdiction over its pre-acquisition misconduct. The acquisition of a company does not create jurisdiction where none existed before.

Importantly, Company A’s extensive pre-acquisition due diligence allowed it to identify and halt the corruption. As there was no continuing misconduct post-acquisition, the FCPA was not violated.

Scenario 2:

Company A performs only minimal and pro forma pre-acquisition due diligence. It does not conduct a risk-based analysis, and its review of Foreign Company’s data, contracts, and third-party and distributor agreements is cursory. Company A acquires Foreign Company and makes it a wholly owned subsidiary. Although Company A circulates its compliance policies to all new personnel after the acquisition, it does not translate the compliance policies into the local language or train its new personnel or third-party agents on anti-corruption issues.

A few months after the acquisition, an employee in Company A’s international sales office (Sales Employee) learns from a legacy Foreign Company employee that for years the government contract that generated most of Foreign Company’s revenues depended on inflated commissions to a third-party agent “to make the right person happy at Foreign Government Agency.” Sales Employee is told that unless the payments continue the business will likely be lost, which would mean that Company A’s new acquisition would quickly become a financial failure. The payments continue for two

(cont’d)
years after the acquisition. After another employee of Company A reports the long-running bribe scheme to a director at Foreign Government Agency, Company A stops the payments and DOJ and SEC investigate.

Based on these facts, would DOJ or SEC charge Company A?

Yes. DOJ and SEC have prosecuted companies like Company A in similar circumstances. Any charges would not, however, be premised upon successor liability, but rather on Company A’s post-acquisition bribe payments, which themselves created criminal and civil liability for Company A.

Scenario 3:

Under local law, Company A’s ability to conduct pre-acquisition due diligence on Foreign Company is limited. In the due diligence it does conduct, Company A determines that Foreign Company is doing business in high-risk countries and in high-risk industries but finds no red flags specific to Foreign Company’s operations. Post-acquisition, Company A conducts extensive due diligence and determines that Foreign Company had paid bribes to officials with Foreign Government Agency. Company A takes prompt action to remediate the problem, including following the measures set forth in Opinion Procedure Release No. 08-02. Among other actions, it voluntarily discloses the misconduct to DOJ and SEC, ensures all bribes are immediately stopped, takes remedial action against all parties involved in the corruption, and quickly incorporates Foreign Company into a robust compliance program and Company A’s other internal controls.

Based on these facts, would DOJ or SEC prosecute Company A?

DOJ and SEC have declined to prosecute companies like Company A in similar circumstances. Companies can follow the measures set forth in Opinion Procedure Release No. 08-02, or seek their own opinions, where adequate pre-acquisition due diligence is not possible.

Hypothetical: Successor Liability Where Acquired Company Was Already Subject to the FCPA

Both Company A and Company B are Delaware corporations with their principal offices in the United States. Both companies’ shares are listed on a national U.S. exchange.

Scenario 1:

Company A is considering acquiring several of Company B’s business lines. Prior to the acquisition, Company A engages in extensive due diligence, including: (1) having its legal, accounting, and compliance departments review Company B’s sales and financial data, its customer contracts, and its third-party and distributor agreements; (2) performing a risk-based analysis of Company B’s customer base; (3) performing an audit of selected transactions engaged in by Company B; and (4) engaging in discussions with Company B’s general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other major corruption-related issues that have surfaced at Company B over the past ten years. This due diligence aims to determine whether Company B has appropriate anti-corruption and compliance policies in place, whether Company B’s employees have been adequately trained regarding those policies, how Company B ensures that those policies are followed, and what remedial actions are taken if the policies are violated.

During the course of its due diligence, Company A learns that Company B has made several potentially improper payments in connection with a government contract with Foreign Country. As a condition of the acquisition, Company A requires Company B to disclose the misconduct to the government. Company A makes certain that the illegal payments (cont’d)
have stopped and quickly integrates Company B’s business lines into Company A’s own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Company B’s third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights.

Based on these facts, would DOJ or SEC prosecute?

DOJ and SEC have declined to prosecute companies like Company A in similar circumstances. DOJ and SEC encourage companies like Company A to conduct extensive FCPA due diligence. By uncovering the corruption, Company A put itself in a favorable position, and, because the corrupt payments have stopped, Company A has no continuing liability. Whether DOJ and SEC might charge Company B depends on facts and circumstances beyond the scope of this hypothetical. DOJ would consider its Principles of Federal Prosecution of Business Organizations and SEC would consider the factors contained in the Seaboard Report, both of which are discussed in Chapter 5. In general, the more egregious and long-standing the corruption, the more likely it is that DOJ and SEC would prosecute Company B. In certain limited circumstances, DOJ and SEC have in the past declined to bring charges against acquired companies, recognizing that acquiring companies may bear much of the reputational damage and costs associated with such charges.

Scenario 2:

Company A plans to acquire Company B. Although, as in Scenario 1, Company A conducts extensive due diligence, it does not uncover the bribery until after the acquisition. Company A then makes certain that the illegal payments stop and voluntarily discloses the misconduct to DOJ and SEC. It quickly integrates Company B into Company A’s own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Company B’s third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights.

Based on these facts, would DOJ or SEC prosecute?

Absent unusual circumstances not contemplated by this hypothetical, DOJ and SEC are unlikely to prosecute Company A for the pre-acquisition misconduct of Company B, provided that Company B still exists in a form that would allow it to be prosecuted separately (e.g., Company B is a subsidiary of Company A). DOJ and SEC understand that no due diligence is perfect and that society benefits when companies with strong compliance programs acquire and improve companies with weak ones. At the same time, however, neither the liability for corruption—nor the harms caused by it—are eliminated when one company acquires another. Whether DOJ and SEC will pursue a case against Company B (or, in unusual circumstances, Company A) will depend on consideration of all the factors in the Principles of Federal Prosecution of Business Organizations and the Seaboard Report, respectively.

Scenario 3:

Company A merges with Company B, which is in the same line of business and interacts with the same Foreign Government customers, and forms Company C. Due diligence before the merger reveals that both Company A and Company B have been engaging in similar bribery. In both cases, the bribery was extensive and known by high-level management within the companies.

Based on these facts, would DOJ or SEC prosecute?

Yes. DOJ and SEC have prosecuted companies like Company C on the basis of successor liability. Company C is a combination of two companies that both violated the FCPA, and their merger does not eliminate their liability. In addition, since Company C is an ongoing concern, DOJ and SEC may impose a monitorship to ensure that the bribery has ceased and a compliance program is developed to prevent future misconduct.
Additional Principles of Criminal Liability for Anti-Bribery Violations: Aiding and Abetting and Conspiracy

Under federal law, individuals or companies that aid or abet a crime, including an FCPA violation, are as guilty as if they had directly committed the offense themselves. The aiding and abetting statute provides that whoever “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission,” or “willfully causes an act to be done which if directly performed by him or another would be an offense against the United States,” is punishable as a principal.\(^\text{199}\) Aiding and abetting is not an independent crime, and the government must prove that an underlying FCPA violation was committed.\(^\text{200}\)

Individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for agreeing to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation. For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the FCPA. Under certain circumstances, it could also be held liable for the domestic concern’s substantive FCPA violations under pinkerton v. United States, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined.\(^\text{201}\)

A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States.\(^\text{202}\) For example, if a foreign company or individual conspires to violate the FCPA with someone who commits an overt act within the United States, the United States can prosecute the foreign company or individual for the conspiracy. The same principle applies to aiding and abetting violations. For instance, even though they took no action in the United States, Japanese and European companies were charged with conspiring with and aiding and abetting a domestic concern’s FCPA violations.\(^\text{203}\)

Additional Principles of Civil Liability for Anti-Bribery Violations: Aiding and Abetting and Causing

Both companies and individuals can be held civilly liable for aiding and abetting FCPA anti-bribery violations if they knowingly or recklessly provide substantial assistance to a violator.\(^\text{204}\) Similarly, in the administrative proceeding context, companies and individuals may be held liable for causing FCPA violations.\(^\text{205}\) This liability extends to the subsidiaries and agents of U.S. issuers.

In one case, the U.S. subsidiary of a Swiss freight forwarding company was held civilly liable for paying bribes on behalf of its customers in several countries.\(^\text{206}\) Although the U.S. subsidiary was not an issuer for purposes of the FCPA, it was an “agent” of several U.S. issuers. By paying bribes on behalf of its issuers’ customers, the subsidiary both directly violated and aided and abetted the issuers’ FCPA violations.

What Is the Applicable Statute of Limitations?

Statute of Limitations in Criminal Cases

The FCPA’s anti-bribery and accounting provisions do not specify a statute of limitations for criminal actions. Accordingly, the general five-year limitations period set forth in 18 U.S.C. § 3282 applies to substantive criminal violations of the Act.\(^\text{207}\)

In cases involving FCPA conspiracies, the government may be able to reach conduct occurring before the five-year limitations period applicable to conspiracies
under 18 U.S.C. § 371. For conspiracy offenses, the government generally need prove only that one act in furtherance of the conspiracy occurred during the limitations period, thus enabling the government to prosecute bribes paid or accounting violations occurring more than five years prior to the filing of formal charges.208

There are at least two ways in which the applicable limitations period is commonly extended. First, companies or individuals cooperating with DOJ may enter into a tolling agreement that voluntarily extends the limitations period. Second, under 18 U.S.C. § 3292, the government may seek a court order suspending the statute of limitations posed in a criminal case for up to three years in order to obtain evidence from foreign countries. Generally, the suspension period begins when the official request is made by the U.S. government to the foreign authority and ends on the date on which the foreign authority takes final action on the request.209

Statute of Limitations in Civil Actions

In civil cases brought by SEC, the statute of limitations is set by 28 U.S.C. § 2462, which provides for a five-year limitation on any “suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.” The five-year period begins to run “when the claim first accrued.” The five-year limitations period applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction or the disgorgement of ill-gotten gains, for conduct pre-dating the five-year period. In cases against individuals who are not residents of the United States, the statute is tolled for any period when the defendants are not “found within the United States in order that proper service may be made thereon.”210 Furthermore, companies or individuals cooperating with SEC may enter into tolling agreements that voluntarily extend the limitations period.
THE FCPA: ACCOUNTING PROVISIONS

In addition to the anti-bribery provisions, the FCPA contains accounting provisions applicable to public companies. The FCPA’s accounting provisions operate in tandem with the anti-bribery provisions and prohibit off-the-books accounting. Company management and investors rely on a company’s financial statements and internal accounting controls to ensure transparency in the financial health of the business, the risks undertaken, and the transactions between the company and its customers and business partners. The accounting provisions are designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure.”

The accounting provisions consist of two primary components. First, under the “books and records” provision, issuers must make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer’s transactions and dispositions of an issuer’s assets. Second, under the “internal controls” provision, issuers must devise and maintain a system of internal accounting controls sufficient to assure management’s control, authority, and responsibility over the firm’s assets. These components, and other aspects of the accounting provisions, are discussed in greater detail below.

Although the accounting provisions were originally enacted as part of the FCPA, they do not apply only to bribery-related violations. Rather, the accounting provisions ensure that all public companies account for all of their assets and liabilities accurately and in reasonable detail, and they form the backbone for most accounting fraud and issuer disclosure cases brought by DOJ and SEC.
In the past, “corporate bribery has been concealed by the falsification of corporate books and records” and the accounting provisions “remove[] this avenue of coverup.”

*Senate Report No. 95-114, at 3 (1977)*

What Is Covered by the Accounting Provisions?

**Books and Records Provision**

Bribes, both foreign and domestic, are often mischaracterized in companies’ books and records. Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)), commonly called the “books and records” provision, requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” The “in reasonable detail” qualification was adopted by Congress “in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic.” The addition of this phrase was intended to make clear “that the issuer’s records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes.”

The term “reasonable detail” is defined in the statute as the level of detail that would “satisfy prudent officials in the conduct of their own affairs.” Thus, as Congress noted when it adopted this definition, “[t]he concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.”

Although the standard is one of reasonable detail, it is never appropriate to mischaracterize transactions in a company’s books and records. Bribes are often concealed under the guise of legitimate payments, such as commissions or consulting fees.

In instances where all the elements of a violation of the anti-bribery provisions are not met—where, for example, there was no use of interstate commerce—companies nonetheless may be liable if the improper payments are inaccurately recorded. Consistent with the FCPA’s approach to prohibiting payments of any value that are made with a corrupt purpose, there is no materiality threshold under the books and records provision. In combination with the internal controls provision, the requirement that issuers maintain books and records that accurately and fairly reflect the corporation’s transactions “assure[s], among other things, that the assets of the issuer are used for proper corporate purpose[s].” As with the anti-bribery provisions, DOJ’s and SEC’s enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.

**Bribes Have Been Mischaracterized As:**

- Commissions or Royalties
- Consulting Fees
- Sales and Marketing Expenses
- Scientific Incentives or Studies
- Travel and Entertainment Expenses
- Rebates or Discounts
- After Sales Service Fees
- Miscellaneous Expenses
- Petty Cash Withdrawals
- Free Goods
- Intercompany Accounts
- Supplier / Vendor Payments
- “Write-offs”
- “Customs Intervention” Payments
Internal Controls Provision

The payment of bribes often occurs in companies that have weak internal control environments. Internal controls over financial reporting are the processes used by companies to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements. They include various components, such as: a control environment that covers the tone set by the organization regarding integrity and ethics; risk assessments; control activities that cover policies and procedures designed to ensure that management directives are carried out (e.g., approvals, authorizations, reconciliations, and segregation of duties); information and communication; and monitoring. Section 13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)), commonly called the "internal controls" provision, requires 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 (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
  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 ....

Like the “reasonable detail” requirement in the books and records provision, the Act defines “reasonable assurances” as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”

The Act does not specify a particular set of controls that companies are required to implement. Rather, the internal controls provision gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.

An effective compliance program is a critical component of an issuer’s internal controls. Fundamentally, the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its workforce; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. A company’s compliance program should be tailored to these differences. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.

A 2008 case against a German manufacturer of industrial and consumer products illustrates a systemic internal controls problem involving bribery that was unprecedented in scale and geographic reach. From 2001 to 2007, the company created elaborate payment schemes—including slush funds with ineffective internal controls often face risks of embezzlement and self-dealing by employees, commercial bribery, export control problems, and violations of other U.S. and local laws.
funds, off-the-books accounts, and systematic payments to business consultants and other intermediaries—to facilitate bribery. Payments were made in ways that obscured their purpose and the ultimate recipients of the money. In some cases, employees obtained large amounts of cash from cash desks and then transported the cash in suitcases across international borders. Authorizations for some payments were placed on sticky notes and later removed to avoid any permanent record. The company made payments totaling approximately $1.36 billion through various mechanisms, including $805.5 million as bribes and $554.5 million for unknown purposes. The company was charged with internal controls and books and records violations, along with anti-bribery violations, and paid over $1.6 billion to resolve the case with authorities in the United States and Germany.

The types of internal control failures identified in the above example exist in many other cases where companies were charged with internal controls violations. A 2010 case against a multi-national automobile manufacturer involved bribery that occurred over a long period of time in multiple countries. In that case, the company used dozens of ledger accounts, known internally as “internal third party accounts,” to maintain credit balances for the benefit of government officials. The accounts were funded through several bogus pricing mechanisms, such as “price surcharges,” “price inclusions,” or excessive commissions. The company also used artificial discounts or rebates on sales contracts to generate the money to pay the bribes. The bribes also were made through phony sales intermediaries and corrupt business partners, as well as through the use of cash desks. Sales executives would obtain cash from the company in amounts as high as hundreds of thousands of dollars, enabling the company to obscure the purpose and recipients of the money paid to government officials.

In addition to bribery charges, the company was charged with internal controls and books and records violations.

Good internal controls can prevent not only FCPA violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees. DOJ and SEC have repeatedly brought FCPA cases that also involved other types of misconduct, such as financial fraud, commercial bribery, export controls violations, and embezzlement or self-dealing by company employees.

Potential Reporting and Anti-Fraud Violations

Issuers have reporting obligations under Section 13(a) of the Exchange Act, which requires issuers to file an annual report that contains comprehensive information about the issuer. Failure to properly disclose material information about the issuer’s business, including material revenue, expenses, profits, assets, or liabilities related to bribery of foreign government officials, may give rise to anti-fraud and reporting violations under Sections 10(b) and 13(a) of the Exchange Act.

For example, a California-based technology company was charged with reporting violations, in addition to violations of the FCPA’s anti-bribery and accounting provisions, when its bribery scheme led to material misstatements in its SEC filings. The company was awarded contracts procured through bribery of Chinese officials that generated material revenue and profits. The revenue and profits helped the company offset losses incurred to develop new products expected to become the company’s future source of revenue growth. The company improperly recorded the bribe payments as sales commission expenses in its books and records.

Companies engaged in bribery may also be engaged in activity that violates the anti-fraud and reporting provisions. For example, an oil and gas pipeline company and its employees engaged in a long-running scheme to use the company’s petty cash accounts in Nigeria to make a variety of corrupt payments to Nigerian tax and court officials using false invoices. The company and its employees also engaged in a fraudulent scheme to minimize the company’s tax obligations in Bolivia by using false invoices to claim false offsets to its value-added tax obligations. The scheme resulted in material overstatements of the company’s net income in the company’s financial statements, which violated the Exchange Act’s anti-fraud and reporting provisions. Both schemes also violated the books and records and internal controls provisions.
What Are Management’s Other Obligations?

Sarbanes-Oxley Act of 2002

In 2002, in response to a series of accounting scandals involving U.S. companies, Congress enacted the Sarbanes-Oxley Act (Sarbanes-Oxley or SOX), which strengthened the accounting requirements for issuers. All issuers must comply with Sarbanes-Oxley’s requirements, several of which have FCPA implications.


Section 302 of Sarbanes-Oxley requires that a company’s “principal officers” (typically the Chief Executive Officer (CEO) and Chief Financial Officer (CFO)) take responsibility for and certify the integrity of their company’s financial reports on a quarterly basis. Under Exchange Act Rule 13a-14, which is commonly called the “SOX certification” rule, each periodic report filed by an issuer must include a certification signed by the issuer’s principal executive officer and principal financial officer that, among other things, states that: (i) based on the officer’s knowledge, the report contains no material misstatements or omissions; (ii) based on the officer’s knowledge, the relevant financial statements are accurate in all material respects; (iii) internal controls are properly designed; and (iv) the certifying officers have disclosed to the issuer’s audit committee and auditors all significant internal control deficiencies.


Sarbanes-Oxley also strengthened a company’s required disclosures concerning the state of its internal control over financial reporting. Under Section 404, issuers are required to present in their annual reports management’s conclusion regarding the effectiveness of the company’s internal controls over financial reporting. This statement must also assess the effectiveness of such internal controls and procedures. In addition, the company’s independent auditor must attest to and report on its assessment of the effectiveness of the company’s internal controls over financial reporting.

As directed by Section 404, SEC has adopted rules requiring issuers and their independent auditors to report to the public on the effectiveness of the company’s internal controls over financial reporting. These internal controls include those related to illegal acts and fraud—including acts of bribery—that could result in a material misstatement of the company’s financial statements. In 2007, SEC issued guidance on controls over financial reporting.

SOX Section 802 (18 U.S.C. §§ 1519 and 1520)—Criminal Penalties for Altering Documents

Section 802 of Sarbanes-Oxley prohibits altering, destroying, mutilating, concealing, or falsifying records, documents, or tangible objects with the intent to obstruct, impede, or influence a potential or actual federal investigation. This section also prohibits any accountant from knowingly and willfully violating the requirement that all audit or review papers be maintained for a period of five years.

Who Is Covered by the Accounting Provisions?

Civil Liability for Issuers, Subsidiaries, and Affiliates

The FCPA’s accounting provisions apply to every issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file annual or other periodic reports pursuant to Section 15(d) of the Exchange Act. These provisions apply to any issuer whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange-traded American Depository Receipts. They also apply
to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission, such as annual and quarterly reports. Unlike the FCPA’s anti-bribery provisions, the accounting provisions do not apply to private companies.246

Although the FCPA’s accounting requirements are directed at “issuers,” an issuer’s books and records include those of its consolidated subsidiaries and affiliates. An issuer’s responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions. For instance, DOJ and SEC brought enforcement actions against a California company for violating the FCPA’s accounting provisions when two Chinese joint ventures in which it was a partner paid more than $400,000 in bribes over a four-year period to obtain business in China.247 Sales personnel in China made the illicit payments by obtaining cash advances from accounting personnel, who recorded the payments on the books as “business fees” or “travel and entertainment” expenses. Although the payments were made exclusively in China by Chinese employees of the joint venture, the California company failed to have adequate internal controls and failed to act on red flags indicating that its affiliates were engaged in bribery. The California company paid $1.15 million in civil disgorgement and a criminal monetary penalty of $1.7 million.

Companies may not be able to exercise the same level of control over a minority-owned subsidiary or affiliate as they do over a majority or wholly owned entity. Therefore, if a parent company owns 50% or less of a subsidiary or affiliate, the parent is only required to use good faith efforts to cause the minority-owned subsidiary or affiliate to devise and maintain a system of internal accounting controls consistent with the issuer’s own obligations under the FCPA.248 In evaluating an issuer’s good faith efforts, all the circumstances—including “the relative degree of the issuer’s ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located”—are taken into account.249

Civil Liability for Individuals and Other Entities

Companies (including subsidiaries of issuers) and individuals may also face civil liability for aiding and abetting or causing an issuer’s violation of the accounting provisions.250 For example, in April 2010, SEC charged four individuals—a Country Manager, a Senior Vice President of Sales, a Regional Financial Director, and an International Controller of a U.S. issuer—for their roles in schemes to bribe Kyrgyz and Thai government officials to purchase tobacco from their employer. The complaint alleged that, among other things, the individuals aided and abetted the issuer company’s violations of the books and records and internal controls provisions by “knowingly provid[ing] substantial assistance to” the parent company.251 All four executives settled the charges against them, consenting to the entry of final judgments permanently enjoining them from violating the accounting and anti-bribery provisions, with two executives paying civil penalties.252 As in other areas of federal securities law, corporate officers also can be held liable as control persons.253

Similarly, in October 2011, SEC brought an administrative action against a U.S. water valve manufacturer and a former employee of the company’s Chinese subsidiary for violations of the FCPA’s accounting provisions.254 The Chinese subsidiary had made improper payments to employees of certain design institutes to create design specifications that favored the company’s valve products. The payments were disguised as sales commissions in the subsidiary’s books and records, thereby causing the U.S. issuer’s books and records to be inaccurate. The general manager of the subsidiary, who approved the payments and knew or should have known that they were improperly recorded, was ordered to cease-and-desist from committing or causing violations of the accounting provisions, among other charges.255

Additionally, individuals and entities can be held directly civilly liable for falsifying an issuer’s books and records or for circumventing internal controls. Exchange Act Rule 13b2-1 provides: “No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to [the books and records provision] of the Securities Exchange Act.”256 And Section 13(b)(5) of
The FCPA: Accounting Provisions

The Exchange Act (15 U.S.C. § 78m(b)(5)) provides that “[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account ....”257 The Exchange Act defines “person” to include a “natural person, company, government, or political subdivision, agency, or instrumentality of a government.”258

An issuer’s officers and directors may also be held civilly liable for making false statements to a company’s auditor. Exchange Act Rule 13b2-2 prohibits officers and directors from making (or causing to be made) materially false or misleading statements, including an omission of material facts, to an accountant. This liability arises in connection with any audit, review, or examination of a company’s financial statements or in connection with the filing of any document with SEC.259

Finally, the principal executive and principal financial officer, or persons performing similar functions, can be held liable for violating Exchange Act Rule 13a-14 by signing false personal certifications required by SOX. Thus, for example, in January 2011, SEC charged the former CEO of a U.S. issuer for his role in schemes to bribe Iraqi government officials in connection with the United Nations Oil-For-Food Programme and to bribe Iraqi and Indonesian officials to purchase the company’s fuel additives. There, the company used false invoices and sham consulting contracts to support large bribes that were passed on to foreign officials through an agent, and the bribes were mischaracterized as legitimate commissions and travel fees in the company’s books and records. The officer directed and authorized the bribe payments and their false recording in the books and records. He also signed annual and quarterly SOX certifications in which he falsely represented that the company’s financial statements were fairly presented and the company’s internal controls sufficiently designed, as well as annual representations to the company’s external auditors where he falsely stated that he complied with the company’s code of ethics and was unaware of any violations of the code of ethics by anyone else. The officer was charged with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications.260 He consented to the entry of an injunction and paid disgorgement and a civil penalty.261 He also later pleaded guilty in the United Kingdom to conspiring to corrupt Iraqi and Indonesian officials.262

Criminal Liability for Accounting Violations

Criminal liability can be imposed on companies and individuals for knowingly failing to comply with the FCPA’s books and records or internal controls provisions.263 As with the FCPA’s anti-bribery provisions, individuals are only subject to the FCPA’s criminal penalties for violations of the accounting provisions if they acted “willfully.”264

For example, a French company was criminally charged with failure to implement internal controls and failure to keep accurate books and records, among other violations.265 As part of its deferred prosecution agreement, the company admitted to numerous internal control failures, including failure to implement sufficient anti-bribery compliance policies, maintain a sufficient system for the selection and approval of consultants, and conduct appropriate audits of payments to purported “business consultants.”266 Likewise, a German company pleaded guilty to internal controls and books and records violations where, from 2001 through 2007, it made payments totaling approximately $1.36 billion through various mechanisms, including $805.5 million as bribes and $554.5 million for unknown purposes.267

Individuals can be held criminally liable for accounting violations. For example, a former managing director of a U.S. bank’s real estate business in China pleaded guilty to conspiring to evade internal accounting controls in order to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese public official with whom
he had a personal friendship. The former managing director repeatedly made false representations to his employer about the transaction and the ownership interests involved.268

**Conspiracy and Aiding and Abetting Liability**

As with the FCPA’s anti-bribery provisions, companies (including subsidiaries of issuers) and individuals may face criminal liability for conspiring to commit or for aiding and abetting violations of the accounting provisions.

For example, the subsidiary of a Houston-based company pleaded guilty both to conspiring to commit and to aiding and abetting the company’s books and records and anti-bribery violations.269 The subsidiary paid bribes of over $4 million and falsely characterized the payments as “commissions, “ fees,” or “legal services, “ consequently causing the company’s books and records to be inaccurate. Although the subsidiary was not an issuer and therefore could not be charged directly with an accounting violation, it was criminally liable for its involvement in the parent company’s accounting violation.

Similarly, a U.S. subsidiary of a Swiss freight forwarding company that was not an issuer was charged with conspiring to commit and with aiding and abetting the books and records violations of its customers, who were issuers and therefore subject to the FCPA’s accounting provisions.270 The U.S. subsidiary substantially assisted the issuer-customers in violating the FCPA’s books and records provision by masking the true nature of the bribe payments in the invoices it submitted to the issuer-customers.271 The subsidiary thus faced criminal liability for its involvement in the issuer-customers’ FCPA violations even though it was not itself subject to the FCPA’s accounting provisions.

**Auditor Obligations**

All public companies in the United States must file annual financial statements that have been prepared in conformity with U.S. Generally Accepted Accounting Principles (U.S. GAAP). These accounting principles are among the most comprehensive in the world. U.S. GAAP requires an accounting of all assets, liabilities, revenue, and expenses as well as extensive disclosures concerning the company’s operations and financial condition. A company’s financial statements should be complete and fairly represent the company’s financial condition.272 Thus, under U.S. GAAP, any payments to foreign government officials must be properly accounted for in a company’s books, records, and financial statements.

U.S. laws, including SEC Rules, require issuers to undergo an annual external audit of their financial statements and to make those audited financial statements available to the public by filing them with SEC. SEC Rules and the rules and standards issued by the Public Company Accounting Oversight Board (PCAOB) under SEC oversight, require external auditors to be independent of the companies that they audit. Independent auditors must comply with the rules and standards set forth by the PCAOB when they perform an audit of a public company. These audit standards govern, for example, the auditor’s responsibility concerning material errors, irregularities, or illegal acts by a client and its officers, directors, and employees. Additionally, the auditor has a responsibility to obtain an understanding of an entity’s internal controls over financial reporting as part of its audit and must communicate all significant deficiencies and material weaknesses identified during the audit to management and the audit committee.273

Under Section 10A of the Exchange Act, independent auditors who discover an illegal act, such as the payment of bribes to domestic or foreign government officials, have certain obligations in connection with their audits of public companies.274 Generally, Section 10A requires auditors who become aware of illegal acts to report such acts to appropriate levels within the company and, if the company fails to take appropriate action, to notify SEC.
OTHER RELATED U.S. LAWS

Businesses and individuals should be aware that conduct that violates the FCPA’s anti-bribery or accounting provisions may also violate other statutes or regulations. Moreover, payments to foreign government officials and intermediaries may violate these laws even if all of the elements of an FCPA violation are not present.

Travel Act

The Travel Act, 18 U.S.C. § 1952, prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity.275 “Unlawful activity” includes violations of not only the FCPA, but also state commercial bribery laws. Thus, bribery between private commercial enterprises may, in some circumstances, be covered by the Travel Act. Said differently, if a company pays kickbacks to an employee of a private company who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act.

DOJ has previously charged both individual and corporate defendants in FCPA cases with violations of the Travel Act.276 For instance, an individual investor was convicted of conspiracy to violate the FCPA and the Travel Act in 2009 where the relevant “unlawful activity” under the Travel Act was an FCPA violation involving a bribery scheme in Azerbaijan.277 Also in 2009, a California company that engaged in both bribery of foreign officials in violation of the FCPA and commercial bribery in violation of California state law pleaded guilty to conspiracy to violate the FCPA and the Travel Act, among other charges.278

Money Laundering

Many FCPA cases also involve violations of anti-money laundering statutes.279 For example, two Florida executives of a Miami-based telecommunications company were convicted of FCPA and money laundering conduct where they conducted financial transactions involving the proceeds of specified unlawful activities—violations of the FCPA, the criminal bribery laws of Haiti, and wire fraud—in order to conceal and disguise these proceeds. Notably, although foreign officials cannot be prosecuted for FCPA
violations, three former Haitian officials involved in the same scheme were convicted of money laundering.

**Mail and Wire Fraud**

The mail and wire fraud statutes may also apply. In 2006, for example, a wholly owned foreign subsidiary of a U.S. issuer pleaded guilty to both FCPA and wire fraud counts where the scheme included overbilling the subsidiary’s customers—both government and private—and using part of the overcharged money to pay kickbacks to the customers’ employees. The wire fraud charges alleged that the subsidiary had funds wired from its parent’s Oregon bank account to off-the-books bank accounts in South Korea that were controlled by the subsidiary. The funds, amounting to almost $2 million, were then paid to managers of state-owned and private steel production companies in China and South Korea as illegal commission payments and kickbacks that were disguised as refunds, commissions, and other seemingly legitimate expenses.

**Certification and Reporting Violations**

Certain other licensing, certification, and reporting requirements imposed by the U.S. government can also be implicated in the foreign bribery context. For example, as a condition of its facilitation of direct loans and loan guarantees to a foreign purchaser of U.S. goods and services, the Export-Import Bank of the United States requires the U.S. supplier to make certifications concerning commissions, fees, or other payments paid in connection with the financial assistance and that it has not and will not violate the FCPA. A false certification may give rise to criminal liability for false statements.

Similarly, manufacturers, exporters, and brokers of certain defense articles and services are subject to registration, licensing, and reporting requirements under the Arms Export Control Act (AECA), 22 U.S.C. § 2751, et seq., and its implementing regulations, the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120, et seq. For example, under AECA and ITAR, all manufacturers and exporters of defense articles and services must register with the Directorate of Defense Trade Controls. The sale of defense articles and services valued at $500,000 or more triggers disclosure requirements concerning fees and commissions, including bribes, in an aggregate amount of $100,000 or more. Violations of AECA and ITAR can result in civil and criminal penalties.

**Tax Violations**

Individuals and companies who violate the FCPA may also violate U.S. tax law, which explicitly prohibits tax deductions for bribes, such as false sales “commissions” deductions intended to conceal corrupt payments. Internal Revenue Service-Criminal Investigation has been involved in a number of FCPA investigations involving tax violations, as well as other financial crimes like money laundering.
GUIDING PRINCIPLES OF ENFORCEMENT

What Does DOJ Consider When Deciding Whether to Open an Investigation or Bring Charges?

Whether and how DOJ will commence, decline, or otherwise resolve an FCPA matter is guided by the Principles of Federal Prosecution in the case of individuals, and the Principles of Federal Prosecution of Business Organizations in the case of companies.

DOJ Principles of Federal Prosecution

The Principles of Federal Prosecution, set forth in Chapter 9-27.000 of the U.S. Attorney’s Manual, provide guidance for DOJ prosecutors regarding initiating or declining prosecution, selecting charges, and plea-bargaining. The Principles of Federal Prosecution provide that prosecutors should recommend or commence federal prosecution if the putative defendant’s conduct constitutes a federal offense and the admissible evidence will probably be sufficient to obtain and sustain a conviction unless (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists. In assessing the existence of a substantial federal interest, the prosecutor is advised to “weigh all relevant considerations,” including the nature and seriousness of the offense; the deterrent effect of prosecution; the person’s culpability in connection with the offense; the person’s history with respect to criminal activity; the person’s willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the person is convicted. The Principles of Federal Prosecution also set out the considerations to be weighed when deciding whether to enter into a plea agreement with an individual defendant, including the nature and seriousness of the offense and the person’s willingness to cooperate, as well as the desirability of prompt and certain disposition of the case and the expense of trial and appeal.

DOJ Principles of Federal Prosecution of Business Organizations

The Principles of Federal Prosecution of Business Organizations, set forth in Chapter 9-28.000 of the U.S. Attorney’s Manual, provide guidance regarding the resolution of cases involving corporate wrongdoing. The Principles of Federal Prosecution of Business Organizations recognize that resolution of corporate criminal cases by means other
than indictment, including non-prosecution and deferred prosecution agreements, may be appropriate in certain circumstances. Nine factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- the nature and seriousness of the offense, including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- the existence and effectiveness of the corporation’s pre-existing compliance program;
- the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies;
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
- the adequacy of remedies such as civil or regulatory enforcement actions.

As these factors illustrate, in many investigations it will be appropriate for a prosecutor to consider a corporation’s pre-indictment conduct, including voluntary disclosure, cooperation, and remediation, in determining whether to seek an indictment. In assessing a corporation’s cooperation, prosecutors are prohibited from requesting attorney-client privileged materials with two exceptions—when a corporation or its employee asserts an advice-of-counsel defense and when the attorney-client communications were in furtherance of a crime or fraud. Otherwise, an organization’s cooperation may only be assessed on the basis of whether it disclosed the relevant facts underlying an investigation—and not on the basis of whether it has waived its attorney-client privilege or work product protection.291

What Does SEC Consider When Deciding Whether to Open an Investigation or Bring Charges?

SEC’s Enforcement Manual, published by SEC’s Enforcement Division and available on SEC’s website,292 sets forth information about how SEC conducts investigations, as well as the guiding principles that SEC staff considers when determining whether to open or close an investigation and whether civil charges are merited. There are various ways that potential FCPA violations come to the attention of SEC staff, including: tips from informants or whistleblowers; information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives. Investigations can be formal, such as where SEC has issued a formal order of investigation that authorizes its staff to issue investigative subpoenas for testimony and documents, or informal, such as where the staff proceeds with the investigation without the use of investigative subpoenas.

In determining whether to open an investigation and, if so, whether an enforcement action is warranted, SEC staff considers a number of factors, including: the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct. SEC staff also may
consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws.

For more information about the Enforcement Division’s procedures concerning investigations, enforcement actions, and cooperation with other regulators, see the Enforcement Manual at http://www.sec.gov/divisions/enforce.shtml.

Self-Reporting, Cooperation, and Remedial Efforts

While the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.

Criminal Cases

Under DOJ’s Principles of Federal Prosecution of Business Organizations, federal prosecutors consider a company’s cooperation in determining how to resolve a corporate criminal case. Specifically, prosecutors consider whether the company made a voluntary and timely disclosure as well as the company’s willingness to provide relevant information and evidence and identify relevant actors inside and outside the company, including senior executives. In addition, prosecutors may consider a company’s remedial actions, including efforts to improve an existing compliance program or appropriate disciplining of wrongdoers. A company’s remedial measures should be meaningful and illustrate its recognition of the seriousness of the misconduct, for example, by taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.

The Principles of Federal Prosecution similarly provide that prosecutors may consider an individual’s willingness to cooperate in deciding whether a prosecution should be undertaken and how it should be resolved. Although a willingness to cooperate will not, by itself, generally relieve a person of criminal liability, it may be given “serious consideration” in evaluating whether to enter into a plea agreement with a defendant, depending on the nature and value of the cooperation offered.

The U.S. Sentencing Guidelines similarly take into account an individual defendant’s cooperation and voluntary disclosure. Under § 5K1.1, a defendant’s cooperation, if sufficiently substantial, may justify the government filing a motion for a reduced sentence. And under § 5K2.16, a defendant’s voluntary disclosure of an offense prior to its discovery—if the offense was unlikely to have been discovered otherwise—may warrant a downward departure in certain circumstances.

Chapter 8 of the Sentencing Guidelines, which governs the sentencing of organizations, takes into account an organization’s remediation as part of an “effective compliance and ethics program.” One of the seven elements of such a program provides that after the detection of criminal conduct, “the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization’s compliance and ethics program.” Having an effective compliance and ethics program may lead to a three-point reduction in an organization’s culpability score under § 8C2.5, which affects the fine calculation under the Guidelines. Similarly, an organization’s self-reporting, cooperation, and acceptance of responsibility may lead to fine reductions under § 8C2.5(g) by decreasing the culpability score. Conversely, an organization will not qualify for the compliance program reduction when it unreasonably delayed reporting the offense. Similar to § 5K1.1
for individuals, organizations can qualify for departures pursuant to § 8C4.1 of the Guidelines for cooperating in the prosecution of others.

Civil Cases

SEC’s Framework for Evaluating Cooperation by Companies

SEC’s framework for evaluating cooperation by companies is set forth in its 2001 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, which is commonly known as the Seaboard Report. This report, which explained the Commission’s decision not to take enforcement action against a public company for certain accounting violations caused by its subsidiary, details the many factors SEC considers in determining whether, and to what extent, it grants leniency to companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies 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 regulatory agencies, and to self-regulatory organizations;
- 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 SEC staff with all information relevant to the underlying violations and the company’s remedial efforts.

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit SEC’s broad discretion to evaluate every case individually on its own unique facts and circumstances. Similar to SEC’s treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced sanctions in connection with enforcement actions.

SEC’s Framework for Evaluating Cooperation by Individuals

In 2010, SEC announced a new cooperation program for individuals. SEC staff has a wide range of tools to facilitate and reward cooperation by individuals, from taking no enforcement action to pursuing reduced sanctions in connection with enforcement actions. Although the evaluation of cooperation depends on the specific circumstances, SEC generally evaluates four factors to determine whether, to what extent, and in what manner to credit cooperation by individuals:

- the assistance provided by the cooperating individual in SEC’s investigation or related enforcement actions, including, among other things: the value and timeliness of the cooperation, including whether the individual was the first to report the misconduct to SEC or to offer his or her cooperation; whether the investigation was initiated based upon the information or other cooperation by the individual; the quality of the cooperation, including whether the individual was truthful and the cooperation was complete; the time and resources conserved as a result of the individual’s cooperation; and the nature of the cooperation, such as the type of assistance provided;
- the importance of the matter in which the individual provided cooperation;
- the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct, including the severity of the individual’s misconduct, the culpability of the individual, and the efforts undertaken by the individual to remediate the harm; and
• the appropriateness of a cooperation credit in light of the profile of the cooperating individual.

Corporate Compliance Program

In a global marketplace, an effective compliance program is a critical component of a company’s internal controls and is essential to detecting and preventing FCPA violations. Effective compliance programs are tailored to the company’s specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change.

An effective compliance program promotes "an organizational culture that encourages ethical conduct and a commitment to compliance with the law." Such a program protects a company’s reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures a company’s assets. A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations.

In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, DOJ and SEC also consider the adequacy of a company’s compliance program when deciding what, if any, action to take. The program may influence whether or not charges should be resolved through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. It will often affect the penalty amount and the need for a monitor or self-reporting. As discussed above, SEC’s Seaboard Report focuses, among other things, on a company’s self-policing prior to the discovery of the misconduct, including whether it had established effective compliance procedures. Likewise, three of the nine factors set forth in DOJ’s Principles of Federal Prosecution of Business Organizations relate, either directly or indirectly, to a compliance program’s design and implementation, including the pervasiveness of wrongdoing within the company, the existence and effectiveness of the company’s pre-existing compliance program, and the company’s remedial actions. DOJ also considers the U.S. Sentencing Guidelines’ elements of an effective compliance program, as set forth in § 8B2.1 of the Guidelines.

These considerations reflect the recognition that a company’s failure to prevent every single violation does not necessarily mean that a particular company’s compliance program was not generally effective. DOJ and SEC understand that “no compliance program can ever prevent all criminal activity by a corporation’s employees,” and they do not hold companies to a standard of perfection. An assessment of a company’s compliance program, including its design and good faith implementation and enforcement, is an important part of the government’s assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company’s effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.

DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:

• Is the company’s compliance program well designed?
• Is it being applied in good faith?
• Does it work?

This guide contains information regarding some of the basic elements DOJ and SEC consider when evaluating compliance programs. Although the focus is on compliance with the FCPA, given the existence of anti-corruption laws in many other countries, businesses should consider designing programs focused on anti-corruption compliance more broadly.
**Hallmarks of Effective Compliance Programs**

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs. Indeed, small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating companies’ compliance programs.

Compliance programs that employ a “check-the-box” approach may be inefficient and, more importantly, ineffective. Because each compliance program should be tailored to an organization’s specific needs, risks, and challenges, the information provided below should not be considered a substitute for a company’s own assessment of the corporate compliance program most appropriate for that particular business organization. In the end, if designed carefully, implemented earnestly, and enforced fairly, a company’s compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

**Commitment from Senior Management and a Clearly Articulated Policy Against Corruption**

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a “culture of compliance” and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business. A well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees to engage in misconduct to achieve business objectives, will be ineffective. DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption. This may be the result of aggressive sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team. The higher the financial stakes of the transaction, the greater the temptation for management to choose profit over compliance.

A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.

In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.

**Code of Conduct and Compliance Policies and Procedures**

A company’s code of conduct is often the foundation upon which an effective compliance program is built. As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company’s behalf. Indeed, it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it. When assessing a compliance program, DOJ and SEC will review whether the company
has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.

Whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures will also be considered by DOJ and SEC. These types of policies and procedures will depend on the size and nature of the business and the risks associated with the business. Effective policies and procedures require an in-depth understanding of the company’s business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks. Among the risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments. For example, some companies with global operations have created web-based approval processes to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations. Many of these systems have built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests. These types of systems can be a good way to conserve corporate resources while, if properly implemented, preventing and detecting potential FCPA violations.

Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company.

Oversight, Autonomy, and Resources

In appraising a compliance program, DOJ and SEC also consider whether a company has assigned responsibility for the oversight and implementation of a company’s compliance program to one or more specific senior executives within an organization. Those individuals must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company’s compliance program is implemented effectively. Adequate autonomy generally includes direct access to an organization’s governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee). Depending on the size and structure of an organization, it may be appropriate for day-to-day operational responsibility to be delegated to other specific individuals within a company. DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company’s size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

Risk Assessment

Assessment of risk is fundamental to developing a strong compliance program, and is another factor DOJ and SEC evaluate when assessing a company’s compliance program. One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company’s compliance program is ineffective. A $50 million contract with a government agency in a high-risk country warrants greater
scrutiny than modest and routine gifts and entertainment. Similarly, performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program.

As a company’s risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits. The degree of appropriate due diligence is fact-specific and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. When assessing a company’s compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.

**Training and Continuing Advice**

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training, however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter. In addition to the existence and scope of a company’s training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company’s ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

**Incentives and Disciplinary Measures**

In addition to evaluating the design and implementation of a compliance program throughout an organization, enforcement of that program is fundamental to its effectiveness. A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation. Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences.

DOJ and SEC recognize that positive incentives can also drive compliant behavior. These incentives can take many
Some organizations, for example, have made adherence to compliance a significant metric for management’s bonuses so that compliance becomes an integral part of management’s everyday concern. Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and internal audit staff. Others have made working in the company’s compliance organization a way to advance an employee’s career. SEC, for instance, has encouraged companies to embrace methods to incentivize ethical and lawful behavior:

[Make integrity, ethics and compliance part of the promotion, compensation and evaluation processes as well. For at the end of the day, the most effective way to communicate that “doing the right thing” is a priority, is to reward it. Conversely, if employees are led to believe that, when it comes to compensation and career advancement, all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they’ll perform to that measure. To cite an example from a different walk of life: a college football coach can be told that the graduation rates of his players are what matters, but he’ll know differently if the sole focus of his contract extension talks or the decision to fire him is his win-loss record.]

No matter what the disciplinary scheme or potential incentives a company decides to adopt, DOJ and SEC will consider whether they are fairly and consistently applied across the organization. No executive should be above compliance, no employee below compliance, and no person within an organization deemed too valuable to be disciplined, if warranted. Rewarding good behavior and sanctioning bad behavior reinforces a culture of compliance and ethics throughout an organization.

Third-Party Due Diligence and Payments

DOJ’s and SEC’s FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program.

Although the degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the third-party, some guiding principles always apply.

First, as part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, companies should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party’s introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, companies should undertake some form of ongoing monitoring of third-party relationships. Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

In addition to considering a company’s due diligence on third parties, DOJ and SEC also assess whether the company has informed third parties of the company’s
Compliance Program Case Study

Recent DOJ and SEC actions relating to a financial institution’s real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District’s real estate arm. The government entity conducted the transactions through two special purpose vehicles (“SPVs”), with the second SPV purchasing a 12% stake in a real estate project.

The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity’s payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity’s offices; searching media sources; and conducting background checks on the entity’s principals. The financial institution vetted the SPVs by obtaining a letter with designated bank account information from a Chinese official associated with the government entity (the “Chinese Official”); using an international law firm to request and review 50 documents from the SPVs’ Canadian attorney; interviewing the attorney; and interviewing the SPVs’ management.

Notwithstanding the financial institution’s robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution’s executive in charge of the project, and the SPV’s attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA’s internal control provisions and also settled with SEC.

compliance program and commitment to ethical and lawful business practices and, where appropriate, whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments. These can be meaningful ways to mitigate third-party risk.

Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis and without fear of retaliation. Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken. Companies will want to consider taking “lessons learned” from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and Review

Finally, a good compliance program should constantly evolve. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its
industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.

According to one survey, 64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs.\(^{324}\) An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines.\(^{325}\) Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.\(^{326}\)

**Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration**

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks.\(^{327}\) Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business's profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target's value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government, cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.\(^{328}\) When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.\(^{329}\)

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions.\(^{330}\)
Other Guidance on Compliance and International Best Practices

In addition to this guide, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce’s International Trade Administration has published Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, and the Department of State has published Fighting Global Corruption: Business Risk Management.

There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance. Most notably, the OECD’s 2009 Anti-Bribery Recommendation and its Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance, published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:

- Asia-Pacific Economic Cooperation—Anti-Corruption Code of Conduct for Business;
- International Chamber of Commerce—ICC Rules on Combating Corruption;
- Transparency International—Business Principles for Countering Bribery;
- United Nations Global Compact—The Ten Principles;
- World Bank—Integrity Compliance Guidelines; and
- World Economic Forum—Partnering Against Corruption—Principles for Countering Bribery.

Hypothetical: Third-Party Vetting

Part 1: Consultants

Company A, a U.S. issuer headquartered in Delaware, wants to start doing business in a country that poses high risks of corruption. Company A learns about a potential $50 million contract with the country’s Ministry of Immigration. This is a very attractive opportunity to Company A, both for its profitability and to open the door to future projects with the government. At the suggestion of the company’s senior vice president of international sales (Sales Executive), Company A hires a local businessman who assures them that he has strong ties to political and government leaders in the country and can help them win the contract. Company A enters into a consulting contract with the local businessman (Consultant). The agreement requires Consultant to use his best efforts to help the company win the business and provides for Consultant to receive a significant monthly retainer as well as a success fee of 3% of the value of any contract the company wins.

What steps should Company A consider taking before hiring Consultant?

There are several factors here that might lead Company A to perform heightened FCPA-related due diligence prior to retaining Consultant: (1) the market (high-risk country); (2) the size and significance of the deal to the company; (3) the company’s first time use of this particular consultant; (4) the consultant’s strong ties to political and government leaders; (5) the success fee structure of the contract; and (6) the vaguely-defined services to be provided. In order to minimize the likelihood of incurring FCPA liability, Company A should carefully vet Consultant and his role in the transaction, including close scrutiny of the relationship between Consultant and any Ministry of Immigration officials or other government officials. Although there is nothing inherently illegal about contracting with a third party that has close connections to politicians and government officials to perform legitimate services on a transaction, this type of relationship can be susceptible to corruption. Among other things, Company A may consider conducting due diligence on Consultant, including background (cont’d)
and reference checks; ensuring that the contract spells out exactly what services and deliverables (such as written status reports or other documentation) Consultant is providing; training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights); and ensuring that payments requested by Consultant have the proper supporting documentation before they are approved for payment.

Part 2: Distributors and Local Partners

Assume the following alternative facts:

Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A’s products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project to Company A, claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or, in the alternative, a contribution to its marketing efforts, either in the form of a lump sum or as a percentage of the total contract. The requested discount/allowance is significantly larger than usual, although there is precedent at Company A for granting this level of discount in unique circumstances. Distributor further advises Company A that the Ministry’s procurement officials responsible for awarding the contract have expressed a strong preference for including a particular local company (Local Partner) in the transaction as a subcontractor of Company A to perform installation, training, and other services that would normally have been performed by Distributor or Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.

What additional compliance considerations do these alternative facts raise?

As with Consultant in the first scenario above, Company A should carefully vet Distributor and Local Partner and their roles in the transaction in order to minimize the likelihood of incurring FCPA liability. While Company A has an established relationship with Distributor, the fact that Distributor has requested an additional discount warrants further inquiry into the economic justification for the change, particularly where, as here, the proposed transaction structure contemplates paying Local Partner to provide many of the same services that Distributor would otherwise provide. In many cases, it may be appropriate for distributors to receive larger discounts to account for unique circumstances in particular transactions. That said, a common mechanism to create additional margin for bribe payments is through excessive discounts or rebates to distributors. Accordingly, when a company has pre-existing relationships with distributors and other third parties, transaction-specific due diligence—including an analysis of payment terms to confirm that the payment is commensurate with the work being performed—can be critical even in circumstances where due diligence of the distributor or other third party raises no initial red flags.

Company A should carefully scrutinize the relationship among Local Partner, Distributor, and Ministry of Immigration officials. While there is nothing inherently illegal about contracting with a third party that is recommended by the end-user, or even hiring a government official to perform legitimate services on a transaction unrelated to his or her government job, these facts raise additional red flags that warrant significant scrutiny. Among other things, Company A would be well-advised to require Principal 1 to verify that he will have no role in the Ministry of Immigration’s decision to award the contract to Company A, notify the Ministry of Immigration and his own ministry of his proposed involvement in the transaction, and certify that he will abide by the FCPA and other anti-corruption laws and that his involvement in the transaction is permitted under local law.

(cont’d)
Assume the following additional facts:

Under its company policy for a government transaction of this size, Company A requires both finance and compliance approval. The finance officer is concerned that the discounts to Distributor are significantly larger than what they have approved for similar work and will cut too deeply into Company A’s profit margin. The finance officer is also skeptical about including Local Partner to perform some of the same services that Company A is paying Distributor to perform. Unsatisfied with Sales Executive’s explanation, she requests a meeting with Distributor and Principal 1. At the meeting, Distributor and Principal 1 offer vague and inconsistent justifications for the payments and fail to provide any supporting analysis, and Principal 1 seems to have no real expertise in the industry. During a coffee break, Distributor comments to Sales Executive that the finance officer is naive about “how business is done in my country.” Following the meeting, Sales Executive dismisses the finance officer’s concerns, assuring her that the proposed transaction structure is reasonable and legitimate. Sales Executive also reminds the finance officer that “the deal is key to their growth in the industry.”

The compliance officer focuses his due diligence on vetting Distributor and Local Partner and hires a business investigative firm to conduct a background check. Distributor appears reputable, capable, and financially stable and is willing to take on real risk in the project, financial and otherwise. However, the compliance officer learns that Distributor has established an off-shore bank account for the transaction. The compliance officer further learns that Local Partner’s business was organized two years ago and appears financially stable but has no expertise in the industry and has established an off-shore shell company and bank account to conduct this transaction. The background check also reveals that Principal 1 is a former college roommate of a senior official of the Ministry of Immigration. The Sales Executive dismisses the compliance officer’s concerns, commenting that what Local Partner does with its payments “isn’t our problem.” Sales Executive also strongly objects to the compliance officer’s request to meet with Principal 1 to discuss the off-shore company and account, assuring him that it was done for legitimate tax purposes and complaining that if Company A continues to “harass” Local Partner and Distributor, they would partner with Company A’s chief competitor. The compliance officer and the finance officer discuss their concerns with each other but ultimately sign off on the deal even though their questions had not been answered. Their decision is motivated in large part by their conversation with Sales Executive, who told them that this was the region’s most important contract and that the detailed FCPA questionnaires and robust anti-corruption representations in the contracts placed the burden on Distributor and Local Partner to act ethically.

Company A goes forward with the Distributor and Local Partner agreements and wins the contract after six months. The finance officer approves Company A’s payments to Local Partner via the offshore account, even though Local Partner’s invoices did not contain supporting detail or documentation of any services provided. Company A recorded the payments as legitimate operational expenses on its books and records. Sales Executive received a large year-end bonus due to the award of the contract.

In fact, Local Partner and Distributor used part of the payments and discount margin, respectively, to funnel bribe payments to several Ministry of Immigration officials, including Principal 1’s former college roommate, in exchange for awarding the contract to Company A. Thousands of dollars are also wired to the personal offshore bank account of Sales Executive.

How would DOJ and SEC evaluate the potential FCPA liability of Company A and its employees?

This is not the case of a single “rogue employee” circumventing an otherwise robust compliance program. Although Company A’s finance and compliance officers had the correct instincts to scrutinize the structure and economics of the transaction and the role of the third parties, their due diligence was incomplete. When the initial inquiry identified significant red flags, they approved the transaction despite knowing that their concerns were unanswered or the answers they received raised additional concerns and red flags. Relying on due diligence questionnaires and anti-corruption representations is insufficient, particularly when the risks are readily apparent. Nor can Company A or its employees shield themselves from liability because it was Distributor and Local Partner—rather than Company A directly—that made the payments.

The facts suggest that Sales Executive had actual knowledge of or was willfully blind to the consultant’s payment of the bribes. He also personally profited from the scheme (both from the kickback and from the bonus he received from the company) and intentionally discouraged the finance and compliance officers from learning the full story. Sales Executive is therefore subject to liability under the anti-bribery, books and records, and internal controls provisions of the FCPA, and others may be as well. Company A may also be liable for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA given the number and significance of red flags that established a high probability of bribery and the role of employees and agents acting on the company’s behalf.
What Are the Potential Consequences for Violations of the FCPA?

The FCPA provides for different criminal and civil penalties for companies and individuals.

Criminal Penalties

For each violation of the anti-bribery provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $2 million. Individuals, including officers, directors, stockholders, and agents of companies, are subject to a fine of up to $250,000 and imprisonment for up to five years.

For each violation of the accounting provisions, the FCPA provides that corporations and other business entities are subject to a fine of up to $25 million. Individuals are subject to a fine of up to $5 million and imprisonment for up to 20 years.

Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA—up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding. Fines imposed on individuals may not be paid by their employer or principal.

U.S. Sentencing Guidelines

When calculating penalties for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines in all of its resolutions, including guilty pleas, DPAs, and NPAs. The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the “offense level” is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, cooperation, pre-existing compliance programs, and remediation.

The Guidelines provide for different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under § 2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines to identify a final offense level. This final offense level, combined with other factors, is used
to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty.

For example, violations of the anti-bribery provisions are calculated pursuant to § 2C1.1. The offense level is determined by first identifying the base offense level; adding additional levels based on specific offense characteristics, including whether the offense involved more than one bribe, the value of the bribe or the benefit that was conferred, and the level of the public official; adjusting the offense level based on the defendant’s role in the offense; and using the total offense level as well as the defendant’s criminal history category to determine the advisory guideline range. For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA’s accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the defendant was an officer or director of a publicly traded company at the time of the offense.

For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations. The base fine consists of the greater of the amount corresponding to the total offense level, calculated pursuant to the Guidelines, or the pecuniary gain or loss from the offense. This base fine is then multiplied by a culpability score that can either reduce the fine to as little as five percent of the base fine or increase the recommended fine to up to four times the amount of the base fine. As described in § 8C2.5, this culpability score is calculated by taking into account numerous factors such as the size of the organization committing the criminal acts; the involvement in or tolerance of criminal activity by high-level personnel within the organization; and prior misconduct or obstructive behavior. The culpability score is reduced if the organization had an effective pre-existing compliance program to prevent violations and if the organization voluntarily disclosed the offense, cooperated in the investigation, and accepted responsibility for the criminal conduct.

**Civil Penalties**

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to $16,000 per violation. Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to $16,000 per violation, which may not be paid by their employer or principal.

For violations of the accounting provisions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company. SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings.

**Collateral Consequences**

In addition to the criminal and civil penalties described above, individuals and companies who violate the FCPA may face significant collateral consequences, including suspension
or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.

Debarment

Under federal guidelines governing procurement, an individual or company that violates the FCPA or other criminal statutes may be barred from doing business with the federal government. The Federal Acquisition Regulations (FAR) provide for the potential suspension or debarment of companies that contract with the government upon conviction of or civil judgment for bribery, falsification or destruction of records, the making of false statements, or “[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”363 These measures are not intended to be punitive and may be imposed only if “in the public’s interest for the Government’s protection.”364

Under the FAR, a decision to debar or suspend is discretionary. The decision is not made by DOJ prosecutors or SEC staff, but instead by independent debarment authorities within each agency, such as the Department of Defense or the General Services Administration, which analyze a number of factors to determine whether a company should be suspended, debarred, or otherwise determined to be ineligible for government contracting. Such factors include whether the contractor has effective internal control systems in place, self-reported the misconduct in a timely manner, and has taken remedial measures.365 If a cause for debarment exists, the contractor has the burden of demonstrating to the satisfaction of the debarring official that it is presently responsible and that debarment is not necessary.366 Each federal department and agency determines the eligibility of contractors with whom it deals. However, if one department or agency debars or suspends a contractor, the debarment or suspension applies to the entire executive branch of the federal government, unless a department or agency shows compelling reasons not to debar or suspend the contractor.367

Although guilty pleas, DPAs, and NPAs do not result in automatic debarment from U.S. government contracting, committing a federal crime and the factual admissions underlying a resolution are factors that the independent debarment authorities may consider. Moreover, indictment alone can lead to suspension of the right to do business with the government.368 The U.S. Attorney’s Manual also provides that when a company engages in fraud against the government, a prosecutor may not negotiate away an agency’s right to debar or delist the company as part of the plea bargaining process.369 In making debarment determinations, contracting agencies, including at the state and local level, may consult with DOJ in advance of awarding a contract. Depending on the circumstances, DOJ may provide information to contracting authorities in the context of the corporate settlement about the facts and circumstances underlying the criminal conduct and remediation measures undertaken by the company, if any. This information sharing is not advocacy, and the ultimate debarment decisions are squarely within the purview of the independent debarment authorities. In some situations, the contracting agency may impose its own oversight requirements in order for a company that has admitted to violations of federal law to be awarded federal contracts, such as the Corporate Integrity Agreements often required by the Department of Health and Human Services.

Cross-Debarment by Multilateral Development Banks

Multilateral Development Banks (MDBs), like the World Bank, also have the ability to debar companies and individuals for corrupt practices.370 Each MDB has its own process for evaluating alleged corruption in connection with MDB-funded projects. When appropriate, DOJ and SEC work with MDBs to share evidence and refer cases. On April 9, 2010, the African Development Bank Group, the Asian Development Bank, the European Bank for
Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group entered into an agreement under which entities debarred by one MDB will be sanctioned for the same misconduct by other signatory MDBs. This cross-debarment agreement means that if a company is debarred by one MDB, it is debarred by all.

**Loss of Export Privileges**

Companies and individuals who violate the FCPA may face consequences under other regulatory regimes, such as the Arms Export Control Act (AECA), 22 U.S.C. § 2751, *et seq.*, and its implementing regulations, the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120, *et seq.* AECA and ITAR together provide for the suspension, revocation, amendment, or denial of an arms export license if an applicant has been indicted or convicted for violating the FCPA. They also set forth certain factors for the Department of State’s Directorate of Defense Trade Controls (DDTC) to consider when determining whether to grant, deny, or return without action license applications for certain types of defense materials. One of those factors is whether there is reasonable cause to believe that an applicant for a license has violated (or conspired to violate) the FCPA; if so, the Department of State “may disapprove the application.” In addition, it is the policy of the Department of State not to consider applications for licenses involving any persons who have been convicted of violating the AECA or convicted of conspiracy to violate the AECA. In an action related to the criminal resolution of a U.K. military products manufacturer, the DDTC imposed a “policy of denial” for export licenses on three of the company’s subsidiaries that were involved in violations of AECA and ITAR.

**When Is a Compliance Monitor or Independent Consultant Appropriate?**

One of the primary goals of both criminal prosecutions and civil enforcement actions against companies that violate the FCPA is ensuring that such conduct does not occur again. As a consequence, enhanced compliance and reporting requirements may be part of criminal and civil resolutions of FCPA matters. The amount of enhanced compliance and kind of reporting required varies according to the facts and circumstances of individual cases.

In criminal cases, a company’s sentence, or a DPA or NPA with a company, may require the appointment of an independent corporate monitor. Whether a monitor is appropriate depends on the specific facts and circumstances of the case. In 2008, DOJ issued internal guidance regarding the selection and use of corporate monitors in DPAs and NPAs with companies. Additional guidance has since been issued. A monitor is an independent third party who assesses and monitors a company’s adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company’s misconduct. Appointment of a monitor is not appropriate in all circumstances, but it may be appropriate, for example, where a company does not already have an effective internal compliance program or needs to establish necessary internal controls. In addition, companies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.

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**Factors DOJ and SEC Consider When Determining Whether a Compliance Monitor Is Appropriate Include:**

- **Seriousness of the offense**
- **Duration of the misconduct**
- **Pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines**
- **Nature and size of the company**
- **Quality of the company’s compliance program at the time of the misconduct**
- **Subsequent remediation efforts**
In civil cases, a company may similarly be required to retain an independent compliance consultant or monitor to provide an independent, third-party review of the company’s internal controls. The consultant recommends improvements, to the extent necessary, which the company must adopt. When both DOJ and SEC require a company to retain a monitor, the two agencies have been able to coordinate their requirements so that the company can retain one monitor to fulfill both sets of requirements.

The most successful monitoring relationships are those in which the company embraces the monitor or consultant. If the company takes the recommendations and suggestions seriously and uses the monitoring period as a time to find and fix any outstanding compliance issues, the company can emerge from the monitorship with a stronger, long-lasting compliance program.
RESOLUTIONS

What Are the Different Types of Resolutions with DOJ?

Criminal Complaints, Informations, and Indictments

Charges against individuals and companies are brought in three different ways under the Federal Rules of Criminal Procedure: criminal complaints, criminal informations, and indictments.

DOJ may agree to resolve criminal FCPA matters against companies either through a declination or, in appropriate cases, a negotiated resolution resulting in a plea agreement, deferred prosecution agreement, or non-prosecution agreement. For individuals, a negotiated resolution will generally take the form of a plea agreement, which may include language regarding cooperation, or a non-prosecution cooperation agreement. When negotiated resolutions cannot be reached with companies or individuals, the matter may proceed to trial.

Plea Agreements

Plea agreements—whether with companies or individuals—are governed by Rule 11 of the Federal Rules of Criminal Procedure. The defendant generally admits to the facts supporting the charges, admits guilt, and is convicted of the charged crimes when the plea agreement is presented to and accepted by a court. The plea agreement may jointly recommend a sentence or fine, jointly recommend an analysis under the U.S. Sentencing Guidelines, or leave such items open for argument at the time of sentencing.

Deferred Prosecution Agreements

Under a deferred prosecution agreement, or a DPA as it is commonly known, DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred, that is, postponed for the purpose of allowing the company to demonstrate its good conduct. DPAs generally require a defendant to agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor. DPAs describe the company’s conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant to the U.S. Sentencing Guidelines. In addition to being publicly filed, DOJ places all of its DPAs on its website. If the company successfully completes the term of the agreement (typically two or three years), DOJ will then move to dismiss the filed charges. A company’s successful completion of a DPA is not treated as a criminal conviction.
Non-Prosecution Agreements

Under a non-prosecution agreement, or an NPA as it is commonly known, DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties. In circumstances where an NPA is with a company for FCPA-related offenses, it is made available to the public through DOJ’s website. The requirements of an NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty. If the company complies with the agreement throughout its term, DOJ does not file criminal charges. If an individual complies with the terms of his or her NPA, namely, truthful and complete cooperation and continued law-abiding conduct, DOJ will not pursue criminal charges.

Declinations

As discussed above, DOJ’s decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the Principles of Federal Prosecution, in the case of individuals, and the Principles of Federal Prosecution of Business Organizations, in the case of companies. As described, in the case of individuals, the Principles of Federal Prosecution advise prosecutors to weigh all relevant considerations, including:

- federal law enforcement priorities;
- the nature and seriousness of the offense;
- the deterrent effect of prosecution;
- the person’s culpability in connection with the offense;
- the person’s history of criminal activity;
- the person’s willingness to cooperate in the investigation or prosecution of others; and
- the probable sentence or other consequences if the person is convicted.

The Principles of Federal Prosecution provide additional commentary about each of these factors. For instance, they explain that prosecutors should take into account federal law enforcement priorities because federal law enforcement and judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. The deterrent effect of prosecution should also be kept in mind because some offenses, “although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.”

As discussed above, the Principles of Federal Prosecution of Business Organizations require prosecutors to consider nine factors when determining whether to prosecute a corporate entity for an FCPA violation, including the nature and seriousness of the offense; the pervasiveness of wrongdoing within the company; the company’s history of similar conduct; the existence and effectiveness of the company’s pre-existing compliance program; and the adequacy of remedies, such as civil or regulatory enforcement actions.

Pursuant to these guidelines, DOJ has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence. To protect the privacy rights and other interests of the uncharged and other potentially interested parties, DOJ has a long-standing policy not to provide, without the party’s consent, non-public information on matters it has declined to prosecute. To put DOJ’s declinations in context, however, in the past two years alone, DOJ has declined several dozen cases against companies where potential FCPA violations were alleged.

As mentioned above, there are rare occasions in which, in conjunction with the public filing of charges against an individual, it is appropriate to disclose that a company is not also being prosecuted. That was done in a recent case where a former employee was charged but the former corporate employer was not.
What Are the Different Types of Resolutions with SEC?

Civil Injunctive Actions and Remedies

In a civil injunctive action, SEC seeks a court order compelling the defendant to obey the law in the future. Violating such an order can result in civil or criminal contempt proceedings. Civil contempt sanctions, brought by SEC, are remedial rather than punitive in nature and serve one of two purposes: to compensate the party injured as a result of the violation of the injunction or force compliance with the terms of the injunction.

Where a defendant has profited from a violation of law, SEC can obtain the equitable relief of disgorgement of ill-gotten gains and pre-judgment interest and can also obtain civil money penalties pursuant to Sections 21(d)(3) and 32(c) of the Exchange Act. SEC may also seek ancillary relief (such as an accounting from a defendant). Pursuant to Section 21(d)(5), SEC also may seek, and any federal court may grant, any other equitable relief that may be appropriate or necessary for the benefit of investors, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.

Civil Administrative Actions and Remedies

SEC has the ability to institute various types of administrative proceedings against a person or an entity that it believes has violated the law. This type of enforcement action is brought by SEC’s Enforcement Division and is litigated before an SEC administrative law judge (ALJ). The ALJ’s decision is subject to appeal directly to the Securities and Exchange Commission itself, and the Commission’s decision is in turn subject to review by a U.S. Court of Appeals.

Administrative proceedings provide for a variety of relief. For regulated persons and entities, such as broker-dealers and investment advisers and persons associated with them, sanctions include censure, limitation on activities, suspension of up to twelve months, and bar from association or revocation of registration. For professionals such as attorneys and accountants, SEC can order in Rule 102(e) proceedings that the professional be censured, suspended, or barred from practicing before SEC. SEC staff can seek an order from an administrative law judge requiring the respondent to cease and desist from any current or future violations of the securities laws. In addition, SEC can obtain disgorgement, pre-judgment interest, and civil money penalties in administrative proceedings under Section 21B of the Exchange Act, and also can obtain other equitable relief, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.

Deferred Prosecution Agreements

A deferred prosecution agreement is a written agreement between SEC and a potential cooperating individual or company in which SEC agrees to forego an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in SEC’s investigation and related enforcement actions; (2) enter into a long-term tolling agreement; (3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and (4) under certain circumstances, agree either to admit or not to contest underlying facts that SEC could assert to establish a violation of the federal securities laws. If the agreement is violated during the period of deferred prosecution, SEC staff may recommend an enforcement action to the Commission against the individual or company for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, SEC staff may use any factual admissions made by the cooperating individual or company in support of a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.
In May of 2011, SEC entered into its first deferred prosecution agreement against a company for violating the FCPA. In that case, a global manufacturer of steel pipe products violated the FCPA by bribing Uzbekistan government officials during a bidding process to supply pipelines for transporting oil and natural gas. The company made almost $5 million in profits when it was subsequently awarded several contracts by the Uzbekistan government. The company discovered the misconduct during a worldwide review of its operations and brought it to the government’s attention. In addition to self-reporting, the company conducted a thorough internal investigation; provided complete, real-time cooperation with SEC and DOJ staff; and undertook extensive remediation, including enhanced anti-corruption procedures and training. Under the terms of the DPA, the company paid $5.4 million in disgorgement and prejudgment interest. The company also paid a $3.5 million monetary penalty to resolve a criminal investigation by DOJ through an NPA.

For further information about deferred prosecution agreements, see SEC’s Enforcement Manual.

Non-Prosecution Agreements

A non-prosecution agreement is a written agreement between SEC and a potential cooperating individual or company, entered into in limited and appropriate circumstances, that provides that SEC will not pursue an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in SEC’s investigation and related enforcement actions; and (2) comply, under certain circumstances, with express undertakings. If the agreement is violated, SEC staff retains its ability to recommend an enforcement action to the Commission against the individual or company.

For further information about non-prosecution agreements, see SEC’s Enforcement Manual.

Termination Letters and Declinations

As discussed above, SEC’s decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in SEC’s Enforcement Manual. The same factors that apply to SEC staff’s determination of whether to recommend an enforcement action against an individual or entity apply to the decision to close an investigation without recommending enforcement action.

Generally, SEC staff considers, among other things:

- the seriousness of the conduct and potential violations;
- the resources available to SEC staff to pursue the investigation;
- the sufficiency and strength of the evidence;
- the extent of potential investor harm if an action is not commenced; and
- the age of the conduct underlying the potential violations.

SEC has declined to take enforcement action against both individuals and companies based on the facts and circumstances present in those matters, where, for example, the conduct was not egregious, the company fully cooperated, and the company identified and remediated the misconduct quickly. SEC Enforcement Division policy is to notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission. This notification takes the form of a termination letter.

In order to protect the privacy rights and other interests of the uncharged and other potentially interested parties, SEC does not provide non-public information on matters it has declined to prosecute.

What Are Some Examples of Past Declinations by DOJ and SEC?

Neither DOJ nor SEC typically publicizes declinations but, to provide some insight into the process, the following are recent, anonymized examples of matters DOJ and SEC have declined to pursue:

Example 1: Public Company Declination

DOJ and SEC declined to take enforcement action against a public U.S. company. Factors taken into consideration included:
• The company discovered that its employees had received competitor bid information from a third party with connections to the foreign government.
• The company began an internal investigation, withdrew its contract bid, terminated the employees involved, severed ties to the third-party agent, and voluntarily disclosed the conduct to DOJ’s Antitrust Division, which also declined prosecution.
• During the internal investigation, the company uncovered various FCPA red flags, including prior concerns about the third-party agent, all of which the company voluntarily disclosed to DOJ and SEC.
• The company immediately took substantial steps to improve its compliance program.

Example 2: Public Company Declination
DOJ and SEC declined to take enforcement action against a public U.S. company. Factors taken into consideration included:
• With knowledge of employees of the company’s subsidiary, a retained construction company paid relatively small bribes, which were wrongly approved by the company’s local law firm, to foreign building code inspectors.
• When the company’s compliance department learned of the bribes, it immediately ended the conduct, terminated its relationship with the construction company and law firm, and terminated or disciplined the employees involved.
• The company completed a thorough internal investigation and voluntarily disclosed to DOJ and SEC.
• The company reorganized its compliance department, appointed a new compliance officer dedicated to anti-corruption, improved the training and compliance program, and undertook a review of all of the company’s international third-party relationships.

Example 3: Public Company Declination
DOJ and SEC declined to take enforcement action against a U.S. publicly held industrial services company for bribes paid by a small foreign subsidiary. Factors taken into consideration included:
• The company self-reported the conduct to DOJ and SEC.
• The total amount of the improper payments was relatively small, and the activity appeared to be an isolated incident by a single employee at the subsidiary.
• The profits potentially obtained from the improper payments were very small.
• The payments were detected by the company’s existing internal controls. The company’s audit committee conducted a thorough independent internal investigation. The results of the investigation were provided to the government.
• The company cooperated fully with investigations by DOJ and SEC.
• The company implemented significant remedial actions and enhanced its internal control structure.

Example 4: Public Company Declination
DOJ and SEC declined to take enforcement action against a U.S. publicly held oil-and-gas services company for small bribes paid by a foreign subsidiary’s customs agent. Factors taken into consideration included:
• The company’s internal controls timely detected a potential bribe before a payment was made.
• When company management learned of the potential bribe, management immediately reported the issue to the company’s General Counsel and Audit Committee and prevented the payment from occurring.
• Within weeks of learning of the attempted bribe, the company provided in-person FCPA training to employees of the subsidiary and undertook
an extensive internal investigation to determine whether any of the company’s subsidiaries in the same region had engaged in misconduct.

- The company self-reported the misconduct and the results of its internal investigation to DOJ and SEC.
- The company cooperated fully with investigations by DOJ and SEC.
- In addition to the immediate training at the relevant subsidiary, the company provided comprehensive FCPA training to all of its employees and conducted an extensive review of its anti-corruption compliance program.
- The company enhanced its internal controls and record-keeping policies and procedures, including requiring periodic internal audits of customs payments.
- As part of its remediation, the company directed that local lawyers rather than customs agents be used to handle its permits, with instructions that “no matter what, we don’t pay bribes”—a policy that resulted in a longer and costlier permit procedure.

**Example 5: Public Company Declination**

DOJ and SEC declined to take enforcement action against a U.S. publicly held consumer products company in connection with its acquisition of a foreign company. Factors taken into consideration included:

- The company identified the potential improper payments to local government officials as part of its pre-acquisition due diligence.
- The company promptly developed a comprehensive plan to investigate, correct, and remediate any FCPA issues after acquisition.
- The company promptly self-reported the issues prior to acquisition and provided the results of its investigation to the government on a real-time basis.
- The acquiring company’s existing internal controls and compliance program were robust.
- After the acquisition closed, the company implemented a comprehensive remedial plan, ensured that all improper payments stopped, provided extensive FCPA training to employees of the new subsidiary, and promptly incorporated the new subsidiary into the company’s existing internal controls and compliance environment.

**Example 6: Private Company Declination**

In 2011, DOJ declined to take prosecutorial action against a privately held U.S. company and its foreign subsidiary. Factors taken into consideration included:

- The company voluntarily disclosed bribes paid to social security officials in a foreign country.
- The total amount of the bribes was small.
- When discovered, the corrupt practices were immediately terminated.
- The conduct was thoroughly investigated, and the results of the investigation were promptly provided to DOJ.
- All individuals involved were either terminated or disciplined. The company also terminated its relationship with its foreign law firm.
- The company instituted improved training and compliance programs commensurate with its size and risk exposure.
WHISTLEBLOWER PROVISIONS AND PROTECTIONS

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal. Through their knowledge of the circumstances and individuals involved, whistleblowers can help SEC and DOJ identify potential violations much earlier than might otherwise have been possible, thus allowing SEC and DOJ to minimize the harm to investors, better preserve the integrity of the U.S. capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 both contain provisions affecting whistleblowers who report FCPA violations. Sarbanes-Oxley prohibits issuers from retaliating against whistleblowers and provides that employees who are retaliated against for reporting possible securities law violations may file a complaint with the Department of Labor, for which they would be eligible to receive reinstatement, back pay, and other compensation. Sarbanes-Oxley also prohibits retaliation against employee whistleblowers under the obstruction of justice statute.

In 2010, the Dodd-Frank Act added Section 21F to the Exchange Act, addressing whistleblower incentives and protections. Section 21F authorizes SEC to provide monetary awards to eligible individuals who voluntarily come forward with high quality, original information that leads to an SEC enforcement action in which over $1,000,000 in sanctions is ordered. The awards range is between 10% and 30% of the monetary sanctions recovered by the government. The Dodd-Frank Act also prohibits employers from retaliating against whistleblowers and creates a private right of action for employees who are retaliated against.

Furthermore, businesses should be aware that retaliation against a whistleblower may also violate state, local, and foreign laws that provide protection of whistleblowers.
On August 12, 2011, the final rules for SEC’s Whistleblower Program became effective. These rules set forth the requirements for whistleblowers to be eligible for awards consideration, the factors that SEC will use to determine the amount of the award, the categories of individuals who are excluded from award consideration, and the categories of individuals who are subject to limitations in award considerations. The final rules strengthen incentives for employees to report the suspected violations internally through internal compliance programs when appropriate, although it does not require an employee to do so in order to qualify for an award.

Individuals with information about a possible violation of the federal securities laws, including FCPA violations, should submit that information to SEC either online through SEC’s Tips, Complaints, and Referrals (TCR) Intake and Resolution System (available at https://denebleo.sec.gov/TCRExternal/disclaimer.xhtml) or by mailing or faxing a completed Form TCR to the Commission’s Office of the Whistleblower.

Whistleblowers can submit information anonymously. To be considered under SEC’s whistleblower program as eligible for a reward, however, the information must be submitted on an anonymous whistleblower’s behalf by an attorney. Whether or not a whistleblower reports anonymously, SEC is committed to protecting the identity of a whistleblower to the fullest extent possible under the statute. SEC’s Office of the Whistleblower administers SEC’s Whistleblower Program and answers questions from the public regarding the program. Additional information regarding SEC’s Whistleblower Program, including answers to frequently asked questions, is available online at http://www.sec.gov/whistleblower.
DOJ OPINION PROCEDURE

DOJ’s opinion procedure is a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by DOJ under the FCPA. Generally speaking, under the opinion procedure process, parties submit information to DOJ, after which DOJ issues an opinion about whether the proposed conduct falls within its enforcement policy. All of DOJ’s prior opinions are available online. Parties interested in obtaining such an opinion should follow these steps:

First, those seeking an opinion should evaluate whether their question relates to actual, prospective conduct. The opinion procedure cannot be used to obtain opinions on purely historical conduct or on hypothetical questions. DOJ will not consider a request unless that portion of the transaction for which an opinion is sought involves only prospective conduct, although the transaction as a whole may have components that already have occurred. An executed contract is not a prerequisite and, in most—if not all—instances, an opinion request should be made before the requestor commits to proceed with a transaction. Those seeking requests should be aware that FCPA opinions relate only to the FCPA’s anti-bribery provisions.

Second, before making the request, the company or individual should check that they are either an issuer or a domestic concern, as only those categories of parties can receive an opinion. If the transaction involves more than one issuer or domestic concern, consider making a request for an opinion jointly, as opinions only apply to the parties that request them.

Third, those seeking an opinion must put their request in writing. The request must be specific and accompanied by all relevant and material information bearing on the conduct and circumstances for which an opinion is requested. Material information includes background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any. Those seeking opinions are under an affirmative obligation to make full and true disclosures. Materials disclosed to DOJ will not be made public without the consent of the party submitting them.
**Fourth**, the request must be signed. For corporate requestors, the signatory should be an appropriate senior officer with operational responsibility for the conduct that is the subject of the request and who has been designated by the corporation’s chief executive officer. In appropriate cases, DOJ also may require the chief executive officer to sign the request. Those signing the request must certify that it contains a true, correct, and complete disclosure with respect to the proposed conduct and the circumstances of the conduct. 408

**Fifth**, an original and five copies of the request should be addressed to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Opinion Group. 409 The mailing address is P.O. Box 28188 Central Station, Washington, D.C. 20038. DOJ also asks that you send an electronic courtesy copy to FCPA.Fraud@usdoj.gov.

DOJ will evaluate the request for an FCPA opinion. 410 A party may withdraw a request for an opinion at any time prior to the release of an opinion. 411 If the request is complete and all the relevant information has been submitted, DOJ will respond to the request by issuing an opinion within 30 days. 412 If the request is incomplete, DOJ will identify for the requestor what additional information or documents are required for DOJ to review the request. Such information must be provided to DOJ promptly. Once the additional information has been received, DOJ will issue an opinion within 30 days of receipt of that additional information. 413 DOJ’s FCPA opinions state whether, for purposes of DOJ’s present enforcement policy, the prospective conduct would violate either the issuer or domestic concern anti-bribery provisions of the FCPA. 414 DOJ also may take other positions in the opinion as it considers appropriate. 415 To the extent that the opinion concludes that the proposed conduct would not violate the FCPA, a rebuttable presumption is created that the requestor’s conduct that was the basis of the opinion is in compliance with the FCPA. 416 In order to provide non-binding guidance to the business community, DOJ makes versions of its opinions publicly available on its website. 417

If, after receiving an opinion, a party is concerned about prospective conduct that is beyond the scope of conduct specified in a previous request, the party may submit an additional request for an opinion using the procedures outlined above. 418
CONCLUSION

The FCPA was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes. Following Congress’ leadership in enacting the FCPA 35 years ago, and through determined international diplomatic and law enforcement efforts in the time since, laws like the FCPA prohibiting foreign bribery have been enacted by most of the United States’ major trading partners.

This guide is designed to provide practical advice about, and useful insights into, our enforcement considerations. For businesses desiring to compete fairly in foreign markets, it is our goal to maximize those businesses’ ability to comply with the FCPA in the most effective and efficient way suitable to their business and the markets in which they operate. Through our ongoing efforts with the U.S. and international business and legal communities and non-governmental organizations, DOJ and SEC can continue effectively to protect the integrity of our markets and reduce corruption around the world.
THE FOREIGN CORRUPT PRACTICES ACT:

15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff


(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

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

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;
(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice’s present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice’s present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.
The Foreign Corrupt Practices Act

APPENDIX

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term "foreign official" means 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 for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(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.

(B) 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.

(3)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

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

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78f of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.


(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder
thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries
on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(c) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, for which purposes of the Department of Justice’s present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice’s present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice’s present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice’s present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.
(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) 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.

(2)(A) The term "foreign official" means 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 for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(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.

(B) 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.

(4)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

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

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs
(1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a “United States person” means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. § 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

15 U.S.C. § 78dd-3 Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 [Section 30A of the Exchange Act] of this title or a domestic concern, 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—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

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

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—
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(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term “person,” when referring to an offender, means any natural person other than a national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2)(A) The term “foreign official” means 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 for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(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.

(B) 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.

(4)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—
(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
(ii) processing governmental papers, such as visas and work orders;
(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(S) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or
(B) any other interstate instrumentality.

* * *


Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 [15 U.S.C. §§ 77a, et seq.] and, with respect to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—
(A) make and keep books, records, and accounts, which, in reasonable
detail, accurately and fairly reflect the transactions and dispositions of
the assets of the issuer;

(B) devise and maintain a system of internal accounting controls suf-
ficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management’s general
or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of
financial statements in conformity with generally accepted accounting
principles or any other criteria applicable to such statements, and (II)
to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with manage-
ment’s general or specific authorization; and

(iv) the recorded accountability for assets is compared with the exist-
ing assets at reasonable intervals and appropriate action is taken with
respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable
share of such issuer of a reasonable annual accounting support fee or
fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the
United States, no duty or liability under paragraph (2) of this subsec-
tion shall be imposed upon any person acting in cooperation with the
head of any Federal department or agency responsible for such matters
if such act in cooperation with such head of a department or agency
was done upon the specific, written directive of the head of such
department or agency pursuant to Presidential authority to issue such
directives. Each directive issued under this paragraph shall set forth
the specific facts and circumstances with respect to which the provi-
sions of this paragraph are to be invoked. Each such directive shall,
unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States
who issues such a directive pursuant to this paragraph shall main-
tain a complete file of all such directives and shall, on October 1 of
each year, transmit a summary of matters covered by such directives
in force at any time during the previous year to the Permanent Select
Committee on Intelligence of the House of Representatives and the
Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with
the requirements of paragraph (2) of this subsection except as pro-
vided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to imple-
ment a system of internal accounting controls or knowingly falsify any
book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant
to section 78l of this title or an issuer which is required to file
reports pursuant to section 78o(d) of this title holds 50 per centum
or less of the voting power with respect to a domestic or foreign firm,
the provisions of paragraph (2) require only that the issuer proceed
in good faith to use its influence, to the extent reasonable under the
issuer’s circumstances, to cause such domestic or foreign firm to devise
and maintain a system of internal accounting controls consistent with
paragraph (2). Such circumstances include the relative degree of the
issuer’s ownership of the domestic or foreign firm and the laws and
practices governing the business operations of the country in which
such firm is located. An issuer which demonstrates good faith efforts
to use such influence shall be conclusively presumed to have complied
with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms “rea-
sonable assurances” and “reasonable detail” mean such level of detail
and degree of assurance as would satisfy prudent officials in the con-
duct of their own affairs.

* * *

Act of 1934]

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other
than section 78dd-1 of this title [Section 30A of the Exchange Act]),
or any rule or regulation thereunder the violation of which is made
unlawful or the observance of which is required under the terms of
this chapter, or any person who willfully and knowingly makes, or
causes to be made, any statement in any application, report, or docu-
ment required to be filed under this chapter or any rule or regulation
thereunder or any undertaking contained in a registration statement
as provided in subsection (d) of section 78o of this title, or by any
self-regulatory organization in connection with an application for
membership or participation therein or to become associated with a
member thereof, which statement was false or misleading with respect
to any material fact, shall upon conviction be fined not more than
$5,000,000, or imprisoned not more than 20 years, or both, except
that when such person is a person other than a natural person, a fine
not exceeding $25,000,000 may be imposed; but no person shall be
subject to imprisonment under this section for the violation of any
rule or regulation if he proves that he had no knowledge of such rule
or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports
required to be filed under subsection (d) of section 78o of this title or
any rule or regulation thereunder shall forfeit to the United States the
sum of $100 for each and every day such failure to file shall continue.
Such forfeiture, which shall be in lieu of any criminal penalty for such
(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.
ENDNOTES


The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.

Id.


5 President George W. Bush observed in 2006 that "the culture of corruption has undercut development and good governance and . . . impedes our efforts to promote freedom and democracy, end poverty, and combat international crime and terrorism." President’s Statement on Kleptocracy, 2 PUB. PAPERS 1504 (Aug. 10, 2006), available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060810.html. The administrations of former President George W. Bush and President Barack Obama both recognized the threats posed to security and stability by corruption. For instance, in issuing a proclamation restricting the entry of certain corrupt foreign public officials, former President George W. Bush recognized "the serious negative effects that corruption of public institutions has on the United States’ efforts to promote security and to strengthen democratic institutions and free market systems. . . ." Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 14, 2004). Similarly, President Barack Obama’s National Security Strategy paper, released in May 2010, expressed the administration’s efforts and commitment to promote the recognition that “pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.” The White House, National Security Strategy 38 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.


that firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations, and face higher, not lower, costs of capital."


38 H.R. Rep. No. 95-640, at 4-5; S. Rep. No. 95-114, at 4. The Senate Report observed, for instance, that “[m]anagements which resort to corporate bribery and the falsification of records to enhance their business reveal a lack of confidence about themselves,” while citing the Secretary of the Treasury’s testimony that “[p]aying bribes—apart from being morally repugnant and illegal in most countries—is simply not necessary for the successful conduct of business here or overseas.” Id.


42 See Omnibus Trade and Competitiveness Act of 1988, § 5003(d). The amended statute included the following directive:

It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.


43 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions art. 1.1, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter Anti-Bribery Convention]. The Anti-Bribery Convention requires member countries to make it a criminal offense “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that (a) the official act or refrain from acting in the conduct of international business.” The Convention and its commentaries also call on all parties (a) to ensure that aiding and abetting and authorization of an act of bribery are criminal offenses, (b) to assert territorial jurisdiction “broadly so that an extensive physical connection to the bribery act is not required,” and (c) to assert nationality jurisdiction consistent with the general principles and conditions of each party’s legal system. Id. at art. 1.2, cmts. 25, 26.


45 There is no private right of action under the FCJA. See, e.g., Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1028-29 (6th Cir. 1990); McLean v. Int’l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987).


48 Additional information about publicly available market research and due diligence assistance is available online. See In’l Trade Admin., Marker Research and Due Diligence, available at http://export.gov/salesandmarketing/eg_main_018204.asp. The International Company Profile reports include a listing of the potential partner’s key officers and senior management; banking relationships and other financial information about the company; and market information, including sales and profit figures and potential liabilities. They are not, however, intended to substitute for a company’s own due diligence, and the Commercial Service does not offer ICP in countries where Dun & Bradstreet or other private sector vendors are already performing this service. See In’l Trade Admin., International Company Profile, available at http://export.gov/salesandmarketing/eg_main_018198.asp.


50 This form can be located at http://tcc.export.gov/Report_a_Barrier/index.asp.


53 Information about the Advocacy Center can be found at http://export.gov/advocacy.

54 Reports on U.S. compliance with these treaties can be found at http://www.justice.gov/criminal/fraud/fcpa/intlagree/.

55 See Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEELY COMP. PRES. Doc. 2290, 2291 (Nov. 10, 1998) (“U.S. companies have had to compete on an uneven playing field . . . . The OECD Convention . . . is designed to change that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions.”).

56 Colombia is also a member of the Working Group and is expected to accede to the Anti-Bribery Convention.

57 OECD, Country Monitoring of the OECD Anti-Bribery Convention, available at http://www.oecd.org/document/12/0,3746, en_2649_34859_44684959_1_1_1_1,00.html.

58 OECD, Phase 3 Country Monitoring of the OECD Anti-Bribery Convention, available at http://www.oecd.org/document/31/0,3746, en_2649_34859_46684959_1_1_1_1,00.html.


60 The OECD Phase 1, 2, and 3 reports on the United States, as well as the U.S. responses to questionnaires, are available at http://www.justice.gov/criminal/fraud/fcpa/intlagree.


For additional information about GRECO, see Council of Europe, Group of States Against Corruption, available at http://www.coe.int/t/dghl-monitoring/greco/default_EN.asp. The United States has not yet ratified the GRECO convention.


purp... the 'retaining business' prong, was constitutional and is essential to protect U.S. interests abroad. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal, constitutional, and treaty obligations.

The exercise of jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States is consistent with U.S. legal, constitutional, and treaty obligations. This exercise of 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."

This interpretation is consistent with U.S. treaty obligations. See S. Rep. No. 105-2177 (1998) (expressing Congress' intention that the 1998 amendments to the FCPA "conform it to the requirements of and to implement the OECD Convention."); Anti-Bribery Convention at art. 4.1, supra note 19 ("Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.")


See 15 U.S.C. §§ 78dd-1(g) ("irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization"), 78dd-2(1) ("irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization")

S. Rep. No. 105-277 at 2 ("[T]he OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad.").

Id. at 2-3.

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

See H.R. REP. No. 95-831, at 12 (referring to "business purpose" test).

See, eg., Complaint, SEC v. Siemens AG, supra note 48; Criminal Information, United States v. Siemens AG, supra note 48.

In amending the FCPA in 1988, Congress made clear that the business purpose element, and specifically the "retaining business" prong, was meant to be interpreted broadly.

The Congress wish to make clear that the reference to corrupt payments for "retaining business" in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.

H.R. REP. No. 100-576, at 1951-52 (internal citations omitted).


See http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-info.pdf; see also Press Release, U.S. Dept. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010) (logistics provider and its subsidiary engaged in scheme to pay thousands of bribes totaling at least $27 million to numerous foreign officials on behalf of customers in oil and gas industry "to circumvent local rules and regulations relating to the import of goods and materials into numerous foreign jurisdictions").


Id. at 749. Indeed, the Kay court found that Congress' explicit exclusion of facilitation payments from the scope of the FCPA was evidence that "Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person." Id. at 749-50 (emphasis added).

Id. at 749-55.

Id. at 756 ("It still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would 'assist in obtaining or retaining business.'").


The House Report states in full:

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function. The word "corruptly" connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word "corruptly" indicates an intent or desire wrongly to influence the recipient. It does not require that the act [be] fully consummated or succeed in producing the desired outcome.

Id. The Senate Report provides a nearly identical explanation of the meaning of the term:

The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain
Jurors instructions in FCPA cases have defined “corruptly” consistent with the definition found in the legislative history. See, e.g., Jury Instructions at 23-24, United States v. Esquenazi, supra note 44; Jury Instructions at 10, United States v. Green, supra note 44; Jury Instructions at 35, United States v. Jefferson, supra note 44; Jury Instructions at 25, United States v. Bourke, supra note 44; Jury Instructions at 17, United States v. Kay, supra note 44; Jury Instructions at 5, United States v. Mead, supra note 44.


United States v. Kay, 513 F.3d 432, 448 (5th Cir. 2007); see also Jury Instructions at 38, United States v. Esquenazi, supra note 44; Jury Instructions at 10, United States v. Green, supra note 44; Jury Instructions at 35, United States v. Jefferson, supra note 44; Jury Instructions at 25, United States v. Bourke, supra note 44; Jury Instructions at 5, United States v. Mead, supra note 44.


The phrase “anything of value” is not defined in the FCPA, but the identical phrase under the domestic bribery statute has been broadly construed to include both tangible and intangible benefits. See, e.g., United States v. Moor, 525 F.3d 1033, 1048 (11th Cir. 2008) (rejecting defendant’s objection to instruction defining sex as a “thing of value,” which “unambiguously covers intangible considerations”); United States v. Gorman, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (holding that loans and promises of future employment are “things of value”); United States v. Williams, 705 F.2d 603, 622-23 (2d Cir. 1983) (approving jury instruction that stock could be a “thing of value” if defendant believed it had value, even though the shares had no commercial value, and noting that “[t]he phrase ‘anything of value’ in bribery and related statutes has consistently been given a broad meaning”).


Like the FCPA, the domestic bribery statute, 18 U.S.C. § 201, prohibits giving, offering, or promising “anything of value.” Numerous domestic bribery cases under Section 201 have involved “small” dollar bribes. See, e.g., United States v. Franco, 632 F.3d 880, 882-84 (5th Cir. 2011) (affirming bribery convictions of inmate for paying correctional officer $325 to obtain cell phone, food, and marijuana, and noting that 18 U.S.C. § 201 does not contain minimum monetary threshold); United States v. Williams, 216 F.3d 1099, 1103 (D.C. Cir. 2000) (affirming bribery conviction for $70 bribe to vehicle inspector); United States v. Traitz, 871 F.2d 368, 396 (3rd Cir. 1989) (affirming bribery conviction for $100 bribe paid to official of Occupational Health and Safety Administration); United States v. Huich Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985) (affirming bribery convictions including $100 bribe to immigration official); United States v. Bishon, 463 F.2d 887, 889 (D.C. Cir. 1972) (affirming bribery conviction for $100 bribe to division chief of District of Columbia Sewer Operations Division).

See Complaint, SEC v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48.


See, e.g., United States v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48 (same).


See, e.g., United States v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48 (same).

See Complaint, SEC v. UTCStarcom, supra note 94; Non-Pros. Agreement, In re UTCStarcom, supra note 94.

See, e.g., United States v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48 (same).

See, e.g., United States v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48 (same).

See, e.g., United States v. Daimler AG, supra note 48; Criminal Information, United States v. Daimler AG, supra note 48 (same).
controls provisions and paid a civil penalty of $1,500,000. Complaint, SEC v. Lucent, supra note 97. Additionally, the company entered into a non-prosecution agreement with DOJ and paid a $1,000,000 monetary penalty. Non-Pro. Agreement, In re Lucent, supra note 97.

105 United States v. Liebovitz, 923 F.2d 1308, 1311 (8th Cir. 1991).


108 FCPA opinion procedure releases can be found at http://www.justice.gov/criminal/fraud/fcpa/. In the case of the company seeking to contribute the $1.42 million grant to a local MFI, DOJ noted that it had undertaken each of these due diligence steps and controls, in addition to others, that would minimize the likelihood that anything of value would be given to any officials of the Eurasian country. U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 10-02 (July 16, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf.


110 Id.


112 Id.

113 The United States has some state-owned entities, like the Tennessee Valley Authority, that are instrumentalities of the government. McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 411 n.18 (6th Cir. 2006) (“[T]here is no question that TVA is an agency and instrumentalities of the United States.”) (internal quotes omitted).


115 Id. at 1 (“[A]fter more than two decades of privatization, government ownership and control remains widespread in many regions—and in many parts of the world still dominates certain sectors.”).

116 To date, consistent with the approach taken by DOJ and SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide. See Order, United States v. Carson, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No. 119, ECF No. 335 (list of examples of enforcement actions based on foreign officials of state-owned or state-controlled entities. See Government’s Opposition to Defendants’ Amended Motion to Dismiss Counts One Through Ten of the Indictment at 18, United States v. Carson, supra note 119, ECF No. 332; Exhibit I, United States v. Carson, supra note 119, ECF No. 335 (list of examples of enforcement actions based on foreign officials of state-owned entities).


See Indictment at 2, United States v. Esquenazi, supra note 44, ECF No. 3; Affidavit of Mr. Louis Gary Lissade at 1-9, ECF No. 417-2.


Id.


“H.R. Rep. No. 100-576, at 922. The常委会 also noted that “[i]n interpreting what is lawful under the written laws and regulations... the normal rules of legal construction would apply.” Id.

See United States v. Kozens, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008). Likewise, the court found that a provision under Azeri law that relieved bribe payors of criminal liability if they were extorted did not make the bribe payments legal. Azeri extortion law precludes the prosecution of any officer for the illegal payments, but it does not make the payments legal. Id. at 540-41.


For example, the Eighth Circuit Court of Appeals found that providing airline tickets to a government official in order to corruptly influence that official may form the basis for a violation of the FCAPA's anti-bribery provisions. See Liebo, 923 F.2d at 1311-12.

eventual act or decision or which do not involve any discretionary action,
giving the examples of "a gratuity paid to a custom official to speed the
processing of a customs document" or "payments made to secure permits,
licenses, or the expedient performance of similar duties of an essentially
ministerial or clerical nature which must of necessity be performed in an

43 Id. not be condoned."
46 In a 2004 decision, the Fifth Circuit emphasized this precise point,
commenting on the limited nature of the facilitating payments exception:
A brief review of the types of routine governmental
actions enumerated by Congress shows how limited
Congress wanted to make the grease exceptions.
Routine governmental action, for instance, includes
"obtaining permits, licenses, or other official
documents to qualify a person to do business in
a foreign country," and "scheduling inspections
associated with contract performance or inspections
related to transit of goods across country."
Therefore, routine governmental action does not
include the issuance of every official document or
every inspection, but only (1) documentation that
qualifies a party to do business and (2) scheduling an
inspection—very narrow categories of largely non-
discretionary, ministerial activities performed by
mid- or low-level foreign functionaries.

United States v. Kay: 359 F.3d 738, 750-51 (5th Cir. 2004) [internal
footnote omitted] (emphasis in original).

47 Non-Pros. Agreement, In re Helmerich & Payne, Inc. (July 29, 2009)
gov/criminal/fraud/fcpa/cases/helmerich-payne-06-29-09helmerich-
agreec.pdf; Admin. Proceeding Order, In the Matter of Helmerich &
In the Matter of Helmerich & Payne], available at http://www.sec.gov/

48 Criminal Information, Vecto Gray Controls Inc., et al., No. 07-
www.justice.gov/criminal/fraud/fcpa/cases/vecto-contro/02-06-
07vectograysinfo.pdf.

Corp. (Nov. 4, 2010), available at http://www.justice.gov/criminal/
fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf; see also
sources cited supra note 68.

50 Working Group on Bribery, 2009 Recommendation of the Council for
Further Combating Bribery of Foreign Public Officials in International
Business Transactions, at § VI (recommending countries should
periodically review their policies and approach to facilitation payments
and should encourage companies to prohibit or discourage facilitation
payments 'in view of the corrosive effect of small facilitation payments,
particularly on sustainable economic development and the rule of law');
Working Group on Bribery, United States: Phase 3, at 24 (Oct. 15,
.pdf (commending United States for steps taken in line with 2009
recommendation to encourage companies to prohibit or discourage
facilitation payments).

51 Facilitating payments are illegal under the U.K. Bribery Act
2010, which came into force on July 1, 2011, and were also illegal under
prior U.K. legislation, See Bribery Act 2010, c.23 [Eng.], available
at http://www.legislation.gov.uk/ukpga/2010/23/contents; see also
Procedures Which Relevant Commercial Organisations Can Put into Place
to Prevent Persons Associated with Them from Bribery (Section 9 of the
guidance/docs/bribery-act-2010-guidance.pdf.

52 See, e.g., Non-Pros. Agreement, In re Helmerich & Payne, supra note
163; Admin. Proceeding Order, In the Matter of Helmerich & Payne,
supra note 163.

53 In order to establish duress or coercion, a defendant must demonstrate
that the defendant was under unlawful, present, immediate, and
impending threat of death or serious bodily injury; that the defendant
did
not negligently or recklessly create a situation where he would be forced to engage in criminal conduct (e.g., had been making payments as part of an ongoing bribery scheme); that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. See Eleventh Circuit Pattern Jury Instr., Special Instr. No. 16 (2003); see also Fifth Circuit Pattern Jury Instr. No. 1.36 (2001); Sixth Circuit Pattern Jury Instr. No. 6.05 (2010); Seventh Circuit Pattern Jury Instr. No. 6.08 (1998); Ninth Circuit Pattern Jury Instr. No. 6.5 (2010); 1A Kevin F. O’Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions § 19.02 (6th ed. 2008 & Supp. 2012).


171 Id. at 10.

172 Id. at 11.


175 Id.

176 These payments, however, must be accurately reflected in the company’s books and records so that the company and its management are aware of the payments and can assure that the payments were properly made under the circumstances. For example, in one instance, a Kazakh immigration prosecutor threatened to fine, jail, or deport employees of a U.S. company’s subsidiary. Believing the threats to be genuine, the employees in Kazakhstan sought guidance from senior management of the U.S. subsidiary and were authorized to make the payments. The employees then paid the government official a total of $45,000 using personal funds. The subsidiary reimbursed the employees, but it falsely recorded the reimbursements as “salary advances” or “visa fines.” The parent company, which eventually discovered these payments, as well as other improperly booked cash payments made to a Kazakhstani consultant to obtain visas, was charged with civil violations of the accounting provisions. Admin. Proceeding Order, In the Matter of NATCO Group Inc., Exchange Act Release No. 61325 [Jan. 11, 2010], available at http://www.sec.gov/litigation/admin/2010/61325.pdf (imposing cease-and-desist order and $65,000 civil monetary penalty).


178 See, e.g., Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938) (“Where one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agent within the scope of the agent’s authority.”); United States v. Nynex Corp., 788 F. Supp. 16, 18 n.3 (D.D.C. 1992) (holding that “[a] corporation can of course be held criminally liable for the acts of its agents,” including “the conduct of its subsidiaries.”).

179 Pacific Can Co., 95 F.2d at 46; Nynex Corp., 788 F. Supp. at 18 n.3.

180 See, e.g., Standard Oil Co. v. United States, 307 F.2d 120, 127 (5th Cir. 1962).


182 See, e.g., Philip Urofsky, What You Don’t Know Can Hurt You: Successor Liability Resulting From Inadequate FCPA Due Diligence in M&A Transactions, 1763 PLI/Corp. 651, 637 (2009) (“As a legal matter, when one corporation acquires another, it assumes any existing liabilities of that corporation, including liability for unlawful payments, regardless of whether it knows of them.”). Whether or not successor liability applies to a particular corporate transaction depends on the facts involved and state, federal, and, potentially, foreign law.

183 See, e.g., Carolyn Lindsey, More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act, 35 Ohio N.U. L. Rev. 959, 966 (2009) (“Allowing a company to escape its debts and liabilities by merging with another entity is considered to lead to an unjust result.”).


186 For a discussion of declinations, see Chapter 7.


criminal/fraud/fcpa/cases/granado-jorge/12-21-10granado-indict.pdf.


Compare Criminal Information, United States v. Snamprogetti, supra note 60, with Deferred Proc. Agreement, United States v. Snamprogetti, supra note 60, ECF No. 3.


In enacting the FCPA in 1977, Congress explicitly noted that “[t]he concepts of aiding and abetting and joint participation would apply to a violation under this bill in the same manner in which those concepts have always applied in both SEC civil actions and in implied private actions brought under the securities laws generally,” H.R. Rep. No. 95-640, at 8. “In response to concerns that such a statutory provision might be abused always applied in both SEC civil actions and in implied private actions rejected the addition of proposed cost-benefit language to the definition of the statute,” 217 H.R. Rep. No. 94-831, at 10.

207 18 U.S.C. § 3282(a) provides: “Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.” See Granenwald v. United States, 353 U.S. 391, 396-97 (1957) (holding government must prove conspiracy still existed and at least one overt act was committed within the statute of limitations); Fiswick v. United States, 329 U.S. 211, 216 (1946) (“The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.”) (citation omitted); see generally Julie N. Sarnoff, Federal Criminal Conspiracy, 48 AM. CRIM. L. REV. 663, 676 (Spring 2011).


225 The accounting provisions contain a narrow exemption related to national security and the protection of classified information. Under this “national security” provision, “no duty or liability [under Section 13(b)(2) of the Exchange Act] shall be imposed upon any person acting in cooperation with the head of any federal department or agency responsible for such matters if such an act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives.” Section 13(b)(3) of the Exchange Act, 15 U.S.C. § 78m(b)(3). As Congress made clear, however, the exception is narrowly tailored and intended to prevent the disclosure of classified information. H.R. Rep. 94-831, at 11, available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/coreупрттеiako8-831.pdf.


228 Id.


238 Id.
237 Although private companies are not covered by the books and records
236 and internal controls provisions of the FCPA and do not fall within
234 SEC’s jurisdiction, such companies generally are required by federal
232 and state tax laws and state corporation laws to maintain accurate books
230 and records sufficient to properly calculate taxes owed. Further, most
229 private companies maintain their books and records to facilitate the
227 preparation of financial statements in conformity with GAAP to comply
225 with financial institutions’ lending requirements.
223 See, e.g., Complaint, SEC v. Biomet, supra note 221 (bribes paid to
government healthcare providers in which phony invoices were used to
justify payments and bribes were falsely recorded as “consulting fees” or “commissions” in company’s books and records); Criminal
Information, United States v. Biomet, supra note 221 (same); SEC v.
Alcatel-Lucent, supra note 48 (bribes paid to foreign officials to secure
telecommunications contracts where company lacked proper internal
controls and permitted books and records to falsify); United States v.
Alcatel-Lucent, S.A., supra note 48 (same).
221 Complaint, SEC v. Daimler AG, supra note 48; Criminal Information,
United States v. Daimler AG, supra note 48.
220 Id.
219 See supra note 92; Complaint, SEC v. Elkin, supra note 50, ECF 6-9 (final judgments).
216 Id. at 2, 4, 6-7.
213 See Complaint at 11-12, SEC v. Elkin, supra note 50, ECF 1. 
212 SEC v. Elkin, supra note 50, ECF 6-9 (final judgments).
211 See supra note 48; SEC v. Technip, supra note 132, (French company);
United States v. Technip, supra note 132, (same); see also Admin.
(Norwegian company), available at http://www.sec.gov/litigation/admin/
2006/34-54599.pdf; Criminal Information, United States v.
210 Although private companies are not covered by the books and records
209 and internal controls provisions of the FCPA and do not fall within
206 SEC’s jurisdiction, such companies generally are required by federal
204 and state tax laws and state corporation laws to maintain accurate books
202 and records sufficient to properly calculate taxes owed. Further, most
200 private companies maintain their books and records to facilitate the
198 preparation of financial statements in conformity with GAAP to comply
196 with financial institutions’ lending requirements.
194 See Section 13(b)(6) of the Exchange Act, 15 U.S.C. § 78m(b)(6), which
193 provides that where an issuer “holds 50 per centum or less of the
192 voting power with respect to a domestic or foreign firm,” the issuer must
191 “proceed in good faith to use its influence, to the extent reasonable under
190 the issuer’s circumstances, to cause such domestic or foreign firm to devise
190 and maintain a system of internal accounting controls consistent with
189 [Section 13(b)(2)].”
188 See 15 U.S.C. § 78m(b)(6). Congress added the language in subsection
78m(b)(6) to the FCPA in 1988, recognizing that “it is unrealistic to expect a
minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary.” H.R. Rpt. No.
100-576, at 917. The Conference Report noted that, with respect to
minority owners, “the amount of influence which an issuer may exercise necessarily varies from case to case. While the relative degree of
ownership is obviously one factor, other factors may also be important in
determining whether an issuer has demonstrated good-faith efforts to use
its influence.” Id.; see also S. Rep. No. 100-85, at 50.
187 See Section 20(e) of the Exchange Act, titled “Prosecution of Persons
Who Aid and Abet Violations,” explicitly provides that for purposes of a
civil action seeking injunctive relief or a civil penalty, “any person that
knowingly or recklessly provides substantial assistance to another person in
violation of a provision of this title, or of any rule or regulation issued
under this title, shall be deemed to be in violation of such provision to
the same extent as the person to whom such assistance is provided.”
186 See Complaint at 11-12, SEC v. Elkin, supra note 50, ECF 1. 
185 SEC v. Elkin, supra note 50, ECF 6-9 (final judgments).
182 Id. at 2, 4, 6-7.
178 See, e.g., Complaint, SEC v. Jennings, No. 11-cv-1444 (D.D.C. Jan. 24,
177 Complaint, id., ECF No. 1, Final Judgment, id., ECF No. 3.
176 Serious Fraud Office, Innospec Ltd: Former CEO admits bribery to falsify
175 15 U.S.C. § 78m(b)(4)-(5). Congress adopted this language in 1988 in
order to make clear that, consistent with enforcement policy at the time,


238 22 C.F.R. §§ 130.2, 130.9.


241 See USAM § 9-27.000.

242 See USAM § 9-27.420 (setting forth considerations to be weighed when determining whether it would be appropriate to enter into plea agreement).

243 See USAM § 9-28.000 et seq.

244 See USAM § 9-28.710 (discussing attorney-client and work product protections).


247 See USAM § 9-28.900 (discussing restitutions and remediations). The commentary further states that prosecutors should consider and weigh whether the corporation appropriately disciplined wrongdoers and a corporation’s efforts to reform, including its quick recognition of the flaws in the program and its efforts to improve the program. Id.


250 Id. § 8C2.5(f)(2) (2011).


See generally Debbie Troklus, et al., Compliance 101: How to Build and Maintain an Effective Compliance and Ethics Program, Society of Corp. Compliance and Ethics (2008) 3-9 [hereinafter Compliance 101] (listing reasons to implement compliance program, including protecting company’s reputation, creating trust between management and employees, preventing false statements to customers, creating efficiencies and streamlining processes, detecting employee and contractor fraud and abuse, ensuring high-quality products and services, and providing “early warning” system of inappropriate actions); Transparency Int’l, Business Principles for Countering Bribery: Small and Medium Enterprise (SME) Edition 5 (2008) (citing benefits of anti-bribery program like protecting reputation, creating record of integrity enhances opportunities to acquire government business, protecting company assets otherwise squandered on bribes); Mark Pieth, Harmonising Anti-Corruption Compliance: The OECD Good Practice Guidance 45-46 (2011) [hereinafter Harmonising Anti-Corruption Compliance] (citing need for compliance program to prevent and detect in-house risks, such as workplace security or conflicts of interest, and external risks, like anti-trust violations, embargo circumvention, environmental hazards, and money laundering).

Debarment authorities, such as the Department of Defense or the General Services Administration, may also consider a company’s compliance program when deciding whether to debar or suspend a contractor. Specifically, the relevant regulations provide that the debarment authority should consider “[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment,” and “[w]hether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.” 48 C.F.R. § 9.406-1(a).

USAM § 9-28.300. When evaluating the pervasiveness of wrongdoing within the corporation, prosecutors are advised that while it may be appropriate to charge a corporation for minor misconduct where the wrongdoing was pervasive, “it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondent theory for the single isolated act of a rogue employee.” Id. § 9-28.300.A. (emphasis added). Prosecutors should also consider a company’s compliance program when examining any remedial actions taken, including efforts to implement an effective compliance program or to improve an existing one. As the commentary explains, “although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation’s quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.” Id. § 9-28.900.B. Finally, the Principles of Federal Prosecution of Business Organizations provides that prosecutors should consider the existence and effectiveness of the corporation’s pre-existing compliance program in determining how to treat a corporate target. Id. § 8B2.1 & app. note 2 (2011). (“The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.”)

See Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012) (declining to bring criminal case against corporate employer that “had constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials”), available at http://www.justice.gov/opa/pr/2012/April/12-crmm-534.htm; Press Release, U.S. Sec. and Exchange Comm., SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud, No. 2012-78 (Apr. 25, 2012) (indicating corporate employer was not charged in the matter and had “cooperated with the SEC’s inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved”), available at http://www.sec.gov/news/press/2012/2012-78.htm.

See USAM § 9-28.800.B.

and responsibility for restoring public trust by conducting themselves in a manner that is worthy of the trust that is placed in them." Cynthia Glassman, SEC. Implementation of Sarbanes-Oxley: The New Corporate Governance, Remarks at National Economists Club (April 7, 2003), available at http://www.sec.gov/NEWS/speech/sphc040703cg.htm.

Indeed, research has found that "[e]thical culture is the single biggest factor determining the amount of misconduct that will take place in a business. Ethics Resource Center, 2009 National Business Ethics Survey: Ethics in the Recession (2009), at 41. Metrics of ethical culture include ethical leadership (tone at the top), supervisor reinforcement of ethical behavior (middle management reinforcement), and peer commitment (supporting one another in doing the right thing). Ethics Resource Center, 2011 National Business Ethics Survey: Workplace Ethics in Transition (2012) at 19. Strong ethical cultures and strong ethics and compliance programs are related, as data show that a well-implemented program helps lead to a strong ethical culture. Id. at 34. "Understanding the nature of any gap between the desired culture and the actual culture is a critical first step in determining the nature of any ethics-based risks inside the organization." David Gebler, The Role of Corporate Culture at 1.7, in Society of Corporate Compliance and Ethics, The Complete Compliance and Ethics Manual (2011), "To create an ethical culture, attention must be paid to norms at all levels of an organization, including the "tone at the top," mood in the middle," and "buzz at the bottom." Id. 1.9-1.10.


312 See U.S. Sentencing Guidelines § 8B2.1(b)(6) (2011) ("The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.").

See, e.g., Joseph E. Murphy, Society of Corp. Compliance and Ethics, Using Incentives in Your Compliance and Ethics Program (2011) at 1; The Ethics and Compliance Handbook, supra note 317, at 111-23.


314 See, e.g., ICC Rules on Combating Corruption, supra note 309, at 8.


316 Corporate Board Member/FTI Consulting 2009 Legal Study, Buckle Up. Boards and General Counsel May Face a Bumpy Ride in 2009, at 5 ("Interestingly, while 67% of general counsel say their company is subject to compliance under the FCPA, 64% of those say there is room for improvement in their FCPA training and compliance programs.").

317 See U.S. Sentencing Guidelines § 8B2.1(b)(5)(B) ("The organization shall establish the steps … to evaluate periodically the effectiveness of the organization's compliance and ethics program.").


325 See Harmonising Anti-Corruption Compliance, supra note 302, at 46 ("Anti-corruption compliance is becoming more and more harmonised worldwide.").

326 OECD Good Practice Guidance, supra note 309.

327 APEC Anti-Corruption Code, supra note 309.


329 See, e.g., Joseph E. Murphy, Society of Corp. Compliance and Ethics, The Complete Compliance and Ethics Manual barring company from future FCPA violations based on allegations that it paid excessive marketing diem to an Egyptian official and his family); United States v. American


333 See Harmonising Anti-Corruption Compliance, supra note 302, at 46 ("Anti-corruption compliance is becoming more and more harmonised worldwide.").

334 OECD Good Practice Guidance, supra note 309.

335 APEC Anti-Corruption Code, supra note 309.

336 ICC Rules on Combating Corruption, supra note 309.

337 Business Principles for Countering Bribery, supra note 309.

338 The Ten Principles, supra note 309.

339 Integrity Compliance Guidelines, supra note 309.

340 Partnering Against Corruption, supra note 309.


347 The U.S. Sentencing Guidelines are promulgated by the U.S. Sentencing Commission; the United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting ex-officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. The Guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.


349 Id. at ch. 3-5.

350 Id. § 2C.1.1(b).

351 Id. § 2B1.1(b).

352 Id. § 3B1.1.

353 Id. at ch. 4, § 5A.


355 Id. § 8C2.4 (a).

356 Id. § 8C2.5.

357 Id. § 8C2.5(f), 8C2.5(g).

358 DOJ has exercised this civil authority in limited circumstances in the last thirty years. See, e.g., United States & SEC v. KPMG Siddharta Siddharta & Harsono, et al., No. 01-cv-3105 (S.D. Tex. 2001) (entry of injunction barring company from future FCPA violations based on allegations that company paid bribes to Indonesian officials in order to reduce the company’s tax assessment); United States v. Metcalf & Eddy, Inc., No. 99-cv-12566 (D. Mass. 1999) (entry of injunction barring company from future FCPA violations and requiring maintenance of compliance program based on allegations that it paid excessive marketing and promotional expenses such as airfare, travel expenses, and per diem to an Egyptian official and his family); United States v. American Totalisator Co. Inc., No. 99-cv-161 (D. Md. 1999) (entry of injunction barring company from future FCPA violations based on allegations that it paid money to its Greek agent with knowledge that all or some of the money paid would be offered, given, or promised to Greek foreign officials in connection with sale of company’s system and spare parts); United States v. Eagle Bus Manufacturing, Inc., No. 91-cv-171 (S.D. Tex. 1991) (entry of injunction barring company from future FCPA violations
based on allegations that employees of the company participated in bribery scheme to pay foreign officials of Saskatchewan's state-owned transportation company $50,000 CAD in connection with sale of buses; United States v. Carver, et al., No. 79-cv-1768 (S.D. Fla. 1979) (entry of injunction barring company from future FCPA violations based on allegations that Carver and Holley, officers and shareholders of Holcar Oil Corp., paid $1.5 million to Qatar foreign official to secure an oil drilling concession agreement); United States v. Kenny, et al., No. 79-cv-2038 (D.D.C. 1979) (in conjunction with criminal proceeding, entry of injunction barring company from future FCPA violations for providing illegal financial assistance to political party to secure renewal of stamp distribution agreement).

365 15 U.S.C. §§ 78dd-2(g)(1)(B), 78dd-3(c)(1)(B), 78ff(c)(1)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).


(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any administrative or civil investigative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

365 15 U.S.C. §§ 78dd-2(g)(1)(B), 78dd-3(c)(1)(B), 78ff(c)(1)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

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(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.
DOJ has recently declined matters where some or all of the following circumstances were present: (1) a corporation voluntarily and fully disclosed the internal misconduct; (2) corporate principles voluntarily engaged in interviews with DOJ and provided truthful and complete information about their conduct; (3) a parent company conducted extensive pre-acquisition due diligence of potentially liable subsidiaries and engaged in significant remediation efforts post-acquisition; (4) a company provided information about its extensive compliance policies, procedures, and internal controls; (5) a company agreed to a civil resolution with the Securities and Exchange Commission while also demonstrating that criminal declination was appropriate; (6) only a single employee was involved in the improper payments; and (7) the improper payments involved minimal funds compared to overall business revenues.


See id. § 6.2.4.

See id. § 6.2.6.


18 U.S.C. § 1513(c).

15 U.S.C. § 78a-6(a)(3). The new provision defines “original information” to mean information that:

(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the media, unless the whistleblower is a source of the information.


For example, the rules: (1) make a whistleblower eligible for an award if the whistleblower reports original information internally, and the company informs the SEC about the violations; (2) give whistleblowers 120 days to report information to the SEC after first reporting internally and still be treated as if he or she had reported to the SEC at the earlier reporting date, thus preserving their “place in line” for a possible whistleblower award from the SEC; and (3) provide that a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower’s interference with internal compliance and reporting system is a factor that can decrease the amount of an award. See Exchange Act Rule 21F, 17 C.F.R. § 240.21F. See Exchange Act Rule 21F-7(b), 17 C.F.R. § 240.21F-7(b).

For example, SEC staff will not disclose a whistleblower’s identity in response to requests under the Freedom of Information Act. However, there are limits on SEC’s ability to shield a whistleblower’s identity, and in certain circumstances SEC must disclose it to outside entities. For example, in an administrative or court proceeding, SEC may be required to produce documents or other information that would reveal the whistleblower’s identity. In addition, as part of ongoing SEC investigatory responsibilities, SEC staff may use information provided by a whistleblower during the course of the investigation. In appropriate circumstances, SEC may also provide information, subject to confidentiality requirements, to other governmental or regulatory entities. Exchange Act Rule 21F-7(c), 17 C.F.R. 240.21F-7(c).

Although SEC does not have an opinion procedure release process, it has declared its decision to follow the guidance announced through DOJ’s FCAPA Opinion Release Procedure. U.S. Sec. and Exchange Comm., SEC Release No. 34-17099 (Aug. 29, 1980), available at http://www.sec.gov/news/digest/1980/dig082980.pdf; SEC Release No. 34-17099 stated that, to encourage issuers to take advantage of the DOJ’s FCAPA Review Procedure, as a matter of prosecutorial discretion, SEC would “not take enforcement action alleging violations of Section 30A in any case where an issuer has sought and obtained an FCAPA Review letter from the Department, prior to May 31, 1981, stating that the Department will not take enforcement action under Section 30A with respect to the transaction involved.” Id. The release further noted that it would revisit this policy once the DOJ had evaluated the results of the FCAPA Review Procedure after its first year of operation. A second release stated that the SEC would continue to adhere to the policy announced in Release No. 34-17099. U.S. Sec. and Exchange Comm., SEC Release No. 34-18255 (Nov. 13, 1981), available at http://www.sec.gov/news/digest/1981/dig11381.pdf.

Both DOJ’s opinion procedure releases (from 1993 to present) and review procedure releases (from 1980-1992) are available at http://www.justice.gov/criminal/fraud/fcpa/opinion.

The full regulations relating to DOJ’s opinion procedure are available at http://www.justice.gov/criminal/fraud/fcpa/docs/frcgcrpt.pdf.

28 C.F.R. § 80.1.

28 C.F.R. § 80.3.

28 C.F.R. § 80.12 (“Neither the submission of a request for an FCAPA Opinion, its pending, nor the issuance of an FCAPA Opinion, shall in any way alter the responsibility of an issuer to comply with the accounting requirements of 15 U.S.C. §78m(b)(2) and (3”).

28 C.F.R. § 80.4.

28 C.F.R. § 80.5.

28 C.F.R. § 80.6.

28 C.F.R. § 80.14(a). This non-disclosure policy applies regardless of whether DOJ responds to the request or the party withdraws the request before receiving a response. Id.

28 C.F.R. § 80.6.

28 C.F.R. § 80.2.

In connection with any request for an FCAPA opinion, DOJ may conduct whatever independent investigation it believes appropriate. 28 C.F.R. § 80.7.

28 C.F.R. § 80.15. Once a request is withdrawn, it has no effect. However, DOJ reserves the right to retain a copy of any FCAPA opinion request, documents, and information submitted during the opinion release procedure for any governmental purpose, subject to the restrictions on disclosures in 28 C.F.R. § 80.14.

28 C.F.R. § 80.8.

28 C.F.R. § 80.7.” “Such additional information, if furnished orally, must be confirmed in writing promptly. The same person who signed the initial request must sign the written, supplemental information and must again certify it to be a true, correct and complete disclosure of the requested information.” Id.
414 28 C.F.R. § 80.9 (“No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA opinion letter signed by the Attorney General or his designee.”).

415 28 C.F.R. § 80.8. FCPA opinions do not bind or obligate any agency other than DOJ. They also do not affect the requesting party’s obligations to any other agency or under any statutory or regulatory provision other than those specifically cited in the particular FCPA opinion. 28 C.F.R. § 80.11. If the conduct for which an FCPA opinion is requested is subject to approval by any other agency, such FCPA opinion may not be taken to indicate DOJ’s views on any legal or factual issues before that other agency. 28 C.F.R. § 80.13.

416 28 C.F.R. § 80.10. DOJ can rebut this presumption by a preponderance of the evidence. A court determining whether the presumption has been rebutted weighs all relevant factors, including whether the submitted information was accurate and complete and the activity was within the scope of conduct specified in the request. Id. As of September 2012, DOJ has never pursued an enforcement action against a party for conduct that formed the basis of an FCPA opinion stating that the prospective conduct would violate DOJ’s present enforcement policy.

417 As a general matter, DOJ normally anonymizes much of the information in its publicly released opinions and includes the general nature and circumstances of the proposed conduct. DOJ does not release the identity of any foreign sales agents or other types of identifying information. 28 C.F.R. § 80.14(b). However, DOJ may release the identity of the requesting party, the foreign country in which the proposed conduct is to take place, and any actions DOJ took in response to the FCPA opinion request. Id. If a party believes that an opinion contains proprietary information, it may request that DOJ remove or anonymize those portions of the opinion before it is publicly released. 28 C.F.R. § 80.14(c).

418 28 C.F.R. § 80.16.
Alternative Trading Systems: Description of ATS Trading in National Market System Stocks

LAURA TUTTLE

October 2013

This paper is the first in a series of DERA staff white papers planned to analyze off-exchange trading of NMS stocks. While this paper is limited to discussing descriptive statistics, other papers in the series will provide more quantitative analysis on the pricing of trades, and will extend analysis of off-exchange activity beyond that occurring on ATSS.

ABSTRACT

This paper discusses descriptive statistics on U.S. equity Alternative Trading Systems (ATSs, some of which are referred to as “dark pools”). The paper is intended to inform public discussion of the role and regulation of ATSS.

While ATSS operate markets similar in some ways to the registered exchanges, there are important institutional differences. Although both exchanges and ATSS provide marketplaces for buyers and sellers to transact in securities, ATSS do not necessarily provide public information on the best prices available to traders within their system. They also do not set rules governing the conduct of subscribers and they perform no self-regulation, while exchanges perform all of these functions. Additionally, because ATSS are regulated as broker-dealers, they comply with a different set of regulations than traditional exchanges.

1 This memorandum was prepared for Craig Lewis, Director and Chief Economist of the Division of Economic and Risk Analysis (DERA). It was reviewed by Amy Edwards and Jennifer Marietta-Westberg, DERA, and Michael Gaw and Dan Gray, Division of Trading and Markets (TM). Michael Gaw provided substantial assistance with Form ATS-R filings and knowledge of institutional detail of individual venues; Michael Gaw and Dan Gray provided substantial comments and feedback. The U.S. Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement of any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author’s colleagues upon the staff of the Commission.

2 Throughout this paper, I describe a venue as “dark” if it does not publicly disseminate top of book information and consider as “lit” a venue that does distribute this data.

3 See Release No. 34-40760 for a more detailed discussion of exchange versus ATS regulatory requirements.
Trading on ATSS regularly comprises 10-15% of U.S. equity trading volume.\(^4\) However, academic and public understanding of ATSS lags that of traditional exchanges partially due to a lack of publicly available data on ATSS.\(^5\) Using a five-day sample of regulatory data from May 7-11, 2012, this paper discusses summary statistics on ATSS participation in the trading of National Market System (NMS) stocks, including common stocks and many exchange-traded products (ETPs).\(^6\)

Summary of main findings:

- 35 broker-dealer firms operate 44 ATSSs that actively trade NMS stocks.
- ATSSs execute an estimated 11.31% of NMS dollar volume, and 12.12% of NMS share volume.
- The distribution of reported trade\(^7\) sizes on dark ATSSs\(^8\) is remarkably similar to that observed on traditional exchanges.
- The five ATSSs with average order sizes exceeding 1,000 shares collectively comprise 2.94% of ATSS dollar volume and 3.01% of ATSS share volume.
- 1.11% of ATSS orders receive at least a partial fill, and 0.69% of shares routed to an ATSS are filled.
- For all market-capitalization groups of stocks, at least 10% of trading dollar volume (11.37% of share volume) is attributable to ATSSs, with the largest market share occurring in medium capitalization stocks (12.30% of dollar volume and 12.86% of share volume).
- 7.39% of ETF dollar volume and 8.49% of ETF share volume is executed on ATSSs as opposed to 12.83% of the dollar volume and 12.80% of the share volume in other NMS stocks.

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\(^{6}\) The legal definition of “NMS stocks” includes ETPs. Most ETPs in the sample are exchange-traded funds (ETFs), but the sample includes other exchange-traded products as well. See 17 CFR 240.600(b)(47) (defining “NMS stock” as any NMS security other than an option); 17 CFR 240.600(b)(46) (defining “NMS security” as any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options).

\(^{7}\) Throughout this document, I use “fill” to denote an execution in association with the order that generated it. A “trade” is an execution event involving multiple fills and is considered in isolation of the orders that generated it. For example, two resting buy orders for 100 shares each may cross with a 200 share sell order. This generates three or four fills, depending on whether the sell-side fills are aggregated before reporting. One or two trades will be reported to the consolidated tape totaling 200 shares.

\(^{8}\) The subsample of dark ATSSs excludes Electronic Communication Networks (“ECNs”) where possible because they distribute top of book information and are therefore considered to be lit venues for the purpose of this analysis.
I. Description of Data and Data Limitations

Generally only limited data on ATSs is publicly available. Although some data vendors provide subscription sources of information on ATS trading, these data vendors rely on self-reported data and sometimes include venues in their analyses that may generally be regarded as dark pools but are excluded from this analysis because they do not file Form ATS-R\(^9\). Furthermore, the information provided by commercial sources is limited in scope. Generally, information on order characteristics, activity levels in the cross section of stocks, and fill rates is not available to commercial data vendors or the public.

The data used in this paper is comprised of all FINRA OATS\(^{10}\)-reported ATS orders and trades\(^{11}\) for NMS stocks for the five-day period covering May 7-11, 2012, representing 26 firms reporting designated ATS orders and trades within OATS. I am unable to distinguish ATS order and execution data from other data in OATS for nine venues comprising 11.30% of ATS transacted dollar volume based on 2012Q2 Form ATS-R\(^{12}\) filings with the Commission.\(^{13},^{14}\)

My results are based on 2.9 billion ATS orders resulting in 32.2 million ATS fills representing $229.1 billion in trading.\(^{15}\) A one-week sample of data permits me to examine order and trade characteristics

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\(^9\) See Release No. 34-40760 for information on the scope of Reg ATS. Also see Footnote 30.

\(^{10}\) FINRA’s OATS data includes order, trade, routing and quote information that can be used to recreate most order life cycle events for orders in NMS stocks routed in the over the counter (OTC) markets. All FINRA-member firms are required to report data to FINRA electronically. Further information on OATS is available on FINRA’s web site (http://www.finra.org/industry/compliance/markettransparency/oats/).

\(^{11}\) See http://www.finra.org/finramanual/rules/r7400/.

\(^{12}\) Each ATS is required to submit a Form ATS-R to the Commission within 30 days of the end of each calendar quarter. Form ATS-R requires reporting of, among other things, the total units and dollar volume traded by the ATS in several categories of securities. See Release No. 34-40760.

\(^{13}\) Most, but not all, venues which are not represented in our ATS sample are small venues with limited volume. I have no reason to believe that these venues have order flow that is characteristically different from the venues with ATS data represented in our sample.

\(^{14}\) The data for the 11.30% of ATS volume that I cannot identify is likely to be present within OATS, but possibly results from certain intra-firm transfer events that are excluded from OATS reporting requirements.

\(^{15}\) These numbers are not adjusted for double-counting. Generally, all ATS executed transacted dollar volume within OATS is double-counted; two 100-share orders (one seeking to buy, the other seeking to sell) will generate a 100-share trade and result in two 100-share execution (fill) reports in OATS. However, two resting orders of 100 shares may cross with a single 200 share order, creating three order and execution fill records, of which one or two (of total size 200 shares) will be reported to the consolidated tape through the trade reporting facility (TRF). Choosing to report only the buy or sell side of trades would allow me to arrive at single-counted order and execution numbers, but would possibly bias order and trade size results depending on whether large orders tended to be buys or sells during the sample week. I adjust for this double-counting in calculations of ATS market share of trading by halving executed transacted dollar or share volumes reported in OATS. On exchanges, only one side of a reportable trade reports to the consolidated tape, avoiding this double-counting.
and market share at a point in time, but does not allow me to examine changes in these metrics over time\textsuperscript{16} or the evolution of NMS structure in response to market and regulatory changes.

I identify ATS orders\textsuperscript{17} via a combination of receiving department code and the reporting firm’s market participant identification code (MPID).\textsuperscript{18} I include as orders all records with message types of new order, combined order/execution, combined order/routing, and cancel/replace.\textsuperscript{19} The sample does not exclude routings between ATSs.\textsuperscript{20} I also check Form ATS-R filings from the second quarter of 2012 to help validate data identification techniques and identify venues that are not represented in the ATS sample.

I construct the sample of securities in the following manner. I begin with 6,686 NMS stocks for which I have Center for Research in Security Prices (CRSP) volume, price and share class information\textsuperscript{21} for April 2012. I remove 2 securities of issuers that have corporate actions that affect security characteristics (such as delistings, splits, equity offerings or listing venue changes), and 4 securities for which no ATS orders or executions occur during the sample week. The final sample is 6,680 stocks.


\textsuperscript{17} To validate the order identification procedure, I compare OATS-identified order flow to quarterly volume reported to the Commission by ATSs during 2012Q2. Among venues with substantial market share, for many venues I find execution volumes of expected magnitude. My analysis suggests some venues may double-count volume in their quarterly filings with the Commission.

\textsuperscript{18} MPID and receiving department code are OATS data elements. Further information on OATS is presented in Footnote 10.

\textsuperscript{19} Order types of cancel, desk, combined order/routing, and routing are excluded from consideration of order-receiving events. When market participant A routes an order to ATS B, two records are generated within OATS. One routing message is submitted by A and one order received message is submitted by B. I focus the ATS order identification methodology on the messages generated by ATS B.

\textsuperscript{20} As a robustness check, I implement a second definition of ATS orders that includes only the first ATS order in a parent-child order chain (see Appendix A). This alternate definition excludes all routes between ATSs, as well as all order modifications occurring on ATSs. 72.41% of ATS orders qualify for inclusion in this sub-sample. Generally, order characteristics are largely unchanged. However, there are significant differences across venues in the proportion of orders and executions that this excludes from the subsample. Some large venues have over 97% of their sample retained in this alternate definition, while other large venues have their sample reduced by 90%. I am unable to determine if this is due to differences in how order modification is accomplished on these venues (some may lack a formal cancel/replace order type), or whether it is due to differences in routing activity between ATSs.

\textsuperscript{21} Price and volume information is required to assign securities to pre-determined price and average daily dollar volume groups elsewhere in the analysis. Share class information is needed to differentiate the trading of securities with multiple share classes in OATS.
II. Overview of ATSs

In the second quarter of 2012, 90 ATSs were registered with the Commission; 21 reported no volume information and appeared to be inactive. In Table 1, I describe the traded asset classes and activity level of the 69 active ATSs using information from 2012Q2 Form ATS-R filings.

Of the 69 active ATSs, 45 trade in NMS stocks. While the majority of ATSs transact in stocks, the notional value of derivatives transacted on ATSs comprises 51.04% of ATS dollar volume.22 Fixed income securities and credit instruments comprise 44.86% of ATS dollar volume, and NMS stocks comprise 4.05% of ATS dollar volume. No other category accounts for more than 0.04% of ATS dollar volume.

Table 1: Activity Level of Active ATSs by Asset Class

<table>
<thead>
<tr>
<th>Venue Type</th>
<th>N</th>
<th>Dollar Volume (MM)</th>
<th>Proportion of Dollar Volume (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural</td>
<td>2</td>
<td>1</td>
<td>0.00%</td>
</tr>
<tr>
<td>Credit / Fixed Income</td>
<td>8</td>
<td>24,158,681</td>
<td>44.86%</td>
</tr>
<tr>
<td>Derivative</td>
<td>6</td>
<td>27,486,746</td>
<td>51.04%</td>
</tr>
<tr>
<td>Specialized Assets</td>
<td>6</td>
<td>24,061</td>
<td>0.04%</td>
</tr>
<tr>
<td>Private Securities</td>
<td>2</td>
<td>364</td>
<td>0.00%</td>
</tr>
<tr>
<td>NMS Securities</td>
<td>45</td>
<td>2,181,183</td>
<td>4.05%</td>
</tr>
<tr>
<td>Total</td>
<td>69</td>
<td>53,851,036</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

The remainder of this paper focuses on the trading of NMS stocks on ATSs. There are 13 national exchanges that trade NMS stocks. In addition to these traditional trading venues there are 44 operational ATSs that transact in NMS stocks; three of these were classified as ECNs.23 The 44

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22 Venues that trade derivative or credit / fixed income securities often trade multiple classes of assets. Furthermore, there is some overlap between these asset classes; for instance, a credit security may also be a derivative security. Consequently, my assignment of venues to these classifications is somewhat subjective.

23 ECNs publicly display their top-of-book price and depth information and are therefore not considered to be dark pools. They are ATSs, however, and I include them in the data analysis. I estimate that these lit venues comprise 11.42% of ATS dollar volume using 2012Q2 Form ATS-R filings.
operational equity ATSs represent 35 distinct firms, some of which operate multiple ATSs. 24 26 of these firms are represented in my ATS data sample. 25

Three ATSs operate as electronic communications networks (ECNs), which display quotations in NMS stocks in the national market system. However, a majority of ATSs that trade NMS stocks do not display quotations. These ATSs are colloquially known as “dark pools,” although some of them may not be completely dark, because they may provide information about orders in their systems to select market participants but not to the general public.

III. Overall and Venue Market Shares

In this section, I estimate that over 11% of dollar volume in NMS stocks is transacted on ATSs, and document the significant market share variation across venues.

Table 2 presents the calculation of aggregate ATS market share. During the five trading days of the sample, 6,67726 stocks had CRSP-reported dollar volume of $1.142 trillion. I identify $114.6 billion27 in ATS dollar volume, or 10.04% of total CRSP-reported dollar volume. As mentioned previously, approximately 11.30%28 of ATS dollar-volume is not represented within our ATS data sample. Adjusting for these venues implies roughly 11.31%29 of NMS dollar volume (12.12% of share volume) is transacted on ATSs. 30

24 When a single broker-dealer operates multiple ATSs, OATS does not allow each ATS to be uniquely identified. I treat such venues as if they comprised a single ATS. For most firms with multiple ATSs, one is clearly dominant in size, but there are exceptions.
25 See Footnote 14.
26 The estimation of overall ATS market share requires that I exclude odd-lot trades from the ATS volume estimate because odd lots are not included in consolidated tape volume. To facilitate this, I exclude three securities with nonstandard lot sizes from this estimation.
27 I halve OATS dollar volume to adjust for double-counting, and exclude odd-lot transactions. If odd-lot trades are more (or less) common on ATSs than elsewhere in the markets, my estimate of over ATS market share of trading would be downward (or upward) biased.
28 I estimate the market share of venues not represented in the ATS sample from 2012Q2 Form ATS-R filings. Volume figures on these filings are denominated in dollars. Where needed for market share calculations based on shares, I assume that market share across ATSs in share volume are proportional to market share expressed in dollar volume.
29 To clarify the adjustment methodology: single-counted ATS dollar volume from trades of 100 shares or more observed in OATS represents 10.04% of CRSP-reported dollar volume. Adjusting for the 11.30% of ATS market share attributable to venues not represented in the ATS sample implies 11.32% adjusted ATS market share of CRSP-reported trading. 10.04%/(1-.113) = 11.3231%. Henceforth, I adjust ATS market shares to reflect the estimate of market share attributable to the venues not represented in the ATS sample unless otherwise stated.
30 One source of disparity between my estimation of overall ATS participation in NMS trading and estimates from commercial sources commonly reported in the press is that these sources often include certain venues that are not registered as ATSs. (See Release No. 34-40760 for details on off-exchange trading venues that are excluded from Regulation ATS requirements.)
Table 2: Aggregate ATS Market Share

<table>
<thead>
<tr>
<th></th>
<th>Dollar Volume</th>
<th>Share Volume</th>
</tr>
</thead>
<tbody>
<tr>
<td>CRSP Reported Volume</td>
<td>1,142,300,000,000</td>
<td>34,467,036,007</td>
</tr>
<tr>
<td>ATS OATS Reported Volume*a</td>
<td>114,642,981,900</td>
<td>3,704,261,531</td>
</tr>
<tr>
<td>Unobserved ATS Market Share</td>
<td>11.30%</td>
<td>11.30%b</td>
</tr>
<tr>
<td>Estimated Total ATS Market Share</td>
<td>11.31%</td>
<td>12.12%</td>
</tr>
</tbody>
</table>

a ATS volume is adjusted for double counting and excludes odd-lots which are not reported to the consolidated tape at the time of our sample.

b Because Reg ATS filings do not include share volume information, we assume the share volume weighted market share of missing venues is equal to the dollar-volume weighted market share.

There is significant variation in relative trading volume across the 26 identified venues. During the sample week the largest venue contributed 11.92% of ATS dollar volume (10.64% share volume). The five largest accounted for 49.02% of ATS dollar volume (47.07% share volume), and eleven venues each accounted for less than 1% of total ATS dollar and share volume.

IV. Order and Fill Sizes

Popular press and academic articles sometimes describe ATSs as venues used by institutions to trade blocks.31 In this section, I describe order sizes and fill rates across venues. I also compare trade sizes between lit and dark venues. My analyses reveal similarity in order and fill sizes across most venues, with the exception of five ATSs with average order sizes exceeding 1,000 shares that collectively comprise less than 3% of ATS dollar-volume trading. I show that trade size distributions between lit and dark venues are very similar.

I present tables and figures that describe the distribution of order and fill sizes on ATSs, as well as the distribution of consolidated tape reported trade sizes (excluding those trades reported to the trade

reporting facility, so as to compare only exchange trades with ATS trades\textsuperscript{32}) for all NMS stocks in the sample.\textsuperscript{33} Table 3 presents average order and fill size statistics. Aggregate order and fill counts are presented in millions; for each row, the market share of ATS dollar volume is adjusted to reflect the 11.30\% of ATS orders that are not represented in the ATS sample, thus all venues reporting represent 88.70\% of ATS market share. The average ATS order size is 374 shares, and the average aggregate ATS fill size\textsuperscript{34} is 232 shares. I also describe order and aggregate fill sizes for the five and ten largest venues, which respectively represent 49.02\% and 76.72\% of dollar volume. Their order and aggregate fill sizes are slightly smaller but comparable to those for the full sample. Finally, the last row of Table 3 shows statistics for the five venues that have average order sizes that exceed 1,000 shares, which I refer to as “Large Order Venues”. On these venues, the average aggregate fill size exceeds the average order size.\textsuperscript{35} Collectively these large-order venues represent 2.94\% of ATS dollar volume (3.01\% of share volume).

### Table 3: Order and Fill Sizes, All ATS Venues

<table>
<thead>
<tr>
<th></th>
<th>Orders (MM)</th>
<th>Fills (MM)</th>
<th>Average Order Size</th>
<th>Average Aggregate Fill Size</th>
<th>Share of ATS Trading Dollar Volume</th>
<th>Share of ATS Trading (Share Volume)</th>
</tr>
</thead>
<tbody>
<tr>
<td>All venues</td>
<td>2,890</td>
<td>32</td>
<td>374</td>
<td>232</td>
<td>88.70%</td>
<td>88.70%</td>
</tr>
<tr>
<td>Five largest venues</td>
<td>1,495</td>
<td>18</td>
<td>364</td>
<td>219</td>
<td>49.02%</td>
<td>48.16%</td>
</tr>
<tr>
<td>Ten largest venues</td>
<td>2,296</td>
<td>28</td>
<td>360</td>
<td>225</td>
<td>76.27%</td>
<td>75.01%</td>
</tr>
<tr>
<td>Five large-order venues</td>
<td>1.47</td>
<td>0.03</td>
<td>6,220</td>
<td>9,487</td>
<td>2.94%</td>
<td>3.01%</td>
</tr>
</tbody>
</table>

\textsuperscript{32} I exclude TRF-reported trades because they include the trades of ATSS, as well as preferred and internalized order flow.

\textsuperscript{33} The consolidated tape reported trades are from New York Stock Exchange’s Trade and Quote (TAQ) trade files, which contain execution data from all exchanges and the TRF.

\textsuperscript{34} When an order generates multiple fills, the aggregate size of all fills associated with the order is defined as “aggregate fill size”. Consideration of fill sizes in aggregate allows comparison of order size and the trading activity that resulted from placing the order. Fill size is presented fully disaggregated in Figure 2 for comparison with exchange trade sizes.

\textsuperscript{35} This can occur when certain counterparties tend to require large minimum fill sizes, but the venue does not restrict incoming order size. For example, assume institutions place large orders and specify that they will not accept fills below 5,000 shares. The venue may receive many 100 share orders which could interact with the institutional order, were it not for the minimum fill size specified by the institutional customer. In this case, the average order size may be smaller than the average fill size.
Figure 1 shows order and aggregate fill size distributions for all ATS orders and fills. The modal size of both orders and aggregate fills on ATSs is 100 shares. Odd-lot orders comprise 1.16% of ATS orders and account for 6.30% of ATS fills. Using the traditional 10,000+ share definition of blocks, block orders comprise only 0.33% of ATS orders and 0.10% of fills.

**Figure 1: ATS Order and Fill Size Distribution, All ATS Venues**

Figure 2 shows dark\(^{36}\) ATS and lit exchange\(^{37}\) trade sizes. The dark subsample excludes ECN trades where possible. I estimate that the dark subsample consists of 98.90% dark trades.\(^{38}\) This subsample

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\(^{36}\) Using my definitions of dark and lit described in Footnote 2, ECNs are lit venues. One ECN is operated by a firm that also operates a sizeable dark venue; when a single broker-dealer operates multiple ATSs, OATS does not allow each ATS to be uniquely identified. I elect to include this partially lit flow in the dark subsample due to the relatively small size of the lit venue. The sample of dark venues is not fully comparable to those discussed in trade publications because I do not include venues that are dark but do not file Form ATS-R.

\(^{37}\) All TAQ-reporting venues are included with the exception of the trade reporting facility (TRF), where most ATS trades are printed. The TRF is also the reporting destination for other off-exchange trades that would not properly be classified as “lit”, such as internalized and preferenced trades. This segregation of TRF trades, and the removal of most ECN trades from the “dark” subsample provides the sharpest possible comparison between lit and dark trades I can construct with the data. However, just as the dark off-exchange sample includes some lit ECN trades, the lit exchange sample also includes some trades that resulted from hidden exchange orders, as well as the trading of ECNs that at the time of my sample printed trades to a registered exchange. Although this comparison is imperfect, I believe the imperfections are not substantial enough to explain the apparent similarity between the sample distributions.
also excludes trades of less than 100 shares\textsuperscript{39} (which are generally not required to be reported to the consolidated tape), which allows us to make a more precise comparison of trade sizes between the two samples for trades of at least 100 shares. The modal trade size on both lit exchanges and dark AT斯 is 100 shares. On lit exchanges, 71.21\% of trades reported to the consolidated tape are 100-share round lots. On dark AT斯s, the proportion is 69.58\%. Very large trades are rare on both dark AT斯s and lit exchanges. 0.10\% of dark AT斯 trades and 0.07\% of lit exchange trades are for sizes that meet the traditional block definition of 10,000+ shares. Although some dark AT斯 trading likely results from the shredding of larger orders into smaller units for execution over time, the similarity between lit exchange and dark AT斯 trade sizes does not appear to support the characterization of dark AT斯s as venues specializing in block transactions.

Figure 2: Distribution of Dark AT斯 and Lit Exchange Execution Sizes (Excluding Odd-Lots)

Table 4 describes trade size distribution across venues. I focus on the 14 dark venues with AT斯 market share over 1\% of all AT斯 dollar volume, excluding smaller venues for which one week of data may be inadequate to capture typical trade size distributions. I present the minimum, maximum, median and interquartile range statistics for the percentage of trades within each trade size category by venue.

\textsuperscript{39} Estimate is based on 2012Q2 Form ATS-R filings to the Commission, and assumes that the proportion of ECN to dark trades for the mixed-type firm (has both a lit and dark AT斯) during the sample week is equal to the proportion of ECN to dark dollar volume for that firm during 2012Q2.

\textsuperscript{39} I exclude data for three securities with ordinary lot sizes other than 100 shares.
Generally, these statistics suggest that some venues have distributions that are not similar to lit markets. For example, consider the 100-share order percentage. Here the first-quartile cutoff is 63.77% and the third-quartile cutoff is 71.23% suggesting there is significant clustering of venues around the median of 67.17%. By contrast, the minimum percentage of 100-share orders is 33.63%, revealing that at least one venue typically transacts in different sizes. Examining the statistics for 10,000+ share orders, the first- and third-quartile cutoffs are 0.06% and 0.10% respectively, but the maximum is 20.60%, once again indicating that some venues specialize in different trade sizes. In this case, at least one venue does specialize in larger trades than the typical dark ATS. Statistically, the venue or venues that do not focus on single lot trades must be small; otherwise the aggregate presentation in Figure 2 would reveal a higher proportion of large orders.

Table 4: Descriptive Statistics for Trade Size Distribution Across Venues

<table>
<thead>
<tr>
<th></th>
<th>100</th>
<th>101-199</th>
<th>200-299</th>
<th>300-399</th>
<th>400-499</th>
<th>500-999</th>
<th>1,000-4,999</th>
<th>5,000-9,999</th>
<th>10,000+</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minimum</td>
<td>33.63%</td>
<td>0.00%</td>
<td>9.48%</td>
<td>4.76%</td>
<td>2.27%</td>
<td>3.71%</td>
<td>1.54%</td>
<td>0.07%</td>
<td>0.02%</td>
</tr>
<tr>
<td>Maximum</td>
<td>75.14%</td>
<td>2.88%</td>
<td>17.01%</td>
<td>10.17%</td>
<td>4.84%</td>
<td>9.62%</td>
<td>10.18%</td>
<td>3.29%</td>
<td>20.60%</td>
</tr>
<tr>
<td>Mean</td>
<td>65.00%</td>
<td>0.60%</td>
<td>13.33%</td>
<td>6.47%</td>
<td>3.12%</td>
<td>6.06%</td>
<td>3.46%</td>
<td>0.40%</td>
<td>1.57%</td>
</tr>
<tr>
<td>Median</td>
<td>67.17%</td>
<td>0.36%</td>
<td>13.40%</td>
<td>6.05%</td>
<td>3.16%</td>
<td>5.86%</td>
<td>3.23%</td>
<td>0.18%</td>
<td>0.08%</td>
</tr>
<tr>
<td>Quartile 1</td>
<td>63.77%</td>
<td>0.00%</td>
<td>12.30%</td>
<td>5.33%</td>
<td>2.60%</td>
<td>5.07%</td>
<td>2.02%</td>
<td>0.11%</td>
<td>0.06%</td>
</tr>
<tr>
<td>Quartile 3</td>
<td>71.23%</td>
<td>0.89%</td>
<td>14.23%</td>
<td>6.77%</td>
<td>3.48%</td>
<td>6.85%</td>
<td>3.80%</td>
<td>0.22%</td>
<td>0.10%</td>
</tr>
</tbody>
</table>

The analysis in Figure 2 excludes the odd-lot trades of ATSs to facilitate comparison with exchange-reported execution data. In Figure 3, I describe these omitted trades on ATSs. Odd-lot executions comprise 5.8% of all (dark and lit) ATS trades. Like O’Hara, Yao and Ye (2011) who examine odd lots in 120 NASDAQ stocks, I find the modal odd-lot trade size to be 50 shares, with minor peaks in the distribution at round numbers and a general skew toward smaller round lots.

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V. Probability of a Fill

In this section, I document the proportion of ATS orders that generate at least a partial fill. I also compare fill rates across venues.

Table 5 presents statistics on the probability of an order\textsuperscript{41} being at least partially filled. On ATSs, the probability of receiving at least a partial fill is 1.11% and 0.69% of shares ordered through ATSs are filled. Fill rates are highest on venues that specialize in large orders. The overall order fill rate\textsuperscript{42} for these large-order venues is 1.81% of orders, with 2.76% of ordered shares being filled. Statistics on maximum and minimum venue-level average fill rates are also presented, with three venues excluded due to data identification issues.\textsuperscript{43} At the venue level, the maximum average fill rate for orders is 3.17%, and 8.38% for average percent shares filled.

\textsuperscript{41} Here an “order” refers to any type of order, either immediate or cancel (IOC) or resting in the ATS.

\textsuperscript{42} An order is deemed filled if it generates an execution of any size; the second statistic (ordered shares filled) measures the percentage of shares ordered in the venue that are eventually filled.

\textsuperscript{43} I exclude fills that are not associated with an explicitly flagged ATS order from all fill-rate calculations. I exclude three venues with very high fill rates from the analysis of minimum/maximum venue-level fill rates and interpret the overall fill rates cautiously. See Footnote 14 regarding certain internal transfers that are not mandatory OATS reporting events.
Table 5: Fill Probabilities on ATSs

<table>
<thead>
<tr>
<th></th>
<th>% Orders Filled</th>
<th>% Shares Filled</th>
<th>(Max,Min) % Average Order Fill Rates a</th>
<th>(Max,Min) % Average Quantity Fill Rates a</th>
</tr>
</thead>
<tbody>
<tr>
<td>All venues</td>
<td>1.11%</td>
<td>0.69%</td>
<td>(3.17%,0.73%)</td>
<td>(8.38%,0.03%)</td>
</tr>
<tr>
<td>5 largest venues</td>
<td>1.21%</td>
<td>0.73%</td>
<td>(2.56%,0.73%)</td>
<td>(1.21%,0.36%)</td>
</tr>
<tr>
<td>9 of 10 largest venues</td>
<td>1.16%</td>
<td>0.71%</td>
<td>(3.17%,0.73%)</td>
<td>(2.35%,0.36%)</td>
</tr>
<tr>
<td>5 venues with large order sizes</td>
<td>1.81%</td>
<td>2.76%</td>
<td>(2.96%,0.15%)</td>
<td>(8.38%,0.29%)</td>
</tr>
</tbody>
</table>

a Three venues are excluded due to data identification issues

VI. Cross-Sectional Characteristics of ATS Volume

In this section, I investigate the relation between security characteristics, namely market capitalization levels, price levels, and order and fill characteristics. Although the majority of ATS dollar volume is transacted in large cap stocks, I show that for all NMS stock capitalization levels, at least 10% of trading volume occurs on ATSs. The probability of receiving a fill is generally increasing in market capitalization level and decreasing in share price.

In Table 6, I present summary statistics of ATS activity by market capitalization and price. I classify NMS stocks by share price groups based on the closing price on the final day of trading in April 2012. I define market capitalization groups as follows:

- Micro Cap: < $500MM
- Small Cap: $500MM - $1 Bln.
- Medium Cap: $1 -10 Bln.
- Large Cap: > $10 Bln.

44 See Footnote 43.
The proportion of dollar-volume trading occurring on ATSs ranges from 10.00% for micro capitalization stocks to 12.86% for medium capitalization stocks. ATS trading share tends to be higher for stocks with low prices. For example, consider large capitalization stocks; 13.26% of dollar volume for stocks with prices less than $20 per share\textsuperscript{46} occurs on ATSs, while 9.58% of volume is executed on ATSs for stocks with prices over $100. This pattern generally holds for other capitalization groups, though the relation is not reliably monotone across price groups. Order sizes for large capitalization stocks tend to be slightly lower than for other capitalization levels, but average fill sizes are similar across market capitalization levels. The probability of receiving a fill is generally increasing in market capitalization level and decreasing in share price.

\textsuperscript{46} There are no large capitalization securities with share price less than $5 during the sample period.
## Table 6: ATS Trading Characteristics by Market Capitalization Level and Share Price

<table>
<thead>
<tr>
<th>Market Capitalization Level</th>
<th>Price Level</th>
<th>N</th>
<th>ATS Market Share (Dvol)</th>
<th>ATS Market Share (Vol)</th>
<th>Average Order Size</th>
<th>Average Aggregate Fill Size</th>
<th>Probability of Fill</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>All</td>
<td>6680</td>
<td>11.32%</td>
<td>12.12%</td>
<td>374</td>
<td>232</td>
<td>1.11%</td>
</tr>
<tr>
<td>Large</td>
<td>All</td>
<td>393</td>
<td>10.98%</td>
<td>11.62%</td>
<td>344</td>
<td>233</td>
<td>1.53%</td>
</tr>
<tr>
<td>&gt; $100</td>
<td></td>
<td>53</td>
<td>9.58%</td>
<td>8.82%</td>
<td>489</td>
<td>201</td>
<td>0.84%</td>
</tr>
<tr>
<td>$85-100</td>
<td></td>
<td>19</td>
<td>12.01%</td>
<td>11.81%</td>
<td>210</td>
<td>157</td>
<td>1.10%</td>
</tr>
<tr>
<td>$20-85</td>
<td></td>
<td>289</td>
<td>11.53%</td>
<td>11.82%</td>
<td>299</td>
<td>216</td>
<td>1.56%</td>
</tr>
<tr>
<td>$5-20</td>
<td></td>
<td>32</td>
<td>13.26%</td>
<td>12.29%</td>
<td>470</td>
<td>334</td>
<td>2.58%</td>
</tr>
<tr>
<td>&lt; $5</td>
<td></td>
<td>0</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Medium</td>
<td>All</td>
<td>1542</td>
<td>12.30%</td>
<td>12.86%</td>
<td>378</td>
<td>232</td>
<td>1.11%</td>
</tr>
<tr>
<td>&gt; $100</td>
<td></td>
<td>54</td>
<td>12.40%</td>
<td>11.61%</td>
<td>203</td>
<td>150</td>
<td>0.48%</td>
</tr>
<tr>
<td>$85-100</td>
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<td>35</td>
<td>11.50%</td>
<td>11.42%</td>
<td>175</td>
<td>148</td>
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</tr>
<tr>
<td>$20-85</td>
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<td>1048</td>
<td>11.96%</td>
<td>11.91%</td>
<td>302</td>
<td>182</td>
<td>0.86%</td>
</tr>
<tr>
<td>$5-20</td>
<td></td>
<td>386</td>
<td>13.33%</td>
<td>13.24%</td>
<td>583</td>
<td>253</td>
<td>1.80%</td>
</tr>
<tr>
<td>&lt; $5</td>
<td></td>
<td>19</td>
<td>15.48%</td>
<td>15.49%</td>
<td>1,431</td>
<td>731</td>
<td>4.26%</td>
</tr>
<tr>
<td>Small</td>
<td>All</td>
<td>774</td>
<td>10.04%</td>
<td>11.61%</td>
<td>401</td>
<td>222</td>
<td>0.79%</td>
</tr>
<tr>
<td>&gt; $100</td>
<td></td>
<td>12</td>
<td>6.43%</td>
<td>5.97%</td>
<td>461</td>
<td>174</td>
<td>0.17%</td>
</tr>
<tr>
<td>$85-100</td>
<td></td>
<td>6</td>
<td>9.30%</td>
<td>9.23%</td>
<td>341</td>
<td>130</td>
<td>0.17%</td>
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<tr>
<td>$20-85</td>
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<td>325</td>
<td>9.32%</td>
<td>9.75%</td>
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<td>186</td>
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</tr>
<tr>
<td>$5-20</td>
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<td>393</td>
<td>11.11%</td>
<td>11.64%</td>
<td>520</td>
<td>220</td>
<td>1.07%</td>
</tr>
<tr>
<td>&lt; $5</td>
<td></td>
<td>38</td>
<td>14.60%</td>
<td>14.37%</td>
<td>421</td>
<td>282</td>
<td>2.44%</td>
</tr>
<tr>
<td>Micro</td>
<td>All</td>
<td>3971</td>
<td>10.00%</td>
<td>11.37%</td>
<td>400</td>
<td>231</td>
<td>0.58%</td>
</tr>
<tr>
<td>&gt; $100</td>
<td></td>
<td>32</td>
<td>5.92%</td>
<td>5.55%</td>
<td>661</td>
<td>168</td>
<td>0.06%</td>
</tr>
<tr>
<td>$85-100</td>
<td></td>
<td>19</td>
<td>6.29%</td>
<td>6.12%</td>
<td>221</td>
<td>123</td>
<td>0.14%</td>
</tr>
<tr>
<td>$20-85</td>
<td></td>
<td>946</td>
<td>8.88%</td>
<td>9.31%</td>
<td>358</td>
<td>184</td>
<td>0.16%</td>
</tr>
<tr>
<td>$5-20</td>
<td></td>
<td>1674</td>
<td>11.55%</td>
<td>11.93%</td>
<td>433</td>
<td>212</td>
<td>0.69%</td>
</tr>
<tr>
<td>&lt; $5</td>
<td></td>
<td>1300</td>
<td>11.22%</td>
<td>11.51%</td>
<td>386</td>
<td>266</td>
<td>1.70%</td>
</tr>
</tbody>
</table>
VII. ETF Trading on ATSs

In this section, I examine the trading of 1,178 exchange-traded funds (ETFs) on ATSs. Generally, ATSs fill a lower proportion of ETF dollar volume than they fill for other NMS stocks. ETF order and fill sizes on ATSs are larger than those for other stocks.

During the sample week, 27.50% of CRSP-reported dollar volume for NMS stocks is ETF dollar volume, but only 16.85% of dollar volume on ATSs results from ETF trading. As shown in Table 7, ATSs’ share of dollar volume is lower in ETFs than it is in other NMS stocks, with 7.39% of ETF dollar volume (8.49% of share volume) executed on ATSs as opposed to 12.83% of dollar volume (12.80% of share volume) for other NMS stocks. The average ETF order size on an ATS is 899 shares, which is larger than the average order size for other NMS stocks of 249 shares. The associated average aggregate fill sizes respectively are 351 and 222 shares. The probability of at least partial fill on an ATS is lower for ETFs than for other NMS stocks, with only 0.43% of ATS orders for ETFs receiving at least a partial fill compared to 1.28% for other stocks.

Table 7: ETF Trading on ATSs

<table>
<thead>
<tr>
<th>Security Type</th>
<th>N</th>
<th>ATS Market Share (Dvol)</th>
<th>ATS Market Share (Vol)</th>
<th>Average Order Size</th>
<th>Average Aggregate Fill Size</th>
<th>Probability of Fill</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>6,680</td>
<td>11.32%</td>
<td>12.12%</td>
<td>374</td>
<td>232</td>
<td>1.11%</td>
</tr>
<tr>
<td>Other NMS Stocks</td>
<td>5,502</td>
<td>12.83%</td>
<td>12.80%</td>
<td>249</td>
<td>222</td>
<td>1.28%</td>
</tr>
<tr>
<td>ETFs</td>
<td>1,178</td>
<td>7.39%</td>
<td>8.49%</td>
<td>899</td>
<td>351</td>
<td>0.43%</td>
</tr>
</tbody>
</table>

VIII. Conclusion

This study discusses general descriptive statistics on ATSs and reveals a number of empirical facts. First, at the time of the sample, slightly more than half of registered ATSs transacted in NMS stocks, and many

---

47 The ETF subsample includes 1,178 ETFs. The “Other NMS Stocks” subsample is comprised primarily of stocks, but includes other exchange-traded products as well, primarily exchange-traded notes and closed-end funds. Although ETFs are also exchange-traded products, I view ETFs as characteristically different than exchange-traded notes and closed-end funds and worthy of consideration as an asset class of their own in this analysis due to their substantial contribution to aggregate dollar volume of trading (27.50% of CRSP-reported dollar volume during the sample week).
of these venues are quite small. Market share is concentrated, with the ten largest ATSSs accounting for 76.27% of ATS dollar volume.

ATS activity comprises 11.31% of NMS dollar volume and although the majority of trading is in large capitalization issues, ATSSs account for at least 10% of dollar volume in all market capitalization classes. By comparison, ATS market share in the ETF market only is 7.39%. The share of trading attributable to ATSSs decreases in share price.

The aggregate trade size distribution on dark ATSSs is similar to that observed for lit exchanges and does not seem to support the characterization of dark ATSSs as venues that specialize in block transactions. On ATSSs, 1.11% of orders receive at least a partial fill, and 0.69% of shares ordered are filled.
Appendix A

My methodology in this paper does not allow me to simply exclude ATS-to-ATS routes because new order records in OATS do not specify which department within an MPID routed an order. To investigate how these routings affect the results, I construct an alternate sample of ATS orders that includes only the first ATS order in a parent-child order chain. To illustrate my methodology, consider the following order chain that shows the orders generated by a “parent order”:

In my original definition of ATS orders, all events except “parent order” and “Route to B/D” qualified as ATS orders. In this alternate definition, only the first ATS routing from this chain would be included in the ATS order sample, either “Route to ATS A” or “Route to ATS B”, depending upon which had the earlier timestamp. This excludes all ATS-to-ATS routings and all order modifications. Some top-level ATS orders generated through order splitting, however, also are excluded (as in this example).

When I use this alternate definition, the sample is reduced from 2.9 to 2.1 billion ATS orders but the sample characteristics are largely unchanged.

---

48 For instance, assume both Firm A and Firm B have ATSs. If Firm B’s ATS receives an order from Firm A, the new order record within OATS does not allow me to determine if the routing originated from Firm A’s ATS or other departments within Firm A. Reconstructing the order life cycle would allow this determination, but such an analysis is beyond the scope of this paper.

49 This is not necessarily a true parent order; it is the first order in a chain of linked orders within OATS.
2013 ANNUAL REPORT TO CONGRESS ON THE
Dodd-Frank Whistleblower Program
DISCLAIMER
This is a report of the Staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.
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Report available on the Web at:
http://www.sec.gov/about/offices/owb/annual-report-2013.pdf
MESSAGE FROM THE CHIEF OF THE OFFICE OF THE WHISTLEBLOWER

Fiscal Year 2013 was a historic one for the Securities and Exchange Commission’s Office of the Whistleblower (“OWB” or the “Office”). During the year, the Office paid whistleblowers a total of over $14 million in recognition of their contributions to the success of enforcement actions pursuant to which ongoing frauds were stopped in their tracks. While the amounts paid are significant, the bigger story is the untold numbers of current and future investors who were shielded from harm thanks to the information and cooperation provided by whistleblowers. At the end of the day, protecting investors is what the whistleblower program is all about.

The program, which is administered through OWB, is now in its third year of operation. The program was designed to incentivize individuals to provide the U.S. Securities and Exchange Commission (“Commission” or “SEC”) with specific, credible, and timely information about possible securities law violations, and thereby enhance the Commission’s ability to act swiftly to protect investors from harm and bring violators to justice. Under the program, individuals who voluntarily provide the Commission with original information that leads to a successful enforcement action resulting in monetary sanctions of over $1,000,000, may be eligible to receive an award equal to 10-30% of the monies collected by the Commission or in a related action.

The Commission’s goal continues to be the receipt of high-quality information concerning potential securities law violations. The number of whistleblower tips and complaints the Commission receives annually increased from 3,001 in the 2012 fiscal year to 3,238 in the 2013 fiscal year. From the establishment of the whistleblower program in August 2011 until the end of Fiscal Year 2013, the Commission has received 6,573 tips and complaints from whistleblowers.

Fiscal Year 2013 saw the Commission make its largest whistleblower award to date. On September 30, 2013, the Commission awarded over $14 million to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds. In less than six months after receiving the whistleblower’s tip, the Commission was able to bring an enforcement action against the perpetrators and secure investor monies. OWB hopes that award payments like this one will encourage individuals to come forward and assist the Commission in stopping securities fraud.

As mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”), the Commission’s Office of the Inspector General (“OIG”) conducted an audit of the Commission’s whistleblower program and released its report on January 18, 2013. OIG concluded that overall the Commission’s whistleblower program was effective and operated appropriately. Specifically, OIG found that the Commission’s final rules implementing the whistleblower provisions of the Dodd-Frank Act to be clearly defined and user-friendly for those with a basic knowledge.
of securities laws, rules and regulations. OIG also concluded that OWB’s outreach efforts had been strong and that in general OWB was prompt in responding to information received from whistleblowers and in communicating with interested parties. To further strengthen its internal controls, OIG recommended that OWB adopt key performance measures and metrics where appropriate. In response, the Office developed key performance measures and metrics in 28 different areas.

One of the most crucial tenets by which OWB operates is the protection of a whistleblower’s identifying information. OWB works with SEC Enforcement Division staff to protect whistleblower identities against disclosure. The Commission also allows individuals who prefer to remain anonymous to the Commission to be eligible under the whistleblower program if they submit their whistleblower tip through an attorney. Although they must disclose their identity to the Commission before they can be paid an award, the Commission does not publicly disclose whistleblower identities when it announces awards.

The Dodd-Frank Act extended anti-retaliation protections to Commission whistleblowers, which the Commission can enforce through civil enforcement actions in federal court or administrative proceedings. The protection of whistleblowers from retaliation by their employers is important to the success of the whistleblower program. Furthermore, the Commission’s rules prohibit any person from taking action to impede an individual from reporting a securities law violation to the Commission, including through the use of a confidentiality agreement. OWB is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing.

Finally, OWB encourages anyone who believes they have information concerning a potential securities law violation to submit the tip via the online portal on OWB’s webpage (http://www.sec.gov/whistleblower) or by submitting a Form TCR by mail or fax, also located on OWB’s webpage. If a whistleblower or his or her counsel has any question about how or whether to submit a tip to the Commission, or any other questions about the program, the individual should call the whistleblower hotline at (202) 551-4790.

OWB looks forward to the continued growth of the Commission’s whistleblower program. OWB is poised to carry out the Commission’s mission of motivating whistleblowers to submit high-quality information that will lead to successful securities enforcement actions and better protect investors from financial fraud.

Sean X. McKessy  
Chief, Office of the Whistleblower
HISTORY AND PURPOSE

The Dodd-Frank Act\(^1\) amended the Securities Exchange Act of 1934 (the “Exchange Act”)\(^2\) by, among other things, adding Section 21F\(^3\), entitled “Securities Whistleblower Incentives and Protection.” Section 21F directs the Commission to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful Commission enforcement actions resulting in monetary sanctions over $1,000,000, and successful related actions.

Awards are required to be made in the amount equal to 10 to 30% of the monetary sanctions collected. To ensure that whistleblower payments would not diminish the amount of recovery for victims of securities law violations, Congress established a separate fund, called the Investor Protection Fund (“Fund”), out of which eligible whistleblowers would be paid.

The Commission established OWB, a separate office within the Commission’s Division of Enforcement (“Enforcement”), to administer and effectuate the whistleblower program. It is OWB’s mission to administer a vigorous whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize investor losses.

In addition to establishing an awards program to encourage the submission of high quality information, the Dodd-Frank Act and the Commission’s implementing regulations (“the Final Rules”)\(^4\) prohibit retaliation against whistleblowers who report possible wrongdoing based on a reasonable belief that a possible securities violation has occurred, is in progress or is about to occur.\(^5\)

The whistleblower program was designed to complement, rather than replace, existing corporate compliance programs. While it provides incentives for insiders and others with information about unlawful conduct to come forward, it also encourages them to work within their company’s own compliance structure.

Section 924(d) of the Dodd-Frank Act requires OWB to report annually to Congress on OWB’s activities, whistleblower complaints, and the response of the Commission to such complaints. In addition, Section 21F(g)(5) of the Exchange Act requires the Commission to submit an annual report to Congress that addresses the following subjects:

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\(^4\)240 C.F.R. §§ 21F-1 through 21F-17.
\(^5\)15 U.S.C. § 78u-6(h)(1); 240 C.F.R. § 21F-2(b).
• The whistleblower award program, including a description of the number of awards granted and the type of cases in which awards were granted during the preceding fiscal year;

• The balance of the Fund at the beginning of the preceding fiscal year;

• The amounts deposited into or credited to the Fund during the preceding fiscal year;

• The amount of earnings on investments made under Section 21F(g)(4) during the preceding fiscal year;

• The amount paid from the Fund during the preceding fiscal year to whistleblowers pursuant to Section 21F(b);

• The balance of the Fund at the end of the preceding fiscal year; and

• A complete set of audited financial statements, including a balance sheet, income statement and cash flow analysis.\(^6\)

This report has been prepared by OWB to satisfy the reporting obligations of Section 924(d) of the Dodd-Frank Act and Section 21F(g)(5) of the Exchange Act. The sections in this report addressing the activities of OWB, the whistleblower tips received during Fiscal Year 2013, and the processing of those whistleblower tips primarily address the requirements of Section 924(d) of the Dodd-Frank Act. The sections in this report addressing the whistleblower incentive awards made during Fiscal Year 2013 and the Fund primarily address the requirements of Section 21F(g)(5) of the Exchange Act.

\(^6\)In Fiscal Years 2011 and 2012, OWB submitted its report on the Dodd-Frank whistleblower program to Congress on November 15th to coincide with the submission of the Commission’s annual Agency Financial Report to Congress, which included audited financial information on the Fund. However, because of the recent partial government shutdown, the annual Agency Financial Report will be submitted to Congress at a later date. Therefore, the financial information contained in this report concerning the Fund (see page 16) is unaudited, and Congress will receive the audited financial information on the Fund when the Commission submits its 2013 Agency Financial Report.
OVERVIEW OF THE OFFICE OF THE WHISTLEBLOWER

Organization
Section 924(d) of the Dodd-Frank Act directed the Commission to establish a separate office within the Commission to administer and to enforce the provisions of Section 21F of the Exchange Act. On February 18, 2011, the Commission announced the appointment of Sean X. McKessy to head the Office. On January 17, 2012, the Commission named Jane A. Norberg as the Office’s Deputy Chief.

In addition to Mr. McKessy and Ms. Norberg, OWB currently is staffed by nine attorneys and three paralegals.

Activities
Since its establishment, OWB has focused primarily on establishing the office and implementing the whistleblower program pursuant to the Dodd-Frank Act and the Commission’s Final Rules, which became effective on August 12, 2011.

During Fiscal Year 2013, the Office’s activities included the following:

• Communicating with whistleblowers who have submitted tips, additional information, claims for awards, and other correspondence to OWB. The Office also met with whistleblowers, potential whistleblowers and their counsel, and consulted Enforcement staff to provide guidance to whistleblowers and their counsel.

• Staffing a publicly-available whistleblower hotline for members of the public to call with questions about the program. The hotline was established in May 2011. OWB attorneys return all calls within 24 business hours. During the 2013 fiscal year, the Office returned over 2,810 phone calls from members of the public.

• Reviewing and entering whistleblower tips received by mail and fax into the Commission’s Tips, Complaints, and Referrals System (the “TCR System”).

• Working with Enforcement staff to identify and track all enforcement cases potentially involving a whistleblower to assist in the documentation of the whistleblower’s information and cooperation in anticipation of a potential claim for award.

• Posting on the OWB website a notice of every Commission action that resulted in monetary sanctions over $1,000,000, called a Notice of Covered Action (“NoCA”), for which a whistleblower who provided original information that led to the success of that enforcement action may seek an award.

“During the 2013 fiscal year, the Office returned over 2,810 phone calls from members of the public.”
• Reviewing and analyzing applications for whistleblower awards submitted in response to each posted NoCA. OWB attorneys confer with Enforcement staff on the relevant covered action to determine the applicant’s assistance or contribution on the matter. OWB attorneys then prepare a written recommendation concerning whether the Commission should issue an award to the applicant in that matter.

• Responding to requests by claimants to reconsider a preliminary determination of the Claims Review Staff to deny their application for an award. This includes compiling and providing copies of the record which formed the basis of the preliminary determination to grant or deny an award, upon timely request by the claimant.

• Working with the Commission’s Office of Financial Management (“OFM”) to execute on the Commission’s approved awards and get payments to qualified whistleblowers promptly following the Commission’s Final Order.

• Maintaining and updating the OWB website to better inform the public about the whistleblower program (www.sec.gov/whistleblower). The website includes two videos by Mr. McKessy providing an overview of the program and information about how tips, complaints and referrals are handled. The website also contains detailed information about the program, copies of the forms required to submit a tip or claim an award, a listing of current and past NoCAs, links to helpful resources, and answers to frequently asked questions.

• Identifying and monitoring whistleblower complaints alleging retaliation by employers or former employers for reporting possible securities law violations internally or to the Commission. The Commission has the authority to enforce the provisions of the Exchange Act, including the anti-retaliation provisions of Section 21F(h)(1). OWB works with Enforcement staff on potential anti-retaliation enforcement actions where appropriate. OWB also monitors federal court cases addressing the anti-retaliation provisions of the Dodd-Frank Act and the Sarbanes-Oxley Act of 2002. In addition, OWB reviews employee confidentiality and other agreements provided by whistleblowers for potential concerns arising under Rule 21F-17 of the Exchange Act.8

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718 U.S.C. § 1514A. On July 17, 2013, the United States Court of Appeals for the Fifth Circuit in Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013) held that the anti-retaliation provisions of the Dodd-Frank Act provide a private cause of action only for those employees who provide allegations of possible securities law violations directly to the Commission. The Fifth Circuit’s decision in Asadi is contrary to several district court decisions and may contradict a Commission regulation that provides protection for employees from retaliation where they report possible securities violations to persons or authorities other than the Commission, including reporting internally. District courts in both Colorado and California, however, have agreed with the Asadi holding.

8Rule 21F-17(a) provides that “No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing or threatening to enforce, a confidentiality agreement . . . with respect to such communications.” 240 C.F.R. § 21F-17(a).
• Working together with the Commission’s Office of the Inspector General (“OIG”) in connection with the audit required of the Commission’s whistleblower program by Section 922 of the Dodd-Frank Act. OIG issued a final report on January 18, 2013. (See pages 17-18 for a detailed discussion of the OIG’s findings.)

• Developing and implementing key performance measures related to OWB’s internal controls to strengthen the whistleblower process in response to OIG’s evaluation of the whistleblower program.

• Providing training on the Dodd-Frank Act and the Commission’s implementing rules to Commission staff. This included the posting of guidance on Commission intranet sites regarding whistleblower issues and rules. OWB anticipates it will provide additional training to groups likely to be involved in whistleblower matters in the SEC’s Home Office, specialty units, and all eleven Regional Offices in the upcoming fiscal year.

• Providing guidance to Commission staff regarding the handling of confidential whistleblower-identifying information and the handling of potentially privileged information provided by whistleblowers.

• Coordinating with Commission staff in making external referrals to other government agencies consistent with the Dodd-Frank Act’s and the Final Rules’ confidentiality provisions.

• Conferring with regulators from other agencies’ whistleblower offices, including the Internal Revenue Service and the Commodity Futures Trading Commission, to discuss best practices and experiences.

• Actively publicizing the program through participation in webinars, media interviews, presentations, press releases, and other public communications. For Fiscal Year 2013, OWB participated in seventeen public engagements and conducted several media interviews aimed at promoting and educating the public concerning the Commission’s whistleblower program.

• Working with the Commission’s Office of Information and Technology to develop a software solution that will assist and streamline OWB’s daily work flow and track the progress of whistleblower complaints synchronized with various Enforcement data systems.
WHISTLEBLOWER TIPS RECEIVED DURING FISCAL YEAR 2013

The Final Rules specify that individuals who would like to be considered for a whistleblower award must submit their tip via the Commission’s online TCR questionnaire portal or by mailing or faxing their tip on Form TCR to OWB.9 OWB sends an acknowledgement or deficiency letter to whistleblowers for all complaints that are received by mail or fax, which includes a TCR submission number. Whistleblowers who use the online portal to submit a complaint receive a computer-generated confirmation receipt and a TCR submission number. All whistleblower tips received by the Commission are entered into the TCR System, the Commission’s centralized database for prioritization, assignment, and tracking.

Subject of Whistleblower Complaints

In Fiscal Year 2013, 3,238 whistleblower TCRs were received.10 By comparison, for Fiscal Year 2012, the Commission received 3,001 whistleblower TCRs. The table below shows the number of whistleblower tips received by the Commission on a yearly basis since the inception of the whistleblower program:

<table>
<thead>
<tr>
<th></th>
<th>FY201111</th>
<th>FY2012</th>
<th>FY2013</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>334</td>
<td>3,001</td>
<td>3,238</td>
</tr>
</tbody>
</table>

The most common complaint categories reported by whistleblowers in the 2013 fiscal year were Corporate Disclosures and Financials (17.2%), Offering Fraud (17.1%), and Manipulation (16.2%). By comparison, in Fiscal Year 2012, the most common complaint categories reported by whistleblowers also were Corporate Disclosures and Financials (18.2%), Offering Fraud (15.5%), and Manipulation (15.2%).

This is the first year for which the Commission has year-over-year data concerning the nature of the tips and complaints the Commission receives through its whistleblower program. Appendix A shows the number of whistleblower tips, by allegation type and quarter, received during the 2013 fiscal year. Appendix B provides a comparison between the number of whistleblower tips by allegation type that the Commission received during the 2012 and 2013 fiscal years. As demonstrated by Appendix B, the most common complaint categories reported by whistleblowers have remained consistent between the prior and current fiscal years.

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9240 C.F.R. § 21F-9(a).
10The Commission also receives TCRs from individuals who do not wish or are not eligible to be considered for an award under the whistleblower program. The data in this report is limited to those TCRs that include the required whistleblower declaration and does not reflect all TCRs received by the Commission during the fiscal year.
11Because the Final Rules became effective August 12, 2011, only 7 weeks of whistleblower data is available for Fiscal Year 2011.
Origin of Whistleblower Complaints
OWB publicizes and promotes the Commission’s whistleblower program through external speaking engagements, participation in panels, and discussions with the media. OWB educates the public about the whistleblower program by having an accessible website and manning a whistleblower hotline. As a result, the Commission receives whistleblower submissions from individuals throughout the United States as well as from individuals residing in foreign countries.

During Fiscal Year 2013, the Commission received whistleblower submissions from individuals in all fifty (50) states, as well as from the District of Columbia, and the U.S. territories of Puerto Rico, Guam, and the U.S. Virgin Islands, as reflected in the map below. California, New York and Florida were the three states from which the highest number of whistleblower tips originated in the 2013 fiscal year.
Since the beginning of the whistleblower program, the Commission has received whistleblower tips from individuals in sixty-eight (68) countries outside the United States. In Fiscal Year 2013 alone, the Commission received whistleblower submissions from individuals in fifty-five (55) foreign countries. The map below reflects all countries in which whistleblower tips originated during Fiscal Year 2013.

Appendices C and D, which accompany this report, provide more specific information concerning the sources of domestic and foreign whistleblower tips that the Commission received during the 2013 fiscal year.
PROCESSING OF WHISTLEBLOWER TIPS
DURING FISCAL YEAR 2013

The Commission’s Office of Market Intelligence (“OMI”) within Enforcement evaluates incoming whistleblower TCRs and assigns specific, credible, and timely TCRs to members of Commission staff for further investigation or analysis.

TCR Evaluation
OMI reviews every TCR submitted by a whistleblower to the Commission. During the evaluation process, OMI staff examines each tip to identify those that are sufficiently specific, credible, and timely to warrant the additional allocation of Commission resources. When OMI determines a complaint warrants deeper investigation, OMI staff assigns the complaint to one of the Commission’s 11 regional offices, a specialty unit, or to an Enforcement Associate Director in the Home Office. Complaints that relate to an existing investigation are forwarded to the staff working on the existing matter. Tips that could benefit from the specific expertise of another Division or Office within the Commission generally are forwarded to staff in that Division or Office for further analysis.

The Commission may use information from whistleblower tips and complaints in several different ways. For example, the Commission may initiate an enforcement investigation based on the whistleblower’s tip or complaint. Even if a whistleblower's tip does not cause an investigation to be opened, it may still help lead to a successful enforcement action if the whistleblower provides additional information that substantially contributes to an ongoing or active investigation. Tips may also provide information that prompts the Commission to commence an examination of a regulated entity or a review of securities filings, which may lead to an enforcement action.

In certain instances, OMI may determine it is more appropriate that a whistleblower’s tip be investigated by another regulatory or law enforcement agency. When this occurs, the Commission will forward the tip to the Commission point of contact for that agency, consistent with the confidentiality requirements of Section 21F(h)(2) of the Exchange Act. Additionally, tips that relate to the financial affairs of an individual investor or a discrete investor group, usually are forwarded to the Commission’s Office of Investor Education and Advocacy (“OIEA”) for resolution. Comments or questions about agency practice or the federal securities laws also are forwarded to OIEA.
**Assistance by OWB**

OWB supports the tip allocation and investigative processes in several ways. When whistleblowers submit tips on a Form TCR in hard copy via mail or fax, OWB enters this information into the TCR System so it can be evaluated by OMI.\(^{12}\) During the evaluation process, OWB may assist by contacting the whistleblower to obtain additional information to assist in the triage process.

During an investigation, OWB serves as a liaison as necessary between the whistleblower (and his or her counsel) and SEC investigative staff. On occasion, OWB arranges meetings between whistleblowers and the subject matter experts on the Enforcement staff to assist in better understanding the whistleblower’s submissions and developing the facts of specific cases.

OWB staff also communicates frequently with Enforcement staff with respect to the timely documentation of information regarding the staff’s interactions with whistleblowers, the value of the information provided by whistleblowers, and the assistance provided by whistleblowers as the potential securities law violation is being investigated.

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\(^{12}\)Tips submitted by whistleblowers through the Commission’s online Tips, Complaints and Referrals questionnaire are automatically forwarded to OMI for evaluation.
WHISTLEBLOWER AWARDS MADE DURING FISCAL YEAR 2013

Process for Reviewing Applications for Awards
The Office posts on its website a Notice of Covered Action (“NoCA”) for each Commission enforcement action where a final judgment or order, by itself or together with other prior judgments or orders in the same action issued after July 21, 2010, results in monetary sanctions exceeding $1,000,000. OWB also announces on Twitter each time a new group of NoCAs is posted to its website, and sends email alerts to GovDelivery when its website is updated. In addition, whistleblowers may sign up to receive an update via email every time the list of NoCAs on OWB’s website is updated. Once a NoCA is posted, individuals have 90 calendar days to apply for an award by submitting a completed Form WB-APP to OWB by the claim due date listed for that action.

During Fiscal Year 2013, OWB posted 118 Notices of Covered Action for enforcement judgments and orders issued during the applicable period that included the imposition of sanctions exceeding the statutory threshold of $1,000,000. Since the program’s inception, OWB has posted 431 NoCAs to its website.

OWB analyzes each application for a whistleblower award, working with Enforcement staff responsible for the relevant action to understand the contribution or involvement the applicant had in the matter. OWB then prepares a written recommendation as to whether the applicant should receive an award, and if so, the percentage of the award.

The Claims Review Staff, designated by the Co-Directors of Enforcement, reviews OWB's recommendation in accordance with the criteria set forth in the Dodd-Frank Act and the Final Rules. The Claims Review Staff currently is comprised of three senior officers in Enforcement, including one of the Co-Directors. The Claims Review Staff then issues a Preliminary Determination setting forth its assessment as to whether the claim should be allowed or denied and, if allowed, setting forth the proposed award percentage amount.

If a claim is denied and the applicant does not object within the statutory time period, then the Preliminary Determination of the Claims Review Staff becomes the Final Order of the Commission. However, an applicant can request reconsideration and has 30 calendar days to request a copy of the record that

“Since the program’s inception, OWB has posted 431 NoCAs to its website.”

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13 GovDelivery is a vendor that provides communications for public sector clients.
14 240 C.F.R. §§ 21F-10(a), (b).
15 By posting a Notice of Covered Action for a particular case, the Commission is not making a determination either that (i) a whistleblower tip, complaint or referral led to the Commission opening an investigation or filing an action with respect to the case or (ii) an award to a whistleblower will be paid in connection with the case.
16 240 C.F.R. § 21F-10(d).
formed the basis of the Claims Review Staff’s decision or to request a meeting with OWB. Whistleblowers can seek reconsideration with OWB by submitting a written response within 60 calendar days of the later of (i) the date of the Preliminary Determination, or (ii) the date when OWB made materials available for the whistleblower’s review.\(^\text{17}\) OWB considers the issues and grounds advanced in the applicant’s response, along with any supporting documentation provided, and makes its recommendation to the Claims Review Staff. After this additional review, the Claims Review Staff issues a Proposed Final Determination, and the matter is forwarded to the Commission for its decision.\(^\text{18}\)

All Preliminary Determinations of the Claims Review Staff that involve an award of money also are forwarded to the Commission for consideration as Proposed Final Determinations irrespective of whether the applicant objected to the Preliminary Determination.\(^\text{19}\) These procedures ensure that the Commission makes the final decision for all claims in which (1) a monetary award is recommended or (2) there is a preliminary denial of claims to which the applicant objects.

Within 30 days of receiving notice of the Proposed Final Determination, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission. If no Commissioner requests such a review within the 30-day period, then the Proposed Final Determination becomes the Final Order of the Commission. In the event a Commissioner requests a review, the Commission reviews the record that the Claims Review Staff relied upon in making its determination and issues its Final Order.\(^\text{20}\)

**Whistleblower Awards**

Since the inception of the Commission’s whistleblower program in August 2011, the Commission has granted awards to six whistleblowers, with four whistleblowers receiving awards in Fiscal Year 2013. In each instance, the whistleblower provided high-quality original information that allowed the Commission to more quickly unearth and investigate the securities law violation, thereby better protecting investors from further financial injury and helping to conserve limited agency resources.

\(^\text{17}\) 240 C.F.R. § 21F-10(e).

\(^\text{18}\) 240 C.F.R. §§ 21F-10(g), (h).

\(^\text{19}\) 240 C.F.R. §§ 21F-10(f), (h).

On August 21, 2012, the Commission announced its first whistleblower\textsuperscript{21} award. In that instance, the whistleblower helped the Commission stop a multi-million dollar fraud. The whistleblower provided documents and other significant information that allowed the investigation to move at an accelerated pace and prevent the fraud from ensnaring additional victims. During Fiscal Year 2013, the Commission made three more payments to this whistleblower in connection with additional amounts that had been collected by the Commission in the underlying enforcement action.

On June 12, 2013, the Commission announced it had issued an award to three whistleblowers who helped the Commission shut down a sham hedge fund. Two of the whistleblowers provided information that prompted the Commission to open the investigation and stop the scheme before more investors were harmed. The third whistleblower provided independent corroborating information and identified key witnesses. On August 30, 2013, the Commission announced it had approved payouts to each of the three whistleblowers in connection with money that had been collected in a related criminal proceeding.\textsuperscript{22}

On October 1, 2013, the Commission announced it had made the largest whistleblower award to date, awarding over $14 million to a whistleblower whose information led to a Commission enforcement action that recovered substantial investor funds. Less than six months after receiving the whistleblower’s tip, the Commission was able to bring an enforcement action against the perpetrators and secure investor funds.

On October 30, 2013, the Commission announced it made another award payment to a whistleblower whose information and continued cooperation enabled the Commission to detect and halt an ongoing fraudulent scheme. Because the payment was made after the end of Fiscal Year 2013, this award payment is not reflected in the Fund or in the Commission’s financial statements for the 2013 fiscal year.

In sum, during Fiscal Year 2013, the Commission made $14,831,965.64 in award payments to whistleblowers under the Commission’s whistleblower program.

\textsuperscript{21}By law, the Commission must protect the confidentiality of whistleblowers and cannot disclose any information that might directly or indirectly reveal a whistleblower’s identity. Therefore, the information herein concerning the awards the Commission has issued does not include information regarding the whistleblower’s identity or other information that could indirectly reveal the whistleblower’s identity.

\textsuperscript{22}In cases where there are related criminal proceedings in which money is collected by another regulator, a provision in the whistleblower rules allows whistleblowers to then additionally apply for an award based off the other regulator’s collections in what qualifies as a “related action.” 240 C.F.R. § 21F-3(b).
SECURITIES AND EXCHANGE COMMISSION
INVESTOR PROTECTION FUND

Section 922 of the Dodd-Frank Act established the Fund to provide funding for the Commission’s whistleblower award program, including the payment of awards in related actions. In addition, the Fund is used to finance the operations of the SEC’s OIG’s suggestion program. The suggestion program is intended for the receipt of suggestions from Commission employees for improvements in work efficiency, effectiveness, productivity, and the use of resources at the Commission, as well as allegations by Commission employees of waste, abuse, misconduct, or mismanagement within the Commission.

Section 21F(g)(5) of the Exchange Act requires certain Fund information to be reported to Congress on an annual basis. Below is a chart containing Fund-related information for Fiscal Year 2013:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balance of Fund at beginning of fiscal year</td>
<td>$453,429,825.58</td>
</tr>
<tr>
<td>Amounts deposited into or credited to Fund during fiscal year</td>
<td>$0.00²⁷</td>
</tr>
<tr>
<td>Amount of earnings on investments during fiscal year</td>
<td>$650,206.56</td>
</tr>
<tr>
<td>Amount paid from Fund during fiscal year to whistleblowers</td>
<td>($14,831,965.64)</td>
</tr>
<tr>
<td>Amount disbursed to Office of the Inspector General during fiscal year</td>
<td>($51,457.14)</td>
</tr>
<tr>
<td>Balance of Fund at end of the fiscal year</td>
<td>$439,196,609.36</td>
</tr>
</tbody>
</table>

In addition, Section 21F(g)(5) of the Exchange Act requires a complete set of audited financial statements for the Fund, including a balance sheet, income sheet, income statement, and cash flow analysis. That information is included in the Commission’s Agency Financial Report, which is being submitted separately to Congress.

Section 21F(g)(2)(B) of the Exchange Act provides that the Fund shall be available to the Commission for “funding the activities of the Inspector General of the Commission under section 4(i).” 15 U.S.C. § 78u-6(g)(2)(B). The Office of the General Counsel has interpreted Section 21F(g)(2)(B) to refer to Section 4D of the Exchange Act, which establishes the Inspector General’s suggestion program. Subsection (e) of that section provides that the “activities of the Inspector General under this subsection shall be funded by the Securities and Exchange Commission Investor Protection Fund established under Section 21F.” 15 U.S.C. § 78d-4(e).
As referenced above, the financial information on the Fund contained in this report is unaudited, and Congress will receive the audited financial information on the Fund when the Commission submits its 2013 Agency Financial Report.
Pursuant to Section 21F(g)(3) of the Exchange Act, no monetary sanctions are deposited into or credited to the Fund if the balance of the Fund exceeds certain thresholds at the time the monetary sanctions are collected.
EVALUATION OF THE WHISTLEBLOWER PROGRAM BY THE INSPECTOR GENERAL

Section 922 of the Dodd-Frank Act mandated that OIG conduct a review of the Commission’s whistleblower program and submit a report of findings not later than 30 months after the Dodd-Frank Act’s enactment to the (1) Senate Committee on Banking, Housing and Urban Affairs, and (2) House Committee on Financial Services. During Fiscal Year 2013, OWB worked closely with OIG in providing information and materials to enable OIG to perform its evaluation of the Commission’s whistleblower program. On January 18, 2013, OIG issued its final report, a copy of which may be found on OWB’s webpage.28

OIG concluded that implementation of the final rules made the Commission’s whistleblower program clearly defined and user-friendly for those who have basic knowledge of securities laws, rules and regulations.29 OIG also found that the Commission’s whistleblower program is promoted on the Commission’s website, and that the public can easily access OWB’s homepage to learn about the whistleblower program and how to submit a tip.30 OIG determined that OWB’s outreach efforts have been strong and that “[b]ecause of the accessibility of OWB’s website from the SEC’s website, the program’s promotion through various social media methods, prominent presence on major internet search engines, and OWB’s internal and external outreach efforts . . . the SEC’s whistleblower program is effectively promoted on its website and is widely publicized.”31

In its report, OIG concluded that OWB is generally prompt in responding to information that is provided by whistleblowers, applications for whistleblower awards, and in communicating with interested parties.32 However, OIG recommended that the whistleblower program’s internal controls be strengthened by adding performance metrics.33

Enforcement agreed that performance metrics related to OWB’s internal controls may be of value to the whistleblower process.34 As a result, OWB developed performance metrics in 28 key areas and added those metrics to its internal control plan. For instance, on a quarterly basis, OWB will evaluate the percentage of whistleblower tips received by fax or through mail that are entered into the TCR System within three business days of receipt; the percentage of calls returned by OWB to messages left on the hotline within 24 business hours; and the percentage of initial reviews and acknowledgement or deficiency letters that are completed.

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29Id. at v.
30Id.
31Id. at 14.
32Id. at v. 14.
33Id. at v, 20-22.
34Id. at 42, Appendix VI.
within thirty business days of receipt of an application for a whistleblower award. OWB also adopted additional performance measures that it will evaluate on an annual basis.

OWB’s adoption of these performance metrics related to its internal controls was designed to strengthen and enhance the Commission’s whistleblower program. OWB began utilizing the newly-adopted performance metrics in the last quarter of Fiscal Year 2013.

Finally, OIG did not find any programmatic changes to the Commission’s whistleblower program to be necessary at this time. For instance, OIG observed that the Commission’s whistleblower award levels are comparable to the award levels of other federal government whistleblower programs and that the whistleblower appeals process and funding mechanism via the Fund are appropriate.\textsuperscript{35} OIG also determined that it was premature to introduce a private right of action into the Commission’s whistleblower program and concluded that the Freedom of Information Act exemption added by the Dodd-Frank Act aids whistleblowers in disclosing information to the Commission.\textsuperscript{36}

\textsuperscript{35}Id. at vi, 24, 26.

\textsuperscript{36}Id. at vi, 30.
APPENDIX A
WHISTLEBLOWER TIPS BY ALLEGATION TYPE
FISCAL YEAR 2013

* "Other" indicates that the submitter has identified their WB TCR as not fitting into any allegation category that is listed on the online questionnaire.
APPENDIX B
WHISTLEBLOWER TIPS BY ALLEGATION TYPE
COMPARISON OF FISCAL YEARS 2012 AND 2013

* "Other" indicates that the submitter has identified their WB TCR as not fitting into any allegation category that is listed on the online questionnaire.
APPE N D I X C
WHISTLEBLOWER TIPS RECEIVED BY GEOGRAPHIC LOCATION
UNITED STATES AND ITS TERRITORIES
FISCAL YEAR 2013*

*Multiple individuals may jointly submit a TCR under the Commission’s whistleblower program. Appendix C reflects the number of individuals submitting WB TCRs to the Commission within the United States or one of its territories, and not the total number of domestic WB TCRs received by the Commission during Fiscal Year 2013. For example, a WB TCR that is jointly submitted by two individuals in New York and New Jersey would be reflected on Appendix C as a submission from both New York and New Jersey. The total number of persons submitting WB TCRs in the United States or one of its territories during Fiscal Year 2013 was 2250, which constitutes approximately 65.54% of the individuals participating in the Commission’s whistleblower program for this period. Additionally, 779 individuals constituting 22.69% of the total number of persons participating in the Commission’s whistleblower program for Fiscal Year 2013 submitted WB TCRs without any foreign or domestic geographical categorization or submitted them anonymously through counsel.
**Appendix D**

**Whistleblower Tips Received by Geographic Location International Fiscal Year 2013*”

<table>
<thead>
<tr>
<th>Country/Region</th>
<th>Tips</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>6</td>
</tr>
<tr>
<td>Australia</td>
<td>15</td>
</tr>
<tr>
<td>Austria</td>
<td>3</td>
</tr>
<tr>
<td>Belgium</td>
<td>1</td>
</tr>
<tr>
<td>Belize</td>
<td>1</td>
</tr>
<tr>
<td>Botswana</td>
<td>1</td>
</tr>
<tr>
<td>Brazil</td>
<td>4</td>
</tr>
<tr>
<td>Cameroon</td>
<td>1</td>
</tr>
<tr>
<td>Canada</td>
<td>62</td>
</tr>
<tr>
<td>Cayman Islands</td>
<td>1</td>
</tr>
<tr>
<td>China, People’s Republic of China</td>
<td>52</td>
</tr>
<tr>
<td>Colombia</td>
<td>2</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>1</td>
</tr>
<tr>
<td>Curacao</td>
<td>4</td>
</tr>
<tr>
<td>Cyprus</td>
<td>1</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>1</td>
</tr>
<tr>
<td>Egypt</td>
<td>2</td>
</tr>
<tr>
<td>El Salvador</td>
<td>1</td>
</tr>
<tr>
<td>Finland</td>
<td>2</td>
</tr>
<tr>
<td>Germany</td>
<td>7</td>
</tr>
<tr>
<td>Ghana</td>
<td>17</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>4</td>
</tr>
<tr>
<td>India</td>
<td>18</td>
</tr>
<tr>
<td>Indonesia</td>
<td>1</td>
</tr>
<tr>
<td>Ireland</td>
<td>18</td>
</tr>
<tr>
<td>Israel</td>
<td>4</td>
</tr>
<tr>
<td>Italy</td>
<td>8</td>
</tr>
<tr>
<td>Japan</td>
<td>3</td>
</tr>
<tr>
<td>Kenya</td>
<td>1</td>
</tr>
<tr>
<td>Lebanese Republic</td>
<td>1</td>
</tr>
<tr>
<td>Malaysia</td>
<td>1</td>
</tr>
<tr>
<td>Mexico</td>
<td>4</td>
</tr>
<tr>
<td>Montenegro</td>
<td>1</td>
</tr>
<tr>
<td>Netherlands, The</td>
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</tr>
<tr>
<td>New Zealand</td>
<td>10</td>
</tr>
<tr>
<td>Norway</td>
<td>2</td>
</tr>
<tr>
<td>Pakistan</td>
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<tr>
<td>Panama</td>
<td>1</td>
</tr>
<tr>
<td>Portugal</td>
<td>3</td>
</tr>
<tr>
<td>Russia</td>
<td>20</td>
</tr>
<tr>
<td>Singapore</td>
<td>4</td>
</tr>
<tr>
<td>Slovenia</td>
<td>1</td>
</tr>
<tr>
<td>South Africa</td>
<td>4</td>
</tr>
<tr>
<td>South Korea</td>
<td>5</td>
</tr>
<tr>
<td>Spain</td>
<td>3</td>
</tr>
<tr>
<td>Sweden</td>
<td>4</td>
</tr>
<tr>
<td>Switzerland</td>
<td>8</td>
</tr>
<tr>
<td>Taiwan</td>
<td>2</td>
</tr>
<tr>
<td>Thailand</td>
<td>4</td>
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<tr>
<td>Turkey</td>
<td>8</td>
</tr>
<tr>
<td>Ukraine</td>
<td>2</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>2</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>66</td>
</tr>
<tr>
<td>Vietnam</td>
<td>3</td>
</tr>
</tbody>
</table>

*As with domestic WB TCRs, multiple individuals from abroad may jointly submit a TCR under the Commission’s whistleblower program. Appendix D reflects the number of individuals submitting WB TCRs to the Commission from abroad, and not the total number of foreign WB TCRs received by the Commission during Fiscal Year 2013. The total number of persons submitting WB TCRs from abroad during Fiscal Year 2013 was 404, which constitutes approximately 11.77% of the individuals participating in the Commission’s whistleblower program for this period.
The Foreign Corrupt Practices Act (“FCPA”) generally prohibits the bribing of foreign officials.

The FCPA also requires publicly traded companies to maintain accurate books and records and to have a system of internal controls sufficient to provide reasonable assurances that transactions are executed and assets are accounted for in accordance with management’s authorization and recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles (known as “GAAP”).

The FCPA can apply to prohibited conduct anywhere in the world, even, in certain circumstances, where there is no U.S. territorial connection, and extends to publicly traded companies (“issuers”) and their officers, directors, employees, agents, and stockholders. Agents can include third party agents, consultants, distributors, joint-venture partners, and others.

### Anti-Bribery Provisions

The anti-bribery provisions of the FCPA generally prohibit any offer, payment, promise, or authorization to pay money or anything of value to any foreign official, foreign political party, or candidate for public office, intended to influence any act or decision in order to assist in obtaining or retaining business.

- The term “anything of value” may include, among other things, cash, computer equipment, medical supplies, and vehicles.
- The term “foreign official” is defined broadly and can include any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or anyone acting on behalf of such government or department. For example, foreign officials would include foreign military officers in charge of procurement contracts, ministry-level officials, and officers and employees of government-owned or government-controlled entities.

The FCPA also prohibits bribes made to any person (“indirect bribes”) while “knowing” that some or all of the payments will be used by the person, directly or indirectly, to bribe foreign officials or other prohibited recipients. In this context, “knowing” includes willful blindness to the high probability of bribery.

### An Exception – and Two Affirmative Defenses

Generally, there are three situations in which payments to foreign officials would not result in liability under the FCPA. One approach is to show that the
challenged conduct falls within the so-called “routine governmental action” exception to the FCPA. The other two situations involve invoking what are known as “affirmative defenses.”

An affirmative defense generally is an assertion of facts and arguments that, if true, will defeat the prosecution's claim, even if all the allegations made by the prosecution are true. There are two affirmative defenses under the FCPA.

The exception and the two affirmative defenses are discussed in greater detail below.

The “Routine Governmental Action” Exception

The FCPA does not apply to any “facilitating or expediting payment,” the purpose of which is to expedite or secure the performance of a “routine governmental action.”

Routine governmental action encompasses those actions which ordinarily and commonly are performed by a foreign official in: (a) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (b) processing governmental papers, such as visas and work orders; (c) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (d) providing telephone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (e) actions of a similar nature. Routine governmental action does not include, among other actions, any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a company, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to, or continue business with, a company.

It is critical for those issuers that permit facilitation payments to have appropriate internal controls and compliance procedures designed to provide that such payments satisfy the exception for routine governmental action and are properly approved and documented in the issuer's books and records.

The Two Affirmative Defenses under the FCPA

There are two circumstances under which a payment, gift, offer, or promise of anything of value to a foreign official may qualify as an “affirmative defense” under the FCPA: (1) the payment, gift, offer, or promise of anything of value is lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or (2) the payment, gift, offer, or promise of anything of value is a reasonable and bona fide expenditure, such as travel and lodging expenses, directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency thereof.

This means that, if you are accused of bribing a foreign official, you would have an affirmative defense if you could show that the payment, gift, offer, or promise of anything of value to the foreign official was lawful under the written laws and regulations of that foreign official’s country, or was related to a reasonable and bona fide expenditure as described above.

In relying on the local law of the foreign country as an affirmative defense for a payment, gift, offer, or promise of anything of value to a foreign official, the law or regulation being relied upon, at the time of the conduct, must be “written.” Local practice, custom, or other unwritten policies do not qualify as an affirmative defense.

In addition, recent FCPA enforcement actions have involved travel, lodging, and entertainment provided to foreign officials. As with the exception for facilitation payments, issuers that incur these types of expenses on behalf of foreign government officials must have the
appropriate internal controls and compliance procedures in place to provide that these expenses satisfy the “reasonable” and “bona fide” criteria of this affirmative defense and are properly approved and documented in the issuer’s books and records.

Accounting Provisions

The FCPA has two related accounting requirements: (1) books and records; and (2) internal controls. The “books and records” provisions require a company to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company. The “internal controls” provisions require a company to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (a) transactions are executed in accordance with management’s authorization; (b) transactions are recorded as necessary to permit preparation of financial statements and to maintain accountability for assets; (c) access to assets is limited to management’s authorization; and (d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Enforcement of the FCPA

The Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) are jointly responsible for enforcing the FCPA. The SEC brings civil enforcement actions against issuers and their officers, directors, employees, and agents. The DOJ criminally prosecutes issuers and their officers, directors, employees, agents, and domestic concerns, as well as foreign persons and entities (acting within the U.S.). The DOJ also has civil anti-bribery enforcement authority over persons and non-issuers subject to the FCPA. Violations of the FCPA can constitute violations of other federal securities laws and criminal laws.

Penalties

The sanctions for FCPA violations can be significant. Companies that have committed either civil or criminal FCPA violations may have to pay back profits obtained by making improper payments through disgorgement or restitution plus prejudgment interest, pay substantial criminal fines or civil penalties, and/or be subject to oversight by an independent compliance monitor, and for criminal violations they may also be subject to suspension and debarment actions limiting business opportunities with the U.S. government.

For individuals, conviction of a criminal FCPA violation may result in imprisonment and significant fines. The FCPA prohibits companies from paying fines incurred by individuals, either directly or indirectly. Individuals also are subject to significant civil penalties and disgorgement plus prejudgment interest.

Related Information

Press Release: SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010)
Press Release: SEC Charges ABB for Bribery Schemes in Mexico and Iraq (Sept. 29, 2010)