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Over the thirty-seven years that have passed since the Foreign Corrupt Practices Act[1] (FCPA) was signed into law by President Carter in 1977, relatively few cases have been litigated in the federal courts. Instead, the overwhelming majority of cases have been resolved either through plea agreements; non-prosecution or deferred prosecution agreements; or through consented-to civil dispositions in which the accused neither admitted nor denied the allegations of wrongdoing made against them. Additionally, the Department of Justice has made its views of the Act known through the opinion procedure releases that have been issued in response to requests from persons subject to the Act regarding whether the Department would take enforcement action under certain specified circumstances.[2] As a consequence, the government's voice has dominated the interpretation of the Act, and individuals and entities together with their counsel have had to look to these sources for guidance.

Recently, however, individual defendants have challenged the government's interpretation of several of the central features of the Act in prosecutions and civil enforcement actions brought in the United States Courts by the Department of Justice and the Securities and Exchange Commission. These challenges have involved the applicability of the Act's definition of "foreign official" to employees of commercial enterprises in which a foreign government has an ownership interest, and the requirement of a nexus between a corrupt payment and the obtaining or retaining of business with the foreign government by the payor or a third party. While these challenges have not always been successful, the resulting judicial resolution of these issues has been informative.

Additionally, recent enforcement actions brought against public companies by the Securities and Exchange Commission have signaled that the absence of an effective program of compliance with the FCPA may be regarded as a failure to implement an effective system of internal financial controls as required by the Act.[3] There may also be an issue whether an executive's reliance on the corporation's effective compliance program would evidence a lack of the requisite corrupt intent in the

1. 15 U.S.C. § 78dd-1 (1998).
2. The Act required the Attorney General to establish a procedure "to provide responses to specific inquiries [by affected persons and entities] concerning conformance of their conduct with the Department of Justice's present enforcement policy" regarding the anti-bribery provisions of the Act. Such responses create a rebuttable presumption "that conduct, which is specified in a request . . . 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 anti-bribery provisions of the Act. This presumption may be overcome by a preponderance of evidence that the information submitted was not "accurate and complete," and that conduct in fact was not within the scope of the conduct specified in the request for opinion. 15 U.S.C. §§ 78dd-1(e)(1)-1(f)(1). The Department of Justice procedures are codified at 28 C.F.R. § 80 (2015). Since 1980, there have been 59 opinion procedure releases.
3. 15 U.S.C. § 78m(b)(2)(B) (2012).

event an improper payment were to be made by a subordinate.[4]

Definitive and authoritative resolution of these issues remains to be seen.

Background of the Foreign Corrupt Practices Act

The prohibitions against the bribery of foreign government officials set forth in the Foreign Corrupt Practices Act grew out of the revelation of widespread bribery by U.S. companies doing business abroad in the investigation of the 1972 burglary of the Democratic National Committee's offices in the Watergate office building in Washington, D.C. The Special Watergate Prosecutor's investigation exposed overseas corrupt payments that had been made in order to procure the sales of goods and services to foreign governments as well as to create off-book funds that were used to make illegal campaign contributions to the Nixon re-election campaign. The Watergate investigation resulted in the criminal prosecution of twenty-two corporations and twenty-one individuals.[5]

The Watergate Prosecutor's findings concerning the activities of some of the largest publicly traded companies in the United States led to an inquiry by the Securities and Exchange Commission into "questionable payments" by U.S. public companies. This investigation and the SEC's "voluntary disclosure program" resulted in enforcement actions against Ashland Oil Company, Boeing Company, Braniff Airways, General Tire and Rubber Company, Northrop Corporation, and United Brands Company, among others, and admissions by more than 400 companies (117 of which were among the Fortune 500 largest companies) of corrupt payments in excess of $300 million.[6]

Both houses of Congress held extensive hearings concerning overseas payments by U.S. companies that included testimony by senior corporate executives concerning the use of foreign subsidiaries, off-book "slush funds," and foreign agents to make corrupt payments to foreign government officials.[7] As a consequence,

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4. This issue was litigated but not resolved in Mark A. Jackson & James J. Ruehlen, Accounting and Auditing Enforcement Act Release No. 3564, 2014 WL 3101442 (July 7, 2014), in which the charges against Mr. Jackson were dismissed in exchange for his consent, without admitting or denying the allegations in the complaint, to the entry of an order enjoining him from violating the accounting provisions of the Act as a controlling person.
5. *See Abuses of Corp. Power*: *Hearings before the Subcomm. on Priorities in Gov't of the Joint Econ. Comm.,* 94th Cong. 91 (1976) [hereinafter *Abuses of Corp. Power*]; H. Lowell Brown, BRIBERY IN INT'L COMMERCE (Thomson-West), Ch. 1.
6. *See The Activities of Am. Multinational Corps. Abroad*: *Hearings before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l. Relations*, 94th Cong. 36 (1975) [hereinafter *The Activities of Am. Multinational Corps. Abroad*]; *Unlawful Corp. Payments Act of 1977*: H. Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 95-640 at 4 (1977) [hereinafter *Unlawful Corp. Payments Act of 1977*].
7. *See The Activities of Am. Multinational Corps. Abroad, supra* note 6; *Multinational Corp. and U. S. Foreign Policy*: *Hearings before the Subcomm. on Multinational Corp. of the Comm. on Foreign*

Congress enacted the Foreign Corrupt Practices Act,[8] which was signed into law by President Carter on December 19, 1977.[9] Since its original enactment, the FCPA has been amended twice – first in 1988,[10] and subsequently in 1998[11] to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Organization for Economic Cooperation and Development to which the United States was a signatory.[12]

Overview of the Foreign Corrupt Practices Act

The FCPA sought to address the problem of foreign bribery by individuals and entities subject to U.S. jurisdiction in two distinct but related ways. First, reflecting the concern of the SEC that the use of shareholder funds to make corrupt payments was being disguised by public companies through false accounting entries and the creation of off-book slush funds, the Act established for the first time federal requirements for corporate governance.[13] To that end, the Act amended the Securities Exchange Act of 1934,[14] and established requirements for accounting and internal financial controls that were applicable to all corporations whose shares were traded on U.S. exchanges and were registered with the SEC in accordance with the 1934 Exchange Act (i.e., corporations that are "issuers").[15] These requirements apply to all issuers regardless of whether the company engages in any overseas business.[16] The accounting and controls requirements apply to foreign corporations

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Relations, U.S. Senate, 94th Cong. 1 (1976); *Abuses of Corp. Power*, *supra* note 5; *Foreign Payments Disclosure: Hearings before the Subcomm. on Priorities and Econ. in Gov't of the Joint Econ. Comm.*, 94th Cong. 1 (1976); *Foreign Corrupt Practices Domestic and Foreign Inv. Disclosure*: *Hearings before the Comm. on Banking, Housing and Urban Affairs*, 95th Cong. 1 (1977); *Unlawful Corp. Payments Act of 1977*, *supra* note 6; *Corp. Business Practices and U.S. Foreign Policy*: *Hearings before the Subcomm. on Int'l Econ. Policy and Trade of the Comm. on Int'l Relations*, H.R. Rep., 95th Cong. 1 (1977).

8. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977).
9. Presidential Statement on Signing the Foreign Corrupt Practices and Investment Disclosure Bill, 13 Weekly Comp. Pres. Doc. 1909 (Dec. 20, 1977).
10. Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988).
11. Pub. L. No. 105-366, § 1. (1998).
12. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions]; *see* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C. J. OF INT'L & COMM. REG. 239 (2001).
13. *See* Sec. and Exch. Comm'n v. World-Wide Coin Investments, Ltd., 567 F. Supp. 724, 748-49 (N.D. Ga. 1983).
14. 15 U.S.C. § 78a-o (2012).
15. 15 U.S.C. § 78c(a)(8) (2012).
16. *See* H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post-Caremark Era*, 26 DEL. J. CORP. L. 1 (2001).

whose shares are listed on U.S. exchanges,[17] including shares traded in the form of American Depository Receipts ("ADRs").[18]

The accounting provisions of the Act require that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately reflect the transactions and dispositions of the assets of the issuer."[19] Issuers are required to implement a system of financial controls that are sufficient to provide "reasonable assurances" that: 1) transactions are executed in accordance with management's authorization; 2) transactions are recorded as necessary to permit the preparation of financial statements that conform to applicable accounting standards, and to maintain accountability for assets; 3) access to assets is permitted only in accordance with management's authorization; and 4) at reasonable intervals, comparisons are made of the recorded accountability of assets and the existing assets, and that appropriate action is taken with respect to any differences.[20] While these requirements are not subject to a requirement of materiality,[21] reasonableness has been recognized as the governing standard.[22]

In order to confront the problem of overseas payments directly, Congress rejected the approach favored by the SEC of requiring disclosure of questionable foreign payments in a company's financial statements and instead enacted provisions making certain acts of foreign bribery crimes under U.S. law.[23] Thus, it is a criminal

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17. *See, e.g.,* Tyco Int'l Ltd., Accounting and Auditing Enforcement Act Release No. 3409, 2012 WL 4359227 (Sept. 24, 2012); United States v. Novo Nordisk A/S, No. 1:09-cr-00126-RJL (D.D.C. May 11, 2009).
18. *See, e.g., United States v. Total S.A.*, No. 1:13-cr-239 (E.D. Va. May 29, 2013); Total S.A., Exchange Act Release No. 69654, 2013 WL 2326682 (May 29, 2013); Koninklijke Philips Electronics, N.V., Exchange Act Release No. 69327, 2013 WL 1384548 (Apr. 5, 2013).
19. 15 U.S.C. § 78m(b)(2)(A) (2012).
20. 15 U.S.C. § 78m(b)(2)(B) (2012).
21. *See* Promotion of the Reliability of Financial Information and Prevention of Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15570, 16 SEC Docket 1143 (Feb. 15, 1979); *see also* Frederick B. Wade, *An Examination of the Provisions and Standards of the FCPA*, 9 SYR. J. INT'L L. & COM. 258, 263 (1982) (Wade was the Chief Counsel to the SEC Division of Enforcement at the time).
22. With respect to the accounting provisions, *see* COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, FOREIGN CORRUPT PRACTICES AND DOMESTIC FOREIGN INVESTMENT IMPROVED DISCLOSURE ACT OF 1977, S. Rep. No. 95-114 at 8 (1977); H.R. Rep. 95-83, at 10-11 (1977) (Conf. Rep.); Securities and Exchange Commission Release Notice, No. 17500 (1981) (comments of SEC Chairman Harold M. Williams); Fed. Sec. L. Rep. (CCH) ¶ 82,882 at 84,341 (1981) (testimony of SEC Chairman John S.R. Shad before the Subcomm. on Securities and the Subcommittee on International Monetary Policy of the Committee on Banking, Housing and Urban Affairs concerning S. 708). With respect to the financial controls provisions, *see* Omnibus Trade and Competitiveness Act of 1988 Conference Report, H.R. REP. NO. 100-576, at 917 (1988); *see also* Statement of Management on Internal Accounting Control, 44 Fed. Reg. 26702, 26704 (May 4, 1979).
23. *See* Committee on Interstate and Foreign Commerce, Unlawful Corporate Payments Act of 1977, H.R. REP. NO. 95-640, at 6 (1977).

offense punishable by imprisonment and substantial fines,[24] for an individual or entity to:

- Use 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 money or an offer, gift, promise to give or the authorization of the giving of anything of value;
- To any foreign official, foreign political party, political party official, or candidate for public office;
- For the purpose of: influencing an act or decision of the foreign official, inducing the foreign official to do or omit doing an act in violation of the official's lawful duty, securing an improper advantage, or of inducing the use of the person's influence with the government or an instrumentality of the government;
- In order to assist the person or entity in obtaining or retaining business or to direct business to any person.

It is likewise unlawful to make such a payment or offer to another person while knowing that all or a portion of the funds or thing of value would be offered, promised or given to a foreign official (political party, party official or candidate for public office), either directly or indirectly, for the same prohibited purpose.[25]

Unlike the accounting and financial controls requirements, the anti-bribery provisions of the Act are not restricted in their applicability to issuers, but rather apply as well to "domestic concerns"[26] and to foreign persons whose actions subject them to the jurisdiction of the United States.[27] Under the Act, a "domestic concern" is "any individual who is a citizen, national, or resident of the United States," as well as "any corporation, partnership, association, joint stock company, business trust, unincorporated organization, or any 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."[28]

At the time the FCPA was enacted, there had been testimony in various congressional hearings concerning the use of foreign subsidiaries as conduits for corrupt payments, and Congress wrestled with whether the foreign subsidiary of a

24. Individuals may be imprisoned for up to five years and fined up to $100,000. Individuals are also subject to a civil penalty of up to $10,000 for each violation. Entities may be fined up to $2 million. Fines and penalties imposed on individuals cannot be paid or reimbursed by their employers. 15 U.S.C. § 78dd-2(g) (1998).
25. 15 U.S.C. § 78dd-1(a), 2(a), 3(a).
26. *Id.* at 2(a).
27. *Id.* at 3(a).
28. *Id.* at 2(h)(1).

U.S. corporation should be subject to prosecution as a domestic concern. The House adopted a bill that extended jurisdiction over subsidiaries while the Senate did not. In conference, the House receded to the Senate.[29] Nevertheless, the conference made it clear that an issuer or domestic concern that engaged in prohibited bribery through a subsidiary, or any third party, would be liable under the Act.[30] Additionally, the Department of Justice has taken the position that the U.S. subsidiary of a foreign corporation is subject to prosecution as a domestic concern.[31]

The government will look to where a corporation has its principal place of business as well as the jurisdiction in which the corporation was organized.[32] In at least one instance, the government asserted that a company registered in the Netherlands with its principal place of business in Israel was nevertheless a U.S. domestic concern based on indications of the company's gradual relocation to the United States.[33]

United States nationals are deemed to be domestic concerns regardless of the nationality of the corporate employer.[34]

The 1998 amendments to the Act also enhanced U.S. jurisdiction over foreign companies and individuals, including foreign subsidiaries of U.S. companies. The amendments implemented the provisions of the OECD anti-bribery convention, which called on all parties to exercise fully their national and territorial jurisdiction in prohibiting international bribery.[35] Accordingly, Congress added a new section to

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29. H.R. REP. NO. 95-831 at 13 (1977) (Conf. Rep.).
30. *Id.* at 14. The liability of the U.S. company for the acts of a foreign subsidiary may be direct or may be based on principles of alter ego. *See* H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1 (1998).
31. *See United States v. Tillery and Novak*, No. 4:08-cr-00022 (S.D. Tex. Jan. 17, 2008) (the Panamanian subsidiary of a Panamanian corporation whose principal place of business was Tulsa, Oklahoma was alleged to be a domestic concern); *United States v. Hoskins and Pomponi*, No. 3:12-cr-00238-JBA (D. Ct. Jul. 30, 2013) (the U.S. subsidiary of a French parent corporation that was organized under the laws of Delaware and headquartered in Windsor, Connecticut was alleged to be a domestic concern); *United States v. Basurto*, No. 4:09-cr-00325 (S.D. Tex. Jun. 10, 2009) (the U.S. subsidiary of a Swiss corporation that was organized under the laws of Delaware and headquartered in Sugarland, Texas was alleged to be a domestic concern).
32. *See*, *e.g.*, *United States v. Brown*, No. 4:06-cr-00316 (S.D. Tex. Sept. 11, 2006) (a Panamanian corporation and its wholly owned subsidiary, also a Panamanian company, were charged as domestic concerns on the grounds that their principal place of business was Tulsa, Oklahoma).
33. These indications were: 1) retention of a chief executive officer based in Houston, Texas; 2) relocation of senior executives to Houston; 3) engagement of an independent auditor in Houston; 4) relocation of the financial and accounting functions to Houston; and 5) relocation of the "coordination of operational business activities" to Houston. *In re: Paradigm B.V.*, Letter from Mark F. Mendelsohn, Deputy Chief, Fraud Section, Dep't of Justice to Saul M. Pilchen (Sept. 21, 2007).
34. *See United States v. Hammarskjold*, No. 1:13-mj-02086-JS (D.N.J. Nov. 8, 2013) (the former CEO of PetroTiger Ltd., a British Virgin Islands oil and gas company, who was a U.S. citizen was prosecuted as a domestic concern for conspiracy to violate the FCPA).
35. OECD Convention on Combating Bribery of Foreign Public Officials in International Business

the anti-bribery provisions establishing jurisdiction, under certain circumstances, over individuals and entities that are neither issuers nor domestic concerns.[36] Under this new section, such persons[37] who "while in the territory of the United States," corruptly make use of the U.S. mails or any means or instrumentalities of interstate commerce and who commit "any act in furtherance" of a prohibited payment may be subject to prosecution in the United States. Liability does not require that the person have operations in the United States, however. Instead, jurisdiction may be asserted on the basis of acts within the territory such as the transfer of funds from a depository in the United States to an account overseas.[38]

In enacting the anti-bribery provisions, Congress drew heavily from the domestic bribery statute.[39] As a consequence, the use of "corruptly" to define the necessary intent requires proof of a *quid pro quo* between the payment and official misconduct such that the payment to a foreign official must be intended to cause that official to misuse her or his public office.[40]

Underlying the anti-bribery provisions is the requirement that the prohibited payment be made to a foreign official "in order to assist" the payor "in obtaining or retaining business" or "directing business to any person." That is, there must be a business nexus underlying the corrupt payment. The contours of some of these core concepts have begun to emerge through challenges to the government's construction of the Act in cases litigated in the federal courts.

Transactions, *supra* note 12, 37 I.L.M. at 5.

36. 15 U.S.C. § 78dd-3 (1998).

37. Person is defined in the Act as being "any natural person other than a national of the United States . . . 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." 15 U.S.C. § 78dd-3(f)(1).

38. *See United States v. Statoil,* ASA, No. 06-cr-960 (S.D.N.Y. Oct. 13, 2006). Statoil admitted making corrupt payments to an official of the Government of Iran with funds transferred from a bank in New York to a bank in Switzerland (shares of Statoil were also traded on U.S. exchanges in the form of ADRs). In another case involving Aibel Group, Ltd., a British subsidiary of a privately held corporation, was charged with violations of the FCPA. It was alleged that Aibel Group had used affiliated U.S. companies to perform subsea drilling projects and that Aibel Group personnel had made telephone calls and had sent email communications to employees of the U.S. companies to arrange for corrupt payments to be made to Nigerian government officials. *United States v. Aibel Group Limited*, No. 4:07-cr-00005 (S.D. Tex. Jan. 5, 2007).; In *United States v. Misao Hioki*, No. 4:08-cr-00795 (S.D. Tex. Dec. 8, 2008), a Japanese executive was charged with conspiracy to violate the FCPA based on his participation in meetings in the U.S. with personnel from the company's U.S. subsidiary and his coordination of the corrupt payments through officials of the U.S. subsidiary, *available at* http://www.justice.gov/criminal-fraud/case/united-states-v-misao-hioki-court-docket-number-08-cr-795.

39. 18 U.S.C. § 201(b) (1994). *See* H.R. REP. NO. 95-640 at 8 (1977); S. REP. NO. 95-114 at 10 (1977).

40. H.R. REP. NO. 95-640 at 8 (1977); S. REP. NO. 95-114 at 10 (1977); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999).

Foreign Official

The intended recipient of the prohibited payment must be a foreign official, a foreign political party or an officer of a political party, or a candidate for foreign political office. The Act states that a foreign official is "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."[41] Officers and employees of foreign governments and their agencies are prototypic foreign officials. However, the Act includes officers and employees of government "instrumentalities," which has led the government to a broad interpretation of the persons who are foreign officials.

Construing the domestic bribery statute, the United States Supreme Court has observed that to be considered a "public official," it is only necessary that an individual "possess some degree of official responsibility for carrying out a federal program or policy."[42] Thus, the Court said, the proper inquiry is not so much the legal employment status of the individual, "but rather whether the person occupies a position of public trust with official federal responsibilities."[43] For that reason, private sector employees who performed functions of public trust have been treated as being public officials for purposes of the bribery statute.[44] Similarly, individuals who are "in a position of providing information and making recommendations to decision makers" are considered public officials, as long as their "input is given

41. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). The OECD anti-bribery convention defined a "foreign public official" as being "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization." In this connection, the convention defined a "foreign country" as including "all levels and subdivisions of government from national to local." OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 12, 37 I.L.M. at 9.

42. *Dixson v. United States*, 465 U.S. 482, 489 (1984).

43. *Id.* at 496. Accordingly, a variety of federal employees have been deemed to be "public officials" for purposes of the domestic bribery statute. These employees have included grain inspectors, *United States v. Kirby*, 587 F.2d 876 (7th Cir. 1978); postal service clerks and truck drivers, *United States v. Gelb*, 881 F.2d 1155 (2d Cir. 1989); agents of the Fish and Wildlife Service, *Nordgren v. United States*, 181 F.2d 718 (9th Cir. 1950) and of the Bureau of Alcohol, Tobacco and Firearms, *United States v. Gjieli*, 717 F.2d 968 (6th Cir. 1983).

44. *See, e.g.*, *Dixson*, 465 U.S. at 482 (employees of a non-profit corporation that administered federal community development block grants were public officials). State government employees who administered federal funds were similarly considered to be public officials. *See, e.g., United States v. Hollingshead*, 672 F.2d 751 (9th Cir. 1982) (the director of the state housing authority); *United States v. Snyder*, 930 F.2d 1090 (5th Cir. 1991) (member of the state public service commission).

sufficient weight to influence the decision at issue."[45]

The government has interpreted "foreign officials" under the FCPA in the same way. In *United States v. Young & Rubicam, Inc.*,[46] a U.S. advertising agency was prosecuted under the FCPA for payments made to a Jamaican businessman, Arnold Foote, in order to obtain the advertising account of the Jamaican Tourist Board. Foote was described as having had "close ties to the Jamaican Labor Party and to the administration of Prime Minister Edward Sega." Foote was also the Executive Chairman of a "government instrumentality," Martins Travel, and he "acted in an official capacity on behalf of the Minister of Tourism and the Jamaican Tourist Board" as an advisor to the Government of Jamaica with respect to "tourism, advertising and public relations matters," which included the selection of the advertising agency for the Jamaica Tourist Board.[47] In like fashion, Goodyear International Corporation was prosecuted under the FCPA for payments made to employees of the Iraqi Trading Company, a state-owned enterprise through which the Government of Iraq purchased automobile tires for resale in Iraq,[48] and the Sam P. Wallace Company, Inc., was prosecuted for payments made to the Chairman of the Trinidad and Tobago Racing Authority in order to obtain a contract for the construction of a race track grand stand.[49]

Payments to employees of government-owned enterprises have also been the basis for prosecutions under the FCPA. Administrators and physicians employed by public health authorities have been treated as foreign officials,[50] as have employees

45. United States v. Kenney, 185 F.3d 1217, 1221-22 (11th Cir. 1999) (an employee of a government contractor who served as an "acquisition manager" advising U.S. Air Force decision makers was a public official).
46. United States v. Young & Rubicam, Inc. 741 F. Supp. 334 (D. Conn. 1990).
47. *Id.* at 350.
48. United States v. Goodyear International Corporation, No. 89-156 (D.D.C. May, 11 1989); *see also* Allianz SE, Exchange Act Release No. 68448, 2012 WL 6561120 (Dec. 17, 2012) (payments to "account introducers" employed by Indonesian state-owned entities in order to secure contracts for government financed projects); Diageo, PLC, Exchange Act Release No. 64978, 2011 WL 3159087 (Jul. 27, 2011) (payments to employees of the Canteen Services Department of the Indian military to secure sales of liquor).
49. United States v. Sam P. Wallace Company, Inc., No. Cr. 83-0034 (P.R. Feb. 23, 1983); *see also* United States v. Green, No. 2:08-cr-00059-GW (C.D. Cal. Jan. 16, 2008) (payments to the daughter of a senior official of the Tourism Authority of Thailand to secure the contract for the Bangkok International Film Festival).
50. *See* United States v. Syncor Taiwan, Inc., No. 02-cr-124-SVW (C.D. Cal. Dec. 5, 2002); Syncor Int'l Corp., Accounting and Auditing Enforcement Act Release No. 1688, 2002 WL 31757645 (Dec. 10, 2002); Syncor Int'l Corp., Exchange Act Release No. 46979, 2002 WL 31757634 (Dec. 10, 2002) (cease and desist order) Schering-Plough Corp., Litigation Release No. 18740, 2004 WL 1268036 (June 9, 2004); United States v. DPC, No. 2:05-cr-00482-DSF (C.D. Cal. May 20, 2005); Diagnostic Products, Exchange Act Release No. 51724, 2005 WL 1211548 (May 20, 2005); Johnson & Johnson, Accounting and Auditing Enforcement Act Release No. 3261, 2011 WL 1341152 (April 8, 2011); Smith & Nephew Plc., Accounting and Auditing Enforcement Act Release No. 3363, 2012 WL 8703676 (Feb. 6, 2012); *Tillery and Novak*, *supra* note 31; Biomet,

of state-owned airlines,[51] purchasing agents of government-owned steel mills,[52] directors of a 77% state-owned aluminum smelter,[53] employees of state-owned manufacturers of electrical equipment,[54] and the president of a state-owned company that invested in real estate joint ventures.[55]

Prosecutions have also arisen from payments to officials and employees of state-owned or controlled monopolies. For example, officials of state-controlled entities engaged in the exploration and exploitation of petroleum resources have been regarded as foreign officials because the entities were considered to be government instrumentalities.[56] Officers and employees of state-owned electric power[57] and telecommunications monopolies[58] have also been regarded as foreign officials. In at

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Inc., Accounting and Auditing Enforcement Act Release No. 3374, 2012 WL 1894151 (Mar. 26, 2012); Orthofix Int'l N.V., Litigation Release No. 22412, 2012 WL 2836935 (Jul. 10, 2012); Pfizer, Inc. & Wyeth LLC, Accounting and Auditing Enforcement Act Release No. 3399, 2012 WL 3201839 (Aug. 8, 2012); Eli Lilly, Litigation Release No. 22576, 2012 WL 6642672 (Dec. 20, 2012); Stryker Corp., Exchange Act Release No. 70751, 2013 WL 5757376 (Oct. 24, 2013).

51. Con-Way, Inc., Accounting and Auditing Enforcement Act Release No. 2866, 2008 WL 3925208 (Aug. 27, 2008).

52. United States v. SSI International Far East Ltd., No. 06-cr-398 (D. Or. Oct. 10, 2006); Schnitzer Steel Industries, Inc., Exchange Act Release No. 54606, 2006 WL 2987067 (Oct. 16, 2006); *see also* Robert W. Philip, Litigation Release No. 20397, 2007 WL 4355531 (Dec. 13, 2007).

53. United States v. Alcoa World Alumina LLC, No. 2:14-cr-00007-DWA (W.D. Pa. Jan. 9, 2014); Alcoa, Inc., Exchange Act Release No. 71261, 2014 WL 69457 (Jan. 9, 2014).

54. Maxwell Technologies, Inc., Accounting and Auditing Enforcement Act Release No. 3236, 2011 WL 300237 (Jan. 31, 2011); United States v. Reido, 13-cr-03789 (S.D. Cal. 2013).

55. Peterson, Accounting and Auditing Enforcement Release No. 3384, 2012 WL 1894189 (Apr. 25, 2012).

56. *See* United States v. Bodmer, No. 1:03-cr-00947-SAS (S.D.N.Y. Aug. 5, 2003); ABB Ltd., Accounting and Auditing Enforcement Act Release No. 2049, 2004 WL 1514888 (July 6, 2004); United States v. Brown, No. 4:06-cr-0016 (S.D. Tex. Sept. 11, 2006); United States v. Statoil ASA, No. 06-cr-960 (S.D.N.Y. Oct. 13, 2006); Statoil ASA, Exchange Act Release No. 54599, 2006 WL 2933839 (Oct. 13, 2006); United States v. Steph, No. 4:07-cr-00307 (S.D. Tex. Nov. 5, 2007); Srinivasan, Accounting and Auditing Enforcement Release No. 2726 (September 25, 2007); Electronic Data Systems Co., Exchange Act Release No. 56519, (Sept. 25, 2007); *Tillery and Novak*, *supra* note 31; United States v. Willbros Group, Inc., No. 4:08-cr-00287 (S.D. Tex. May 14, 2008); United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. Feb. 6, 2009); United States v. Tessler & Chodan, No. 4:09-cr-00098 (S.D. Tex. Feb. 17, 2009); United States v. Morlok, No. 8:09-cr-00005-JVS (C.D. Cal. Jan. 7, 2009); United States v. Stuart Carson, et. al., No. 8:09-00077-JVS (C.D. Cal. April 8, 2009); United States v. Covino, No. 8:08-cr-00336-JVS (C.D. Cal. Dec. 17, 2009); ENI S.p.A., Accounting and Auditing Enforcement Act Release No. 3149, 2010 WL 2685825 (Jul. 7, 2010); Summers, Accounting and Auditing Enforcement Act Release No. 3169, 2010 WL 2685825 (Aug. 5, 2010); *United States v. Total S.A.*, No. 1:13-CR-239 (E.D. Va. 2013); Total S.A., Securities Exchange Act Release No. 69654, 2013 WL 2326682 (May 29, 2013); Weatherford Int'l, Ltd., Litigation Release No. 22880, 2013 WL 6173833 (S.D. Tex. Nov. 26, 2013).

57. *See Basurto*, No. 4:09-cr-0032, *supra* note 31; United States v. O'Shea, No. 4:09-cr-00629 (S.D. Tex. Nov. 16, 2009); ABB Ltd., Accounting and Auditing Enforcement Act Release No. 3191, 2010 WL 3791963 (Sept. 29, 2010); *Maxwell Technologies, Inc.*, 2011 WL 300237, *supra* note 54; United States v. Pomponi, No. 12-CR-238 (JBA) (D. Conn. Apr. 30, 2013); United States v. Hoskins, No. 12-CR-238-JBA (D. Conn. Jul. 30, 2013).

58. *See* United States v. Sapsizian, et al, No. 1:06-cr-20797-PAS (S.D. Fla. Dec. 19, 2006); Lucent

least one case, the foreign officials were identified only as employees of "state owned enterprises."[59] Several defendants have challenged their indictments on the grounds that the recipients of the allegedly corrupt payments were not foreign officials within the meaning of the Act.

United States v Aguilar

In the first of these cases, *United States v. Aguilar*,[60] two individuals, Keith E. Lindsey and Steve K. Lee, and their employer, Lindsey Manufacturing Company (collectively, the "Lindsey defendants") were charged with conspiracy to violate the FCPA and with nine counts of substantive violations of the Act.[61] The gravamen of these charges was that the defendants had paid bribes to two high-ranking officials of the Comision Federal de Electricidad ("CFE"), an electric utility company that was wholly owned by the Government of Mexico. The prosecution alleged that these payments had been made through a third party agent, Grupo Internacional de Asesores S.A., which was owned by the Aguilar defendants.

The defendants sought dismissal of the FCPA charges contending that "under no circumstances can a state-owned corporation be a department, agency or instrumentality of a foreign government," and therefore, officers and employees of the corporation could not be foreign officials within the meaning of the Act. The district court denied the motion to dismiss the indictment.

According to the allegations in the indictment, which were treated as true for purposes of deciding the motion, the CFE was owned by the Mexican government and was responsible for supplying electric power to all of Mexico other than Mexico City. The recipients of the payments (Nestor Moreno and Arturo Hernandez) had served successively as the Director of Operations for CFE.

Lindsay Manufacturing Company was a privately held corporation incorporated and headquartered in California. Thus, Lindsay Manufacturing was a domestic concern. Defendant Keith Lindsay was the President and defendant Lee was the CFO of Lindsay Manufacturing Company.

The government's allegations of wrongdoing centered on payments made by the

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Technologies, Inc., Accounting and Auditing Enforcement Act Release No. 2760, 2007 WL 4481513 (Dec. 21, 2007); Ott & Young, Litigation Release No. 20556, 2008 WL 1958635 (May 6, 2008); Amoako, Litigation Release No. 20556, 2008 WL 1958635 (May 6, 2008); Faro Technologies, Inc., Exchange Act Release No. 57933, 2008 WL 2310956 (Jun. 5 2008); United States v. Alstom S.A., No. 3:14-CR-00245-JBA (D. Conn. Dec. 22, 2014).

59. Bruker Corp., Exchange Enforcement Act Release No. 73835, 2014 WL 7016166 (Dec. 15, 2014).

60. United States v. Noriega, et al., No. 2:10-cr-01031-AHM (C.D. Cal. Sept. 15, 2010).

61. *Id.* Two other defendants, Angela Aguilar and her husband Enrique Aguilar Noriega (collectively, the "Aguilar defendants"), were charged with violations of the FCPA, including conspiracy, and with related money laundering offenses. The Aguilars were citizens of Mexico but were resident in the United States and were therefore considered to be domestic concerns subject to the FCPA.

Lindsey defendants to Grupo ostensibly as commissions for sales and marketing services performed by Enrique Aguilar. The government charged that Grupo had been selected to act as sales representative for Mexico because of Enrique Aguilar's relationship with Moreno. Under the representative agreement, Grupo was to receive a thirty-percent (30%) commission on all goods and services sold to CFE (it was noted this commission was "significantly higher" than the commission paid to previous sales representatives).

Through a series of twenty-nine false invoices submitted to the Lindsey defendants, the Aguilar defendants accumulated a fund of $5,949,078.85, which was used to make payments to Moreno and Hernandez. The Aguilar defendants paid Moreno's monthly American Express credit card balance, assisted Moreno in purchasing an 82-foot yacht, (making payments totaling approximately $1,350,000), purchased a Ferrari automobile for Moreno, and paid $45,000 to Moreno's half-brother. Payments totaling $600,000 were made by the Aguilar defendants to relatives of Hernandez including Hernandez's mother and brother for "professional services" and "consulting". The government alleged that as *quid pro quo* for these payments, "Lindsey Manufacturing obtained multiple contracts with CFE while using Grupo as its sales representative."[62]

In a motion filed on February 28, 2011, the defendants sought dismissal of the indictment on the grounds that employees of state-owned corporations, such as CFE, were not "foreign officials" within the meaning of the FCPA.[63] The Government opposed their motion,[64] and submitted the declaration of Clifton M. Johnson, Assistant Legal Advisor for Law Enforcement and Intelligence at the U. S. Department of State. In his declaration, Johnson stated that in the years following the ratification of the OECD anti-bribery convention, the United States had "consistently asserted its compliance with its obligations under the Convention, including the obligation to criminalize the bribery of foreign officials of public enterprises, including enterprises that may be owned by foreign states." This criminalization of bribery of foreign public officials, "including officials of public enterprises," was, he said, "a central aspect of U. S. leadership in this area," which he warned would be "undermined" were the FCPA to be interpreted "in a way that would render the United States non-compliant with the Convention."[65]

62. First Superseding Indictment, United States v. Aguilar, No. 2:10-cr-01031-AHM (C.D. Cal. Oct. 21, 2010).
63. Def.'s Notice of Mot. And Mot. to Dismiss the First Superseding Indictment; Mem. of Points and Authorities; (Proposed) Order (Filed under separate cover), *Aguilar,* No. 2:10-cr-01031-AHM (C.D. Cal. Feb. 28, 2011).
64. Opp'n to Def.'s Mot. to Dismiss the First Superseding Indictment; Mem. of Points and Authorities; Exhibits, *Aguilar*, No. 2:10-CR-01031-AHM (C.D. Cal. Mar. 10, 2011).
65. Supplement to the Gov't's Opp'n to the Def.'s Mot. to Dismiss the First Superseding Indictment;

The motion came for hearing before the Honorable A. Howard Matz on April 20, 2011. In his oral ruling on the motion, Judge Matz noted that under the Mexican constitution, the provision of electrical power was a "strictly a government function" and that under Mexican statutory law, the CFE is defined as a "decentralized public entity with legal personality." Judge Matz also noted that the governing board of the CFE was comprised of the Secretaries of Finance and Public Credit, as well as other government departments and that the Director General of the CFE was appointed by the President of the Republic of Mexico. Additionally, Judge Matz took notice of the CFE website that described the CFE as being an agency of the Mexican federal government that was created and owned by the Mexican government.[66] After a brief colloquy with defense counsel, Judge Matz denied the defendants' motion, concluding that the CFE was an instrumentality of the Mexican government.[67]

Judge Matz illuminated his ruling in a written opinion issued on April 20, 2011. Judge Matz rejected the defense argument that under the plain language of the FCPA and the legislative history, an instrumentality of the government "cannot and does not encompass a state-owned corporation," because state-owned corporations "do not necessarily share *any* characteristics in common with departments or agencies" (emphasis in original).[68] Judge Matz observed that in framing their argument, the defendants had conceded that "*some* state-owned corporations can and do share the characteristics of departments and agencies" (emphasis in original). Judge Matz posited a "non-exclusive list" of characteristics to be considered when evaluating whether an entity is an instrumentality of the government:

1. The entity provides a service to the citizens (in many cases to all of the inhabitants) of the jurisdiction;
2. The "key officers and directors" are either government officials or are appointed by government officials;
3. The entity is financed "at least in large measure" through governmental appropriations or through government mandated taxes, licenses, fees or royalties;
4. The entity is vested with exclusive or controlling power to administer designated functions; and

Decl. of Clifton M. Johnson, *Aguilar*, No. 2:10-cr-01031-AHM (C.D. Cal. March 18, 2011).

66. Hr'g Tr. vol. 1, 19:14-21, *Aguilar*, No. 2:10-cr-01031-AHM (C.D. Cal. April 1, 2011).

67. *Id.* at 29:17-25, 30:1-5.

68. Relying on the canon of statutory construction *Ejusdem Generis* (where general words follow specific words in a statute, the general words are construed as embracing only objects that are similar in nature to those enumerated in the preceding specific words), the defendants argued that "instrumentality" should be interpreted in light of "department" and "agency" that precede it in statute. A proposition with which the government agreed. United States v. Aguilar, 783 F. Supp. 2d 1108, 1114 n.5 (C.D. Cal. 2011) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 114 (2001)).

5. The entity is perceived and understood to be performing governmental functions.

Judge Matz found that CFE had these characteristics.

Judge Matz also took notice of the OECD convention and Congress's stated intention in enacting the 1998 amendments to conform the FCPA to the requirements of the convention. Judge Matz found the government's argument "persuasive" that notwithstanding Congress's failure to specifically include officials and employees of state-owned corporations, the "structure, object, and purpose of the FCPA are consistent with a definition of instrumentality that includes at least some state-owned corporations." [69]

Subsequently, on December 1, 2011, Judge Matz granted the defendants' motion to vacate their convictions and to dismiss the indictment on grounds of prosecutorial misconduct.[70]

United States v Carson

In a second case filed in the United States District Court for the Central District of California, *United States v. Stuart Carlson*,[71] the defendants similarly moved for dismissal of the indictment on the grounds that corrupt payments to employees of state-owned companies were not payments to foreign officials and therefore did not violate the Act.

The indictment charged six individuals with conspiracy to violate the FCPA and the Travel Act,[72] and with nine substantive violations of the Act. The defendants were executives of Controlled Components, Inc. ("CCI"), a manufacturer of control valves used in the nuclear, oil and gas, and power generation industries.[73] The company was organized under the laws of the United States with its principal offices in Rancho Santa Margarita, California. CCI was therefore a domestic concern.

The indictment charged that between 2003 and 2007, the defendants either made or had caused to be made corrupt payments totaling approximately $4.9 million to

69. *Aguilar,* 783 F. Supp. 2d at 1117.
70. *Id.* at 1120.
71. United States v. Carson, No. 8:09-cr-00077-JVS, 2011 WL 5101701 (C.D. Cal. May 18, 2011).
72. 18 U.S.C. § 1952 (2015).
73. *Carson*, 2011 WL 5101701. The defendants were either domestic concerns or agents of a domestic concerns. Stuart Carson was the CEO of CCI. His wife, Hong Carson, also known as Rose Carson, was the manager of sales for China and Taiwan. Paul Cosgrove was Executive Vice President and the head of world sales. David Edmonds was the Vice President for worldwide customer service. Flavio Riccoti, an Italian national, was VP and head of sales for Europe, Africa and the Middle East. Han Yong Kim, a citizen of Korea, was the head of CCI's Korean office. Two other individuals were named in the indictment. Richard Morlok was the company's finance director, and Mario Covino, a resident of the United States, was the director of worldwide factory sales.

officials and employees of state-owned companies, resulting in profits to the company of approximately $46.5 million. Some of these payments were made directly while others were made through third party consultants engaged for that purpose. Payments were made in the form of cash, gifts, and expense paid travel and entertainment. College tuition for the children of two executives of state-owned companies was also paid by CCI.

The indictment alleged that corrupt payments were made to executives and employees of state-owned companies in: China (Jangsu Nuclear Power Corporation, Guohua Petroleum Materials and Equipment Corporation, PetroChina, Dong Fang Electric Corporation, and China National Offshore Oil Corporation); Korea (Korea Hydro and Nuclear Power); Malaysia (Petroleum Nasional Berhad, "Petronas"); and the United Arab Emirates (National Petroleum Construction Company). Although the indictment was spare in its detail concerning these companies, the government submitted a statement by Special Agent Brian Smith of the Federal Bureau of Investigation concerning the state-owned enterprises in support of the government's opposition to dismissal of the FCPA counts.

With respect to the entities in China, Agent Smith stated that "the major corporate entities in most industries in China are controlled by the government despite being listed on capital market exchanges," such that from 2000 to 2005 "99.3% of revenues in the electricity, gas and water industry were under the ownership of the Chinese government." A commission of the State Council (which Smith described as the "highest executive organ of State power," the state-owned Assets Supervision and Administration of the State Council ("SASC") was vested with responsibility for appointing and retaining executives, managing state-owned assets of the enterprises, and overseeing the remission of capital gains to the state. Smith also noted in this connection that the Chinese criminal code included persons who perform public services in state-owned companies within the definition of "state functionaries" as well as persons assigned by state-owned companies to perform public services in entities not owned by the state. Solicitation or acceptance of money or property by such persons in exchange for "benefits" could result in imprisonment, as well as for the person who gave or offered the payment.

Of the Chinese state-owned entities specified in the indictment, Agent Smith stated that PetroChina, the largest oil and gas producer and distributor in China, was a subsidiary of China National Petroleum Corporation, an "enterprise directly controlled by the PRC," which owned approximately 86% of the shares of PetroChina. China Petroleum Materials and Equipment Corporation, a distributor of petrochemical products and petroleum mechanical equipment, was also identified as a subsidiary of China National Petroleum Corporation. The China National Offshore Oil Corporation was described as a state-owned enterprise governed by the

SASC, the regulations creating the corporation described it as "a state corporation with the qualification of a judicial person," which had the authority to develop and market petroleum. Published reports indicated that senior officials were appointed by the Chinese government. Also according to published reports as well as its own website, Dong Fang Electric Corporation was established with the approval of the SASC as the "national strategic base for heavy-duty machinery and equipment," and as a "National Research and Development Center." Guohua Electric Power Company described itself as a subsidiary of the Shenhua Group, a state-owned enterprise under the leadership of the Communist Party of China and the State Council. Lastly, according to Smith's research, the China National Nuclear Corporation ("CNNC") was created by the State Council and controlled most of the nuclear sector business. CNNC purported to be the major investor in all nuclear power plants in China. CNNC was a 50% owner of Jiangsu Nuclear Power Corporation, whose other investors were China Power Investment Corporation (30%) and Jiangsu Guoxin Group (20%).

Agent Smith provided information on the other state-owned enterprises underlying the FCPA counts. Korea Hydro and Nuclear Power Company, LTD, ("KHNP") was a wholly owned subsidiary of Korea Electric Power Company ("KEPCO"), a government corporation with a "virtual monopoly" over the provision of the electric power that was 50% owned by the South Korean government. KHNP was formed after the re-organization of KEPCO and since its formation, KHNP had operated nuclear and hydroelectric power plants in South Korea. Under the KHNP articles of incorporation, the President of the Republic of Korea appointed the president of KHNP. Nevertheless, Smith stated that KHNP employees did not enjoy civil service protections and did not receive government pensions.

In Malaysia, Petronas was incorporated as "the national oil company of Malaysia vested with the entire ownership and control of the petroleum resources in the country." Petronas was wholly owned by the Malaysian government and was subject to the control and direction of the Prime Minister. Dividends were to be paid to the federal government and to the governments of "any relevant State." Petronas had the monopoly over the processing and refining of petroleum and the manufacturing of petro-chemical products. The chairman of the board of directors was selected by the Prime Minister. The board was comprised of the Director General of the Economic Planning Unit, the General Secretary of the Ministry of Finance, the Director of the Economic Coordination Unit, the independent advocate, and the solicitor, as well as members of the senior management. The chairman and the board reported directly to the Prime Minister. Malaysian bribery law defined a "public body" as including "any company or subsidiary company over which or in which any public body has controlling power or interest."

Lastly, in Abu Dhabi, the National Petroleum Construction Company ("NPCC") described itself as a "public join stock company," providing services in the development of petroleum resources. The majority owner (70%) was the General Holdings Corporation, also a tax-exempt public joint stock company that was wholly owned by the Higher Corporation for the Specialized Economic Zones in the Emirate of Abu Dhabi. Under the UAE penal code, among the persons considered to be "public officials" were the chairman, members of the board of directors, managers, and all other employees "working in associations and public corporations." These individuals and any "person assigned to a public service" who solicited or accepted a gift or privilege of any kind in exchange for "the performance of an act or its omission in breach of his duties" would be subject to imprisonment.[74]

Like the Lindsey and Aguilar defendants, the Carson defendants argued that the conspiracy and the substantive FCPA counts should be dismissed because employees of state-owned companies could never be deemed "foreign officials" under the FCPA as a matter of law. The Honorable James V. Selna denied their motion concluding that whether a state-owned company may be considered an instrumentality under the FCPA was a question of fact that was not amenable to determination before trial and "simply assuming that a company is wholly owned by the state is insufficient for the Court to determine as a matter of law whether the company constitutes a government instrumentality." As Judge Matz had in his *Aguilar* decision, Judge Selna enumerated factors that would bear on the determination of whether a commercial entity should be treated as a government instrumentality. Thus, the trier of fact should consider:

1. How the foreign state characterized the entity and its employees;
2. The degree of control exercised by the foreign government over the entity;
3. The purpose that the entity's activities were to serve;
4. The obligations and privileges of the entity under the foreign state's laws, including whether the entity had exclusive or controlling power to administer its designated functions;
5. The circumstances surrounding the entity's creation; and
6. The degree of ownership of the entity by the foreign state and whether the state provided financial support such as subsidies, special tax treatment or loans.

Judge Selna made it clear that these factors were neither exclusive nor exhaustive

74. *Carson*, Smith Decl., ¶¶ 2-4, April 2, 2012. Government's Opposition to Defendants' Amended Motion to Dismiss Counts One through Ten of the Indictment; Memorandum of Points and Authorities; Declaration of Special Agent Brian Smith.

and no single factor would be dispositive of whether an entity was a government instrumentality. Judge Selna emphasized that there were several types of evidence to be considered of which state ownership was but one.

Also like Judge Matz, Judge Selna was of the view that absent a statutory definition, "instrumentality" should be given its ordinary meaning. Judge Selna agreed with the defense that instrumentality should be construed both in the context of the terms that preceded it in the statute as well as of the FCPA as a whole. Judge Selna also agreed that the use of the term instrumentality "was intended to capture entities that are not departments or agencies of a foreign government, but nevertheless carry out governmental functions or objectives." Thus, Judge Selna concluded that while "a mere monetary investment" by a foreign government would not transform a commercial entity into a government instrumentality, such an investment coupled with other factors, "that objectively indicated the entity is being used as an instrument to carry out governmental objectives" would support a finding that the entity should be treated as an instrumentality. But in any event, the statute's use of instrumentality produced no "crisp exclusion of a state-owned entity," as the defendants had suggested in their motion. Rather, "just like an agency or department" a state-owned entity may provide "a modality through which a government may conduct its business."

In this connection, Judge Selna took notice that "corporations have long been used in this country to carry out governmental objectives." Judge Selna cited as examples the first and second banks of the United States, the Panama Railroad Company, the United States Grain Company, the Emergency Fleet Corporation, the United States Spruce Production Corporation, the War Finance Corporation, the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, and the Tennessee Valley Authority. This history was "indisputably relevant to whether foreign state-owned companies could *ever* be considered instrumentalities of a foreign state" (emphasis original). [75]

United States v Nexus Technologies, Inc.

In addition to Judge Matz's opinion in *Aguilar,* Judge Selna cited two other decisions of the district courts that had rejected similar arguments. In *United States v. Nexus Technologies, Inc.*,[76] the individual defendants (Nam Quoc Nguyen, founder

75. *Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701. Criminal Minutes-General, Order Denying Defendants' Motion to Dismiss Counts 1 through 10 of the Indictment. Defendants Stuart Carson, Hong Carson, Paul Cosgrove and David Edmonds pleaded guilty to conspiracy to violate the FCPA.

76. *Id.* (citing United States v. Nguyen, No. 2:08–cr–00522–TJS, ECF No. 144 (E.D. Pa. Dec. 30, 2009)).

and president of Nexus Technologies; Kim Anh Nguyen, an employee of Nexus Technologies with responsibility for finance; and An Quoc Nguyen, an employee of Nexus Technologies with responsibility for shipping goods) were charged with conspiracy to violate the FCPA and nine substantive FCPA violations. Nexus Technologies, Inc., a corporation organized under the laws of Delaware with offices in New Jersey and Pennsylvania, and the individual defendants were U.S. citizens, and therefore, were all domestic concerns.

The indictment charged that the individual defendants had made or had caused to be made through third parties, payments totaling approximately $200,000 to employees of several "agencies and instrumentalities" of the Government of Vietnam in order to secure sales of the company's products that included underwater mapping equipment, bomb containment equipment, helicopter parts, chemical detectors, satellite communication components and air tracking systems. Recipients of these payments were employed by state-owned or controlled entities identified in the indictment as: the PetroVietnam Gas Company, a subsidiary of PetroVietnam, that was wholly owned and controlled by the Government of Vietnam and was engaged in the exploitation of Vietnam's natural resources; Southern Services Flight Company, an airline owned and operated by the Vietnam's People's Army; T & T Company, Ltd., the "procurement arm of Vietnam's Ministry of Public Safety engaged in border security; and Vietsovpetrol Joint Venture, a joint venture for the exploitation of natural resources that was wholly owned and controlled by the Government of Vietnam and the Government of the Russian Federation.[77]

The defendants moved to dismiss the FCPA counts of the indictment on the grounds that employees of state-owned enterprises were not foreign officials. On December 2, 2009, the Honorable Timothy J. Savage denied the motion as moot without issuing an opinion.[78] On September 15, 2010, Nexus Technologies and the individual defendants pleaded guilty to a variety of charges including violations of the FCPA.

77. *Id.*

78. *Id.* Judge Savage noted that a superseding indictment had been filed. United States v. Nguyen, No. 2:08-cr-00522-TJS (E.D. Pa. Dec. 2, 2009). In another case, United States v. O'Shea, No. 4:09-cr-00629 (S.D. Tex. Mar. 7, 2011), the general manager of the Texas Unit of ABB, LTD. (a Swiss corporation whose shares were traded on U.S. Exchanges in the form of ADRs and which therefore was an issuer) was charged with having arranged through a third party sales representative to make payments of approximately $900,000 to officials of the Comision Federal de Electricidad ("CFE"), which was described in the indictment as an "electric utility company owned by the United Mexico States . . . responsible for supplying electricity to all of Mexico other than Mexico City." O'Shea moved to dismiss the FCPA counts of the indictment claiming that CFE employees were not foreign officials. The motion was denied without an opinion by the Honorable Lynn N. Hughes. O'Shea was subsequently acquitted by the court after the close by the government's case-in-chief.

United States v Esquenazi

The second case cited by Judge Matz was *United States v Joel Esquenazi,*[79] in which Esquenazi and four others were alleged to have made or authorized the making of corrupt payments to Robert Antoine, a co-defendant who had been Director of International Relations for Telecommunications d'Haiti ("Haiti Teleco"). Another defendant, Jean Rene Duperval, succeeded Antoine as Director of International Relations. As Haiti Teleco is the state-owned telecommunications company in Haiti, Antoine and Duperval were deemed to be foreign officials.

Terra Telecommunications Corporation (identified in the indictment as "Corporation X") was a privately owned telecommunications company organized under the laws of Nevada and headquartered in Miami, Florida (hence Terra Telecommunications was a domestic concern). Terra Telecommunications was engaged in the business of purchasing time from foreign telephone providers and re-selling the minutes to customers in the United States. One of the vendors with whom Terra Telecommunications did business was Haiti Teleco, the only provider of non-cellular telephone service to and from Haiti.

Joel Esquenazi was the president and director of Terra Telecommunications and a citizen of the United States. As such, Esquenazi was deemed to be a domestic concern. His co-defendant Carlos Rodriguez was the executive vice president who oversaw the finances of Terra Telecommunications. As a citizen of the United States, Rodriguez was likewise deemed to be a domestic concern. The remaining defendant, Marguerite Grandison, the sister of Duperval, served as the intermediary between Terra Telecommunications and Duperval. Grandison was deemed to be a domestic concern by virtue of her residence in the United States.

The government alleged that in order to obtain preferred rates and a reduction in the number of minutes for which payments were owed (thereby effectively reducing the per minute rate that would be charged), Esquenazi and Rodriguez made payments to Antoine through third party consultants that were in excess of $744,625. Esquenazi and Rodriguez were also alleged to have made payments through third parties including defendant Grandison, totaling approximately $75,000.[80]

The defendants moved to dismiss the indictment contending that employees of Haiti Teleco were not foreign officials within the meaning of the FCPA. In an order entered on November 19, 2010, the Honorable Jose E. Martinez denied defendants' motion. Judge Martinez found that the indictment had sufficiently alleged that Antoine and Duperval had been foreign officials "by alleging that these individuals

79. United States v. Esquenazi, 752 F.3d 912, 919 (11th Cir. 2014).
80. *Id.*

were directors of the state-owned Haiti Teleco." Judge Martinez also rejected the argument for the defense that Haiti Teleco was not a government instrumentality as a matter of law. Judge Martinez concluded instead that "The plain language in this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco *could* be an instrumentality of the Haitian government" (emphasis added). Judge Martinez pointed out, however, that any factual arguments concerning the status of Antoine and Duperval as foreign officials could be addressed at trial.[81]

Defendants Esquenazi and Rodriguez were convicted of all counts on August 4, 2011.[82] Within days of their conviction, counsel for another individual disclosed a declaration by the Prime Minister of Haiti, Jean Max Bellerive, stating that "Teleco has never been and until now is not a state enterprise." In a second statement Prime Minister Bellerive said that while "the facts mentioned in the statement are truthful," he wished to clarify that "the only legal point that should stand out in this statement is that there exists no law specifically designating Teleco as a public institution." Bellerive added that "this does not mean that Haiti's public laws do not apply to Teleco even if no public law designates it as such.[83] Esquenazi and Rodriguez moved for a judgment of acquittal or, new trial, which was denied. Appeal was taken to the United States Court of Appeals for the Eleventh Circuit.

In their appeal Esquerazi and Rodriguez challenged both the trial court's instruction on "instrumentality" and the sufficiency of the evidence that Haiti Teleco was an instrumentality of the Haitian government. Thus, the court of appeals considered the "central question" before the court to be "what instrumentality means (and whether Teleco qualifies as one)."[84]

The court noted the parties' agreement that a qualifying instrumentality "must perform a government function at the government's behest," but this and the accepted dictionary definitions "get us only part of the way there."

Applying the "common sense cannon of *noscitur a socis* ("a word is known by the company it keeps"), the court "gleaned" from the Act's references to "agency" and "department" in the definition of foreign official that to be an instrumentality, "must be under the control or dominion of the government" and an entity "must be doing the business of the government."[85]

The court went on to consider what functions constitute the business of

81. *Id.*
82. *Id.* The trial of Esquenazi and Rodriguez was severed from that of Duperval and Grandison on November 25, 2010. On March 12, 2012, Duperval was convicted on all counts. The case against Grandison was closed after Grandison agreed to enter into a diversion program.
83. *Id.* These excerpts were quoted in *Esquenazi*, 752 F.3d at 919-20.
84. *Esquenazi*, 752 F.3d at 920.
85. *Id.* at 922.

government by looking to "the broader statutory context in which the word is used." The court noted the example of providing telephone service in the definition of "routine governmental action,"[86] as used in the Act's exception for facilitating or expediting payments.[87] From this, the court concluded "that a government-controlled entity provides a commercial service does not automatically mean it is not an instrumentality."[88]

The court also considered the 1998 amendments to the Act and the effect of the OECD anti-bribery convention. The court cited the convention's definition of a "foreign public official" as "any person exercising a public function for a foreign country," including for a "public enterprise," which the commentaries explained was "any enterprise, regardless of its legal form, over which a government, or governments, may directly or indirectly, exercise a dominant influence," unless that enterprise "operates on a normal basis in the relevant market, i.e., on a basis which is substantially equivalent of a private enterprise, without preferential subsidies or other privileges."[89]

The court acknowledged that Congress had only amended the definition of foreign official to include officials of public international organizations. However, the court inferred from the omission of the convention's expansive definition that "Congress considered its pre-existing definition already to cover a foreign public official of an enterprise," as described in the conventions commentaries.[90]

The court also rejected the contention that "instrumentality" applied "only to entities that perform traditional, core government functions." Such a limited construction, the court said, was not imposed by the Act and "would put the United States out of compliance with its international obligations." Instead, in order to determine whether an entity is a governmental instrumentality, one "ought to look to whether that foreign government considers the entity to be performing a governmental function." That is, whether the foreign government "*treats* the function the foreign entity performs as its own," requiring an analysis of such

86. 15 U.S.C. §§ 78dd-1 (f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A).
87. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).
88. *Esquenazi*, 752 F.3d at 922.
89. *Id.* at 923.
90. *Id.* In this regard, the court also acknowledged it was generally "wary of relying too much on later legislative developments to decide a prior Congress's legislative intent," because Congress had made changes in the FCPA to ensure compliance with the promises made when joining the convention, making the FCPA a "different law" after those amendments. In the court's view, "we may consider Congress's intent in passing those amendments as strongly suggestive of the meaning of instrumentality as it exists today." The court also noted that the Fifth Circuit had construed the FCPA in light of the OECD convention in its decision in United States v. Kay, 359 F.3d 738, 754 (5th Cir. 2004), and that the Supreme Court had long considered that federal statutes should be construed in such a way as to ensure compliance with international obligations that had been voluntarily undertaken. *Id.* at 924.

"objective factors" as control, exclusivity, governmental authority to hire and fire, subsidization, and whether an entity's finances are treated as part of the public fisc. (emphasis in original)[91]

Accordingly, in order to guide both government and the public in making this determination, the court proposed a definition of "instrumentality" as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court conceded that determining whether the entity was controlled by a foreign government and whether the function served by the entity was one that the foreign government "treats as its own" are "fact bound questions." Without referring to the analysis of these questions in either *Aguilar* or *Carson*, the court offered a variety of indicia to be considered. Although not to be considered an exhaustive list with respect to the question of control, the court identified the following factors:

1. The foreign government's formal designation of the entity;
2. Whether the foreign government has a majority interest in the entity;
3. The foreign government's ability to hire and fire the entity's principals;
4. The extent to which the profits of the enterprise inure directly to the government fisc;
5. The extent to which the government funds the entity if the entity fails to break even; and
6. The length of time that these indicia have existed.[92]

With respect to whether the foreign government treated the function performed by the entity "as its own," the court suggested the following:

1. Whether the entity has been given a monopoly over the function performed;
2. Whether the foreign government subsidizes the costs of performing the function;
3. Whether the entity provides a service to the public at large within the foreign country; and
4. Whether the entity is perceived as performing a governmental function by the public and by the foreign government.[93]

In light of these factors and the court's definition of instrumentality, the court upheld the trial court's jury instruction.[94] The court found that, read in context, the

91. *Esquenazi*, 752 F.3d at 925.
92. *Id.*
93. *Id.* at 926.
94. *Id.* at 927. (The District Court instructed the jury that: "To decide whether Telecommunications

instruction made plain that the provision of service by a government-owned or controlled entity was not sufficient alone to constitute an instrumentality, but rather ownership was a factor that the jury "may" consider. The court also noted that the trial court's instruction had included the same factors that the court had itself identified.

The court also concluded the evidence at trial had been sufficient to establish that Haiti Teleco was an instrumentality of the Haitian government. Viewing that evidence in the light most favorable to the prosecution, the court found that: 1) Haiti had granted the company a monopoly over telecommunications services and had conferred on Teleco certain tax advantages; 2) beginning in the early 1970's and continuing through the period of indictment, the Haitian National Bank had owned 97% of the equity of Haiti Teleco; 3) the Director General of Haiti Teleco was appointed by the President of Haiti with the concurrence the Prime Minister and the Ministers of Public Works and Economic Finance; and 4) the Board of Directors was also appointed by the Haitian President. Additionally, an expert witness had testified that even though there was no law declaring that Haiti Teleco was a public entity, everyone including government officials considered Haiti Teleco to be a public entity.[95] The Eleventh Circuit affirmed the convictions in all respects and on October 6, 2014, the Supreme Court denied certiorari.[96]

The Department of Justice

In an opinion procedure release issued under the statutory opinion procedure mandated by the FCPA, the United States Department of Justice adopted the *Aguilar* and *Esquenazi* analysis in determining whether an individual was a foreign official by virtue of membership in a foreign country's royal family.[97] The requestor was a U.S. lobbying firm (a domestic concern) that wished to represent a foreign

D'Haiti or Teleco is an instrumentality of the government of Haiti, you may consider factors including, but not limited to: One, whether it provides services to the citizens and inhabitants of Haiti. Two, whether its key officers and directors are government officials or are appointed by government officials. Three, the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans or revenue from government mandated fees. Four, Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions. And five, whether Teleco is widely perceived and understood to be performing official or governmental functions.")

95. *Esquenazi*, 752 F.3d at 928-29. Relatedly, the court of appeals held that an evidentiary hearing concerning the two declarations by Prime Minister Bellerive had not been required. *Id.* at 932-34.

96. United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3138 (U.S. Oct. 6, 2014) (No. 14-189).

97. Opinion Procedure Release, Foreign Corrupt Practices Act Op. No. 12-01, 2012 WL 4482054 (Sept. 18, 2012).

embassy in the United States. In that connection, the requestor proposed to engage a consulting company in that country to introduce the requestor to the embassy and to advise the requestor on "cultural awareness issues." The consulting firm would also act as the requestor's sponsor in the foreign country (a necessary prerequisite to doing business). The consulting firm was to assist the requestor in establishing an office in the foreign country and in identifying business opportunities. The foreign consulting firm was a partnership of three individuals, one of whom was a member of the foreign country's royal family.

The Department of Justice concluded that the member of the royal family was not a foreign official under the circumstances proffered by the requestor. In making this determination, the Department applied the rule of *Aguilar*, *Carson* and *Esquenazi* as well as that of an earlier opinion procedure release.[98] The Department stated that "whether a member of a royal family is a foreign official turns on such factors as (i) how much control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (ii) whether a foreign government characterizes an individual or entity as having governmental power; and (iii) whether and under what circumstances an individual (or entity) may act on behalf of, or bind, a government."[99] The Department emphasized that "this inquiry is fact-intensive and no single factor is dispositive."[100]

98. Opinion Procedure Release*,* Foreign Corrupt Practices Act Op. No. 10-03, 2010 WL 3602836 (Sept. 1, 2010). There, a U.S. domestic concern was pursuing an initiative with a foreign government to implement a "novel" approach to a particular natural resource infrastructure development and to that end, the requestor intended to engage a consultant (a U.S. person) that held contracts with the foreign government to represent the government and act on its behalf. *Id.* The Department noted that the definition of foreign official included persons acting on behalf of a foreign government and thus, the consultant and its owner and employees could be foreign officials. *Id.* However, the Department concluded that under the circumstances of the request, and the prophylactic measures taken by the requestor and consultant, the consultant would not be acting on behalf of the foreign government and therefore would not be deemed to be a foreign official. *Id.*

99. Applying these factors to the circumstances represented by the requestor, the Department concluded that "this member of this royal family is not a foreign official – so long as he does not directly or indirectly represent that he is acting on behalf of the royal family or in his capacity as a member of the royal family." *Id.* In support of this decision, the Department cited the following with respect to the royal family member: 1) he had no official or unofficial title or role in the government; 2) he had no power over any aspect of government decision-making; 3) he could not ascend to a government position by virtue of his membership in the royal family; 4) he had no benefits or privileges by virtue of being a member of the royal family; and 5) he had no personal, professional or familial relationship with the persons in the Embassy or government who would decide to whom to award the subject contract. *Id.*

100. The Department of Justice and the Securities and Exchange Commission reiterated this view in the guidance issued on November 14, 2012. *A Resource Guide to the U.S. Foreign Corrupt Practice Act*, U.S. DEP'T OF JUSTICE AND SEC. EXCH. COMM. (2015), *available at* http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf. [hereinafter *Resource Guide*. There it was stated that "whether a particular entity constitutes an instrumentality under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function."

Observations

The Department of Justice and the Securities and Exchange Commission have given a broad reading to the definition of foreign officials as applied to officers and employees of state-owned enterprises. Enforcement actions against Garth R. Peterson arising from payment to the then-Chairman of a real estate investment firm owned by the Luwan District Government in Shanghai, China, and against Schnitzer Steel Industries, Inc., its chairman and its Korean subsidiary resulting from payments to purchasing officials in both private and state-owned steel mills in China reflect this view. Defendants in several criminal prosecutions, notably in the *Aguilar*, *Carson*, and *Esquenazi* prosecutions, took a concomitantly narrower position arguing that employees of state-owned enterprises could not be deemed foreign officials under any circumstances as a matter of law. While the issue has not been widely or authoritatively resolved, now that there has been litigation concerning the application of the foreign official definition in a more concrete factual context, it appears that neither construction of the FCPA was correct.

Instead, what is emerging is a fact-intensive and hopefully more nuanced understanding that an enterprise is not *a fortiori* a government instrumentality simply by virtue of the dominant equity position held by a foreign government. Indeed, there has been a recognition that while there are state-owned entities which are government instrumentalities, there are others that are not. (Just as an individual may be a foreign official in certain circumstances but not in others.)

There appears to be a general agreement that the issue is one of fact rather than of law. Further, there appears to be a growing consensus that in addressing the conundrum of whether a foreign official can be employed by a commercial enterprise, there are certain factors that should be considered. Principal among these indicia of a governmental enterprise are:

1. That the enterprise provide a service to the country's citizens at large (*Aguilar*, *Carson*, *Esquenazi*);

Id. The DoJ and the SEC identified eleven factors that companies "should consider" in evaluating the risk of violations and in designing compliance programs. *Id*. These factors were: 1) the extent of ownership of the entity by a foreign government (the DoJ and the SEC noted that "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); 2) the degree of control over the entity (including the appointment of "key officers and directors"); 3) the characterization of the entity and its employees; 4) the circumstances of the entity's creation; 5) the purpose of the entity's activities; 6) the entity's legal obligations and privileges; 7) the entity's exclusive or controlling power over the entity's designated functions; 8) the level of state support; 9) the services provided; 10) whether the governmental purpose to be achieved by the entity is expressed in governmental policy; and 11) the general perception that the entity is performing a governmental function. *Id.*

2. That the enterprise enjoy an exclusive or dominant place in providing the service (*Aguilar*, *Carson*, *Esquenazi*);
3. That the enterprise is wholly owned or majority owned by the state and receives public funding for the enterprise's activities (*Aguilar*, *Carson*, *Esquenazi*);
4. That the enterprise is identified by the state as an instrumentality of the state or it is otherwise generally perceived by the public as performing a public function (*Aguilar*, *Carson*, *Esquenazi*);
5. That one or more executives of the enterprise are appointed by and can be removed by the state (*Aguilar*, *Carson*, *Esquenazi*).

Other factors include:

a) The extent to which the revenues of the enterprise inure to the benefit of the state (*Esquenazi*);
b) The circumstances surrounding the creation of the enterprise (*Carson*); and
c) The length of time that the indicia of a public enterprise have existed (*Esquenazi*).

The Department of Justice has suggested consideration of additional indicia such as:

a) Control over the "levers of power" as they relate to programmatic administration and finance;
b) Characterization of the individual by the state as a government official; and
c) The degree to which the individual may be said to be acting for or on behalf of the government (Opinion Procedure Release Nos. 12-01 and 10-03).

The Business Nexus Requirement

The proscription of the anti-bribery provisions extend to corrupt payments to foreign officials, and candidates for office: 1) to influence an act or decision of the recipient in an official capacity; 2) to induce the recipient to do or to omit doing an act in violation of the recipient's duty: 3) to secure an improper advantage, or to induce the recipient to use influence with the government or an instrumentality of the government to affect or influence a decision of the government or instrumentality; 4) in order to assist the payor "in obtaining or retaining business for or with, or directing business to, any person."[101] This focus on obtaining or retaining business or directing business to any person is referred to as the business nexus requirement.

101. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2015).

The Legislative Background

When legislation was first introduced to address the questionable payments problem criminally, both the House bill and the Senate bill included the requirement of a business nexus, as well as a prohibition against "influencing legislation or regulations of that government or instrumentality."[102] The Senate bill was adopted on September 15, 1976. However, after the House bill was referred to the Committee on Interstate and Foreign Commerce on September 16, 1976, which held hearings on September 21 and 22, the committee was unable to raise a quorum and the bill expired at the end of the legislative session.

Foreign bribery legislation was again introduced beginning in January 1977. On January 10, 1977, Congressman John Murphy and Stephen J. Solarz introduced H.R. 1602, which included both the business nexus requirement and a prohibition against payments for the purpose of influencing legislation or regulations "of government or an instrumentality." Eight days later, Senators William Proxmire and Harrison Williams introduced S. 305, which contained both the business nexus requirement and the prohibition against influencing legislation and regulations. A third, much broader bill, H.R. 3815, was introduced in the House on February 22, 1977, by Congressman Bob Eckhardt. The Eckhardt bill prohibited the giving of anything of value to a foreign official "for purposes of: (A) influencing any act or decision of such foreign official in his official capacity; 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."

The House bill was passed on November 1, 1977. The House – Senate conference blended provisions of the two bills with respect to the purpose of the prohibited corrupt payment. The bill proposed by the conference prohibited payments for the purpose of influencing an act or decision of a foreign official (including a decision to fail to perform an official function) or of inducing a foreign official to use influence to affect a decision of the government or instrumentality, "in order to assist such issuer [or domestic concern] in obtaining or retaining business for or with, or directing business to, any person."[103] The conferees explained that by incorporating provisions of the two bills into their proposed bill, "the conferees clarified the scope of the prohibition." That is, "by requiring that the purpose of the payment must be to

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102. *See* H.R. 15481, 94th Cong. (1976) and the identical S. 3664, 94th Cong. (1976); H.R. 13870, 94th Cong. (1976); H.R. 13953, 94th Cong. (1976). Other legislation such as S. 3379, 94th Cong. (1976), S. 3418, 94th Cong. (1976), S. 3741, 94th Cong. (1976), and H.R. 15149, 94th Cong. (1976) adopted a reporting and disclosure approach without criminalization of corrupt foreign payments. *See* AD HOC COMMITTEE ON FOREIGN PAYMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON QUESTIONABLE FOREIGN PAYMENTS BY CORPORATIONS: THE PROBLEM AND APPROACHES TO A SOLUTION 29 (1977).
103. FOREIGN CORRUPT PRACTICES ACT, H.R. REP. NO. 95-831, at 3 (1977) (Conf. Rep.).

influence any act or decision by a foreign official (including a decision not to act) or to induce such official to use his influence to affect a governmental act decision so as to assist an issuer in obtaining, retaining or directing business to any person."[104]

During the consideration of the conference bill in the Senate, Senator John Tower, speaking in support of the bill, observed that "under the bill, payments must meet two tests to be actionable: first, they must be made to secure or retain business, and second, they must be made to an official whose duties are not essentially ministerial or clerical."[105] Congressman Harvey O. Staggers, the chair of the conference, similarly explained during the consideration of the bill in the House that with regard to the anti-bribery provisions, the House version had been adopted by the conference, "with the modification that the bribe must also be to retain or obtain business."[106] In his remarks during the colloquy on the bill, Congressman Samuel Devine, a member of the conference, also observed that Section 103 of the bill "prohibits a company subject to the jurisdiction of the SEC from using interstate commerce to make a bribe to a foreign official in order to obtain or retain business. Section 104 prohibits all other domestic concerns from making these kinds of bribes."[107] Another member of the conference, Congressman Eckhardt, made a similar observation.[108]

The conference bill was adopted by the Senate on December 6 and the House on December 7, 1977. President Carter signed the Act into law on December 19.

Over the next decade, Congress revisited a number of provisions of the FCPA. On May 28, 1980, Senator John Chafee introduced S. 2763, the Business Accounting and Trade Simplification Act. Among the proposed changes to the anti-bribery provisions was the exclusion of gifts and business courtesies. No action was taken on the Chafee Bill.

On March 12, 1981, Senator Chafee reintroduced his bill, now designated as S. 708. The bill would have amended both the anti-bribery and the accounting provisions. As the Committee on Banking, Housing and Urban Affairs explained in its report, S. 708 "would rewrite section 104 of the current law." Subsection (a) of the revised provision "was designed to bring the Act into conformity with the domestic bribery statutes," and therefore, "would prohibit a domestic concern from making use of the means or any other instrumentality of interstate commerce to

104. *Id.* at 12.
105. 123 CONG. REC. 38602 (1977).
106. *Id.* at 38777.
107. *Id.* at 38778.
108. *Id.* at 38779. Congressman Eckhardt told his colleagues that "The purpose of the payment must be to influence any act or decision of a foreign government official or to induce such official to use his influence to affect a government act or decision so as to assist U.S. companies in obtaining, retaining, or directing business to any person." *Id.*

make payments for the purposes of influencing any act or decision of a foreign official in his official capacity, or inducing him to do or omit to do any act in violation of his legal duty as a foreign official, or inducing him to so use his influence, for the purposes of assisting the domestic concern in obtaining or retaining business, or directing business to any person."[109] After hearings were held by the committee, S. 708 passed the Senate on November 23, 1981, but was never acted upon in the House.

The Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce held FCPA oversight hearings in 1981 and 1982.[110] The predominate issue in regard to the anti-bribery provisions put forward by the witnesses at the hearings involved the "reason to know" standard of knowledge as the basis of liability for corrupt payments by third parties.[111] No legislation resulted from these hearings.[112]

The Business Accounting and Trade Simplification Act, S. 414, was again introduced, this time by Senator Henry Heinz. On February 3, 1983, joint hearings were held by the Subcommittee on International Finance and Monetary Policy and the Subcommittee on Securities.[113] As reported out of the Committee on Banking, Housing and Urban Affairs, S. 414 retained the business nexus requirement. No further action was taken on S. 414.

On September 17, 1986, Senator Heinz once again offered the Business Accounting and Trade Simplification Act, S. 430. As with the earlier version of the bill, S. 430 preserved the business nexus requirement.[114] The bill was reported out of the Committee on Banking, Housing and Urban Affairs on September 24, 1986. No action was taken by the Senate.

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109. BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT, S. REP. NO. 97-209, at 20 (1981).

110. These hearings were held on September 16, November 18, and December 16, 1981. At the time S. 708 was under consideration by the Senate. *Foreign Corrupt Practices Act Hearing on S. 708 Before the Comm. on Banking, Housing and Urban Affairs*, 95th Cong. (1981). Further oversight hearings were held on June 8, 1982. *Foreign Corrupt Practices Act – Oversight: Hearing on H.R.J 97-166 Before the Subcomm. on Telecomm., Consumer Protection, and Fin. of the Comm. on Energy and Commerce*, 97th Cong. (1982).

111. As originally enacted the FCPA prohibited payments to third parties when there was "reason to know" that all or a portion of the payment would be used for a corrupt purpose. *Id.* This "reason to know" standard was later eliminated from the Act by the 1988 amendments. *Id.*

112. *Hearing on H.R.J 97-166 Before the Subcomm. on Telecomm., Consumer Protection, and Fin. of the Comm. on Energy and Commerce*, 97th Cong. (1982).

113. *Business Accounting and Foreign Trade Simplification Act Hearing on S. Hrg 98-33 Before the Subcomm. on International Finance and Monetary Policy and the Subcomm. on Securities,* 98th Cong. 7 (1983).

114. BUSINESS ACCOUNTING AND FOREIGN TRADE SIMPLIFICATION ACT, S. REP. NO. 98-207 (1983).

The 1988 Amendments

The FCPA was subsequently amended as part of the Omnibus Trade and Competitiveness Act of 1988. The House and the Senate bills differed on a number of points and consequently, the bills were referred to a conference of the House and the Senate.

Among the differences in the two bills was whether a prohibited payment was one intended to influence the performance of an "official function" or a "legal duty". In this regard, the conference noted that the House bill included a prohibition against payments to induce foreign officials "to make a decision to fail to perform his or its *official functions,"* while the Senate bill "changed the approach…to one which included within prohibited payments those made to induce a foreign official to do or omit to do any act in *violation of his legal duty* as a foreign official" (emphasis added). The House receded to an amended version of the Senate provision that "would prohibit payments to any foreign official for the purpose of influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official." The conference explained that "this language conforms to the domestic bribery standard found at 18. U.S.C. 201."[115]

Second, the House bill had included a prohibition of payments "for procurement of legislative, judicial, regulatory, or other action in seeing more favorable treatment by a foreign government." The Senate bill had no comparable provision. The House again receded to the Senate. Although the business nexus requirement had been unchanged in the two bills, the conference then added the wholly gratuitous comment that "the conferees 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 terms should not however, be construed so broadly as to include lobbying or other normal representations to government officials."[116] Without further explanation or citation, the conference referred to the "*United Brands"* case as an example of a prohibited payment related to the execution or performance of a contract or the "carrying out of existing business." The conference appears to have been referring to an SEC enforcement action against United Brands in 1975, which then Chairman of the SEC Roderick M. Hills had mentioned in this

115. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.).
116. *Id.* at 918-19.

testimony before the Subcommittee on Priorities and Economy in Government of the Joint Economic Committee on January 14, 1976, prior to the enactment of the FCPA, in which the SEC alleged that United Brands had paid $1.25 million to officials of "a central American country" in order to obtain a reduction in export tax.[117]

The 1998 Amendments

The amendments to the Act in 1998 also touched on the business nexus requirement. The OECD Convention enlarged the prohibited purpose of a payment to a foreign government official to include not only payments to "obtain or retain business" but also to secure "other improper advantage."[118] The commentaries accompanying the convention explained that the term "other improper advantage" referred to "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."[119] Thus, under the convention, obtaining an improper advantage would be a prohibited purpose in the same way as a payment for the purpose of obtaining or retaining business.

However, as enacted, the bill to implement the convention altered the wording of this provision. Thus, the Act now provides that it is unlawful to make a corrupt payment to a foreign official for purposes of: A) "influencing any act or decision of such foreign official in his official capacity," or "inducing such foreign official to do or omit to do any act in violation of the lawful doing of such official," or "*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, domestic concern, or other person] *in obtaining or retaining business for or with, or directing business to, any person*"[120] (emphasis added). Payments to political parties or officers of political parties or candidates for public office and payments to third parties are likewise prohibited for the purpose of securing an improper advantage in order to assist the payee "in obtaining or retaining business for or with, or

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117. *Hearings Before the Subcomm. on Priorities and Economy in Gov't of the Joint Economic Comm. on Abuses of Corporate Power*, 94th Cong. 5 (1976).
118. The Convention required signatories to "establish that it is 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 the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business *or other improper advantage in the conduct of international business."* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 12, 37 I.L.M. at 4 (emphasis added).
119. *Id.* at 8.
120. 15 U.S.C. §§ 78dd-1(a)(1); 78dd-2(a)(1); 78dd-3(a)(1)6.

directing business to any person."[121] Thus, even after the 1998 amendments, corrupt payments prohibited by the Act remained subject to the business nexus requirement.

The Securities and Exchange Commission

Nevertheless, the Securities and Exchange Commission has brought enforcement actions against issuers arising from corrupt payments intended to obtain favorable tax and regulatory treatment. For example, in 1997, the Securities and Exchange Commission brought actions against Triton Energy Corporation and five individuals in which the Commission alleged that Triton had made payments to a third party, Richard Siouffi, knowing that all or a portion of the funds would be transmitted to officials of the Indonesian Ministry of Finance to procure favorable determinations regarding the treatment of various items of cost in order to obtain a reduction in Indonesian taxes. Triton Energy and the individuals consulted to the entry of injunctions and cease and desist orders against them without admitting or denying the Commission's allegations.[122] Similarly, Baker Hughes Incorporated, two of the company's former financial officers (Eric L. Mattson, former CFO, and James W. Harris, former Controller), the company's accounting firm in Indonesia, KPMG Siddharta Siddharta & Harsono, and one of the firm's partners, Sonny Harsono, consented to the settlement of charges that Mattson and Harris had authorized Harsono to make a payment of $75,000 to Indonesian tax officials in order to reduce a tax assessment for the company's Indonesia Subsidiary from $3.2 million to $270,000. None of the defendants admitted or denied the allegations.[123] Willbros Group and the three individuals (Jason Steph, Gerald Jenson and Lloyd Gibbers) were alleged to have made corrupt payments to Nigerian government officials to secure petroleum development contracts and to have made corrupt payments to Nigerian tax court officials to reduce the company's tax liability.[124] A former supervisory employee of the Willbros Nigerian operations, Jim Bob Brown, was charged in a separate action with having participated in the scheme to bribe Nigerian tax officials. Although Brown consented to the entry of an order of

121. 15 U.S.C. §§ 78dd-1(a)(1)(A), 78dd-1(a)(2)(A), 78dd-1(a)(3)(A); 78dd-2(a)(1)(A),78dd-2(a)(2)(A), 78dd-2(a)(3)(A); 78dd-3(a)(1)(A), 78dd-3(a)(2)(A), 78dd-3(a)(3)(A).

122. Triton Energy Corp. , Accounting and Auditing Enforcement Act Release No. 890, 1997 WL 94191 (Feb. 27, 1997); David Gore*,* Exchange Act Release 38343, 1997 WL 94186 (Feb. 27, 1997).

123. Baker Hughes Inc., Exchange Act Release No. 44784, 2001 WL 1090832 (Sept. 12, 2001); Eric L. Mattson & James W. Harris, Accounting and Auditing Enforcement Act Release No. 1445, 2001 WL 1044995 (Sept. 12, 2001); KPMG Sidharta Sidharta & Harsono*,* Accounting and Auditing Enforcement Act Release No. 1446, 2001 WL 1044993 (Sept. 12, 2001).

124. Willbros Group, Inc., et al., Accounting and Auditing Enforcement Act Release No. 2826, 2008 WL 2050840 (May 14, 2008).

permanent injunction, he neither admitted nor denied the allegations.[125] The Securities and Exchange Commission charged Layne Christensen Company with having made corrupt payments to obtain reduced tax liabilities in the Democratic Republic of Congo, the Republic of Guinea, and the Republic of Mali.[126]

Enforcement actions have also involved payments allegedly made to customs officials. In a wide-ranging enforcement action arising from an investigation by the Department of Justice and the Securities and Exchange Commission of the overseas practices of the global freight forwarding company, Panalpina World Transport (Holding) Ltd., and the company's U. S. subsidiary, Panalpina, Inc., complaints were filed by the Commission in the District of Columbia against GlobalSantaFe Corporation[127] and Transocean, Inc.;[128] in Louisiana against Tidewater, Inc.;[129] and in Texas against Panalpina, Inc.,[130] Pride International, Inc.,[131] and Noble Corporation;[132] all of which were involved in the petroleum services industry.[133] In these complaints, the Commission charged the companies with having violated the Act by paying bribes to customs officials in ten countries in order to reduce customs duties, to obtain and renew import permits and to secure other favorable treatment. The companies consented to the entry of final judgments without admitting or denying the allegations in the complaints.

Both the Securities and Exchange Commission and the Department of Justice pursued prosecution of Douglas A. Murphy and David G. Kay, executives of American Rice, Inc. for bribes allegedly paid to customs officials in order to avoid taxes on rice imported into Haiti. While the Commission's enforcement action was stayed, Murphy and Kay challenged the indictment filed against them, arguing that because the payments underlying the indictment were not made for the purpose of

125. Jim Bob Brown, Accounting and Auditing Enforcement Act Release No. 2479, 2006 WL 2633082 (Sept. 14, 2006).
126. Layne Christensen Co., Exchange Act Release No. 73437, 2014 WL 5423780 (Oct. 27, 2014) (Layne Christensen neither admitted nor denied the allegations).
127. GlobalSantaFe Corp., Accounting and Auditing Enforcement Act Release No. 3201, 2010 WL 4363891 (Nov. 4, 2010).
128. Transocean, Inc., Accounting and Auditing Enforcement Act Release No. 3202, 2010 WL 4363892 (Nov. 4, 2010).
129. Tidewater, Inc., Accounting and Auditing Enforcement Act Release No. 3207, 2010 WL 4363896 (Nov. 4, 2010).
130. Panalpina, Inc., Accounting and Auditing Enforcement Act Release No. 3205, 2010 WL 4363894 (Nov. 4, 2010).
131. Pride Int'l, Inc., Accounting and Auditing Enforcement Act Release No. 3203, 2010 WL 4363893 (Nov. 4, 2010).
132. Noble Corp., Accounting and Auditing Enforcement Act Release No. 3206, 2010 WL 4363895 (Nov. 4, 2010).
133. Also as a consequence of this investigation, administrative proceedings were instituted against Royal Dutch Shell, Plc. Royal Dutch Shell, Plc., Exchange Act Release No. 63243, 2010 WL 4363890 (Nov. 4, 2010).

obtaining or retaining business, they did not satisfy the business nexus requirement of the FCPA.

United States v. David Kay and Douglas Murphy

In an indictment filed on July 15, 2004,[134] Murphy, the former President, and Kay, the former Vice President for Marketing, of American Rice, Inc. were charged with conspiracy and twelve violations of the FCPA.[135] In essence, Kay and Murphy were charged with having engaged in a scheme between 1995 and 1999 under which bribes were paid to induce tax and customs officials of the government of Haiti to accept false invoices and bills of lading that understated the amount of rice being imported into Haiti, thereby reducing the amount of customs duties and sales taxes that would otherwise have been owed to the Haitian government (a reduction of approximately $1,456,821). Payments were also made to Haitian tax officials to delay a determination of the status of Rice Corporation of Haiti, the Haitian subsidiary of American Rice.

Murphy and Kay moved to dismiss the indictment on the grounds that the FCPA did not prohibit payments made for the purpose of reducing customs duties and tax obligations. Following a hearing held on April 4, 2002, the Honorable David Hittner of the United States District Court for the Southern District of Texas granted the defendants' motion and dismissed the indictment.[136] The court found the Act's business nexus to be ambiguous under the circumstances and as a consequence, the court reviewed the legislative history of the Act. The court noted that at the time of the original enactment in 1977, Congress had rejected a broadening of the scope of the anti-bribery provisions in favor of the phrase "obtain or retain business." Judge Hittner found that this legislative history confirmed that "in 1977, Congress chose to limit the scope of the prohibited activities under the FCPA and did not intend to cover payments made to influence any and all governmental decisions."[137]

The court took notice of the 1988 amendments and the rejection by the House-Senate conference of the provision of the House bill that would have extended the anti-bribery provisions to payments for "procurement of legislative, judicial, regulatory *or other action in seeking more favorable treatment by a foreign*

134. The original indictment was filed on July 12, 2001. A superseding indictment was filed on March 25, 2002. The second superseding indictment was filed on July 15, 2004. United States v. David Kay and Douglas Murphy, No. H-01-914 (S.D.Tex Oct. 7, 2004).
135. Murphy was also charged with obstruction of justice in connection with the SEC investigation that resulted in an SEC enforcement action, Douglas A. Murphy, David G. Kay, and Lawrence H. Theriot, Accounting and Auditing Enforcement Act Release No. 1607, 2002 WL 1769778 (Aug. 1, 2002). The SEC action was stayed during the pendency of the criminal case.
136. United States v. Kay (*Kay I),* 200 F. Supp. 2d 681 (S.D. Tex. 2002).
137. *Id.* at 684.

government" (emphasis in original). With regard to the purported clarification of the business nexus requirement in the report of the conference, Judge Hittner declined "to give the 1988 House Conference Report deference in its interpretation of the FCPA, as it consists of an after the fact interpretation of the term 'retaining business' by a subsequent Congress more than ten years after the enactment of the original language." While the court acknowledged that subsequent enactments are entitled to great weight in construing a statute, in the case of the 1988 conference report language, "the Court is not asked to consider enactments of a subsequent Congress that would serve as guidance," but rather, "in 1988, Congress *rejected* the House's proposal to expand the obtain or retain business language," and accordingly, "the 1988 House Conference Report attempts to clarify language that was never amended" (emphasis in original). The court concluded, "the 1988 House Conference Report consists of a belated interpretation of preexisting statutory language by the House, whose attempt to amend pertinent provisions of the statute had failed."[138]

Thus, the court held that "Congress has considered and rejected statutory language that would broaden the scope of the FCPA to call the conduct in question here. Accordingly, the court determined that the allegations in the indictment in this case do not fall under the scope of the FCPA."[139]

The government took an appeal of Judge Hittner's ruling to the United States Court of Appeals for the Fifth Circuit, which reversed the decision of the district court and reinstated the indictment, holding that "such bribes *could* (but do not necessarily) come within the statute"[140] (emphasis in original).

The court of appeals acknowledged that the FCPA did not criminalize every payment to a government official. Thus, the court said, the first question was "whether payments made to foreign officials to obtain unlawfully reduced customs duties or sales tax liabilities can ever fall within the scope of the FCPA." That is, "whether illicit payments made to foreign officials to obtain unlawfully reduced customs duties or sales tax liabilities can *ever* constitute the kind of bribery that is proscribed by FCPA."[141] The court answered in affirmative.

The court of appeals agreed with the district court's conclusion that the statute was ambiguous, particularly with respect to "how attenuated can the linkage be"

138. *Id.* at 685-86. Additionally, the court questioned why the House sought to amend the Act in that way in the first instance, if as the conference suggested, the FCPA already proscribed payments to obtain more favorable treatment by the government. The court noted as well that the Congress was aware of the *United Brands* case at the time of the original enactment but had not specifically included language in the Act that would have prohibited payments to reduce tax obligations. The court further observed that in considering the 1998 amendments, Congress had again declined to amend or broaden the business nexus requirement.
139. *Id.* at 686.
140. United States v. Kay (*Kay II*), 359 F. 3d 738 (5th Cir. 2004).
141. *Id.* at 740.

between the effect sought by the bribe (i.e., tax minimization) and the goal of obtaining and retaining business.[142]

In a bit of judicial legerdemain, the court considered the SEC's report on questionable payments that had been submitted to the Senate Banking, Housing and Urban Affairs Committee in 1976 recommending that the legislation apply to payments intended to influence the promulgation of legislation or regulations.[143] From this the court concluded that even though the Senate was specifically concerned with payments intended to secure new business, the Senate "was also mindful of bribes that influence legislative or regulatory actions," as well as those intended "to maintain established business opportunities," which were "much more capacious" than directing business to a person. The court further observed that the obtaining and retaining business language mirrored language in the SEC Report but was broader because the SEC Report had described only payments to obtain or retain government contracts. From this, the court surmised, "in using the word business when it easily could have used the phraseology of [the] SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to obtain or retain government contracts." Substituting the word "maintain" for the statutory "retain" in its analysis, the court declared that "the Senate's express intention that the statute apply to corrupt payments that *maintain* business opportunities also supports this conclusion" (emphasis original). Based on this analysis, the court held that the legislative intent was "sufficiently broad to include bribes meant to affect the administration of revenue laws."[144]

142. *Id.* at 744.

143. The Securities and Exchange Commission on its own initiative submitted a report to the Senate Committee on Banking, Housing and Urban Affairs on May 12, 1976. REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, SUBMITTED TO THE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS, S. REP. NO. 71-389 0 (1976). The report summarized the information from public disclosures by 89 companies concerning "questionable payments" together with information derived from the Commissions' enforcement actions. As part of the report, the Commission submitted proposed legislation. The SEC informed the Committee of its observation that payments had been made to government officials" for four principal purposes." First, payments had been made to secure "special or unjustified favors or advantages" in the enactment of tax or other laws or their administration. Second, payments had been made "with the intent to assist the company in obtaining or retaining government contracts." Third, payments had been made "to persuade low-level government officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities." Fourth, payments were made in the form of political contributions. *Id. at* 26-27. The legislation proposed by the SEC on the basis of the questionable payments investigation was confined to the maintenance of accurate books, records, and accounts, and to the implementation of an adequate system of financial controls. *Id. at* 63-64. The legislation did not address foreign bribery directly and did not mention obtaining or retaining contracts, government or otherwise. Thus, to the extent that the 1976 Senate bill had been "substantially based" on the SEC Report, as the court believed it was, *see Kay II*, 359 F.3d at 747, the bill was based on the accounting and controls measures proposed in the SEC Report.

144. *Id.* at 748.

Having concluded that "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 court went on to infer from the limited exception made for facilitating payments that "Congress intended the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effect to aid in obtaining or retaining business for some person." Thus having taken flight, the court opined that in enacting the FCPA in 1977, "The congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, … irrespective of whether it be related to administering the law, awarding, extending or renewing a contract, or executing or preserving an agreement."[145]

The court found the House-Senate conference's rejection of the 1988 House bill language that would have enlarged the anti-bribery provisions to include payments for influencing "regulatory action in seeking more favorable treatment by a foreign government" to have "no bearing on whether obtaining or retaining business" included conduct at issue in the case. Instead, it was the court's view that "subsequent legislative history about unchanged statutory language" was entitled to "great weight."[146] This was because "Congress is at its most authoritative when

145. *Id.* at 749-50. The court of appeals drew support for its interpretation of the business nexus requirement by reference to the Act's definition of "routine governmental action," which enumerates four examples of actions "ordinarily and commonly performed by a foreign official." The two examples cited by the court were "(i) obtaining permits, licenses, or other documents to qualify a person to do business in a foreign country" and "(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or related to transit of goods across country." *See* § 78dd-1(f)(3)(A), 2(h)(4)(A), 3(f)(4)(A) (1998). From this the court concluded that "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." *Kay II,* 359 F.3d at 751 (emphasis in original). The court ignored the statutory language clarifying that the examples were neither exhaustive nor exclusive and that such routine governmental action includes "actions of a similar nature." The court also chose to ignore the second part of the definition making clear that "routine governmental action does not include any decision by a foreign official *whether, or on what terms, to award new business or to continue business* with a particular party, or any action taken by a foreign official involved in the making decision process to encourage a decision *to award new business or to continue business* with a particular party." 15 U.S.C. § 78dd-1(f)(3)(B), 2(h)(A)(B), 3(f)(4)(B) (emphasis added). Thus, to the extent that the exception for routine governmental action is relevant at all to the analysis, it is clear that the exception is also subject to the business nexus requirement.

146. In support of this proposition, the court of appeals relied on the Supreme Court's decision in Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*,* 395 U.S. 367 (1969), which concerned the Commission's authority to enforce the "fairness doctrine" in regard to personal attacks in the context of public issues and to political editorializing by radio and television broadcasters. In the portion of the decision cited by the court of appeals, the Supreme Court noted that the 1959 amendments of the Communications Act had ratified the FCC interpretation of the public interest standard under the Communications Act. The Court cited specific statutory language

adding complex and sophisticated amendments to an already complex and sophisticated Act."[147] On this basis, the court of appeals concluded that with respect to the 1988 conference report, "the legislative history that the district court rejected as irrelevant in fact explains how the 1988 amendments relate to the original scope of the statute and concomitantly to the business nexus element."[148]

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in the 1959 amendment of the Act that the exception made from the requirement of equal time for candidates appearing on news programs was not an exception "from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." In light of this specific reiteration of the FCC Fairness Doctrine in the legislation, the Court observed that "the amendment vindicated the FCC's general view that the Fairness Doctrine inhered in the public interest standard," and in that context, "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* at 380-381. There, the Court was commenting on the specific language of a congressional enactment not as in *Kay II*, the dicta in a legislative report.

147. *Kay II*, 359 F.3d at 752. The court of appeals cited its own 1975 decision in Mount Sinai Hospital of Greater Miami v. Weinberger*,* 517 F.2d 329 (5th Cir. 1975). There, the hospital had obtained an injunction against an attempt by the Department of Health, Education and Welfare to recover $6.3 million in payments under the Medicare program for allegedly unnecessary medical procedures and hospital stays. The court of appeals reversed the district court, holding that the government had a common law right to recoup funds paid for medically unnecessary services. *Id.* at 345. In its analysis, the Court considered the 1972 amendments to the original legislation enacted in 1965. In that regard, the court observed that while the 1965 legislation made no provision for recoupment of payments, "the 1972 amendments filled the gap." In particular, the court pointed out that four of the 1972 amendments pertained directly to recoupment. Thus, the court wrote, "Here we have Congress at its most authoritative, adding complex and sophisticated amendments to an already complex and sophisticated Act." As the court explained, like the legislation in *Red Lion Broadcasting,* in enacting the 1972 amendments, Congress was not "merely expressing an opinion on a matter which may come before a court but is acting on what it understands its own prior acts to mean," and consequently, holding that HEW did not have recoupment authority "would render these amendments pointless and ineffectual." Inexplicably, however, the court in *Kay II* failed to note the distinction drawn in *Mount Sinai Hospital* between legislation such as the 1972 amendments and the situation "where Congress has attempted to direct subsequent court decisions on legislation whose original meaning was ambiguous" – citing as an example, "*A Committee of Congress attempting to advise the Courts of what it thought a prior Congress means," id. at* 343 (emphasis added), which was precisely what the conference appears to have been attempting to do in the 1988 conference report that the court of appeals found to be so persuasive.

148. *Kay II*, 359 F. 3d at 752. The court cited the 1988 conference report in three respects. First the court implied from the adoption of the Senate bill creating an affirmative defense that a payment to a foreign official "was a reasonable and bona fide expenditure, such as travel and lodging expenses, . . . directly related to . . . (B) the execution or performance of a contract," that "*corrupt*, non-bona fide payments related to contract execution and performance have always been and remain prohibited." (emphasis in original) All that the conference said in regard to these affirmative defenses was that if a payment or gift was "corruptly made, in return for an official act or omission" then the payment would not be considered to have been bona fide and "this defense would not be available." H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.). Nothing was said with respect to the business nexus requirement.
Second, the court of appeals referred to the definition of "routine governmental action," as used in the provision exempting facilitating payments. The court opined that excluding decisions by foreign officials "whether, or on what terms, to award new business or to continue business" with a party, "must mean conversely, that decisions that do relate to continuing business with a particular party are covered…by the statute." While acknowledging that the conference

The court of appeals found added support for its sweeping interpretation of the business nexus requirement in the 1998 amendments following ratification of the OECD Anti-bribery convention. The court recognized that the placement of the "improper advantage" language did not comport with the structure of the Convention's anti-bribery article. However, the court adopted the government's argument that the placement of "improper advantage" among "the original list of abuses of discretion in consideration for bribes that the statute proscribes," rather than immediately following "obtaining and retaining business," as it was in the Convention, "merely shows that Congress already intended for the business nexus requirement to apply broadly, and thus declined to be redundant.[149]

Accordingly, the court held that Congress intended payments to government officials in order to reduce tax and customs liability could fall within the coverage of the business nexus requirement. The court "hastened to add," however, that payments to evade customs duties and sales taxes would not "automatically constitute a violation of the FCPA." Instead, in order to make out a violation of the anti-bribery provisions of the Act, the government was required to show that "the bribery was intended to produce an effect, here through tax savings, that would result in obtaining or retaining business."[150]

The government sought to conform its theory of the case to this latter qualification

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report simply repeated the statutory intent "without explaining it," the court discerned "no meaningful distinction" between the phrase "continuing business" in the statutory text" and "carrying out of existing business in the Conference Report." *Kay II,* 359 F.3d at 752-53. Once again, however, the court failed to note that the conference report discussion of routine governmental action (the source of the phrase "to continue business") explained that "ordinarily and commonly performed actions with respect to permits or licenses would not include those governmental approvals involving an exercise of discretion by a government official *where the actions are the functional equivalent of obtaining or retaining business* for or with, or directing business to, any person." H.R. REP. NO. 100-576, at 918 (1988)
(Conf. Rep.) (emphasis added).

Third, the court cited the conference report's explanation for declining to adopt the House bill's language that would have prohibited payments "for procurement of legislative, judicial, regulatory, or *other action in seeking more favorable treatment by a foreign government." Id.* (emphasis in original) The conference rejected this provision of the House bill so that the Act would not "be construed so broadly as to include lobbing or other normal representations to government officials." To the court, "far from being irrelevant to Congress's intentions in 1988, this provides a direct explanation of why Congress elected not to include the newly proposed language." *Kay II,* 359 F.3d at 753. The fact remains, however, that the House proposal to broaden the anti-bribery provision to include "action in seeking more favorable treatment" was rejected and did not become part of the law in 1988, leaving the business nexus requirement unmodified.

149. *Kay II*, 359 F.3d at 754. Indeed, the Court went on to suggest that placing the "improper advantage" language after the business nexus "might have inadvertently swept these payments into the statutory ambit or at least created new confusion as to whether these types of payments were prohibited," notwithstanding the explicit statutory exception for facilitating payments. Nevertheless, the court recognized the "potential discrepancy," which the Court declined to address. *Id.* at 754-55.

150. *Id.* at 756.

of the court's holding. The superseding indictment filed on July 15, 2014, included a new conspiracy count alleging that "The defendants believed that if American Rice Inc. (ARI) and Rice Company of Haiti were required to pay the full amount of duties and taxes that should have been paid on the imported rice they would not have been able to sell the rice at a competitive price, would have lost sales to competitors, and would not have realized an operating profit, thus putting at risk American Rice Inc.'s and Rice Corporation of Haiti's business operations in Haiti." The conspiracy count further alleged that "defendant Murphy [CEO of American Rice, Inc.] believed that it would be nearly impossible to stay profitable if ARI paid the full customs duties, so defendants Murphy and Kay instituted the under-invoicing scheme using third-party boats and caused customs officials to be paid to accept false invoices."[151]

On that basis, the case proceeded to trial and the defendants were convicted of all counts. Appeal was again taken to the Fifth Circuit which affirmed the convictions.[152]

Among the issues raised in their appeal, Kay and Murphy argued that their FCPA convictions should be reversed because the statute failed to give them adequate notice that their conduct was illegal and as a consequence, "the late arriving clarification of the Act," by the court of appeals had denied them due process. The court rejected the defendants' arguments.

In particular, the court rejected the argument that the business nexus requirement was unconstitutionally vague such that defendants "were not reasonably aware of their potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentations." Thus while the payments had not been made "to insure one particular contract's success," the company "ensured through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it." In sum, "in order to retain business in Haiti, the company took measures to keep up with competitors" which could not be excused simply because the competitor paid bribes as well.[153]

The court observed that "a man of common intelligence would have understood that ARI, in bribing foreign officials, was treading close to a reasonably defined line of illegality." As defendants took the risk that their conduct was unlawful, "splitting hairs as to the legality of one type of action under the business nexus test does not allow them to argue successfully that the FCPA's standards are vague."[154]

151. United States v. Kay, Criminal No. 4-01-914 (S.D. Tex. July 15, 2004).
152. United States v. Kay (*Kay III),* 513 F.3d 432 (5th Cir. 2007).
153. *Id.* at 441-42.
154. *Id.* at 442. The court also concluded that the earlier panel's decision construing the business nexus requirement had neither enlarged the scope of the Act nor "created a new and independent principle

The Supreme Court denied certiorari.[155]

Observations

Unlike the domestic bribery statute,[156] or the mail and wire fraud statutes (that criminalize schemes to defraud whose object is the deprivation of the honest services of a government official),[157] the FCPA is not a general bribery statute. When Congress wished to prohibit a broad range of public corruption, Congress did so specifically, as for example in the domestic bribery statute's prohibition against payments (or offers or promises) of "anything of value" to a public official with the intent "to influence any official act,"[158] where an official act means "any decision or action on any question, matter, cause, suit, proceeding, or controversy, which at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."[159] Instead, in enacting the FCPA and in the subsequent amendments of the Act, Congress predicated liability under the anti-bribery provisions on the requirement that a prohibited payment be made (or offered or promised) "in order to assist" the payor "in obtaining or retaining business for or with, or directing business to, any person."

Further it is clear that the FCPA does not criminalize conduct overseas that would be illegal under U.S. anti-bribery laws. Payments to foreign officials permitted under the FCPA (unless there was a business nexus), such as facilitation payments, and, expenditures for expenses incurred by foreign officials, including travel and lodging expenses, that were related to the promotion of products or the execution or performance of a contract, would be viewed as unlawful gratuities[160] or violations of federal ethics rules.[161] Indeed, at the time of the original enactment of the FCPA, the House-Senate conference recognized, specifically with regard to facilitation payments, that some payments to foreign officials that would be considered "reprehensible" under U.S. law were not within the ambit of the FCPA.[162]

Nevertheless, a panel of the Fifth Circuit concluded in *United States v. Kay* that the business nexus requirement should be read broadly, such that payments to foreign tax and customs officials in order to reduce customs and sales tax liability on

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of law." The court therefore rejected the defendants' challenges based on retroactivity. *Id.* at 443-44.

155. United States v. Kay, 513 F.3d 432 (5th Cir.), *cert. denied*, 129 S. Ct. 42 (2008).
156. 18 U.S.C. § 201(b) (1994).
157. 18 U.S.C. §§ 1341 (2008), 1343 (2008), 1346 (1998).
158. *Id.*
159. 18 U.S.C. § 201(b)(1)(A) (1994).
160. 18 U.S.C. § 201(c) (1994).
161. *See* 18 U.S.C. § 209 (2004); 5 C.F.R. §§ 2635.101 (1997) *et. seq.*
162. H.R. REP. No. 95-640, at 8 (1977).

imported goods (thereby increasing the company's profits), could constitute corrupt payments prohibited by the anti-bribery provisions. The panel added, however, that while such payments *could* fall within the Act's prohibitions, it was still necessary to show that the corrupt payments were intended to "produce an effect" that would assist the payor in obtaining or retaining business.[163]

In the appeal following defendants' convictions, a second panel of the Fifth Circuit upheld the Act against the defendants' claim that in view of the earlier panel's construction of the business nexus requirement, the statute had failed to give them fair notice that their conduct was illegal, and as a consequence, they had been denied due process. The panel viewed the statute and the evidence at trial as establishing that the defendants while reasonably aware that they might be engaging in illegal activity by bribing Haitian tax and customs officials, and although the payments had not been made to guarantee the success of a particular contract, the reduction of taxes had made the company competitive, and therefore had been directed toward retaining business.[164]

As flawed as the *Kay* decisions were, the government, particularly the Securities and Exchange Commission, has aggressively pursued companies for payments where the business nexus was tenuous at best.

In the 2007 enforcement action against Bristow Group, Inc., the SEC charged the company with violations of the anti-bribery provisions as a consequence of payments totaling approximately $423,000 that were allegedly made by the company's wholly-owned U.S. subsidiary, Air Log International Ltd., through a Nigerian affiliate, to tax officials of the governments of two Nigerian states in order to obtain a reduction in the amount of expatriate employment taxes. There was no allegation or explanation why these payments and the reduction of the employment tax liability assisted Bristow in obtaining or retaining business. The matter was resolved without Bristow admitting or denying the allegations.[165]

As noted, in 2010, enforcement actions were brought against GlobalSantaFe Corporation; Noble Corporation; Panalpina, Inc.; Pride International, Inc.; Royal Dutch Shell, plc., Tidewater, Inc. and Transocean, Inc., alleging violations of the anti-bribery provisions arising from payments to customs officials in order to obtain import permits, to reduce customs duties, and to secure other favorable treatment. None of the complaints alleged a business nexus for the payments. All of the companies agreed to settlements without admitting or denying the allegations in the complaints.

On December 24, 2013, the SEC announced the simultaneous filing and

163. *Kay II*, 359 F.3d at 756.
164. *Kay III*, 513 F.3d at 441-42.
165. Bristow Group Inc., Exchange Act Release No. 56533, 2007 WL 3314405 (Sept. 26, 2007).

settlement of an enforcement action against Archer-Daniels-Midland Company (ADM). In a related matter, Alfred C. Toepfer International, (Ukraine), Ltd. ("ACTI Ukraine"), an indirect subsidiary of ADM[166] was charged with conspiracy to violate the FCPA. As alleged in the indictment, ACTI Ukraine had made payments to a vendor of export-related services and to a vendor of insurance policies intending that all or a portion of those payments would be transmitted to Ukrainian government officials for their assistance in obtaining refunds of value-added taxes owed to ACTI Ukraine. The government alleged that the refunds gave ACTI Ukraine an unspecified "business advantage."[167] In the complaint filed against ADM, however, the SEC alleged that "getting these VAT refunds earlier—before the Ukraine endured a brief period of hyperinflation—gave ACTI Ukraine a business advantage resulting in a benefit to ADM of roughly $33 million."[168] There was no intimation, either by the Department of Justice or the Securities and Exchange Commission, how this "business advantage" assisted either ADM or ACTI Ukraine in obtaining or retaining business.[169] ACTI Ukraine agreed to plead guilty to conspiracy and ADM entered into a non-prosecution agreement with the Department of Justice.

On October 27, 2014, Layne Christensen Company entered into an agreement with the Securities and Exchange Commission in which the company, without admitting or denying the allegations in the complaint, consented to the entry of an order by the Commission finding that the company had violated the anti-bribery provisions of the Act. The Commission alleged that Layne Christensen's Mineral Exploration Division had authorized several of the company's subsidiaries in Africa to make payments to tax officials in the Democratic Republic of the Congo and in the Republics of Guinea and Mali to reduce tax liabilities and penalties, and to customs officials in Burkina Faso and the Democratic Republic of Congo in order to reduce customs duties and to obtain clearance for the import and eventual export of drilling equipment. Payments were also alleged to have been made to the police and to

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166. According to the SEC complaint against ADM for violations of the accounting and controls provisions, ADM held an indirect 80% interest in Alfred C. Toepfer International B.V., which was the sole owner of ACTI Ukraine. Sec. Exch. Comm'n v. Archer-Daniels-Midland Co., No. 2:13-cv-2279 (C.D. Ill. Dec. 20, 2013).

167. United States v. Alfred C. Toepfer Int'l (Ukr.) Ltd., No. 2:13-cr-20062-MPM-DGB (C.D. Ill. Dec. 20, 2013), Information ¶ 5.

168. Sec. Exch. Comm'n v. Archer-Daniels-Midland Co., No. 2:13-cv-2279 (C.D. Ill. Dec. 20. 2013), Complaint ¶ 38.

169. The 1994 prosecution of Vitusa Corporation was quite similar. There, the defendant pleaded guilty to a violation of the FCPA anti-bribery provisions alleged to have resulted from the payment of a "service fee" demanded by a Dominican Republic official in order to obtain a payment lawfully due to Vitusa for the sale of milk powder to the Dominican government. As the case was resolved by a voluntary plea, no challenge was raised to the lack of an alleged nexus between receipt of the funds owed to Vitusa and the company's obtaining or retaining business. United States v. Vitusa Corp., Criminal No. 94-253 (D.N.J. July 28, 1994).

immigration and border patrol officials in Burkina Faso, Congo, Guinea and Tanzania to obtain entry and work permits for expatriate employees, and to avoid penalties for non-compliance with immigration and labor regulations. Although the Commission contended that these payments were made in order to obtain or retain business, there was no allegation or explanation of how that was to be accomplished.

In effect, the government has simply read the business nexus requirement out of the Act,[170] notwithstanding the *Kay II* court's instruction that the government must prove that a corrupt payment to secure an advantage, such as a reduction in tax or customs duty liability, "was intended to produce an effect…that would assist in obtaining or retaining business."

Corporate Compliance Programs and Internal Financial Controls

Although not a subject of litigation, several recent enforcement actions have linked the absence of an effective program of corporate compliance with the FCPA with the adequacy of internal financial controls mandated by the Act. The efficacy of the corporation's FCPA compliance program and management's reliance on that program were also central issues in the SEC's prosecution of Mark A. Jackson, the former CEO of Noble Corporation, and James J. Ruehlen, Noble's former Nigeria company manager.[171]

The requirement of accurate financial records and effective financial controls was the other prong of Congress's response to foreign bribery. As amended by the FCPA, under the Securities and Exchange Act of 1934,[172] issuers are required 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."[173] Issuers are also required to "devise and maintain a system of internal accounting controls" that are "sufficient to provide reasonable assurances" that:

> (i) Transactions are executed in accordance with management's general or specific authorization;
>
> (ii) Transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria

170. *See Resource Guide, supra* note 100, at 12-14.
171. Sec. Exch. Comm'n v. Mark A. Jackson and James J. Ruehlen, No. 4:12-cv-00563 (S.D. Tex. Feb. 24, 2012), Accounting and Auditing Enforcement Act Release No. 3564, 2014 WL 3101442 (July 7, 2014). The author testified on behalf of Mr. Jackson as an expert witness concerning FCPA compliance programs.
172. 15 U.S.C. §§ 78a *et seq* (1934).
173. 15 U.S.C. § 78m(b)(2)(A) (2012).

applicable to such statements; and (II) to maintain accountability for assets;

(iii) Access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[174]

As used in the accounting and controls provisions of the Act, "reasonable detail" and "reasonable assurances" are that "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[175] Knowing falsification of a book, record or account, or knowing circumvention or failure to implement a system of accounting controls may result in criminal liability[176] punishable by imprisonment for up to ten years and a fine of up to $1,000,000 for individuals, or up to $2,500,000 for entities.[177]

In the rulemaking proceeding following enactment of the accounting and controls requirements, the SEC identified several factors for determining whether an issuer's financial control system achieved the objectives of the Act. These were: 1) the overall control environment; 2) the translation of broad accounting objectives into specific objectives which were applicable to the business, organizational, and other circumstances of the company; and 3) the specific control procedures and environmental factors which should contribute to the achievement of the specific control objectives.[178] In 1998, SEC Commissioner Isaac C. Hunt identified six elements of effective accounting controls: support at the top of the organization; reflective of the structure, functions and risks of the organization; delegated effectively; codified in writing; checked periodically; and enforced.[179] These characteristics were incorporated into the FCPA guidance document issued by the Department of Justice and the SEC.[180]

That guidance also stated the government's view that "an effective compliance program is a critical component of an issuer's internal controls."[181] Recent criminal

174. 15 U.S.C. § 78m(b)(2)(B) (2012).
175. 15 U.S.C. § 78m(b)(7) (2012).
176. 15 U.S.C. § 78m(b)(5) (2012). *See, e.g.*, United States v. Siemens Aktiengesellschaft, No. 1:08-cr-367-RJL (D.D.C. Dec. 15, 2008); United States v. Alliance One Int'l, Inc., No. 4:10-cr-00017 (W.D. Va. 2010); United States v. Peterson, No. 1:12-cr-00224-JBW (E.D.N.Y. May 10, 2012); United States v. Total SA, No. 1:13-cr-239 (E.D. Va. 2013).
177. 15 U.S.C. § 78ff(a) (2002).
178. Statement of Management on Internal Accounting Control, 44 Fed. Reg. 26702, at 26704-05 (May 4, 1979). *See* Brown*, Bribery in International Commerce, supra* note 5 at 81-92.
179. Isaac C. Hunt Jr., Comm'r, Sec. Exch. Comm'n, Remarks at the 27th Ann. AICPA Nat'l Conference on Current SEC Developments (Dec. 7, 1999).
180. *See Resource Guide, supra* note 100, at 40.
181. *Id*.

prosecutions and civil enforcement actions have emphasized that view.[182]

Compliance with the FCPA is simply good corporate governance. Corporations are obliged by state law to conduct their affairs lawfully,[183] and there are powerful incentives for corporations to do so.[184] Indeed, the DoJ / SEC guidance stated that the adequacy of a company's compliance program would be taken into consideration in determining whether to prosecute or to enter into either a non-prosecution agreement or a deferred prosecution agreement. The existence of a compliance program may also affect the penalty or other remedial action sought.[185]

Design of an Effective FCPA Compliance Program

The overarching objective of a corporate compliance program is to foster a culture in which compliance is a norm rather than an obligation. To that end, the compliance program should serve two essential functions. First, the compliance program should prevent violations of law and corporate policy. Second, the compliance program should facilitate prompt detection of violations, allowing the company to take timely remedial action to mitigate the consequences of violative conduct and to preserve the company's legal rights (including disclosure when appropriate).

An effective compliance program is one that responds to the areas of legal risk faced by the company in the conduct of its business.[186] Accordingly, as an initial step in the design of a compliance program, the company should conduct rigorous risk assessments that evaluate the legal and regulatory regimes governing the company's activities and that evaluate the transactional risks to which the company is subject in conducting those activities. In addition to identifying the possible violations of law, the risk assessment should also evaluate where the company's resources should best be focused in order to effectively mitigate the areas of highest

182. *See* United States v. Siemens Aktiengesellschaft, No. 1:09-cr-367-RJL (D.D.C. Dec. 15, 2008); United States v. Total S.A., No. 1:13-cr-239 (E.D. Va. May 29, 2013); United States v. Zao Hewlett-Packard A.O., No. 14-201 (DLJ) (N.D. Cal. 2014); Sec. Exch. Comm'n v. Archer-Daniels-Midland Co., No. 2:13-cv-02279 (C.D. Ill. Dec. 20, 2013); Hewlett-Packard Co., Exchange Act Release No. 71916, 2014 WL 1381418 (Apr. 9, 2014); Smith & Wesson Holding Corp., Exchange Act Release No. 72678, 2014 WL 3706548 (July 28, 2014).

183. *See, e.g.*, DEL. CODE ANN. tit. 8, §101(b) (1998).

184. *See* H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era,* 26 DEL J. CORP. L. 1, 71-102 (2001).

185. *See Resource Guide*, *supra* note 100, at 56.

186. *See* Brown, *Bribery in International Commerce, supra* note 5, at ch. 9. The SEC charged Bruker Corporation with having failed to implement an effective system of financial controls in part because Bruker had not provided its code of conduct, anticorruption policies, and training to employees of the company's Chinese subsidiary, and had not tailored its process for approval of expenditures by third party agents to conditions in China. Bruker Corp., Exchange Act Release No. 73835, 2014 WL 7016166 (Dec. 15, 2014).

compliance risk. An effective compliance program is also one that comports with how the company actually operates. That is, the compliance program must be organic to the company in contrast to a set of rules and procedures imposed upon the company. The design of a corporate compliance program should reflect the reality of the company's operations rather than some hypothetical or idealized notion of how the company should operate. Thus, an effective compliance program is one that is individualized, because as the DoJ / SEC guidance observed, "[w]hen it comes to compliance, there is no one-size-fits-all program."[187]

Compliance Structure

To effectuate the culture of compliance and to implement the necessary compliance procedures, the corporation must establish a structure that involves all of the relevant elements of the corporation. In keeping with its traditional oversight function, the board of directors must be actively engaged. The board, or a committee such as the executive or audit committee or a compliance committee constituted for that purpose, should review and approve the implementation of the compliance program as well as any modifications that management may propose from time-to-time.[188] Periodic reports should be made to this committee by management and outside consultants concerning the program's effectiveness in order to ensure continuous improvement. A mechanism should also be put in place allowing internal reporting to the board by employees and third parties of possible violations of law and corporate policy or of questionable conduct, without fear of retaliation. In the event that a possible violation of law necessitates an independent internal investigation (as where the allegation of misconduct involves the CEO or chief legal officer), the board should supervise the investigation and based on the advice of counsel, the board should direct the remedial action to be taken.

The chief executive officer is responsible to the board for the corporation's legal compliance. The CEO is assisted in discharging this responsibility by the company's chief legal officer, if any. Both the Department of Justice and the SEC have endorsed the installation of a chief compliance officer with responsibility for operation of the compliance program who reports to both the CEO and the board of directors. The compliance officer should be supported by a staff commensurate with the size of the corporation and should be adequately resourced to carry out the compliance function, including training, advice, and oversight.[189]

187. *Resource Guide*, *supra* note 100, at 57.

188. *See* Deferred Prosecution Agreement at 14-15, United States v. Aibel Group Ltd., No. 4:07-cr-00005 (S.D. Tex. Feb. 6, 2007); Brown, *Bribery in International Commerce*, *supra* note 5, § 9:25 (Supp. 2007).

189. For example, among the remedial actions taken by Siemens AG in anticipation of the resolution of

In addition, the company may form an internal compliance committee comprised of the chief compliance officer and senior members of the finance and legal organizations, internal auditors, human resources, and operations. This committee should meet regularly to evaluate the effectiveness of the compliance program and to review significant compliance issues and the company's response, including reports received through the company's "hotline." The committee should also regularly examine the due diligence regarding third party agents and business partners.[190]

It is essential that the compliance function be integrated into the operations. One way of accomplishing this is to have individuals within the operations designated as compliance focal points who serve as subject matter resources to whom questions of policy and procedure can be directed. The compliance focal points can be a source of compliance advice in the first instance, but can also be a conduit for the elevation of more serious or complex issues of legal or regulatory compliance to the chief compliance officer or to corporate counsel. The focal points ensure that the compliance function is a continuing presence where issues of compliance often arise.

Elements of an Effective Compliance Program

At the most basic level, a corporate compliance program should: 1) establish standards to which corporate and individual conduct should conform; 2) provide procedures by which those standards can be met; 3) educate employees concerning their obligations under law and corporate policy, and the company's procedures for compliance; 4) oversee compliance with legal and regulatory requirements, corporate policy and procedures, and evaluate the ongoing effectiveness of the program; and 5) ensure that compliance is recognized and rewarded, and that violations are investigated and remediated, including by appropriate discipline.

A seminal source of the elements of an effective program of corporate compliance was the United States Sentencing Guidelines for Organizational Defendants promulgated by the U.S. Sentencing Commission in 1991.[191] The guidelines provide that in order to have "an effective compliance and ethics program," an organization

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the Department of Justice action following the disclosure of a worldwide bribery scheme, the company created a position on the managing board responsible for legal and compliance matters. The company also installed a chief compliance officer to oversee the compliance program who reported to the general counsel and the CEO and who was supported by 500 full time compliance personnel worldwide. Government Sentencing Memorandum at 22, United States v. Siemens Aktiengesellschaft, No. 1:09-cr-367-RJL (D.D.C. Dec. 12, 2008).

190. Agreed Sentencing Agreement at 9, United States v. Universal Leaf Tabacos Ltda., No. 3:10-cr-00225-REP (E.D. Va. Aug. 6, 2010); Letter from Daniel J. Horowitz, Esq., concerning the non-prosecution of Converse Technology, Inc. (April 6, 2011) (on file with author); Brown, *Bribery in International Commerce*, *supra* note 5, § 9:25.

191. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (U.S. SENTENCING COMM'N 2014).

must: 1) "Exercise due diligence to prevent and detect criminal conduct;" and 2) "Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[192]

Exercise of the requisite due diligence and promotion of the necessary organizational culture, "minimally require" the following:

1. Establishment of standards and procedures to prevent and detect prohibited conduct;
2. A "governing authority" that is knowledgeable about the content and operation of the compliance program and that exercises "reasonable oversight" of the implementation and effectiveness of the program;
3. Assignment of overall responsibility for the program to a specific individual "within the high-level personnel" of the organization;[193]
4. Delegation of day-to-day operational responsibility for the program to specific individuals who report to the "high-level personnel" and to the "governing authority" concerning the effectiveness of the program and who are given "adequate resources, appropriate authority, and direct access to the governing authority;"
5. Exclusion from the "substantial authority personnel" of individuals who are known, or through the exercise of due diligence should have been known, to have engaged in illegal or unethical conduct;[194]
6. Periodic communication, in a practical manner of the organization's standards and procedures to individuals at all levels of the organization (including the governing authority, high level and substantial authority personnel, employees and agents when appropriate);
7. Reasonable steps to ensure: A) that the program is followed (including monitoring and activity); B) that the program's

192. *Id*. at § 8B2.1(a); The guidelines acknowledge that "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." A sentiment echoed in the DoJ / SEC guidance. *Resource Guide*, *supra* note 100, at 56.

193. Under the guidelines, such "high-level personnel" are considered to be "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization," such as directors, executive officers and persons in charge of major business or functional units. U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(B) (U.S. SENTENCING COMM'N 2014).

194. "Substantial authority personnel" are considered to be "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization, "such as plant or sales managers, or persons who negotiate or approve price levels of significant contracts." *Id*. at § 8A1.2 cmt. n.3(C).

effectiveness is periodically evaluated; C) That mechanisms are in place to allow employees and agents to report, anonymously or confidentially, potential criminal conduct or to seek guidance, without fear of retaliation;

8. Promotion and consistent enforcement of the program through appropriate incentives and appropriate disciplinary measures; and
9. Reasonable steps to respond in the event criminal conduct is detected including modification of the compliance and ethics program.[195]

Under the guidelines, implementation of an effective compliance and ethics program requires the organization to "periodically assess the risk of criminal conduct," and to modify the program to reduce any risks that are revealed through the assessment.[196] This risk assessment should include: A) the nature and seriousness of the potential criminal conduct; B) the likelihood that criminal conduct may occur due to the nature of the organization's business; and C) the organization's prior compliance history.[197] These criteria have been adopted by various administrative agencies.[198] The Department of Justice has taken the opportunity presented by non-prosecution and deferred prosecution agreements, plea agreements, and opinion procedure releases to articulate what the Department considers to be an adequate FCPA compliance program.[199] The Department of Justice and the Securities and Exchange Commission have also included a discussion of an effective FCPA compliance

195. *Id*. at § §8B2.1 (b).
196. *Id*. at § §8B2.1 (c).
197. *Id*. at § §8B2.1 cmt. n.7.
198. *See* BROWN, *supra* note 5, at 288-289; BROWN, *supra* note 16, at 111-126.
199. *See* Department of Justice Criminal Division Fraud Section, *Opinion Procedure Releases No. 04-02*, USDOJ.GOV (Jul. 12, 2004), http://www.justice.gov/criminal-fraud/opinion-procedure-releases Letter to Mary C. Spearing, Esq., setting forth the non-prosecution agreement concerning Noble Corporation (Nov. 4, 2010) (on file with author); Deferred Prosecution Agreement at C1-6, United States v. Total, S.A., No. 1:13-cr-00234 (E.D. Va. May 23, 2013); Deferred Prosecution Agreement at C1-8, United States v. Diebold Corp., Criminal No. 5:13-cr-00464 (N.D. Ohio. Oct. 22, 2013); Deferred Prosecution Agreement at C1-8, United States v. Weatherford International, Ltd., No. 4:13-cr-00733 (S.D. Tex. Nov. 26, 2013); Deferred Prosecution Agreement at C1-8, United States v. Bilfinger SE, No. 4:13-cr-00745 (S.D. Tex. Dec. 9, 2013); Letter to William J. Bachman, Esq., setting forth the non-prosecution agreement with Archer Daniels Midland Company (Dec. 20, 2013) (on file with author); Plea Agreement at Ex. 4, United States v. Alcoa World Alumina LLC, No. 2:14-cr-00007 (W.D. Pa. Jan. 9, 2014); Plea Agreement at Ex. 2, United States v. Marubeni Corp., No. 3:14-cr-00052 (D. Conn. Mar. 19, 2014); Plea Agreement at Ex. 3, AO Hewlett-Packard A.O., No. 5:14-cr-00201 (N.D. Cal. Apr. 9, 2014); Deferred Prosecution Agreement at Attach. D, United States v. Hewlett-Packard Polka, SP.Z.O.O., No. 5:14-cr-202 (N.D. Cal. Apr 9, 2014); Letter from Andrew Gentin to Douglas N. Greenberg, regarding the non-prosecution agreement with Bio-Rad Laboratories, Inc. (Nov. 3, 2014) (on file with author); Plea Agreement at Ex. 3, United States v. Alstom S.A., No. 3:14-cr-00246 (D. Conn. Dec. 22, 2014).

program in their guidance document.[200] On the basis of this, it is the enforcers' view that an effective FCPA compliance program is comprised of the following elements:

1. *A high level commitment to compliance with the FCPA* — the company must ensure that the board of directors and members of senior management "provide strong, explicit, and visible support and commitment" to a "clearly articulated and visible corporate policy against violations of the FCPA and other applicable foreign law counterparts." This commitment is also to be "reinforced and implemented by middle managers and employees at all levels of a business."[201]
2. *Policies and procedures memorialized in a compliance code* — in addition to the policy against violation of the FCPA and foreign bribery laws, the company must adopt a written compliance code that applies to all directors, officers, employees, and when appropriate, third parties (including agents, intermediaries, consultants, representatives, distributors, teaming partners, contractors, suppliers, consortia, and joint venture partners). The code is to include procedures that are "designed to reduce the prospect of violations of the anti-corruption laws and the company's compliance code." The anticorruption code and procedures must address, at a minimum, transactions with foreign officials involving gifts, hospitality, entertainment, travel and other expenses; political contributions; charitable donations and sponsorships; facilitation payments; and solicitation and extortion by the foreign official. Policies and procedures addressing the accounting and financial controls provisions of the FCPA are also required. The code should be accessible to employees and others acting on behalf of the company, and should be available overseas in the local language. The code should be reviewed and updated periodically based on the company's risk assessment.
3. *Training and guidance* — the company must ensure that the compliance policies and procedures are "effectively communicated" to the directors, officers, employees and when appropriate, to the company's agents and business partners. The company must provide periodic training to all those in "positions of leadership or trust," or in those positions that "pose a corruption risk to the company." Training is also to be provided to persons in the internal audit, sales, legal, compliance and finance functions. Training should be provided "in a manner appropriate for the targeted audience" including the delivery of training and training manuals in the local

200. *Resource Guide*, *supra* note 100, at 56-61.
201. In the words of the DoJ / SEC Guidance, "A compliance program should apply from the board room to the supply room—no one should be beyond its reach." *Id.* at 59.

language. Compliance with the training requirement should be documented with certifications executed by the recipients of the training. In this connection, the company must establish mechanisms for providing ongoing guidance and advice on compliance.

4. *Internal reporting and investigation of possible violations of law and corporate policy* — An essential feature of the oversight of legal compliance and of monitoring the effectiveness of a corporate compliance is internal reporting and investigation of questionable conduct. A company must establish and maintain a process by which employees and third parties can report confidentially, and anonymously, possible violations of law and corporate policy without fear of retaliation. The process should allow direct communication with the compliance organization, and with the chief legal officer and chief executive officer and with the board of directors (or a committee of the board charged with oversight of the compliance program). The communication may be accomplished by means of a toll-free "hotline" or an ombudsman. All reports of questionable conduct should be enquired into and those that raise substantial issues of legal compliance should be thoroughly investigated. The results of these inquiries should be memorialized and communicated to the individual who made the report, as well as to management and the board.
5. *Consistent discipline of violations*—The company should seek to incentivize compliance with law and company policy. Adherence to compliance requirements and support of the compliance program may serve as a metric for evaluating performance leading to financial reward or professional advancement. Conversely, the company must establish procedures for disciplining those who subject the company to potential liability by violating legal requirements and company policy. These procedures should ensure that discipline is imposed fairly and consistently across the organization regardless of the individual's position or perceived "value" or "importance" within the company. Discipline should not necessarily be confined to those who directly engaged in the violating conduct, but should extend to those who knew (or should have known) of the conduct but did nothing to prevent the conduct, and to those who encouraged or condoned the conduct.

Transactions with Third Parties

Special attention must be paid to third parties, particularly those third parties that interact directly with foreign officials. The failure to exercise adequate due diligence in regard to such third parties may be viewed as a failure to implement an adequate system of financial controls.[202]

With respect to these third-party relationships, companies are to establish and maintain risk-based due diligence requirements pertaining to the retention and ongoing oversight of agents and business partners. When "necessary and appropriate," companies are to include provisions in their contracts with third parties "reasonably calculated to prevent violations of the anti-corruption laws," such as representations and undertakings regarding compliance with anti-corruption laws; the right to conduct audits of the third party's books and records; and the right to terminate the agreement as the result of a breach of the anti-corruption laws, or the company's policies and procedures, or the representations and undertakings of compliance.

Accordingly, companies that engage third parties to act on their behalf overseas must exercise due diligence generally in three areas: selection of the agent; structuring the relationship; and overseeing the agent's activities.

Selection of the agent — As a preliminary matter, the DoJ / SEC guidance suggests that companies should understand the need for a third party agent and the role that the agent is to play in the transaction. With that in mind, the company should evaluate the qualifications of the proposed agent as well as the agent's business reputation and the agent's relationships, if any, with foreign officials.[203] In light of the imputation of knowledge from "willful blindness" or "conscious disregard" of information that would give a reasonable person "reason to know" that all or a portion of the funds paid to a third party would be used for a corrupt purpose,[204] it is of paramount importance particularly when the services are to be performed in a country perceived as being a corrupt place to do business, that companies closely scrutinize the qualifications and reputation of proposed agents as well as the identity of persons associated with the agent through familial or business relationships or through direct or beneficial ownership.[205] Any "red flags" that call

202. *See* G.E. Invision, Inc., Accounting and Auditing Enforcement Act Release No. 2187, 2005 WL 354589 (Feb. 14, 2005); Daimler AG, S.E.C. 10-51, 2010 WL 1242054 (Apr. 1, 2010); Eli Lilly and Co., Litigation Release No. 22576, 2012 WL 6642672 (Dec. 20, 2012); Hewlett-Packard Co., Exchange Act Release No. 71916, 2014 WL 1381418 (Apr. 9, 2014); Smith & Wesson Holding Corp., Exchange Act Release No. 72678, 2014 WL 3706548 (Jul. 28, 2014).

203. *Resource Guide*, *supra* note 100, at 60.

204. 15 U.S.C. § 78dd-1(a)(3); *Id.* at § 78dd-2(a)(3); *Id.* at § 78dd-3(a)(3); *See* BROWN, *supra* note 5, § 2:10.

205. In contrast, a company's rigorous due diligence in selection will evidence a lack of corrupt intent. In Opinion Procedure Release No. 10-02 (July 16, 2010), a U.S. micro-finance institution transferred funds to an institution in a foreign country as a condition-precedent to the foreign regulatory agency granting a license to the local institution that was the recipient of the funds. In selecting the recipient, the U.S. entity and its Eurasian subsidiary had conducted a three-stage due diligence process. In the first stage, publicly available information and information obtained from third parties were analyzed to determine whether the potential candidates were qualified to receive the funds and to use them effectively. In the second stage, "key operating and assessment documents"

into question the candidate's fitness must be investigated and run to ground.[206] Care must be taken to thoroughly document the selection process and the company's due diligence.[207]

Structure of the relationship—the DoJ / SEC guidance recommended that companies ensure that contracts with third parties specifically describe the services that the third party is to perform and establish the terms on which payment is to be made for those services.[208] Additionally, it is recommended that the agreement contain representations and warranties 1) that the third party is not a foreign official, a relative of a foreign official or an agency or instrumentality of a foreign government; 2) that the third party is authorized to act in the manner contemplated

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were reviewed and interviews were conducted with candidate representatives in order to evaluate the candidates' ownership and management structure concerning the candidates' relationship with foreign officials and the potential for corruption. In the third stage, after due diligence was conducted to assess the recipients' reputation for integrity and any possible relationships with foreign officials. When that examination revealed that a foreign official served as a director of the likely recipient and its parent corporation, it was determined that the official's duties were unrelated to the micro-finance industry and that the official would not be compensated for board service. On the basis of that due diligence, the Department of Justice concluded that it was "unlikely" that the transfer of funds to the third party would "result in the corrupt giving of anything of value to such official." Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 10-02, U.S. DEP'T OF JUSTICE (Jul. 16, 2010), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/07/22/1002.pdf.

206. Typical "red flags" necessitating increased scrutiny of a candidate include:
- The candidate does not have the resources or the expertise to perform the services;
- Allegations that the candidate has made corrupt payments in the past;
- The candidate refuses to warrant past and future compliance with anti-corruption laws;
- The candidate is a current or former government official or is a relative or close associate of a foreign official;
- One or more direct or beneficial owners of the candidate are foreign officials;
- The candidate may be considered an agency or instrumentality of a foreign government;
- The candidate requires compensation or a commission that is excessive for the country, the industry, or the services to be performed;
- The candidate requires both a retainer fee and a bonus or commission, or requests payment in advance;
- The candidate insists on being paid in a country other than the country in which the candidate resides or the country in which the services are to be performed, particularly when the country in which payment is to be made has strict bank secrecy laws;
- The candidate insists on payment in cash or cash equivalent;
- The candidate insists that payment of compensation be made to a third party;
- Commission payments or other compensation is to be shared with third parties whose identities are not disclosed; and
- The candidate requests an after-award services contract that the candidate does not have the resources or expertise to perform.

See BROWN, *supra* note 5, § 9:16.

207. *Id.* §§ 9:12-9:19.

208. *Resource Guide*, *supra* note 100, at 60.

by the agreement; 3) that the third party has complied and will continue to comply with all applicable laws and regulations, specifically including the FCPA and the country's anti-bribery laws; 4) that the third party is familiar with the prohibition against promising, offering or making corrupt payments to foreign officials; and 5) that the third party has not made payments in the past that would violate the anti-bribery provisions of the FCPA. In connection with these representations and warranties, the contract should require that the third party notify the company should circumstances change rendering the representations and warranties inaccurate or incomplete.[209]

The agreement should establish that the third party is an independent contractor without authority to bind the company absent the company's specific authorization and approval. It should be made clear that the third party cannot hold itself out as an affiliate of the company and cannot incur any obligation on the part of the company without the company's prior written consent. The agreement should also specify that the rights, duties, and obligations of the third party cannot be assigned unless authorized by the company in advance.

The payment terms should be specified. The agreement should provide that payments are to be made by check or wire transfer payable to the third party and no one else. Cash payments should be explicitly prohibited. The third party should agree to comply with all applicable currency control and tax laws, and there should be a requirement that fees will not be paid absent detailed activity reports.

Similarly, the third party should be required to maintain detailed and accurate records of all expenses incurred under the agreement. The agreement should make clear that expenses will not be reimbursed unless approved in advance and accompanied by documentation deemed adequate by the company. This documentation should be reviewed regularly by the company to determine whether there have been questionable payments requiring further investigation and the company should reserve the right to audit the third party's financial records during the term of the agreement and for a reasonable period (e.g., the statutory limitation period) thereafter. Lastly, the agreement should provide for disclosure of the agreement by the company to all interested governmental agencies in the U.S. and in the country in which the services are to be performed.[210]

Due Diligence in Supervision—the company must exercise continuing due diligence of the third party's activities. The DoJ / SEC guidance advises that companies "confirm and document that the third party is actively performing the

209. *See* BROWN, *supra* note 5, §9:20.
210. Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 04-02, U.S. DEP'T OF JUSTICE (Jul. 12, 2004), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0402.pdf.; BROWN, *supra* note 5, § 9:21.

work for which it is being paid and that its compensation is commensurate with the work being provided."[211] The company should insist on activity reports as a pre-requisite to payment of a third party's fees, and these reports should be reviewed regularly. Company personnel who are responsible for the third party's activities should communicate with the third party regularly and document those communications. The DoJ / SEC guidance recommends periodic updating of the due diligence by exercising audit rights, providing training, and requesting certification of compliance annually by the third party.[212]

Due Diligence in Mergers and Acquisitions—Mergers and acquisitions can also result in successor liability.[213] The risk of liability following a merger or acquisition is particularly acute when violative conduct that was not detected prior to the transaction continues and the successor entity is deemed to have acquiesced in the activities.[214]

As a consequence, it behooves the acquirer to conduct due diligence of the target's compliance with the FCPA. Effective pre-acquisition due diligence has enabled the

211. *Resource Guide*, *supra* note 100, at 64.

212. *Id.*; BROWN, *supra* note 5, § 9:23.

213. *See* H. Lowell Brown, *Successor Corporate Criminal Liability: The Emerging Federal Common Law,* 45 ARK. L. REV. 469, 499 (1996); BROWN, *supra* note 5, § 4:4.50.

214. For example, El Paso Corporation was charged with having continued to make illegal "surcharge" payments to Iraq: government officials in order to purchase oil under the U.N. Oil for Food Program that had begun prior to the merger of an El Paso subsidiary with the Coastal Corporation. El Paso consented to the entry of a judgment without admitting or denying the allegations. El Paso Corp., Litigation Release No. 19991, 2007 WL 414353 (Feb. 7, 2007). In another SEC enforcement action, Halliburton Company and KBR, Inc., were charged with violations of the FCPA in connection with payments to Nigerian government officials by a joint venture that included a subsidiary of Dresser Industries that had begun before the acquisition of Dresser by Halliburton. The SEC alleged that the payments had continued after the acquisition by Halliburton. It was alleged that Halliburton had failed to implement adequate financial controls over the newly formed subsidiary including adequate due diligence in the selection of two third party agents. Halliburton and KBR consented to the entry of a judgment without admitting or denying the allegations. Halliburton Co. et al, Accounting and Auditing Enforcement Act Release No. 2935, 2009 WL 416786 (Feb. 11, 2009). In a third case, the SEC alleged that accounting personnel at Ball Corporation had discovered that questionable payments had been made by Formametal S.A. to Argentine government officials prior to the acquisition of Formametal by Ball. It was further alleged that Formametal had continued making payments after the acquisition and had failed to accurately report the payments in its accounting records. Ball was charged with having failed to take sufficient action to ensure the payments did not recur after Ball had taken over Formametal. Ball consented to the entry of an order by the Commission without admitting or denying the allegations. Ball Corp., Exchange Act Release No. 3255, 2011 WL 1099562 (Mar. 24, 2011). In the SEC enforcement action against Johnson & Johnson, it was alleged that DePuy, Inc., had made corrupt payments to government officials in Greece in order to sell surgical implants. After the acquisition of DePuy by Johnson & Johnson in 1998, former DePuy executives at Johnson & Johnson (including the senior executive of Johnson & Johnson's medical device and diagnostics business in the U.S.) knowingly continued the bribe scheme. Johnson & Johnson consented to the duty of a judgment without admitting or denying the allegations in the complaint. Johnson & Johnson, Accounting and Auditing Enforcement Act Release No. 3261, 2011 WL 1341152 (Apr. 8, 2011).

acquiring company to predicate the acquisition on the target company's resolution of compliance issues.[215] In this connection, the SEC has brought an action against a target company that had made false representations concerning FCPA compliance in the company's public filings.[216] In that case, the target's failure to comply with

215. For example, in the acquisition of Syncor International Corporation by Cardinal Health, the pre-acquisition due diligence revealed that Syncor's Taiwanese subsidiary had paid "commissions" to physicians employed by publicly-owned hospitals to secure purchases of Syncor pharmaceuticals. It was also found that these payments had not been accurately reported on the subsidiary's books. Other similar payments were identified as having been made in Belgium, France, Luxembourg, and Mexico. Cardinal Health refused to conclude the acquisition until Syncor had resolved the FCPA compliance issues with the Department of Justice and the Securities and Exchange Commission. Syncor Taiwan, Inc. (the Taiwanese subsidiary) pleaded guilty to violating the FCPA and paid a fine of $2 million. Plea Agreement, United States v. Syncor Taiwan, Inc., No. 2:02-cr-01244 (C.D. Cal. Dec. 9, 2002). Syncor International entered into a civil settlement with the SEC under which Syncor agreed to pay a penalty of $500,000. Syncor International Corp., Accounting and Auditing Enforcement Act Release No. 1688, 2002 WL 31757645 (Dec. 10, 2002). In another transaction a consortium of investors (J.P. Morgan Partners, Candover Partners, and 3i Group, Ltd.) predicated its purchase of the upstream oil and gas assets of two ABB subsidiaries on the resolution of issues regarding questionable payments in Angola, Brazil, Kazakhstan and Nigeria disclosed by pre-acquisition due diligence. The two ABB subsidiaries, ABB Vetco Gray, Inc. and Vetco Gray U.K. Ltd., each pleaded guilty in violating the FCPA and paid fines totaling $10.5 million. Plea Agreement at Ex. 2, United States v. ABB Vetco Gray, Inc.et al., No. 4:04-cr-00279 (S.D. Tex. Jun. 22, 2004). ABB Ltd. consented to the entity of a judgment, without admitting or denying the allegations, and agreed to pay a civil penalty of $10.5 million (which would be satisfied by payment of the criminal fine by ABB Vetco Gray, Inc., and ABB Vetco Gray U.K. Ltd.), and to disgorge $5.9 million. ABB Ltd., Accounting and Auditing Enforcement Act Release No. 2049, 2004 WL 1514888 (Jul. 6, 2004). In connection with the acquisition of InVision Technologies Company by General Electric Company, GE predicated the transaction on the resolution of FCPA issues that had been revealed in the pre-acquisition due diligence of InVision. As a consequence, InVision entered into an agreement with the Department of Justice in which InVision agreed to pay a penalty of $800,000 in exchange for the Department's agreement not to prosecute. InVision also entered into an agreement with the Securities and Exchange Commission under which InVision paid a civil penalty of $500,000 and disgorged $617,700. G.E. Invision, Inc., Accounting and Auditing Enforcement Act Release No. 2187, 2005 WL 354589 (Feb. 14, 2012). Letter to Brad D. Brain, in regards to how G.E. entered into an agreement in which G.E. agreed to integrate InVision into the G.E. compliance program (Dec. 3, 2004) (on file with author). Halliburton sought an opinion from the Department of Justice in connection with the 2008 acquisition of a U.K. oil and gas services company. Halliburton represented, among other things, that it was precluded from conducting full due diligence by U.K. legal restrictions and the requirements of the bidding process. Halliburton stated that it would disclose the results of the post-acquisition due diligence within 90 days for high risk elements, 180 days for medium risk elements and that it would make complete disclosure within 12 months of the closing. Halliburton also represented that new contracts would be entered into with all third party agents and remedial action would be taken in the event the due diligence revealed issues of FCPA compliance, including disclosure to the Department. Based on Halliburton's representations, the Department stated that it would not take action. Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 08-02, U.S. DEP'T OF JUSTICE (Jun. 13, 2008), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf.

216. *See* Securities and Exchange Commission Release Notice, Exchange Act Release No. 51283, 84 SEC Docket 3327 (March 1, 2003). Titan Corporation represented in both the proxy statement and the merger agreement with Lockheed Martin Corporation that neither the company nor any subsidiary or any director, official or employee had taken any action that would cause Titan or any subsidiary

the FCPA resulted in the termination of the acquisition.[217] Potential acquirors have also been able to secure assurance from the Department of Justice through the opinion procedure that enforcement action would not be taken on the basis of the acquisition.[218]

Once the acquisition has been completed, the acquiring company should move forward expeditiously to integrate the acquired company into the compliance program. The compliance structure should be put in place and training should be provided to directors, officers, employees, and agents (where appropriate). It is also recommended that an audit focused on the FCPA be performed as soon as practicable.[219]

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to violate the FCPA. The Commission believed these representations to be false and stated that the Commission was considering bringing action against Titan under Sections 10(b) and 14(a) of the Exchange Act and Commission Rules 10b-5 and 14a-9. Titan Corporation pleaded guilty to violations of the FCPA and to violation of the tax laws. Titan paid a criminal fine of $13 million. Plea Agreement at 13-14, United States v. Titan Corp., No. 3:05-cr-00314 (S.D. Cal. Mar. 1, 2005). Titan also entered into a settlement with the Securities and Exchange Commission under which Titan agreed to pay a civil penalty of $13 million (which would be satisfied by payment of the criminal fine) and to disgorge $15,479,000. Titan Corp., Litigation Release No. 19107, 2005 WL 474238 (Mar. 1, 2005).

217. Lockheed Martin Corporation terminated the agreement to purchase Titan Corporation.

218. In the proposed acquisition of certain assets of ABB Ltd., the consortium of investors sought and received a statement from the Department of Justice that not enforcement action would be taken on the basis of the requestors' representations concerning the actions that would be taken after the acquisition to implement a comprehensive compliance program that would ensure the conduct that led to the action against ABB Ltd. would not recur. Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 04-02, U.S. DEP'T OF JUSTICE (Jul. 12, 2004), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0402.pdf.

219. *Resource Guide*, *supra* note 100, at 62. An example of this is the acquisition of Pride International, Inc. by Ensco Plc. On November 1, 2010, Pride entered into a deferred prosecution agreement with the Department of Justice. As part of the agreement, Pride undertook the implementation of a compliance and business ethics program, including the maintenance of internal controls. Pride also agreed to reduce its dependence on third parties and to enhance its due diligence procedures with respect to agents and business partners. Deferred Prosecution Agreement at 6-7, *United States v. Pride Int'l, Inc.*, No. 4:10-cr-00766 (S.D. Tex. Nov. 4, 2010). In conjunction with the deferred prosecution, Pride Forasol S.A.S., a Pride International subsidiary, pleaded to guilty to conspiracy, and to violations of the anti-bribery and accounting and controls provisions of the FCPA. Pride Forasol paid a fine of $32,625,000 and was sentenced to a period of three years unsupervised probation. Plea Agreement at 14, 17, United States v. Pride Forasol S.A.S., No. 4:10-cr-00771 (S.D. Tex. Nov. 4, 2010). On May 31, 2011, Ensco plc acquired Pride International and assumed the obligations of Pride International and Pride Forasol. Following the merger, the operations of Pride International and Pride Forasol were integrated into the operations of Ensco, which represented to the Department of Justice that the former Pride and Pride Forasol units would be subject to Ensco's compliance program and systems of accounting and financial controls. Ensco also represented that the retention of agents and business partners would be governed by Ensco's due diligence procedures. Based on these representations, the Department of Justice sought the dismissal of the deferred criminal charges pending against Pride International, and informed the District Court that no further purpose would be served by continuing the probation of Pride Forasol. The district court granted the government's motion to dismiss the charges against Pride International. Order Dismissing Criminal Information, United States v. Pride Int'l Inc., No. 4:10-cr-00766 (S.D. Tex. Nov. 5, 2012); Order Terminating Probation, United States v. Pride Forasol S.A.S., No. 4:10-cr-

Observations

A well-conceived and executed corporate compliance program addresses legal risk in all elements of the company's management and operations. The compliance program should make clear and explicit the company's commitment to compliance with U.S. and foreign anti-bribery laws; establish standards of conduct for all directors, officers and employees (set forth in a code of conduct); provide guidance and procedures to ensure compliance; and reward compliance and punish violations. These policies, procedures and training should focus on the specific areas of legal risk revealed by the company's risk assessment, and should be tailored to the way in which the company actually does business. In structuring the compliance program, the company must assess the benefit of its compliance activities and the resources necessary to implement those activities in order for the program to be efficient and effective. But it is not an answer that the cost of an effective compliance program is too high or that the company cannot afford to implement a compliance program. The simple fact is that in view of the costs of violating the FCPA, and the benefits of good governance and avoidance of liability, a company subject to the FCPA can ill afford not having in place an effective program of compliance.

Conclusion

Since the enactment of the Foreign Corrupt Practices Act in 1977, the principal sources of the Act's interpretation have been the enforcement actions brought by the Department of Justice and the Securities and Exchange Commission, and to a somewhat lesser extent the opinion procedure releases of the Department of Justice. While that remains true, there has been an increase in litigation by individuals charged with violating the FCPA, challenging the government's interpretation of the Act. Recent litigation has raised questions concerning the breadth of the Act's definition of a foreign official and the Act's requirement of a nexus linking an alleged corrupt payment with the obtaining or retaining of business with a foreign government. Although neither of these issues has been authoritatively or

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00771 (S.D. Tex. Nov. 7, 2012). In response to a request made under the statutory opinion procedure, the Department of Justice informed a U.S. consumer products company that the Department would not take enforcement action as a consequence of the company's acquisition of a foreign company and its wholly owned subsidiary that pre-acquisition due diligence revealed had made apparent improper payments. The requestor provided the Department with its pre-acquisition and post-acquisition remediation plans that included integration of the acquired companies into the U.S. company's compliance program. The Department also informed the U.S. company that no action would be taken on the basis of the pre-acquisition conduct, which had not been subject to U.S. jurisdiction. Foreign Corrupt Practices Act Review: Opinion Procedure Release, No. 14-02, U.S. DEP'T OF JUSTICE (Nov. 7, 2014), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf.

definitively resolved, judicial analysis has thrown light on the parameters of these central elements of the Act, which it is hoped will influence the evaluation by the U.S. government of foreign transactions going forward.

In like fashion, corporate compliance programs have been viewed as a mitigating factor in prosecutions and enforcement actions beginning with the questionable payments investigations and voluntary corporate disclosures in the mid-1970's, prior to enactment of the FCPA. The Securities and Exchange Commission has recently signaled that the existence *vel nom* and the effectiveness of an FCPA compliance program is an issue of the adequacy of the internal financial controls mandated by the Act. There is also the question of whether reliance on the effectiveness of the compliance program will in some circumstances vitiate an inference of corrupt intent. As a consequence, it should be anticipated that the efficacy and comprehensiveness of corporate compliance programs will be the subject of future litigation and judicial scrutiny.