

# BRIEFLY...

May 2007

Vol. 11, No. 5

*Perspectives on legislation, regulation and litigation*

## **Foreign Corrupt Practices Act**

*Sharie A. Brown*

*Brian S. Chilton*



NATIONAL  
LEGAL  
CENTER

*Bridging Business and Government*

## **Foreign Corrupt Practices Act**

*Sharie A. Brown*

*Brian S. Chilton*

# TABLE OF CONTENTS

PREFACE.....	vii
EXECUTIVE SUMMARY .....	1
I. THE FOREIGN CORRUPT PRACTICES ACT IN DETAIL .....	4
A. Antibribery Provisions .....	4
1. Elements of an Antibribery Violation .....	5
a) Jurisdiction and Covered Persons.....	5
b) Corruptly .....	6
c) Payment of Money or Anything of Value .....	8
d) Foreign Government Official.....	9
i. Generally.....	9
ii. Identifying Foreign Government Officials When Dealing with Quasi-Private Quasi-Public Foreign Entities.....	10
e) For Purposes of Influencing Acts or Decisions .....	14
f) To Obtain or Retain Business.....	15
2. Indirect or Vicarious Liability and “Willful Blindness” .....	18
3. The Exception and Affirmative Defenses .....	26
a) The “Promotional Expenses” Affirmative Defense in Detail...	27
b) Legislative History of the Promotional Expenses Affirmative Defense .....	28
c) Metcalf & Eddy Prosecution.....	29
d) Department of Justice Opinions.....	31
i. Pre-1988 Department of Justice Opinion Procedures Releases.....	31
ii. Post-1988 Department of Justice Opinion Procedure Releases.....	33

## NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST

1776 K Street, NW, 8th Floor  
Washington, DC 20006  
202-466-9360  
202-466-9366 *fax*  
E-mail: [info@nlcpi.org](mailto:info@nlcpi.org)

Please visit our Web site at: [www.nlcpi.org](http://www.nlcpi.org)

The National Legal Center for the Public Interest is a tax-exempt, nonprofit public interest law and educational foundation, duly incorporated under the law of the District of Columbia to provide nonpartisan legal information and services to the public at large. NLCPI is qualified to receive tax-deductible contributions under I.R.C. Sec. 501(c)(3).

©2007 National Legal Center for the Public Interest

ISSN 1089-9820  
ISBN 0-937299-46-4  
ISBN 1-930742-90-8

Published May 2007

iii. Practical Lessons and Observations Based on the Above Legislative, Enforcement, and Regulatory History . . . . .	35		
B. Record-Keeping and Internal Accounting Provisions . . . . .	39		
1. Liability for the Accounting Practices of Minority-Owned Ventures . . . . .	41		
2. Practical Considerations Relating to Proper Accounting for Facilitating Payments and Payments Involving Foreign Government Officials Generally . . . . .	44		
3. Intersection of the FCPA and the Sarbanes-Oxley Act over Internal Controls . . . . .	45		
C. Statute of Limitations and Penalties . . . . .	46		
1. Statute of Limitations . . . . .	46		
2. Criminal Penalties per Violation . . . . .	47		
3. Civil Penalties per Violation . . . . .	47		
4. Penalties per Violation of the Books and Records Provisions . . . . .	48		
5. Additional Consequences . . . . .	48		
II. APPLICATION OF THE FCPA AGAINST U.S. PARENT COMPANIES BASED UPON VIOLATIONS BY THEIR FOREIGN SUBSIDIARIES WITH A FOCUS ON JURISDICTIONAL ISSUES . . . . .	49		
A. Antibribery . . . . .	49		
B. Enforcement Actions Demonstrating Parent Liability for a Foreign Subsidiary's Violations of the Antibribery Provisions . . . . .	51		
1. Triton Energy . . . . .	51		
2. Syncor . . . . .	53		
		C. U.S. Issuer-Parent's Liability for Books and Records Violations Committed by a Foreign Subsidiary . . . . .	54
		1. BellSouth Corporation . . . . .	54
		2. IBM and Chiquita Brands . . . . .	55
		a) IBM . . . . .	56
		b) Chiquita Brands . . . . .	57
		ABOUT THE AUTHORS . . . . .	60
		NATIONAL LEGAL CENTER . . . . .	63
		BOARD OF DIRECTORS . . . . .	64

## PREFACE

We have previously published monographs on the Foreign Corrupt Practices Act (“FCPA”), a post-Watergate reform measure that has been an effective prosecution tool in regulating business conduct abroad. While enforced only irregularly through at least the mid-1990s, the FCPA has emerged in recent years in the U.S. international business world. The United States Department of Justice and the Securities and Exchange Commission show no sign of letting up in 2007, with record fines imposed in February, only to be broken two months later in April.

In this *Briefly*, Brian Chilton and Sharie Brown, both former federal prosecutors who regularly investigate and counsel companies on both complying with the FCPA and dealing with the U.S. government when they fail to, provide a succinct and detailed explanation of the standards that apply under that statute. For the reasons described further in the Executive Summary, the need to understand and apply those standards has never been more difficult or crucial to companies and those who own and run them than in the current enforcement environment.

Like all other publications of the National Legal Center, this monograph is presented to encourage greater understanding of legal issues, legal procedures, and the law. It is intended to enlighten its readers through the thought, experience, and knowledge of others. The views expressed in this monograph are those of the authors and do not necessarily reflect the positions of the advisers, officers, or directors of the National Legal Center.

This publication is presented purely as an educational public service. This monograph is for general information and should not be used as a substitute for legal consultation on a specific matter.

**Richard A. Hauser**

*President, National Legal Center*

## EXECUTIVE SUMMARY

In 1977, the United States prohibited bribery of foreign officials by passing the Foreign Corrupt Practices Act (“FCPA”). The FCPA is comprised of two components: antibribery provisions and accounting provisions. The antibribery provisions prohibit U.S. companies and persons from bribing foreign government officials to obtain or retain business. A bribe is any payment of money, any gift (or the promise of a payment or gift), or *anything* of value made with corrupt intent to either influence a foreign government official to act (or fail to act) in violation of his lawful duty, or to secure any improper advantage. In the U.S. government’s view, “any improper advantage” includes giving things of value to purchase goodwill, even if express action or inaction by the government official is not sought. “Foreign official” is broadly construed and covers elected officials, consultants with government positions, employees of government-owned companies, officials in political parties, or anyone acting on behalf of a public international organization (such as the United Nations). Because the FCPA prohibits both direct and indirect payments, U.S. companies are prosecuted for bribes offered or paid through their foreign subsidiaries, business partners, or agents.

The FCPA’s record-keeping provisions require U.S. issuers (publicly held companies) 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 issuers.” A company is liable for mischaracterizing or failing to record a transaction on a company’s books, or for failing to maintain proper accounting controls that prevent a mischaracterization or omission. Frequently, when prosecutors cannot prove “corrupt intent” to establish bribery, the transaction at issue was nevertheless inaccurately entered in a company’s books, allowing an alternate means of prosecution.

The FCPA makes one narrow concession to the way business is conducted in other parts of the world, particularly in developing countries. The FCPA allows U.S. companies to make small “facilitating” or “grease” payments to foreign officials to push through routine governmental actions. Under this

“facilitating payments” exception, gratuities or small payments may be paid to secure such routine governmental services as obtaining a permit or license to do business in a foreign country; processing visa and work orders; providing police protection, mail pickup and delivery; scheduling product inspections; providing phone service, power, and water; or unloading cargo. This narrow exception must be treated with extreme caution: facilitating payments may not be made to influence a foreign official’s discretionary judgment, or to cause the official to award new business or to continue business with a particular party. Moreover, even if a facilitating payment is otherwise lawful under the exception, the transaction can still subject a company to prosecution under the FCPA’s books and records provisions if it is not accurately recorded.

The FCPA also provides an affirmative defense for promotional or marketing payments, and for contractual payments involving government officials necessary to perform the contract (e.g., flights on company planes to visit remote construction sites). If a company can show that it incurred reasonable and bona fide expenses (including travel and lodging expenses) on behalf of a foreign official to promote, demonstrate, or explain its products and services to a foreign government official, such payments are likely to fall within the FCPA’s safe harbor. The “promotional and marketing payments” defense often allows companies to host foreign public officials at company facilities or to entertain employees of foreign state-owned firms.

The penalties to companies for failing to adhere to the FCPA’s requirements have never been higher than at the present time. On February 6, 2007, three Vetgo International Ltd. subsidiaries (Vetco Gray UK Ltd., Vetco Gray Controls Inc., and Vetco Gray Controls Ltd.) agreed to pay criminal fines of \$6 million, \$8 million, and \$12 million, respectively, totaling a then-record \$26 million in FCPA fines, for bribery charges arising out of a Nigerian deepwater oil drilling project. On February 7, the SEC announced settlement of FCPA allegations against Texas-based El Paso Corporation, requiring disgorgement of \$5,482,363 and a civil fine of \$2,250,000, stemming from illegal kickbacks in connection with purchases of crude oil under the U.N. Oil for Food Program. And setting the all-time FCPA enforcement fines record (but keep an eye on the headlines, as this record will surely fall as quickly as it was set), on April 26, 2007, the results of a joint enforcement action by the United States Department of Justice and the Securities and Exchange Commission against oil services

firm Baker Hughes and its foreign subsidiaries for FCPA violations in Kazakhstan, Nigeria, Angola, Indonesia, Russia, and Uzbekistan was announced: a total of \$44 million in criminal fines, civil penalties, and disgorgement.

The increasing regularity with which the FCPA is enforced, and the severe penalties invoked as a result of that enforcement, are no mere coincidence. The variables leading to this “Perfect Storm” of FCPA enforcement and penalties are threefold: (1) the passage and implementation of Sarbanes-Oxley; (2) increased globalization; and (3) legal unpredictability due to extremely limited published jurisprudence. Sarbanes-Oxley, which requires, among other things, for companies/officers to certify the adequacy of internal controls, is increasingly pitting companies against their independent auditors, with auditors refusing to certify the company’s financial filings until every potential allegation of corruption has been investigated and remediated, including, increasingly at the auditors’ insistence, being voluntarily disclosed to the U. S. government. The increasing need for U.S. companies to expand globally—and the fact that the low-hanging fruit in the form of safe and easy overseas markets is long gone—leaves U.S. companies with no choice but to move into developing country markets where the business opportunities are high, but so is the corruption. The fact that there are few published cases interpreting the FCPA has ceded over the job of statutory interpretation to U.S. law enforcement. Companies frequently complain that U.S. law enforcement takes too aggressive an approach to interpreting the statute, but, understandably, few companies relish the idea of contesting the government, being indicted, and trying to win on appeal. Arthur Andersen LLP won its Supreme Court challenge of the government’s obstruction case—none of the 28,000+ people who lost their jobs when the company was indicted got those jobs back as a result.

As much as their respective critics may wish, the clock will never be turned back on Sarbanes-Oxley or globalization. They remain a perpetual reality for all businesses and persons covered by the FCPA. But this publication at least seeks to address that last variable—the unpredictability of the law—with a concise but in-depth discussion of the FCPA. Fines of \$44 million provide more than enough incentive for companies and their personnel involved in overseas commerce to learn more about the FCPA.

## I. The Foreign Corrupt Practices Act in Detail

The U.S. Foreign Corrupt Practices Act (“FCPA”) has two distinct components: antibribery provisions and accounting provisions.<sup>1</sup> Generally speaking, antibribery provisions prohibit certain corrupt payments by “issuers” or “domestic concerns” to foreign public officials to obtain or retain business.<sup>2</sup> Accounting provisions require issuers, but not domestic concerns, to maintain adequate books, records, and internal accounting controls.<sup>3</sup> A violation of either provision carries potential criminal and civil penalties. Enforcement responsibility for both provisions rests with the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”). The FCPA was amended on November 10, 1998, to implement the Convention on Combating Bribery of Foreign Officials in International Business Transactions.<sup>4</sup> Among other things, the 1998 amendments broadened the FCPA’s jurisdictional reach.

### A. Antibribery Provisions

In pertinent part, antibribery provisions of the FCPA make it unlawful for any

[covered person]<sup>\*\*\*</sup> to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money [or]<sup>\*\*\*</sup> anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit

<sup>1</sup> See 15 U.S.C. § 78dd-1, -2, -3, m(b)(2). The FCPA was enacted in 1977 as Pub. L. No. 95-213, 91 Stat. 1495 (1977), and amended by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988), the U.S. International Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3306 (1998), and the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>2</sup> See 15 U.S.C. § 78dd-1, -2, -3.

<sup>3</sup> See *id.* § 78m(b)(2).

<sup>4</sup> Convention on Combating Bribery of Foreign Officials in International Business Transactions of Dec. 18, 1997, 37 I.L.M. 1 (1998) (“OECD Antibribery Convention”).

to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage;

\*\*\*\*

in order to assist such [person] in obtaining or retaining business for or with, or directing business to, any person<sup>\*\*\*</sup>.<sup>5</sup>

### 1. Elements of an Antibribery Violation

There are six elements to a potential FCPA antibribery violation, discussed in further detail below:

- + a covered person
- + corruptly
- + offers, pays, promises to pay, or authorizes payment of money or anything of value
- + to any foreign official
- + for purposes of influencing any act or decision of a foreign official in his official capacity, or securing any improper advantage
- + to obtain or retain business.

#### a) Jurisdiction and Covered Persons

As originally enacted, the FCPA’s antibribery provisions applied only to “issuers” and “domestic concerns.”<sup>6</sup> An “issuer” is any publicly held company subject to the registration or reporting requirements of the U.S. Securities Exchange Act of 1934.<sup>7</sup> A “domestic concern” is any individual who is a U.S. citizen, national, or resident, or any business organized under the laws of the United States or that has its principal place of business in the United States.<sup>8</sup> Prior to the 1998 amendments, the FCPA also required that covered persons make “use of the mails or any means or instrumentality of interstate commerce<sup>\*\*\*</sup> in furtherance of” a corrupt payment.

<sup>5</sup> 15 U.S.C. § 78dd-1(a), -2(a).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 78dd-1(a).

<sup>8</sup> *Id.* § 78dd-2(h)(1)(B).

The 1998 amendments extended the FCPA's jurisdictional reach over non-U.S. persons acting within the United States and U.S. persons acting outside the United States. Under the amendments, foreign entities and persons also became subject to the FCPA. These persons are subject to the FCPA if they perform any act in furtherance of an improper payment within U.S. territory.<sup>9</sup> In addition, issuers and other U.S. persons and entities are subject to the FCPA if they commit any act in furtherance of a corrupt payment anywhere in the world, irrespective of whether U.S. mails or other means or instrumentality of interstate commerce are used.<sup>10</sup> U.S. parent corporations may be held liable for acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents who were employed by or acting on behalf of such foreign-incorporated subsidiaries.<sup>11</sup>

As a result of the 1998 amendments, the FCPA's antibribery provisions now apply to (i) issuers, (ii) domestic concerns, (iii) any U.S. person who is an officer, director, employee, agent, or stockholder of an issuer or domestic concern acting on behalf of such issuer or domestic concern, or (iv) any foreign person who violates the FCPA while in the United States.

### **b) Corruptly**

The FCPA prohibits payments that are made with corrupt intent.<sup>12</sup> Although the FCPA does not define that term, legislative history and case law provide limited guidance. As originally passed, the statute's legislative history indicated that the requisite intent was to be the same as under the domestic bribery statute, 18 U.S.C. § 201:

“The word ‘corruptly’ connotes an evil motive or purpose such as that required under 18 U.S.C. § 201(b) ....” As in 18 U.S.C. § 201(b), the word corruptly indicates an intent or desire wrongfully to influence the recipient.<sup>13</sup>

<sup>9</sup> *Id.* § 78dd-3(a).

<sup>10</sup> *Id.* § 78dd-1(g), -2(i). This provision is of questionable constitutional merit, although there have been no challenges thus far. The view articulated in the text is the DOJ's official enforcement policy. See Foreign Corrupt Practices Act Antibribery Provisions (Mar. 15, 2002), <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>. That view has not been tested in the courts.

<sup>11</sup> *Id.* § 78dd-1(g), -2(i).

<sup>12</sup> *Id.* § 78dd-1(a), -2(a), -3(a).

<sup>13</sup> H.R. REP. NO. 95-640, at 8 (1977).

Under this domestic bribery statute, a payment is made corruptly if it is made with the intent to influence the recipient in the performance of an official act; that is, “corruptly” connotes a quid pro quo between payment and the official act.<sup>14</sup> By contrast, the domestic bribery statute does not reach payments to buy favor or generalized goodwill from an official who has been, is, or may at some unknown, unspecified later time, be in a position to act favorably to the giver's interests.<sup>15</sup>

FCPA legislative history explains that “corruptly” connotes an intent to “induce the recipient to misuse his official position in order to wrongfully direct business ... or to obtain preferential legislation or a favorable regulation. The word ‘corruptly’ connotes an evil motive or purpose, an intent to wrongfully influence the recipient.”<sup>16</sup> Similar language appears in the following FCPA jury instruction, which has been approved by the U.S. Court of Appeals for the Eighth Circuit:

The offer, promise to pay, payment or authorization of payment must be intended to induce the recipient to misuse his official position or to influence someone else to do so .... [A]n act is “corruptly” done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.<sup>17</sup>

The former interpretation of “corrupt intent” as requiring some kind of intent to receive a tangible quid pro quo from the government official in exchange for the bribe has recently been challenged by the U.S. government. In an investigation currently being conducted by DOJ and the SEC, the government has taken the position that even if a U.S. company donates money to a charitable institution at a foreign government official's request, and neither the company nor the official receives a tangible benefit from the charity in return, the company nevertheless satisfies the element of

<sup>14</sup> See *United States v. Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (quoting *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980)) (concluding that “[t]his sort of ‘I’ll scratch your back if you scratch mine’ arrangement constitutes bribery because the payer made payments with the intent to exchange them for specific official action”); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (proof of bribery requires evidence that “the payer intended to receive some benefit in return for the payments”).

<sup>15</sup> See *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 405-06 (1999).

<sup>16</sup> S. REP. NO. 95-114, at 10-11 (1977); accord H.R. REP. NO. 95-640, at 7-8.

<sup>17</sup> See *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

“corrupt intent” for seeking the “improper advantage” of buying the official’s general goodwill.

The government’s position has not been tested in court, but the position is not without merit. The FCPA’s 1998 amendments made it unlawful to give anything of value to a government official for purposes of “securing any improper advantage” in obtaining or retaining business.<sup>18</sup> The phrase “any improper advantage” substantially broadened the scope of the statute, and, according to the current view of the U.S. government enforcers, criminalizes efforts to simply purchase a foreign government official’s goodwill by bribery, even absent any showing that the bribe was intended to produce an identifiable and tangible business benefit, or the “quid pro quo” previously thought to be required by analogy to the domestic bribery statute. The legislative history is silent regarding this interpretation, because the language was added by Congress in 1998 to comply with the OECD Antibribery Convention, and was not based on any discussion of congressional intent to broaden the scope of the statute. Because Congress was silent on the issue, whether the government is correct will be a matter of interpretation for the courts based upon the plain language of the statute. Prudent companies will not want to become the first court test-case by engaging in actions that result in government enforcement and a court challenge.

### c) *Payment of Money or Anything of Value*

The FCPA prohibits an offer, payment, promise to pay, or authorization of the payment of money or anything else of value.<sup>19</sup> Money, of course, is expressly included in the statute, but the statute covers far more than cash. “Anything of value” is not otherwise statutorily defined, and legislative history is not illuminating; however, the term has been broadly construed. For example, a gift of airline tickets has specifically been found to constitute a thing of value,<sup>20</sup> as have accommodation upgrades,<sup>21</sup> insurance benefits,<sup>22</sup> and promise of future employment.<sup>23</sup>

<sup>18</sup> 15 U.S.C. § 78dd-1(a)(1)(A)(iii).

<sup>19</sup> *Id.* § 78dd-1(a), -2(a), -3(a).

<sup>20</sup> *See Liebo*, 923 F.2d 1308.

<sup>21</sup> *United States v. Metcalf & Eddy*, Civ. A. No. 99-12566 (D. Mass. 1999).

<sup>22</sup> Dept’t of Justice, FCPA Review Proc. Release 00-01 (Mar. 29, 2000).

<sup>23</sup> *Id.*

In addition, courts construing “anything of value” in the context of other criminal statutes have indicated that “the focus of the above term [“thing of value”] is to be placed on the value which the defendant subjectively attaches to the items received.”<sup>24</sup> That is, courts will look to the value given to the gift by the defendant, not necessarily the value that the market, or a “reasonable person,” would assign. The value is measured subjectively by reference to the foreign government official in question, so that the “value” placed on something by that foreign government official could be both idiosyncratic and intangible.

### d) *Foreign Government Official*

#### i. *Generally*

“Foreign official” is broadly defined by the FCPA to include:

- (i) any elected official, officer, or employee of a foreign government, including departments, agencies and instrumentalities thereof; (ii) any officer or employee of a government-owned or government-controlled state enterprise (such as a state-owned oil company); (iii) any officer or employee of a “public international organization”;<sup>25</sup> (iv) any person acting in an official capacity for or

<sup>24</sup> *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986), *citing* *United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983). The *Gorman* court held that a loan given under better-than-market terms was a “thing of value” to the defendant for purposes of 18 U.S.C. § 201(g), which prohibits public officials from accepting “anything of value” for performance of an official act.

<sup>25</sup> “Public international organizations” are those so designated by Executive Order of the U.S. President pursuant to authority granted by Congress. 22 U.S.C. § 288 (1999). Currently, they include the following: African Development Bank; African Development Fund; Asian Development Bank; Border Environmental Cooperation Commission; Caribbean Organization; Commission for Environmental Cooperation; Commission for Labor Cooperation; Commission for the Study of Alternatives to the Panama Canal; Customs Cooperation Council; European Bank for Reconstruction and Development; and the European Space Agency (formerly European Space Research Organization); The European Police Office (“Europol”); Food and Agriculture Organization; Great Lakes Fishery Commission; Hong Kong Economic and Trade Offices; Inter-American Defense Board; Inter-American Development Bank; Inter-American Institute of Agricultural Sciences; Inter-American Investment Corporation; Inter-American Statistical Institute; Inter-American Tropical Tuna Commission; Intergovernmental Maritime Consultative Organization; International Atomic Energy Agency; International Bank for Reconstruction and Development; International Boundary and Water Commission, United States and Mexico; International Centre for Settlement of Investment Disputes; International Civil Aviation Organization; International Coffee Organization; International Committee of the Red Cross; International Cotton Advisory Committee; International Cotton Institute; International Criminal Police Organization (“INTERPOL”); International Development Association; International Development

on behalf of a foreign government, government entity, or public international organization; or (v) any private consultant who also holds a position with, or acts on behalf of, a foreign government or with a public international organization, or with an enterprise owned or controlled by a foreign government.<sup>26</sup>

## ii. Identifying Foreign Government Officials When Dealing with Quasi-Private Quasi-Public Foreign Entities

It is not always easy to determine who is a foreign government official in some countries, particularly emerging ones or former Communist countries still in the process of transforming to market capitalism. Whether employees of certain foreign companies are considered “foreign officials” under the FCPA can be particularly difficult in some industries, such as

---

Law Institute; International Fertilizer Development Center; International Finance Corporation; International Food Policy Research Institute; International Fund for Agricultural Development; International Hydrographic Bureau; International Joint Commission—United States and Canada; International Labor Organization; International Maritime Satellite Organization; International Monetary Fund; International Pacific Halibut Commission; International Secretariat for Volunteer Service; International Telecommunication Union; International Telecommunications Satellite Organization (“INTELSAT”); International Union for Conservation of Nature and Natural Resources; International Wheat Advisory Committee (International Wheat Council); Interparliamentary Union; Israel-United States Binational Industrial Research and Development Foundation; Korean Peninsula Energy Development Organization; Multilateral Investment Guarantee Agency; Multinational Force and Observers; North American Development Bank; North Pacific Anadromous Fish Commission; North Pacific Marine Science Organization; Organization for European Economic Cooperation (now known as the Organization for Economic Cooperation and Development); Organization for the Prohibition of Chemical Weapons; Organization of African Unity (“OAU”); Organization of American States (includes Pan American Union); Organization of Eastern Caribbean States; Pacific Salmon Commission; Pan American Health Organization (includes Pan American Sanitary Bureau); Preparatory Commission of the International Atomic Energy Agency; Provisional Intergovernmental Committee for the Movement of Migrants from Europe (now known as the “Intergovernmental Committee for European Migration”); South Pacific Commission; United International Bureau for the Protection of Intellectual Property (“BIRPI”); United Nations; United Nations Educational, Scientific, and Cultural Organization; United Nations Industrial Development Organization; Universal Postal Union; World Health Organization; World Intellectual Property Organization; World Meteorological Organization; World Tourism Organization; and World Trade Organization. Also included are the European Union, which includes the European Communities (the European Community, the European Coal & Steel Community, and the European Atomic Energy Community); institutions of the European Union, such as the European Commission, the Council of the European Union, the European Parliament, the European Court of Justice, the European Court of Auditors, the Economic and Social Committee, the Committee of the Regions, the European Central Bank, and the European Investment Bank.

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

defense contracting, telecommunications, or airline manufacturing, where a company has all the attributes of a private enterprise, but on closer scrutiny demonstrates governmental ownership or control.

Two avenues exist whereby an individual employee of a foreign firm could be classified as a “foreign official.” First, the employee could be a foreign official directly in his or her own right, by virtue of a parallel position, status, or appointment with a government entity. This is often the case in the defense industry where foreign military personnel are seconded to the manufacturer, who might otherwise appear to an uninformed outsider to be a regular employee.

Second, an employee could be considered a “foreign official” where his or her employer is an “instrumentality” of a foreign government. Generally speaking, once a company is considered to be an “instrumentality” of a foreign government, every single employee from the lowliest clerk up to the chairman of the board is considered to be a “foreign official” for FCPA purposes, regardless of how local law characterizes those employees. The converse is also true: once a company is determined to be truly private, DOJ would consider a company’s employees not to be foreign officials for FCPA purposes, subject to certain limited exceptions, as explained below.

DOJ leaves little doubt that where a foreign government owns or controls an enterprise, that enterprise is an instrumentality of the foreign government, and every employee thereof is a “foreign official” under the FCPA. A series of enforcement actions from the early 1980s illustrates this principle at work. The “Mexican cases” involved bribes allegedly paid to (1) the sub-director of purchasing and (2) the administrative secretary to the chief of purchasing for Pemex, the Mexican national oil company. DOJ clearly considered these two employees, the latter of whom was arguably merely clerical, to be “foreign officials” because the oil company was owned by the state.<sup>27</sup>

DOJ subsequently made clear that the government makes no distinction between “low”- and “high”-level officials. In a brochure published in 1999,

---

<sup>27</sup> See *United States v. Int’l Harvester Co.*, No. CR-82-244 (S.D. Tex. 1982), 2 FCPA REP. (Bus. L. Inc.) 696.27; *United States v. C.E. Miller Corp. & Charles E. Miller*, No. CR-82-788 (C.D. Cal. 1982), 2 FCPA REP. (Bus. L. Inc.) 696.33; *United States v. Applied Process Products Overseas, Inc.*, No. CR-83-00004 (D.D.C. 1983), 2 FCPA REP. (Bus. L. Inc.) 696.42.

DOJ articulated the expansive view that all employees of a government controlled or owned entity, even clerical staff, are foreign officials: “The FCPA applies to payments to any public official, regardless of rank or position. The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payments ....”<sup>28</sup>

Similarly, and more recently, the SEC alleged that auditors from Pertamina, the Indonesian government-owned oil company that had a contractually based supervisory role over the joint venture defendant, were “foreign officials.”<sup>29</sup>

DOJ and the SEC reaffirmed this view in recent enforcement actions involving Syncor, Inc.<sup>30</sup> Syncor was a U.S. radiopharmaceutical corporation operating abroad via multiple foreign subsidiaries. SEC and DOJ alleged that myriad forms of payments to doctors in the position either to purchase products or to refer patients to Syncor clinics were bribes of “foreign officials.” The rationale was that each of the hospitals in question was government-owned, and, hence, an “instrumentality” of that government.

The more difficult problem of identifying who is a foreign government official arises in the case of a “quasi-private/public” entity, where the government exercises a significant, but not obviously controlling, interest. Here, whether an official of such a firm will be deemed a “foreign government official” depends on the degree of control exercised by the government, which is a case-by-case, fact-bound determination.

<sup>28</sup> DOJ Brochure, *Foreign Corrupt Practices Act Antibribery Provisions*, 1 FCPA REP. (Bus. L. Inc.) 140.001 (Oct. 1999). It is unlikely a court would disagree with DOJ’s interpretation, given the breadth of bribery activity Congress meant to bring within the scope of the Act, and the likelihood that bribes to “low”-level officials otherwise lacking in discretionary authority are merely “pass-throughs” for the payment to go to a higher-level official who is the true target of the payment.

<sup>29</sup> See *In re Gore*, SEC Release No. 38343, Admin. Proceeding File No. 3-9262 (Feb. 27, 1997), 4 FCPA REP. (Bus. L. Inc.) 699.462; see also DOJ FCPA Opinion Rev. Release No. 93-2 (May 11, 1993) (foreign military procurement body whose board of directors comprised military officers and held license from the state to administer all military procurements was an “instrumentality” of a foreign state). According to the pleadings in the case, in paying the auditors, Gore had bribed “foreign officials.”

<sup>30</sup> See *United States v. Syncor Taiwan, Inc.*, No. CR-02-1244-ALL (C.D. Cal. 2002), 5 FCPA REP. (Bus. L. Inc.) 699.8623; see also *In the Matter of Syncor International Corporation*, SEC Exchange Act Release No. 46979, Admin. Proceeding File No. 3-10969 (Dec. 10, 2002), 5 FCPA REP. (Bus. L. Inc.) 699.8542.

Because the FCPA does not otherwise define the term “instrumentality,” and there does not otherwise exist any authority on the question, commentators generally interpreted the term by referring to Congress’s use of the term “instrumentality” in other federal statutes. Both the Foreign Sovereign Immunities Act (“FSIA”) of 1976 and the Byrd Amendment can be examined for some guidance on the meaning of “instrumentality.” The text of the FSIA expressly defines a foreign instrumentality as any entity “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision ....”<sup>31</sup> FSIA case law generally analyzes the issue in the same manner.<sup>32</sup> However, under the case law, ownership of voting shares is not the only consideration; one reported case notes that an entity was a government instrumentality by virtue of the government’s control over appointments to the board of directors.<sup>33</sup> Even under the FSIA, “control” via other means than ownership is possible. The language of the Byrd Amendment (requiring registration with the U.S. Treasury Department whenever a domestic business passes over to foreign government control) is broader than that of the FSIA for purposes of discerning when an entity has become quasi-public. The Byrd Amendment looks to whenever a foreign government has the “power, direct or indirect, whether or not exercised, and whether or not exercisable, through ownership of a majority or a dominant minority of the total outstanding voting securities of an issuer, or by proxy voting, or contractual arrangement to determine, direct, or decide” matters affecting the entity.<sup>34</sup>

Finally, it is important to keep in mind that an individual employee can be a “foreign official” via a multitude of possibilities: status as a civil servant, government-appointed minority director, elected official, functionary in a foreign political party, agent of an international organization, such as the United Nations, or member of a royal family.<sup>35</sup> Any such person appointed

<sup>31</sup> 28 U.S.C. § 1603(b).

<sup>32</sup> See *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 779 n.1 (9th Cir. 1991) (a Mexican import-export company was an instrumentality of the government because over 51 percent owned by the state); *Kramer v. Boeing Co.*, 705 F. Supp. 1392, 1394 (D. Minn. 1989) (Sabena Airlines is an instrumentality of the Belgian government because over 50 percent of voting shares owned by state).

<sup>33</sup> *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625-28 (1983) (examining control where the government retains control over appointments to the board of directors and enabling statute details the duties and tasks of the body).

<sup>34</sup> See 50 U.S.C. § 2170; 31 C.F.R. §§ 800.402, 800.204.

<sup>35</sup> See generally BLI Staff, *Guide to the Foreign Corrupt Practices Act*, 1 FCPA REP. (Bus. L. Inc.) 101.001 (Jan. 2003).

or seconded to an otherwise private organization would still be deemed to be a “foreign official” for FCPA purposes.

In uncertain cases, the U.S. government might look to local law for guidance as to the individual’s status, but would not be bound by it. For instance, in a case involving the purchase of a worthless chromium mine for \$25 million from a British expatriate who also served unofficially and unpaid as the chief of secret police for the Sultan of Oman, the SEC looked to an Omani law that characterized “any other person delegated or elected to perform a public service, for reward or not” as a government official to conclude that the expatriate was a “foreign official” of Oman.<sup>36</sup>

DOJ and the SEC will nevertheless disregard local law when it conflicts with the FCPA. For example, DOJ has opined that notwithstanding a foreign attorney’s opinion interpreting foreign law to the contrary, DOJ considered the director of an enterprise in the early stages of privatization to be a “foreign official” under the FCPA.<sup>37</sup> Even an honorary government position could render an employee a “foreign official.”<sup>38</sup>

As a practical matter, when conducting business in foreign countries, a company must know precisely with whom it is dealing prior to giving a foreign person any “thing of value.” Surface appearances alone may be misleading.

### **e) For Purposes of Influencing Acts or Decisions**

Under the FCPA, a payment is prohibited if made for one or more of the following unlawful purposes:

- (i) influencing any act or decision of a government official in his or her official capacity; (ii) inducing such foreign official to do or omit any act in violation of a lawful duty; (iii) inducing such official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; or [since the enactment of the 1998 amendments,] (iv) securing any improper advantage.<sup>39</sup>

<sup>36</sup> See SEC v. Ashland Oil, Inc., No. CV-86-1904 (D.D.C. 1986), 3 FCPA REP. (Bus. L. Inc.) 696.95.

<sup>37</sup> DOJ FCPA Opinion Rev. Release No. 94-1 (May 13, 1994).

<sup>38</sup> See DOJ FCPA Opinion Rev. Release No. 80-1 (Oct. 29, 1980).

<sup>39</sup> 15 U.S.C. § 78dd-1(a)(1)(A)(i-iii), -2(a)(1)(A)(i-iii).

Note that the addition of the “securing any improper advantage” language substantially broadened the applicability of the FCPA to cover acts where express action or inaction by the government official was not sought, as discussed above in conjunction with the element of “corrupt intent.”

### **f) To Obtain or Retain Business**

Under the FCPA, a payment is prohibited if made to obtain or retain business or to direct business to any person.<sup>40</sup> The government has long construed this element broadly to include a payment intended to influence any governmental decision that would favorably affect the covered person’s business interests,<sup>41</sup> as well as instances where the facts did not indicate an intent to influence a governmental decision to award or direct business.

For example, in *United States v. Vitusa Corp.*<sup>42</sup> and *United States v. Herzberg*<sup>43</sup> (collectively, “*Vitusa*”), DOJ entered into a pair of plea agreements involving a payment that arguably was not made to obtain or retain business. In *Vitusa*, payment was made to a Dominican Republic official to expedite a final payment required under a contract between Vitusa and the Dominican Republic. All that remained under the contract was the Dominican Republic’s obligation to pay Vitusa. Further, Vitusa had no likely prospect of future business with the Dominican Republic. Although it might appear that there was no opportunity to “obtain or retain business” or “direct business to” any person, Vitusa pled guilty to violating the FCPA and was fined \$20,000. In addition, Herzberg pled guilty to violating the FCPA and was sentenced to two years’ supervised probation and a \$5,000 fine. Under these cases, virtually any business purpose would meet the obtaining or retaining element.

A case decided in 2004, *United States v. Kay*,<sup>44</sup> underscores the broader interpretation that applies to the “obtain or retain business” element. Prior

<sup>40</sup> *Id.* § 78dd-1(a)(1)(B), -2(a)(1)(B).

<sup>41</sup> See SEC v. Triton Energy Corp., Civ. A. No. 1:97CV00401 (D.D.C. Feb. 27, 1997) (SEC enforcement action predicated on payments made to reduce tax obligations in Indonesia). The SEC also alleged Triton Energy violated the record-keeping provisions of the FCPA. See *id.*

<sup>42</sup> Crim. No. 94-253, Oct. 1994 FCPA REP. (Bus. L. Inc.) at 699.169 (D.N.J. Apr. 13, 1994).

<sup>43</sup> Crim. No. 94-254, Oct. 1994 FCPA REP. (Bus. L. Inc.) at 699.165 (D.N.J. Apr. 13, 1994).

<sup>44</sup> 359 F.3d 738 (5th Cir. 2004).

to this line of cases, the defense bar had taken the position, which DOJ was cautious in contesting, that “obtain or retain” business required a showing of business actually maintained or obtained, as opposed to merely achieving some economic benefit that did not otherwise result in a commercial transaction. But the litigation in these cases emphasizes that Congress’s intent to eliminate corruption by American businesses engaged in foreign commerce, such that the element “obtain or retain” is satisfied if the “thing of value” was given to the government official to obtain some kind of economic benefit for a company, even if that benefit did not directly result in gaining or maintaining a business advantage. As a practical matter, anytime a covered person gives a thing of value to a foreign government official, the presumption will be that the thing was improperly given to obtain an economic advantage, which will satisfy the “obtain or retain” element even if there is no evidence that the covered person actually received or maintained a business relationship as a result of the thing given to the foreign government official.

According to the indictments against Defendants Murphy and Kay, in advance of certain rice shipments to Haiti between January 1998 and October 1999, Kay directed an American Rice employee to prepare false shipping records that underreported the tonnage of rice on the relevant vessels. Haitian customs officials used the false records to clear the American Rice vessels through customs. After the vessels cleared customs, Kay allegedly directed American Rice employees in Haiti to pay cash bribes to certain customs officials. To hide the payments, Kay then directed American Rice’s controller in Haiti to improperly record the bribery payments as routine business expenditures. American Rice employees made at least 12 bribery payments totaling approximately \$500,000. In exchange, American Rice illegally avoided approximately \$1.5 million in Haitian import taxes. The indictments further alleged that Murphy knew about the bribery scheme, but took no action to stop the payments.

The defendants successfully argued to the lower court that seeking to obtain preferential tax treatment did not fall within the meaning of “obtain or retain” business under the FCPA, arguing that the bribes were not made “to obtain or retain business” for purposes of the FCPA, because they related only to the company’s tax treatment by the Haitian government, and not to any specific business transaction—the rice would have come into Haiti no matter what, so that the bribes related not to specific busi-

ness obtained or retained, but only to how much tax would be paid on the rice.

The United States Court of Appeals for the Fifth Circuit began its review by stating that “the question[] before us in this appeal [is] whether bribes to obtain illegal but favorable tax and customs treatment can ever come within the scope of the [FCPA’s] ‘obtain or retain business’” language.<sup>45</sup> Examining the statutory language and legislative history, the Court observed that the business nexus required between the bribe and the governmental action received was not limited to bribes that won contracts:

Congress was obviously distraught not only about high profile bribes to high ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen. Congress thus made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity’s business in that country .... [T]he concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid .... Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend ... the question whether the defendants’ alleged payments constitute a violation of the FCPA truly turns on whether these bribes were intended to lower ARI’s cost of doing business in Haiti enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations that ARI already had there, so as to come within the scope of the business nexus element as Congress used it in the FCPA.<sup>46</sup> Thus, the Court upheld the indictment against Kay, ruling that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage.”<sup>47</sup>

<sup>45</sup> *Kay*, 359 F.3d at 738, 742.

<sup>46</sup> *Id.* at 749.

<sup>47</sup> *Id.* at 755.

As a result of the *Kay* decision's construction of the "obtain or retain" element, the FCPA currently is understood to prohibit payments to foreign officials not just to buy any act or decision, and not just to induce the doing or omitting of an official function "to assist ... in obtaining or retaining business for or with, or directing business to, any person," but also the making of a payment to such a foreign official to secure an "improper advantage" that will assist in obtaining or retaining business. This could include, for example, seeking favorable tax treatment from a government official even if not directly related to securing or maintaining a specific business relationship. The FCPA prohibits both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps the payor obtain or retain business for some person in a foreign country. Thus, the statute prohibits payments to government officials that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country.

## 2. Indirect or Vicarious Liability and "Willful Blindness"

One of the most difficult but crucial concepts necessary for companies to master in order to fully comprehend the risk of being charged with an FCPA violation is that an FCPA charge can be based on the wrongful acts of an intermediary, such as a foreign agent, subsidiary, or joint venture partner. Moreover, the government does not need to prove that the intermediary acted on a company's direct orders, or even that a company actually knew the intermediary engaged in prohibited conduct. Rather, the government can establish a company's "corrupt" intent to act through the intermediary through a "willful blindness" standard rather than requiring proof of "actual knowledge," such that the government need prove only that a company knew of facts (often referred to as "red flags") indicating a likelihood that the intermediary would engage in prohibited behavior, and then consciously or deliberately took steps to avoid learning whether the intermediary was engaging, or had engaged in, prohibited conduct.

The overwhelming number of enforcement actions against U.S. issuers or domestic concerns are based on illegal actions by foreign third parties, who engage in bribery without the U.S. company's express knowledge or approval. More often than not, this foreign third party is violating company antibribery policies, but nevertheless engages in the illegal action believing the bribe was unavoidable because "that's how business is done in

this part of the world." This is why it is imperative for companies to be hyper-vigilant about engaging in exacting due diligence of proposed foreign third-party intermediaries before becoming involved with them, and then continuing to closely monitor their activities afterward.

The FCPA expressly covers not only direct payments made by the covered person to a foreign government official, but also indirect payments, that is, payments to any person "while knowing"<sup>48</sup> that all or a portion of that payment will be offered or given to a foreign official, where "knowing" is defined as follows:

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.<sup>49</sup>

Under these provisions describing the requisite state of mind or criminal intent, a U.S. company may be liable for illicit payments by third parties, such as a local agent or partner or an intermediary company, if improper payments were made indirectly by that intermediary with the U.S. company's "knowledge." The FCPA's knowledge standard is broader than actual knowledge, and includes situations in which the covered person is aware that the third party is "substantially certain" to violate the FCPA or where

<sup>48</sup> 15 U.S.C. § 78dd-1(a)(3), -2(a)(3), -3(a)(3).

<sup>49</sup> *Id.* § 78dd-1(f)(2), -2(h)(3), -3(f)(3). The standard is drawn from the Supreme Court's test for "willful blindness," which is satisfied if the defendant "is aware of a high probability of [a fact's] existence, unless he actually believes that it does not exist." *Leary v. United States*, 395 U.S. 6, 23 (1969), cited in *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002).

there is a “high probability” of a violation.<sup>50</sup> As explained in legislative history,

the “knowing” standard adopted covers both prohibited actions that are taken with “actual knowledge” of intended results as well as other actions that, while falling short of what the law terms “positive knowledge,” nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act . . . [T]he Conferees agreed that “simple negligence” or “mere foolishness” should not be the basis for liability. However, the Conferees also agreed that the so-called “head-in-the-sand” problem—variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance”—should be covered.<sup>51</sup>

“Willful blindness” as a substitute for actual knowledge is what makes the so-called FCPA red flags important, because these criteria place a covered person on notice of the high probability or substantial certainty of an FCPA violation.<sup>52</sup> Failing to investigate a “red flag,” and arriving at a conclusion that there has been no illegal activity without a thorough investigation, will stand as evidence of knowledge.

A real-world examination of how one company failed to respond appropriately to “red flags” associated with agents was presented just recently in the April 26, 2007, joint enforcement action by the United States Department of Justice and the Securities and Exchange Commission against oil services firm Baker Hughes and its foreign subsidiaries.<sup>53</sup> This action provides

<sup>50</sup> 15 U.S.C. § 78dd-1(f)(3)(B), -2(h)(3)(B), and -3(h)(3)(B).

<sup>51</sup> H.R. CONF. REP. NO. 100-576, at 920 (1988).

<sup>52</sup> “Red flags” include (1) unusual payment patterns or financial arrangements; (2) a history of corruption in the country; (3) a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to violate the FCPA; (4) unusually high commissions; (5) lack of transparency in expenses and accounting records; (6) apparent lack of qualifications or resources to perform the services offered; (7) and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer. See UNITED STATES DEPARTMENT OF JUSTICE, FOREIGN CORRUPT PRACTICES ANTIBRIBERY PROVISIONS, found at <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>.

<sup>53</sup> Securities and Exchange Commission v. Baker Hughes, Inc. and Roy Fearnley, Civ. A. No. H-07-1408 (S.D. Tex. Apr. 26, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20094.htm>. Baker Hughes will pay more than \$23 million in dis-

a thorough and current example of how U.S. law enforcement measures “willful blindness” for purposes of establishing “knowledge” of corrupt payments transmitted through third parties like agents.

The SEC’s complaint alleged that Baker Hughes paid approximately \$5.2 million to two agents “while knowing” that some or all of the money was intended to bribe government officials, specifically officials of state-owned companies, in Kazakhstan.<sup>54</sup> The complaint makes clear that the “knowledge” component was satisfied by evidence establishing “willful blindness” rather than evidence of “actual knowledge” that bribes were transmitted to government officials by the agents. The complaint alleged that one agent was hired in September 2000 on the understanding that Kazakhoil, Kazakhstan’s national oil company at that time, had demanded that the agent be hired to influence senior level employees of Kazakhoil to approve the award of business to the company.<sup>55</sup> Baker Hughes retained the agent principally at the urging of Roy Fearnley, a British citizen and Baker Hughes employee living in Kazakhstan, who was Baker’s primary coordinator on the Kazakhoil bid.<sup>56</sup> Fearnley told his bosses that the “agent for Kazakhoil” told him that unless the agent was retained, Baker Hughes could “say goodbye to this and future business.”<sup>57</sup> Baker Hughes engaged the agent and was awarded an oil services contract in the Karachaganak oil field in Kazakhstan that generated more than \$219 million in gross revenues from 2001 through 2006.<sup>58</sup> Baker Hughes paid the agent \$4.1 million to its bank account in London but received no identifiable services from the agent.<sup>59</sup>

---

gorgement and prejudgment interest, and a civil penalty of \$10 million for violating a 2001 Commission cease-and-desist Order prohibiting violations of the books and records and internal controls provisions of the FCPA. In the parallel criminal action filed by the Department of Justice based on the same facts discussed in greater detail in the SEC’s complaint, Baker Hughes Services International Inc. (“BHSI”)—a wholly owned subsidiary of Baker Hughes Incorporated—pleaded guilty to violating the FCPA, agreeing to payment of a \$11 million fine. *United States v. Baker Hughes Services, International, Inc.*, Sealed Criminal Information and Plea Agreement, Crim. No. H-07-129 (S.D. Tex. Apr. 11, 2007) (unsealed Apr. 26, 2007). The \$44 million in combined fines and penalties resulting from the SEC complaint and the DOJ’s Criminal Information and Plea Agreement is the largest monetary sanction ever imposed in an FCPA case.

<sup>54</sup> *Id.* ¶ 1.

<sup>55</sup> *Id.* ¶ 2.

<sup>56</sup> *Id.* ¶¶ 2, 15.

<sup>57</sup> *Id.* ¶ 3.

<sup>58</sup> *Id.* ¶ 4.

<sup>59</sup> *Id.*

With respect to Baker's willful blindness about the agent's likelihood of bribing government officials, the complaint stresses the following factors:

- ✦ by September 12, 2000, Baker "heard unofficially that Baker Hughes had won the Karachaganak tender and that they should know definitively within the week. By September 14, 2000, the VP of marketing had received a phone call from a senior level employee at Baker Hughes' Western Geophysical division who informed him that Kazakhoil requested that Baker Hughes hire an agent in connection with the Karachaganak tender," and pay the agent a 3 percent commission;<sup>60</sup>
- ✦ "the agent had performed no identifiable services for Baker Hughes with respect to Karachaganak to deserve a commission";<sup>61</sup>
- ✦ the side letter agreement entered into between Baker Hughes and the agent providing for a commission "subject to Baker Hughes being confirmed the winner of the tender and awarded the three-year contract ... was not part of a formal sales representation agreement, and contained no FCPA language at all";<sup>62</sup>
- ✦ "the President of Oil Field Operations ... held a meeting with the VP of Marketing in which they discussed Kazakhoil's request that Baker Hughes retain the agent .... When the VP of marketing left the meeting, he had three directions from the President of Oil Field Operations: (i) to get the Legal Department involved in approving the hiring of the agent; (ii) to rerun their profitability numbers with the 2% agent commission built in, and (iii) to resolve the contract issues with their employee responsible for the legal negotiations on the contract terms." Nevertheless, Fearnley "executed a sales representation agreement with the agent ... before the revised numbers had been completed," and "failed to follow any of the FCPA procedures issued to him by Baker Hughes' Legal Department." Moreover, "Baker Hughes' Legal Department otherwise failed to follow up with Fearnley."<sup>63</sup>

<sup>60</sup> *Id.* ¶ 24.

<sup>61</sup> *Id.* ¶ 25.

<sup>62</sup> *Id.* ¶ 31.

<sup>63</sup> *Id.* ¶¶ 33-34, 36-37.

- ✦ "Neither Fearnley, nor anyone else at Baker Hughes, conducted any meaningful due diligence with respect to the agent until 2003 ...."<sup>64</sup>
- ✦ "By October 12, 2000, less than three weeks after retaining the agent as Baker Hughes' agent in Kazakhstan and more than one year after Baker Hughes commenced its effort to win the project, Fearnley received word that Baker Hughes would be receiving a letter of intent ... as the winner of the Karachaganak tender."<sup>65</sup>

The complaint also alleged that in 1998 Baker Hughes retained a second agent in connection with the award of a large chemical contract with KazTransOil, the national oil transportation operator of Kazakhstan.<sup>66</sup> Between 1998 and 1999, Baker Hughes paid more than \$1 million to the agent's Swiss bank account, despite a company employee knowing by December 1998 that the agent's representative was a high-ranking executive of KazTransOil.<sup>67</sup> With respect to Baker's willful blindness about this agent's likelihood of bribing government officials, the complaint stresses the following factors:

- ✦ although Baker Petrolite, Baker Hughes' foreign subsidiary, "already had an agent assisting with chemical contract in cows expand, Baker Petrolite hired FT Corp. as its agent for the contract. Neither Baker Petrolite nor anyone at Baker Hughes conducted any due diligence with respect to FT Corp., or the individual who purported to work on its behalf, either before or after the engagement. The agency agreement Baker Petrolite signed with FT Corp. was limited to a single page. The agreement contained no reference to the FCPA";<sup>68</sup>
- ✦ in exchange for its commission, the agent was required to perform laboratory and field experiments, carry out marketing functions, and assist in obtaining a fixed supply chemical contract. "Baker Petrolite has no records demonstrating that FT Corp. ever per-

<sup>64</sup> *Id.* ¶ 37.

<sup>65</sup> *Id.* ¶ 38.

<sup>66</sup> *Id.* ¶ 5.

<sup>67</sup> *Id.* ¶¶ 5, 48-51.

<sup>68</sup> *Id.* ¶¶ 50-51.

formed the first two of the three enumerated services, or any other work after the award of the chemical contract”;<sup>69</sup>

Finally, the SEC’s complaint against Baker Hughes also alleged violations of the books and records and internal controls provisions of the FCPA based on activities involving agents and consultants between 1998 and 2005, through whom Baker Hughes made payments in Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan in circumstances that reflected a failure to implement sufficient internal controls to determine whether the payments were for legitimate services, whether the payments would be shared with government officials, or whether these payments would be accurately recorded in Baker Hughes’ books and records.<sup>70</sup> For example, the complaint alleged that

- ✦ from 1998 to 2004, Baker Hughes authorized commission payments of nearly \$5.3 million to an agent (who worked in Kazakhstan, Russia, and Uzbekistan) under circumstances in which the company failed to determine whether such payments were, in part, to be funneled to government officials in violation of the FCPA, including the failure to conduct meaningful due diligence that would have revealed the affiliation that existed between Baker Hughes’ agent and a company to whom Baker made payments to, and making payments to another agent before conducting due diligence, and then once due diligence was performed, ignoring “red flags,” “including that the beneficial owners of [the agent company] or unknown and that its business phone number was potentially linked to a property owned by the Russian government”;<sup>71</sup>
- ✦ in Indonesia, between 2000 and 2003, Baker Hughes paid certain freight forwarders to import equipment into Indonesia using a “door-to-door” process under circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Indonesian customs officials, including having ignored a memo drafted by a consultant that the door-to-door process was an illegal procedure under Indonesian law that was

used to avoid the customs clearance process. The memo further described the procedure as an expeditious shipping process that required a fee to be paid to the Indonesian customs officials by the freight forwarding company, and that generally this resulted in no paperwork to the importer and no proof that any customs taxes or duties had in fact ever been paid;<sup>72</sup>

- ✦ in Nigeria, in 2001, Baker Hughes authorized payments to certain Nigerian tax officials in exchange for receiving a reduced income tax bill under circumstances in which the company failed to adequately assure itself that such payments were not being passed on, in part, to Nigerian customs officials. In particular, “a Nigeria employee told his supervisor, the District Manager for Nigeria, that he had discussed the Nigerian tax officials’ proposal [that the tax assessment be settled by a payment of 12,000,000 Naira split between a 6 million Naira payment to the Nigerian government and a 6 million Naira repayment to then unnamed Nigerian tax officials] with Baker Hughes’ International Tax Manager for the Asia-Pacific region, and, based on those discussions, [concluded that the] payment to the officials could violate the FCPA. A follow-up e-mail from the same employee indicated that he had then discussed the matter with the District Manager, who determined on his own that the FCPA would not be violated by making such a payment because ‘all companies are doing the same in Nigeria.’”<sup>73</sup>
- ✦ in Angola, from 1998 to 2003, Baker Hughes paid an agent more than \$10.3 million in commissions under circumstances in which the company failed to adequately assure itself that such payments were not being passed on to employees of Sonangol, Angola’s state-owned oil company, to obtain or retain business in Angola. In particular, it was later revealed that “Baker Hughes paid in excess of \$1.2 million to an[] Angolan agent whose principal ... was then the brother of a senior level Sonangol employee,” which Baker Hughes failed to learn at the time of the payments because it failed to conduct adequate due diligence.<sup>74</sup>

<sup>69</sup> *Id.* ¶ 51.

<sup>70</sup> *Id.* ¶ 6.

<sup>71</sup> *Id.* ¶¶ 74, 82.

<sup>72</sup> *Id.* ¶¶ 83-85.

<sup>73</sup> *Id.* ¶¶ 65-67.

<sup>74</sup> *Id.* ¶¶ 54-64.

### 3. The Exception and Affirmative Defenses

The FCPA provides for one exception and two affirmative defenses to an allegation of an antibribery violation: facilitating payments, marketing/promotional expenses, and payments in execution of a contract.

Generally speaking, the “facilitating payments” exception permits what often are referred to as “grease” payments to foreign officials. Specifically, the exemption covers “any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official.”<sup>75</sup> The statute defines “routine governmental action” as any action

that is ordinarily and commonly performed by a foreign official in—

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (v) actions of a similar nature.<sup>76</sup>

Because the “facilitating payments” provision is an exception to the FCPA, the burden is on the government to show that this exception does not apply to an alleged violation.

One note of caution is worthwhile. If there is evidence that a payment that might otherwise qualify as a facilitating payment was intended by the defendant as a bribe, then it can serve as the basis for a prosecution. In other words, the facilitating payment is not intended to create a “*de minimis*” exception to the FCPA’s antibribery provisions.

<sup>75</sup> 15 U.S.C. § 78dd-1(b), -2(b).

<sup>76</sup> *Id.* § 78dd-1(f)(3)(A)(i-v), -2.

The two affirmative defenses under the FCPA are (1) payment was lawful under the written laws and regulations of the foreign official’s country;<sup>77</sup> or (2) payment was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or for a foreign official, and was directly related to (a) promotion, demonstration, or explanation of a company’s products or services, or (b) execution or performance of a contract with a foreign government or agency thereof.<sup>78</sup> Because these are “affirmative defenses,” a company bears the burden of proving that they apply to any action challenged by the government.

As a practical matter, the keys to conducting business lawfully under these provisions are: (1) to understand that they are narrowly and strictly construed so as not to engulf the general prohibition against bribery, and (2) that because of their narrow application, any business conducted according to these provisions must be carefully and accurately documented, preferably in advance of the payment, and preferably with the advance involvement and approval of a company’s law department.<sup>79</sup>

The “promotional/marketing” affirmative defense is one that frequently gives companies difficulty, and thus is treated in more detail immediately below.

#### a) The “Promotional Expenses” Affirmative Defense in Detail

The FCPA contains an express affirmative defense for certain legitimate promotional expenses:

[i]t shall be an affirmative defense ... that—

....

<sup>77</sup> *Id.* § 78dd-1(c)(1), -2(c)(1), -3(c)(1).

<sup>78</sup> *Id.* § 78dd-1(c)(2)(A-B), -2(c)(2)(A-B), -3(c)(2)(A-B).

<sup>79</sup> Obviously, advanced documentation, and advanced involvement and approval by a company’s law department, are not technical legal requirements for a transaction to fall within these provisions. As a practical matter, however, the government will be extremely skeptical of after-the-fact attempts to characterize transactions as falling within the narrow scope of these provisions, particularly if the transactions involve large dollar amounts, or occur in the context of other suspicious circumstances. Even if a company ultimately prevails in establishing that a transaction qualifies for the exception of one of the affirmative defenses after-the-fact, simply going through a government inquiry to get to that point can be expensive, disruptive, and permanently damaging to a company’s reputation. Prudent companies, therefore, make every reasonable effort to document payments to foreign government officials as falling within these provisions in advance of the payment, and based upon advance review and approval by the law department.

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

(A) the promotion, demonstration, or explanation of products or services.<sup>80</sup>

This affirmative defense effectively has four elements: the thing of value otherwise given to the foreign government official is (1) reasonable, (2) bona fide, and (3) directly related to the promotion, demonstration, or explanation of (4) the company's products or services.

There is very little case law or regulatory guidance interpreting the promotional expenses related to affirmative defense, and what does exist is so fact-dependent that it cannot provide absolute assurance of lawfulness when attempting to analyze different facts. Below, we discuss the defense's legislative history, leading civil enforcement action, and Department of Justice ("DOJ") opinions in this area.

### **b) Legislative History of the Promotional Expenses Affirmative Defense**

The legislative history confirms that Congress intended the defense to be quite narrow so that even if an expense appears to meet all the required elements, if it was nonetheless intended "corruptly," it is not "bona fide" and will not prevent a finding of violation. As originally enacted in 1977, the FCPA did not contain the promotional expense defense. The defense was first proposed, though not adopted, in 1983, with the following rationale offered by DOJ on the need for the proposed revision:

This exemption ... is meant to sanction legitimate informational and promotional expenditures. Examples are paying travel and lodging expenses of a foreign official required for his attendance at a seminar concerning a domestic concern's goods or services; or transporting a foreign official to the site of a manufacturing plant for an inspection tour as part of an effort to persuade the official to contract for the building of a similar plant in his country. While

<sup>80</sup> 15 U.S.C. § 78dd-1(c)(2)(A), -2(c)(2)(A), -3(c)(2)(A).

such activities are instrumental to obtaining business, in that they may persuade the official of the quality of a business' products or services, it is not expected that the official will give business to the concern in return for the incidental value of the travel and lodging provided. Given the absence of a *quid pro quo* understanding, these activities are not in violation of the current law.<sup>81</sup>

While later formally enacting this defense in 1988, Congress stressed the key difference between a "bona fide" promotional expense and one that is corrupt. If a payment or gift is "corruptly made, in order to obtain an official act or omission," then "it cannot be a bona fide, good-faith payment, and this defense would not be available."<sup>82</sup> This is an important conceptual point because it makes clear that the affirmative defense is extremely limited. The defense is not a true affirmative defense, because instead of defining a kind of "defense" to a charge, what it really does is recognize an area where the key *mens rea* element of a bribery charge—"corrupt intent"—is missing. The key, therefore, to this defense is distinguishing corrupt payments provided to obtain or retain business from legitimate promotional expenses. Thus, the "promotional expenses" affirmative defense might be better understood as a "safe harbor" provision, which the company bears the burden of proving. Stated another way, if the government can prove that the promotional expense, even though it meets all the other required elements of the defense, was "corruptly" intended, the payment cannot be "bona fide" and will not prevent a finding of violation.

### **c) Metcalf & Eddy Prosecution**

The most significant enforcement action in this area is *United States v. Metcalf & Eddy, Inc.*<sup>83</sup> As part of its civil settlement with the government, the company was ultimately enjoined from further violations of the FCPA, and required to pay a civil penalty of \$400,000 and the \$50,000 cost of the government's investigation.

DOJ alleged that this private U.S. company violated the FCPA by providing improper travel benefits to an Egyptian government official to obtain

<sup>81</sup> *The Foreign Trade Practices Act: Hearings on H.R. 2157 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 126 (1983) (statement of Assistant Attorney General Jonathan C. Rose).

<sup>82</sup> H.R. CONF. REP. NO. 100-576, at 922, reprinted in 1988 U.S.C.C.A.N. at 1955.

<sup>83</sup> Civ. A. No. 99CV-12566-NG (D. Mass. Dec. 14, 1999).

his support for the award of several U.S. Agency for International Development (“USAID”) engineering contracts. The case provides some guidance of the admittedly vague line between “corrupt” promotional expenses and “bona fide” ones because DOJ acknowledged that the improper benefits occurred in the context of an overall lawful demonstration of products and services. The improper travel benefits included (1) a per diem cash advance, deemed improper because the official was not expected to pay for any expenses while in the United States,<sup>84</sup> (2) the provision of first-class airfare to the official, his wife, and two children, and (3) side trips to Paris, France, San Diego, California, and Orlando, Florida, to visit Disney World. Payments related to enabling the official’s wife and children to travel with him in first-class accommodations and making side trips failed to meet the requirements of the affirmative defense because they were not “directly related” to promoting the company’s services—there was no articulable business purpose for including the other family members and the touring side trips.

Other aspects of the trip failed under the FCPA’s books and records provisions. An officer of Metcalf & Eddy obtained two undocumented cash advances immediately prior to and during one of the trips taken by the Egyptian official at company expense. These funds were apparently expended in connection with the official’s trip. DOJ alleged that the company failed to keep accurate books and records documenting the payments.

*Metcalf & Eddy* is an important FCPA enforcement action for several reasons:

- *Metcalf & Eddy* demonstrates the government’s zeal in pursuing corrupt practices, no matter the dollar amount. DOJ attorneys speaking publicly about the case declined to give the exact cost of the Egyptian official’s trips to the United States, stressing that because the FCPA has no dollar requirement, any amount may be a corrupt payment for purposes of the FCPA.

<sup>84</sup> The Egyptian official received 150 percent of the applicable per diems under the Federal Travel Regulations, even though Metcalf & Eddy paid for most of the travel and entertainment expenses incurred by the official and his family. The per diem payments were, in effect, unrestricted cash payments to the official.

- This is one of very few civil enforcement actions brought under the FCPA by DOJ (these are ordinarily brought by the SEC), and was probably pursued civilly because criminal prosecution was problematic for the government. DOJ attorneys who prosecuted the case admitted to having difficulty getting documentation from abroad and expressed uncertainty as to how the case would play before a jury without some of that key evidence. *Metcalf & Eddy* signals the government’s willingness to bring a civil enforcement action even if there are evidentiary problems that prevent it from pursuing a criminal case. For a publicly traded company that must be sensitive to any government enforcement action, whether criminal or civil, it is important to keep in mind that the newspaper headlines will still read, “Company X Charged With Bribery,” so that avoiding criminal prosecution in favor of civil enforcement will provide little comfort.
- Finally, this case highlights how the acts of a predecessor company can haunt a successor company, now responsible for those prior corrupt acts because of a merger or buyout, as was the case when the international subsidiary of Metcalf & Eddy was merged into the defendant parent company.

#### d) Department of Justice Opinions

##### i. Pre-1988 Department of Justice Opinion Procedures Releases

Prior to formal adoption of the promotional expense affirmative defense in 1988, DOJ issued several “Opinion Procedures Releases”—advisory opinions addressing whether certain prospective conduct as described in the requesting party’s stipulations conforms with DOJ’s current view of the scope and applicability of the statute.<sup>85</sup>

<sup>85</sup> Even though these preamendment opinion releases have limited value because they precede the 1988 amendment, they are nevertheless instructive for two reasons. First, as noted above in the text, it was the Department of Justice that advocated for the adoption of an affirmative defense that would allow businesses to promote and market themselves without violating the literal language of the FCPA, which is precisely how DOJ had been enforcing the law before the amendment as a matter of prosecutorial discretion. Second, because there is so little published case law or regulatory proceedings interpreting the defense, any guidance as to what has traditionally been important to the enforcers in considering the applicable facts is helpful.

In the first such opinion, DOJ approved the Missouri Department of Agriculture's request to pay reasonable and necessary travel expenses for a 10-person delegation of Mexican officials to promote Missouri agricultural products.<sup>86</sup> The expenses included lodging, meals, entertainment, and travel within the state, as well as hosting of meals, receptions, and product demonstrations by private business firms in the state. The private business representatives also were permitted to give members of the delegation sample products and/or other items of minimal value. Maintaining an eye toward the FCPA's books and records requirements, the Department of Agriculture agreed that it would reimburse lodging, meal, or travel expenditures inadvertently paid by delegation members only with an adequate receipt.<sup>87</sup>

The next relevant request reviewed by DOJ came from a U.S. company participating with two foreign companies in a joint venture in a foreign country.<sup>88</sup> The joint venture had contracted with a government-controlled entity in that country, and an official of that entity was coming to the United States to vacation with his wife. The U.S. joint venture participant wanted to invite the official to extend his vacation in the United States for 10 days to take a promotional tour of the American company's facilities being used in the contract with his government. DOJ said it would not object to payment of all reasonable and necessary expenses for both the official and his wife, including airfare, lodging, meals, ground transportation, and entertainment. The U.S. company had expressly represented that expenses would not exceed \$5,000 and would be paid directly to the providers of the services rather than the official.

DOJ next reviewed Atlantic Richfield Company's request ("ARCO") relating to construction of a large-scale chemical plant in France.<sup>89</sup> ARCO wanted to invite officials from a French government ministry to the United States to review environmental and management concerns raised by French officials. ARCO proposed meetings between the French officials and ARCO management personnel in Philadelphia, Pennsylvania, and then a

<sup>86</sup> Op. Proc. Release No. 82-01.

<sup>87</sup> DOJ also approved a similar proposal, where the Missouri Department of Agriculture and a private company proposed jointly to pay the travel expenses of a Singapore government official in connection with the official's visit to Missouri to review certain sites and demonstrations. Op. Proc. Release No. 83-3.

<sup>88</sup> *Id.* No. 83-2.

<sup>89</sup> *Id.* No. 85-1.

tour of ARCO's plant in Bayport, Texas. ARCO said the trip would not exceed one week, and that it would pay all necessary and reasonable expenses for the French officials, including travel, lodging, and meals expenses. DOJ said it did not view the proposal as raising an enforcement concern, noting, among other things, that ARCO had obtained an opinion from counsel that the trip did not violate French law.

## ii. Post-1988 Department of Justice Opinion Procedure Releases

Several post-1988 DOJ Opinion Procedure Releases have also addressed this issue, including some very recent opinions involving travel and entertainment expenses involving government officials of the People's Republic of China ("PRC").

In the first Opinion Procedure Release following statutory enactment of the affirmative defense, DOJ approved a proposal to pay training, travel, and subsistence expenses of Pakistani government officials and employees relating to performance of a proposed agreement with the Pakistani government.<sup>90</sup> The requesting U.S. company noted that under Pakistani law, the Government of Pakistan could require petroleum exploration and production companies to provide training to government personnel to enable them to supervise the Pakistani petroleum industry. Thus, the Pakistani Ministry of Petroleum and Natural Resources had proposed an agreement obligating the U.S. company to spend at least \$200,000 annually on this training. Although some of the training would take place in Pakistan, other parts of the training could be done more easily at seminars, symposia, and workshops in the United States and Europe. The U.S. company proposed to pay the necessary and reasonable expenses for this training, all related to performance of duties in connection with the supervision of the Pakistan petroleum industry, including seminar fees, airfare, lodging, meals, and ground transportation. The U.S. company agreed that if these expenses looked as though they might exceed \$250,000 annually, it would seek additional DOJ review.

The next relevant Opinion Procedure Releases came in 2004. In the first of these three opinions, a U.S. law firm proposed to co-sponsor with a PRC ministry a comparative law seminar to be held in Beijing.<sup>91</sup> The seminar's

<sup>90</sup> *Id.* No. 92-1.

<sup>91</sup> *Id.* No. 04-01.

stated purpose was to educate U.S. and PRC legal and human resources personnel about labor and employment issues and their practical applications in the two countries, to facilitate compliance, understanding, and development of law in the two jurisdictions. The U.S. law firm proposed to pay for travel-related expenses for attendees, including hotel accommodations for Chinese government officials participating in the seminar, receptions and meals, transportation for Chinese government officials who did not live in Beijing, and translation and printing of conference materials. The law firm agreed it would make all payments directly to the service providers or, if necessary, reimburse costs only upon presentation of a receipt. The law firm agreed it would not provide any gifts or tokens to the attendees, and the government officials would not otherwise be compensated for their participation. The law firm also stipulated that it had no business before entities that might send officials to the seminar, was unaware of any anticipated business between the clients that would be invited and the government officials, had no input in selecting the officials who would be invited, and had obtained assurances from a PRC legal officer that the sponsorship and payment of the expenses would not violate the law of the PRC. Accordingly, DOJ agreed it saw no need to undertake an enforcement action.

DOJ issued a similar opinion for a U.S. law firm proposing to sponsor a trip for 12 PRC government officials to the United States to visit with U.S. public-sector officials and discuss U.S. regulation of employment issues, labor unions, and workforce safety.<sup>92</sup> The firm proposed paying for the 10-day, three-city trip, including travel, lodging, meals, and insurance for the 12 officials and one translator. The firm agreed it (1) would not pay any expenses for the officials' spouses, family, or other guests; (2) would pay all costs directly to the service providers; (3) would not fund, organize, or host any entertainment or leisure activities for the officials; and (4) would not provide any stipend or spending money. The firm also stipulated that: (1) it had no business before the entities sending the officials; (2) it had received an opinion from a PRC legal officer that the sponsorship and payment of expenses would not violate any Chinese law, (3) the Chinese ministry would select the attendees, and (4) it would host only officials working for the ministry, related government agencies, and necessary interpreters. On those facts, DOJ agreed that enforcement was not necessary.

<sup>92</sup> *Id.* No. 04-03.

DOJ also approved a U.S. company's request to fund a "Study Tour" for foreign officials who were members of a committee drafting a new law on mutual insurance.<sup>93</sup> The Study Tour would allow the officials to visit the U.S. company's offices, and meet with state insurance regulators, insurance industry groups, and other insurance companies to help the committee members understand the management and regulation of mutual insurance companies. All five foreign committee members were selected by the foreign governments, and none of them had direct decision-making power over the licensing process. In approving the Study Tour, DOJ stressed its reliance on representations from the U.S. company that (1) the foreign government was selecting the particular officials who would travel; (2) the U.S. company would pay all costs directly to providers or reimburse costs only upon presentation of a receipt; (3) the company would not provide any gifts or tokens to the officials or compensate them for their participation; and (4) the U.S. company did not have any business with the foreign government.

### iii. Practical Lessons and Observations Based on the Above Legislative, Enforcement, and Regulatory History

Based on the language of the FCPA itself, the various DOJ Opinion Releases, and the government's enforcement action in *Metcalf & Eddy*, several important principles can be drawn concerning promotional expenditures in connection with foreign officials:

- **First**, to meet the requirements of the promotional expenditure defense, there must be a bona fide business justification for the expenditure, and there must be an appropriate balance between the business purpose of the trip and the travel and entertainment provided. Entertainment unconnected with company operations or promotional activities is not justifiable.<sup>94</sup> Except in extraordi-

<sup>93</sup> *Id.* No. 04-04.

<sup>94</sup> Whether an activity is "connected" or "unconnected" depends on the business purpose of the overall promotional event. For example, if foreign government officials are in Los Angeles to tour company facilities and complete final negotiations on a contract, it is sufficiently connected to that business purpose to pay for them to attend a Los Angeles Dodgers baseball game that evening, provided that company officials accompany the government officials. It is not, however, sufficiently connected to that business purpose to pay for those same government officials to travel cross-country to Boston to attend the final three games of the World Series. While attendance at a single baseball game on the same evening in the same city where business negotiations and demonstrations took place has a sufficient connection between the business purpose and the entertainment, that

nary circumstances, expenditures for family members or guests are prohibited because ordinarily there is no business justification for such expenditures. The rare exception would be a case such as that presented in Opinion Procedure Release No. 83-2, where the spouse of the foreign official was already traveling with the official on vacation at the official's expense, such that it would have been unreasonable under the circumstances not to pay for the spouse to accompany the official on a trip to the U.S. company's facilities. Indeed, current enforcement practice may very well counsel against payment of these spouse-associated expenses altogether.

- ♦ **Second**, the expenditures must be reasonable under the circumstances, and not extravagant or excessive. DOJ Opinion Procedure Releases repeatedly refer to reasonable and necessary expenditures. Many of the applicants seeking DOJ approval felt compelled to stipulate that they would not provide even token gifts to the officials involved in the event. Although not specifically approved by DOJ, it is generally appropriate to benchmark such expenditures against the amount the company would pay for its own employees or private customers in the same venue for the same purpose. However, even this rule of thumb may very well not apply in countries where annual wages paid to government officials are substantially below wages and benefits, including travel and entertainment practices, that would otherwise apply to peer-level employees of a large U.S. company.
- ♦ **Third**, the presumptive practice should be that payments are made directly to the vendors of the travel and promotional services, such as airlines, hotels, caterers, and the like. In the alternative, the U.S. company can reimburse the foreign official for expenses only upon submission of receipts or other documentation sufficient to meet the requirements of the FCPA's books and records standards (i.e., the standards that the company already applies to its own books and records under the Act). These were characteristics of all the proposals explicitly approved by DOJ. Cash per diems are not per se prohibited, but are more problematic than direct payment or reimbursement. Indeed, cash per diems present a very real pos-

does not mean that baseball games are always legal—the question must always be, “How is the entertainment connected to the business purpose?”

sibility that the official will accept the per diem from the company, while also receiving a per diem from his or her own government, resulting in “double dipping.”<sup>95</sup>

- ♦ **Fourth**, a contractual requirement with a foreign government can be an important justification for promotional and entertainment expenditures. Contractual requirements obligating companies to pay foreign officials' travel expenses (1) are transparent, and hence less susceptible to suspicion, (2) are less discretionary, and hence less likely to be corruptly motivated, or viewed as such, and (3) fall squarely within the language of another affirmative defense under the FCPA, namely, that they are expenditures directly related to “the execution or performance of a contract ...”<sup>96</sup> For each of these reasons, where promotional expenditures are contractually required, they are more likely to be viewed as bona fide business expenses, as they were in Opinion Release 92-1, despite the high amount of expenditures involved.
- ♦ **Fifth**, as Opinion Releases 92-1 and 04-04 illustrate, compliance with local law and receiving the foreign government's approval can provide verification of the bona fide nature of travel and entertainment expenditures. Expenditures that have been brought to the attention of the foreign government involved in advance of the expenditure are far less likely to be viewed by U.S. enforcement as “corrupt,” because the payments were presumably brought to the attention of the involved officials' superiors, creating transparency seldom found where a bribe is the true intent.
- ♦ **Finally**, all promotional and entertainment expenditures should be carefully documented both internally in company records and

<sup>95</sup> Cash per diems are highly dangerous and disfavored. However, in some extraordinary situations, per diem “spending limits” may be preferable to actual reimbursement of expenditures that may otherwise be unrestricted (e.g., meals). Cash per diems are particularly justifiable in relation to expenses that cannot easily be prepaid, such as local transportation (e.g., taxis), tips, laundry and other incidental expenses, secretarial services, phone and fax services, guides and interpreters, and similar expenses recognized in the Federal Travel Regulations, 31 C.F.R. §§ 301-304, as appropriate miscellaneous expenses. It is important that, given their susceptibility to being misconstrued, any cash per diems should be carefully justified and documented. The company should request the original of any receipts generated to ensure that the official is not also seeking reimbursement for the same expense from his or her own government.

<sup>96</sup> 15 U.S.C. § 78dd-1(a)(2)(B), -2(a)(2)(B), and -3(a)(2)(B).

externally to the foreign government. Payments must be fairly and accurately described in the company's books and records to not run afoul of the FCPA's requirement that U.S. issuers "make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuers."<sup>97</sup>

In sum, compliance for promotional and marketing expenses should focus on three fundamental questions. The most important is to determine whether the expenditure is "bona fide" or "corrupt." This requires that the business purpose of the expenditure be carefully defined. In other words, ask, "**What products or services does the company wish to promote, demonstrate, or explain?**"

The next step is to make sure that expenditures are directly related to the defined business purpose, rather than being only indirectly or tangentially related to the business purpose. In other words, ask, "**Is the expenditure necessary to promote, demonstrate, or explain the product or service at the core of the defined business purpose?**" The more the expenditure, both in terms of time and resources, is slanted in the direction of fun, so that the fun aspect begins to overwhelm the business aspect, the more likely it is that the expenditure is only indirectly promoting the company's goods and services.

The final question to ask is, "**Is the amount of the expenditure reasonable?**" The reasonableness of the expenditure is contextually fact-specific, so that there are no broad general rules that can be defined in advance in order to ensure compliance. Nevertheless, the appropriate areas to look in order to measure reasonableness include: (1) prevailing market rates for similar expenditures; (2) the amount of the expenditure versus the government official's salary or receipt of similar benefits from his or her own government; (3) activity of the company's U.S.-regulated competitors when entertaining similar foreign government officials in a similar context; (4) custom, both locally and within the particular industry.

Finally, as is discussed in more detail in the following section, the company must always keep in mind the books and records requirements of the FCPA. The expenditures for marketing and promoting the company's

<sup>97</sup> 15 U.S.C. § 78m(b)(2)(A).

products and services to foreign government officials must be transparent and accurately recorded in the company's records.

## **B. Record-Keeping and Internal Accounting Provisions**

The FCPA's record-keeping and internal accounting controls provisions generally require publicly held companies to maintain adequate books, records, and internal controls.<sup>98</sup> The FCPA's books and records provision requires companies 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.<sup>99</sup>

The FCPA defines "reasonable detail" to mean "such level of detail ... as would satisfy prudent officials in the conduct of their own affairs."<sup>100</sup>

Although the FCPA itself does not define "books and records," the Exchange Act defines "records" broadly to mean "accounts, correspondence, memoranda, tapes, disks, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language."<sup>101</sup> In 1981, the SEC interpreted this term to include only those records that are relevant to accomplishing objectives specified in the internal accounting provision.<sup>102</sup> Nevertheless, "Congress's use of the term 'records' suggests that virtually any tangible embodiment of information made or kept by an issuer is within the scope of the 'books and records' provision."<sup>103</sup>

The books and records provision is supplemented by an SEC rule addressed to individuals, which provides that "[n]o person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to [the books and records provision.]"<sup>104</sup> Individuals may be held civilly liable for

<sup>98</sup> *Id.* § 78m(b)(2).

<sup>99</sup> *Id.* § 78m(b)(2)(A).

<sup>100</sup> *Id.* § 78m(b)(7).

<sup>101</sup> *Id.* § 78c(37) (2000).

<sup>102</sup> Securities Exchange Act Release No. 34-17500, 1981 WL 36385, at \*2 (SEC) (Jan. 29, 1981).

<sup>103</sup> SEC v. World-Wide Coin Inv. 567 F. Supp. 724, 749 (N.D. Ga. 1983).

<sup>104</sup> 17 C.F.R. § 240.13b2-1.

falsifying records. Although on its face the rule reaches more than intentional falsifications, the SEC has declared that the reasonably prudent official standard also applies here, and that inadvertent errors would not be prosecuted.<sup>105</sup> However, the SEC has also taken the position that individuals responsible for managing books and records may be liable for (1) failing to correct known falsifications or falsifications that reasonably should have been known, or (2) attempting to cover up a falsification.<sup>106</sup> Moreover, an individual may be found criminally liable under the FCPA's accounting provisions if found to have "knowingly circumvent[ed]" or "knowingly fail[ed] to implement" a system of internal accounting controls or "knowingly falsif[ied]" records.<sup>107</sup>

The FCPA's internal accounting controls provision provides that issuers shall

devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

- (i) transactions are executed in accordance with management's general or specific authorization;
- (ii) transactions are recorded as necessary (a) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (b) to maintain accountability for assets;
- (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.<sup>108</sup>

"Reasonable assurances" is also defined by the reasonably prudent official standard.<sup>109</sup> According to the SEC, whether an accounting system satisfies

<sup>105</sup> Securities Exchange Act Release No. 34-15570, WL 17892, at \*9-\*10 (SEC) (Feb. 15, 1979).

<sup>106</sup> See SEC v. Triton Energy Corp., *supra* note 41 (Complaint and Undertakings).

<sup>107</sup> 15 U.S.C. § 78(b)(4), (5).

<sup>108</sup> *Id.* § 78m(b)(2)(A)(B)(i-iv).

<sup>109</sup> *Id.* § 78m(b)(7).

internal accounting controls provisions depends on whether the "system, taken as a whole, reasonably meets the statutes' specified objectives."<sup>110</sup>

In a 1981 policy statement, the SEC acknowledged that not even an effective system of internal controls can prevent employees and agents from making mistakes or circumventing the controls, so that the test of an effective system is not perfection, but whether it detects and corrects mistakes and circumventions:

No system of adequate records and controls—no matter how effectively devised or conscientiously applied—could be expected to prevent all mistaken and improper transactions and dispositions of assets. Given human nature, regardless of the adequacy of the system, a bookkeeper may still erroneously post entries, an overzealous agent may make unauthorized payments, or an unscrupulous employee may falsify records for his own purposes. The FCPA recognizes each of these limitations. Neither its text and legislative history nor its purposes suggest that occasional, inadvertent errors were the kind of problem that Congress sought to remedy in passing the Act.... The test of a company's control system is not whether the occasional failings can occur. Those will happen in the most ideally managed company. But, an adequate system of internal controls means that, when such breaches do arise, they will be isolated rather than systematic, and will be subject to a reasonable likelihood of being uncovered in a timely manner and then remedied promptly. Barring, of course, the participation or complicity of senior company officials in the deed, when discovery and correction expeditiously follow, no failing in the company's internal accounting system would have existed. To the contrary, routine discovery and correction would evidence its effectiveness.<sup>111</sup>

## 1. Liability for the Accounting Practices of Minority-Owned Ventures

Issuers are obligated to make sure that a foreign subsidiary's (or foreign joint venture's) books and records satisfy the FCPA's provisions. When the

<sup>110</sup> Securities Exchange Act Release No. 34-17500, *supra* note 102.

<sup>111</sup> Securities Exchange Act Release No. 34-17500, 1981 WL 36385, at \*7-\*8.

issuer expressly owns and controls the subsidiary (or joint venture, as is often the case), this is a matter of strict liability, but where the issuer does not overtly own a controlling interest, the issuer still maintains some responsibility for the accuracy of the venture's books and its internal controls.

The FCPA specifically addresses the responsibility of an issuer with respect to the accounting practices of another entity in which the issuer holds 50 percent or less of the voting power.<sup>112</sup> Under those circumstances, the FCPA

require[s] only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such [other entity] to devise and maintain a system of internal accounting controls consistent with paragraph (2) [i.e., 15 U.S.C. § 78m(b)(2)]. Such circumstances include the relative degree of the issuer's ownership of the [other entity] and the laws and practices governing the business operations of the country in which such [other entity] is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).<sup>113</sup>

This good faith provision was added by the 1988 FCPA amendments. Prior to then, considerable concern had been expressed in the business community about an issuer's liability for a subsidiary's compliance with the FCPA's accounting provisions. The SEC's initial response was the adoption of an enforcement policy announced by the Chairman in a speech titled "The Accounting Provisions of the Foreign Corrupt Practices Act: An Analysis," delivered January 13, 1981, to the SEC Developments Conference of the American Institute of Certified Public Accountants. That enforcement policy provided that where the issuer controlled more than 50 percent of

<sup>112</sup> See 15 U.S.C. § 78m(b)(6).

<sup>113</sup> *Id.* It is arguably ambiguous whether an issuer need only demonstrate good faith efforts with respect to the internal accounting controls provision alone, or with respect to the books and records provision as well. This potential ambiguity is created by the fact that the good faith provision quoted in the text above only refers specifically to the internal accounting controls provision. Thus, one could argue that issuers are only obligated to exert good faith efforts with respect to internal accounting controls and not books and records. Not surprisingly, DOJ and the SEC have taken the position that issuers must demonstrate good faith efforts with respect to both.

the voting securities of the subsidiary, compliance would be expected. Similarly, the issuer would be responsible for ensuring compliance where there was between 20 percent and 50 percent ownership, subject to the issuer's demonstrating that its ownership interest did not amount to control. Where there was less than 20 percent ownership, the commission would bear the burden of demonstrating actual control.

The FCPA now expressly provides that, where the issuer holds 50 percent or less of the voting power of another entity, the issuer's responsibility is fully discharged where the issuer makes a good faith effort "to the extent reasonable under the issuer's circumstances" to cause the other entity to comply with the requirements of the FCPA. The legislative history of the 1988 amendment sheds little additional light on the meaning of this change, except to say that the amendment recognizes that it is unrealistic to expect a minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary.

The amount of influence that an issuer may exercise necessarily varies from case to case. While the relative degree of ownership is obviously one factor, other factors may also be important in determining whether an issuer has demonstrated good faith efforts to use its influence.<sup>114</sup> For example, an issuer is expected to exert considerable control over the foreign concern's accounting practices where the concern depends on the issuer for financial support. Other relevant factors include (a) whether the issuer can obtain access to the concern's books and records, either directly or through auditors, (b) whether any agreements governing the relationship require compliance with the accounting provisions of the FCPA, or (c) whether the issuer has inspection or audit rights. The issuer's ability to influence other shareholders or owners, based on other business relationships, for example, might also be considered.

The practical result of this analysis is that, as under the SEC's pre-1988 amendment enforcement policy, if actual control can be established—e.g., through a veto power on a joint management committee in a joint venture—then the issuer will be held fully responsible for the concern's FCPA accounting provisions compliance. If actual control exists, despite minority ownership status, then proceeding in good faith means that the issuer must compel compliance with the FCPA's books and records and internal

<sup>114</sup> H.R. CONF. REP. NO. 100-576, at 917, reprinted in 1988 U.S.C.C.A.N. at 1950.

accounting provisions. Absent actual control, an issuer will not be responsible for the concern's noncompliance, so long as the issuer demonstrates that it exerted "good faith" influence over the concern's accounting practices to the degree it could. Significantly, this standard suggests that even where an issuer cannot control improper accounting practices, if it cannot demonstrate some good faith efforts to use whatever influence it did have, then the issuer might be held accountable for the concern's conduct.

## 2. Practical Considerations Relating to Proper Accounting for Facilitating Payments and Payments Involving Foreign Government Officials Generally

Absent careful attention to accounting, a company can give a lawful facilitating payment to a foreign government official but still run afoul of the FCPA by not accurately recording and describing those payments in its books and records. It is important to have accounting procedures in place to ensure that all facilitating payments are accurately described and recorded. This includes both facilitating payments made directly by a company or its subsidiary as well as facilitating payments made indirectly through third parties.

The key considerations in accounting for such payments are accuracy and reasonable detail. Accuracy includes, of course, tracking the precise amounts that are paid, both individually and overall. This is undoubtedly easy in the case of facilitating payments made directly by a company or its subsidiary. When third parties such as agents become involved, it is considerably more difficult. A company on whose behalf the third party made the payments is dependent on the third party to provide the company with the necessary information to maintain accurate books and records. For purposes of the FCPA, a company cannot simply ignore the fact that a third-party representative makes facilitating payments on its behalf; nor can a company simply rely on estimates of such payments. Rather, the third-party representative must be required to report the exact amounts of any facilitating payments it makes, and agreements with third parties must specify that the third-party representative is prohibited from making any such payments in the absence of accurately reporting all amounts paid.

These individual amounts, either paid directly by a company or paid through third parties, should, as a matter of best practices, be recorded

under an accounting code that will generally reflect all payments made to or on behalf of foreign government officials. This code should be used not only for facilitating payments, but *any* type of expenditures involving a foreign government official. This would include, for example, promotional and marketing expenditures such as nominal gifts, reasonable meals and entertainment, and business-related travel involving foreign officials. A uniform accounting code for all expenditures involving foreign government officials facilitates accurate record keeping, makes it easier to monitor and audit such payments, thereby strengthening the applicable internal accounting controls.

## 3. Intersection of the FCPA and the Sarbanes-Oxley Act over Internal Controls

Section 404 of the Sarbanes-Oxley Act of 2002<sup>115</sup> requires a company's management to present an internal control report in the company's annual report containing: (1) a statement of the responsibility of management for establishing and maintaining an adequate internal controls structure and procedures for financial reporting; and (2) an assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal controls structure and procedures for financial reporting. Management must disclose any material weaknesses, and will be prohibited from concluding that internal controls over financial reporting are effective if there are one or more material weaknesses. Section 404 also requires a company's auditor to attest to, and report on management's assessment of, the effectiveness of the company's internal controls and procedures for financial reporting in accordance with standards established by the Public Company Accounting Oversight Board.

Section 404's annual reporting requirement substantively overlaps with the requirement for a company's officers to certify significant changes to internal controls under Sarbanes-Oxley Act Section 302, requiring companies to perform quarterly evaluations of changes that have materially affected or are reasonably likely to materially affect a company's internal control over financial reporting. As a practical matter, by operation of Sections 302 and 404, companies must evaluate and certify internal controls over financial reporting on a quarterly basis, and report on them at

<sup>115</sup> Pub. L. No. 107-204, 116 Stat. 745 (2002).

least on an annual basis. A quarterly certification that does not disclose any significant changes to internal controls in effect operates as a report that the internal controls have not changed significantly since the preceding annual report.

Overlap between the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act occurs because the governing definition of internal controls over financial reporting for Sarbanes-Oxley is largely synonymous with the internal accounting controls that publicly held U.S. companies are required to maintain under the Foreign Corrupt Practices Act.<sup>116</sup> Sarbanes-Oxley now requires periodic review and certification of those controls, and the disclosure of any material weakness. The SEC currently takes the view that any antibribery violation of the FCPA that also results in a violation of the books and records provisions is a material weakness in internal controls for Sarbanes-Oxley certification and disclosure purposes. As addressed further below, the penalties for making a willfully false certification are significant.<sup>117</sup>

## C. Statute of Limitations and Penalties

### 1. Statute of Limitations

The applicable statute of limitations for an FCPA violation is five years for both criminal and civil violations. For a criminal violation, the statute runs from the date the potential offense was committed.<sup>118</sup> Under certain circumstances, this five-year period can be suspended for up to three years if a court rules upon application of the United States that there is evidence of an offense in a foreign country.<sup>119</sup> A civil enforcement action may be brought within five years from the date when the claim first accrued.<sup>120</sup> In addition, there are potential theories under which U.S. law enforcement authorities could extend or toll the statute of limitations for years with

<sup>116</sup> 15 U.S.C. § 78m(b)(2).

<sup>117</sup> Knowing that certification of a filing that fails to meet this requirement carries a possible 10-year prison sentence and a \$1 million fine; willful violations carry a possible 20-year sentence and a \$5 million fine. Sarbanes-Oxley Act § 906, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>118</sup> See 18 U.S.C. § 3292 (general criminal statute of limitations).

<sup>119</sup> *Id.* § 3292(a), (c).

<sup>120</sup> 28 U.S.C. § 2462.

respect to SEC enforcement actions.<sup>121</sup> Similarly for criminal actions, when the limitation period has otherwise run for a substantive crime, it is a common prosecutorial tactic to charge around the limitation by alleging a conspiracy to violate the applicable federal criminal statute.<sup>122</sup> Charging a criminal conspiracy to violate the FCPA avoids limitation problems because the statute of limitations period for a conspiracy begins to run anew each time an act in furtherance of the conspiracy occurs, which includes acts undertaken to prevent the conspiracy from being discovered.

### 2. Criminal Penalties per Violation

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years.<sup>123</sup> Moreover, under the Alternative Fines Act,<sup>124</sup> these fines may be actually quite higher—the actual fine may be up to twice the benefit that the defendant obtained by making the corrupt payment. In the case of a bribe relating to a significant contract, the fines can get stratospheric under this provision. Fines imposed on individuals may *not* be paid by their employer or principal.

### 3. Civil Penalties per Violation

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

<sup>121</sup> See, e.g., *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) (where public right or interest is at issue, statutes of limitations “do not bind the United States ... absent a clear showing of Congressional intent to the contrary”).

<sup>122</sup> 18 U.S.C. § 371.

<sup>123</sup> 15 U.S.C. § 78dd-2(g), -3(e).

<sup>124</sup> 18 U.S.C. § 3571.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

#### 4. Penalties per Violation of the Books and Records Provisions

“Any person who willfully violates [the FCPA Books and Records provisions] or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter ... shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.”<sup>125</sup> As before, the Alternative Fines Act applies, so that the monetary fine can be up to twice the benefit the defendant obtained through the violation.

#### 5. Additional Consequences

A person or firm found in violation of the FCPA may also be barred from doing business with the U.S. federal government and may be ruled ineligible to receive export licenses. Debarment from federal contracts can occur based merely on indictment, rather than waiting for final resolution. In addition, the SEC may suspend or bar persons from the securities business, and the Commodity Futures Trading Commission and the Overseas Private Investment Corporation may suspend or debar the entity from agency programs. A violation may also disqualify the firm from obtaining financing from, or being involved in projects financed by, multilateral financial institutions, such as the United Nations or the World Bank. In addition, there is the risk of cross-debarments by national or multinational agencies (including banks) if an entity is so disqualified by these organizations. A payment made to a foreign government official that is unlawful under the FCPA also cannot be deducted under the tax laws as a business expense, so that an improper deduction may also expose a company to tax penalties.

<sup>125</sup> 15 U.S.C. § 78ff(a).

## II. Application of the FCPA against U.S. Parent Companies Based upon Violations By Their Foreign Subsidiaries with a Focus on Jurisdictional Issues

The number of companies or company officials who expressly intend to violate the FCPA are generally rare. However, good intentions are of small comfort in this area, because in the overwhelming number of enforcement examples, U.S. issuers and domestic concerns become embroiled in FCPA enforcement actions not through their own direct actions, but rather through the actions of persons affiliated with foreign subsidiaries or foreign joint venture partners whose day-to-day actions are less known to, or controlled by, the U.S. company. It is therefore appropriate to focus on enforcement actions and theories under the FCPA to understand fully how liability can be established against a U.S. parent based upon acts committed by agents of a foreign subsidiary.

### A. Antibribery

The government has multiple liability theories available under the FCPA's antibribery provisions to establish jurisdiction and file charges against a U.S. parent based on the acts of its foreign subsidiary.<sup>126</sup> First, the government could seek to develop facts showing that, even if there is not direct evidence that the parent knew of, or was actually involved in, the allegedly improper payments, as a general matter, the parent exercised sufficient control over the foreign subsidiary that authorization, direction, or control over the activity in question can be circumstantially inferred as a matter of agency law, thus establishing jurisdiction over the parent for the acts committed by the foreign subsidiary. This is strictly a question of what indicia of control there are, and how closely these indicia relate to the activities at issue. The more control there is, and the closer that control relates to the

<sup>126</sup> With respect to the antibribery provisions, the issue of majority/minority ownership is legally irrelevant because the governing legal question is whether the parent had knowledge of the foreign subsidiary's actions, and liability can be assigned regardless of the percentage of ownership if the parent is aware of the bad act. However, as a factual matter, majority or minority ownership or control may be relevant in assessing the factual question of what the parent should have known.

activities in question, the easier it will be for the government to establish jurisdiction over the parent for the acts in question.

The government could also seek to establish jurisdiction over the parent by developing facts showing that the parent was willfully blind as to the likelihood that the foreign subsidiary would make improper payments. Instead of predicating the parent's liability vicariously through the foreign subsidiary based on indicia of control, as above, this theory would instead base liability upon the parent's own actions: namely, "indirectly" making an improper payment through its own foreign subsidiary. Because the government always has jurisdiction over a U.S. issuer, no matter where the acts occur, the fact that all relevant acts occurred outside the United States would be irrelevant for purposes of jurisdiction.

To proceed on a theory of direct liability against the parent, and assuming that the parent had no actual knowledge of the foreign subsidiary's actions, the government would need to establish the parent's corrupt intent by developing evidence that the parent was on notice of facts that should have caused it to realize that there was a high likelihood that the foreign subsidiary would make the improper payments, and that the parent nevertheless failed to adequately investigate.

Two final cautionary thoughts are worthwhile here, because there is a potential for confusion based upon the unfortunate frequency with which the nomenclature "direct" and "indirect" appear. First, there is potential for confusion as a result of overlap in applicable legal concepts. The concept of direct and indirect liability as applied to the jurisdictional issue is distinct from the concept under the FCPA that one can be held liable for making improper payments indirectly through a third party. Even if one is held liable for "indirect" payments made through a third party, for purposes of jurisdictional analysis, this is still a theory of "direct" rather than vicarious liability. A U.S. parent-issuer cannot defend itself against charges for improper payments in violation of the FCPA merely because the government cannot obtain jurisdiction over the third-party intermediary used to make the payments. The government always has jurisdiction over a U.S. issuer, and that jurisdiction exists irrespective of whether any improper payments are made directly or indirectly through a third party.

Second, there may also be confusion resulting from the nature and quality of evidence. The government's chief task in pursuing a theory of direct liability against the parent for any improper payment is to show that the parent acted with corrupt intent. Intent can be proven not only by "direct" evidence showing actual involvement in any wrongdoing, but also by indirect, or circumstantial, evidence. Building a case on circumstantial evidence means that the government will focus on the facts surrounding the parent's interactions with the foreign subsidiary, both generally and with respect to the questionable activities, to raise the circumstantial inference that the parent was likely involved in or aware of the wrongdoing. Circumstantial cases are always more difficult for the government to prove in terms of the burdens of proof and persuasion, but merely because a case is built entirely on circumstantial evidence does not mean it is deficient jurisdictionally. Once the government presents some evidence from which a jury might infer circumstantially that the parent was willfully blind regarding the foreign subsidiary's alleged acts, even if that evidence might ultimately be deficient in terms of burdens of proof or persuasion, it will be sufficient to establish jurisdiction.

## ***B. Enforcement Actions Demonstrating Parent Liability for a Foreign Subsidiary's Violations of the Antibribery Provisions***

### **1. Triton Energy**

The SEC enforced the antibribery provisions against a U.S. issuer, Triton Energy Corporation, based on the conduct of its wholly owned subsidiary in Indonesia, Triton Indonesia, Inc., also a U.S. corporation.<sup>127</sup> This action is a good example of the government proceeding directly against a U.S. parent for having been "willfully blind" regarding its foreign subsidiary's improper payments.

In 1988, Triton Indonesia assumed control over an oil and gas recovery project under a contract with the Indonesian National Oil Company. The amount of taxes due to the Indonesian government could be reduced by

<sup>127</sup>SEC v. Triton Energy Corporation et al., Civil A. No. 1:97CV00401 (D.D.C.), 63 SEC 2490, Lit. Rel. No. 15266, Release No. AE-890, 1997 WL 94191 ("Triton Complaint").

the amount of “recoverable costs,” as determined by the National Oil Company’s auditors.<sup>128</sup> The SEC charged that between 1989 and 1990, Triton Indonesia’s commercial and general managers authorized at least eight payments to National Oil Company auditors to secure favorable tax treatment, made indirectly through Triton Indonesia’s Indonesian agent.<sup>129</sup> The SEC contended that to disguise the payments to the agent, false entries were made in Triton Indonesia’s books and records.<sup>130</sup>

The parent’s liability was grounded on its apparent knowledge of and acquiescence to the corrupt payments. Importantly, there was no evidence that the parent had any actual knowledge of the illegal payments. Rather, the SEC based its “knowledge” contention on a willful blindness theory, pointing to facts that, in the SEC’s view, should have caused the parent to have been suspicious of the foreign agent’s dealings with government officials.

According to the SEC complaint, senior management of Triton Energy was aware that the agent’s “role with Triton Indonesia included exerting influence with the Indonesian government.”<sup>131</sup> Some members of Triton Energy management were alleged to have expressed concern with “the vagueness of his contractual duties, the large amounts of money he was receiving, how he might be using that money, and his honesty.”<sup>132</sup> Most damning according to the SEC was that “despite these concerns, Triton Energy’s former management did not establish any policies or procedures concerning the circumstances under which Triton Indonesia could make payments to [the agent] for the purpose of influencing a government decision or what activities [the agent] could engage in on Triton Indonesia’s behalf.”<sup>133</sup> The SEC charged that the senior management of Triton Energy had “ignored danger signals” that “should have led to a heightened degree of vigilance about the possibility of violations” of the FCPA but, instead, management had taken “no precautions.”<sup>134</sup> This appears to have been the SEC’s primary theory of parental liability.

<sup>128</sup> Triton Complaint at ¶¶ 9-12.

<sup>129</sup> *Id.* ¶¶ 16-43.

<sup>130</sup> *Id.* ¶¶ 17-46.

<sup>131</sup> *Id.* ¶ 46.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* ¶ 47.

<sup>134</sup> *Id.* ¶¶ 46-47.

Contrary to the SEC complaint’s discussion of the “danger signals” (usually referred to as “red flags”) it believed should have placed Triton Energy on alert, the SEC also alleged that a Triton Energy internal auditor had prepared and distributed a memorandum expressing concern about improper payments by Triton Indonesia to Indonesian government officials and delineating what the auditor believed were questionable practices. According to the SEC, the senior management of Triton Energy failed to inquire into whether the allegations in the auditor’s memorandum were supported in fact. Instead, the then-president of Triton Energy ordered the auditor to collect the copies of his memorandum and to destroy them. Subsequently, in response to questions raised by the independent auditors, “Triton Energy management made a partial disclosure omitting most of the improper payments and most of the false books and records.” According to the complaint, when they met with the independent auditors, “Triton Energy’s then senior management represented that there was no evidence that money was paid to Indonesian auditors.”<sup>135</sup>

It is ultimately unclear from the SEC release whether it predicated the parent’s liability on willful blindness for having failed to investigate the issues raised by the auditor, or whether the SEC viewed the auditor’s findings, and communication of those findings, as sufficient to establish actual knowledge of the improper payments by the parent.

## 2. Syncor

*Syncor International Corporation* involved a U.S. company that provided radiopharmaceutical products and services both in the United States and, through various direct and indirect subsidiaries, in 18 foreign countries.<sup>136</sup> This matter also appears to have been based upon a willful blindness theory, but because the evidentiary record is somewhat muddled, and the company chose to settle with the SEC rather than contest jurisdictional issues that might have been contested, the analytic value of this case is similarly limited.

The SEC alleged that from at least the mid-1980s through September 2002, several of Syncor’s foreign subsidiaries made approximately \$600,000 in illicit payments to doctors employed by hospitals controlled by foreign

<sup>135</sup> *Id.* ¶¶ 49-51.

<sup>136</sup> Release Nos. 1687, 46979, 34-46979, AE-1687, 2002 WL 31757634.

authorities. The SEC alleged that this violated the FCPA's antibribery provisions because the payments were made with the purpose and effect of influencing the doctors' decisions so that Syncor could obtain or retain business with them and the hospitals that employed them.<sup>137</sup> The foreign subsidiaries involved were in Taiwan, Mexico, Belgium, Luxembourg, and France.

The U.S. parent's liability for the foreign subsidiaries' actions was predicated on the allegations that, with respect to the Taiwan subsidiary, "payment of these referral fees was known to and approved by Syncor's founder and chairman of the board, among others at both Syncor and Syncor Taiwan."<sup>138</sup> No such knowledge or approval by the parent was alleged to have existed with respect to the improper payments made by its other foreign subsidiaries. Even as to the Taiwan subsidiary, the precise nature of the "knowledge" and "approvals" attributed to the parent is not detailed. Interestingly, Syncor admitted jurisdiction as to all the improper payments made by its subsidiaries, which the SEC acknowledged as part of its acceptance of Syncor's offer of settlement. The basis for the SEC's assertion of jurisdiction over the improper payment made by the foreign subsidiaries that the parent did not know or approve of is unaddressed.

### **C. U.S. Issuer-Parent's Liability for Books and Records Violations Committed by a Foreign Subsidiary**

Jurisdiction over the parent for liability based on the foreign subsidiary's books and records violations is much easier for the government to establish than an antibribery violation. If the parent owns a majority of the foreign subsidiary, the parent will be strictly liable for any improper entries made by the foreign subsidiary in its books regarding the payments, irrespective of whether the parent had any knowledge or involvement with the entries, and even if the parent took reasonable steps to prevent such entries from occurring.

#### **1. BellSouth Corporation**

BellSouth Corporation was charged with violating the FCPA's accounting and internal controls provisions because of actions taken by two "indirectly

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

owned" subsidiary corporations, one in Venezuela and the other in Nicaragua.<sup>139</sup> Liability for the Venezuelan subsidiary was predicated entirely on BellSouth's ownership interest in the subsidiary, rather than any actual knowledge or involvement in the creation of the false entries.

The SEC alleged that beginning shortly after BellSouth indirectly acquired a majority interest in Telcel, C.A., the senior management of Telcel authorized payments to six offshore companies totaling \$10.8 million. According to the SEC, "Telcel recorded the disbursements in Telcel's books and records based on fictitious invoices" that "indicated, without detail, that Telcel had received from the companies professional, computer, and contracting services," when, in fact, "no services were rendered."<sup>140</sup> The payments were also unsupported by service or vendor agreements with the companies and, according to the SEC, "Bell South has been unable to reconstruct the circumstances or purpose of the payments, or the identity of their ultimate recipients."<sup>141</sup>

The SEC concluded that "Telcel created false books and records by improperly recording the falsely documented, unsubstantiated payments to the offshore companies as bona fide services." The SEC further found that "Telcel's internal controls failed to detect the unsubstantiated payments for a period of at least two years" and that this failure to control "prevented BellSouth from being able to reconstruct the circumstances of the payments, or the identity of the ultimate recipients of the payments."<sup>142</sup> BellSouth was held liable for the entries and control failures without any additional allegations of knowledge or involvement by BellSouth. In *BellSouth*, the SEC made clear its position that ownership by the parent corporation of the subsidiary will engender liability on the part of the parent corporation for accounting and controls deficiencies at the subsidiary.

#### **2. IBM and Chiquita Brands**

Two other enforcement actions brought by the SEC against International Business Machines and Chiquita Brands International, Inc., suggest that neither a lack of direct control nor a lack of knowledge concerning the sub-

<sup>139</sup> SEC v. BellSouth Corp., Lit. Rel. No. 17310, Release No. AE-1495, 2002 WL 47178; *BellSouth*, Release Nos. 34-45279, 45279, AE-1494, 2002 WL 47167.

<sup>140</sup> *BellSouth*, *supra* note 139.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

subsidiary's actions will affect the parent corporation's responsibility to ensure compliance with the accounting and controls requirements of the FCPA by a subsidiary corporation. *IBM*<sup>143</sup> and *Chiquita Brands*<sup>144</sup> also demonstrate the SEC's view that the issuer's liability for the practices of a subsidiary under the accounting and controls provisions is, for all practical purposes, strict liability.

#### a) *IBM*

According to the SEC, in January 1994, IBM-Argentina submitted a proposal to Banco de la Nación Argentina (BNA), a government-owned commercial bank, to modernize and fully integrate the computers in BNA's main office and in the bank's branch offices. IBM-Argentina was awarded the contract in February 1994. Thereafter, according to the SEC complaint, "without the knowledge or approval of any IBM employee in the United States, IBM-Argentina's former senior management caused IBM-Argentina to enter into a subcontract" with an Argentinian corporation, Capacitación Y Computación Rural, S.A. ("CCR"). The SEC alleged that, between 1994 and 1995, IBM-Argentina made payments totaling \$22 million to CCR, "of which at least \$4.5 million was transferred to several BNA directors by CCR."<sup>145</sup>

To effect the payments to CCR, IBM's procurement and contracting procedures were overridden by the former senior management of IBM-Argentina, and the details of the subcontract with CCR were hidden "from the technical and financial review personnel assigned to the contract." According to the SEC, this was accomplished "by providing the Procurement Department with fabricated documentation, including a backdated authorization letter and a document that stated incomplete and inaccurate reasons for hiring CCR." The payments to CCR were recorded by IBM-Argentina as "third-party subcontractor expenses." The SEC complaint further noted that "while IBM did not falsify or destroy any records, in consolidating its subsidiaries' financial results, and without the knowl-

<sup>143</sup> SEC Release Notice, Lit. Rel. No. 16839, Release No. AE-1356, 73 SEC Dkt. 3049, 2000 WL 1867972; SEC Release Notice, Release Nos. 34-43761, 43761, AE-1355, 73 SEC Dkt. 2987, 2000 WL 1867969.

<sup>144</sup> SEC v. Chiquita Brands International, Inc., Civ. A. No. 1:01CV02079 (D.D.C.) (filed Oct. 3, 2001), Lit. Rel. No. 17169, 2001 WL 1165859 ("Chiquita Complaint"); In the Matter of Chiquita Brands International, Inc., Respondent Release No. 34-44902, Release Nos. 44902, AE-1463, 75 SEC Dkt. 2308, 2001 WL 1165876.

<sup>145</sup> *Chiquita Complaint* at ¶¶ 4-13.

edge or approval of any employee in the United States, this information was incorporated into IBM's 1994 Form 10-K which was filed with the SEC on March 23, 1995." When IBM officials learned of the circumvention of IBM's policies and procedures, the senior management of IBM-Argentina was removed and future payments to CCR were stopped.<sup>146</sup>

Despite being deceived by the management of IBM-Argentina, and despite having taken prompt remedial action, the SEC found that IBM had nevertheless violated the accounting provisions of the FCPA:

the Commission concludes that IBM violated Section 13(b)(2)(A) by failing to ensure that IBM-Argentina maintained books and records which accurately reflected IBM-Argentina's transactions and dispositions of assets with respect to the subcontract. The presumably illicit payments to the foreign officials were not disclosed in IBM-Argentina's books and records. Instead, IBM-Argentina's books and records include incomplete and inaccurate descriptions of CCR's services, and a backdated authorization document.<sup>147</sup>

*IBM* demonstrates the SEC's view that a parent corporation will be liable for the practices of a subsidiary that violates the accounting provisions, even though the parent was neither complicit in that conduct nor even aware that the conduct had occurred.

#### b) *Chiquita Brands*

In both a civil injunctive action and an administrative proceeding, the SEC contended that the parent—in this case, Chiquita Brands International, Inc.—should be held liable for the accounting irregularities of its "indirectly wholly-owned subsidiary," C.I. Bananos de Exportación S.A. (Banadex), in Colombia.<sup>148</sup>

The SEC alleged that in 1995, the Colombian government required all holders of licensed facilities for the storage of agricultural goods pending inspection by Colombian customs to apply for renewal of their licenses.

<sup>146</sup> *Id.* ¶¶ 13-17.

<sup>147</sup> SEC Release Notice, Release Nos. 34-43761, 43761, AE-1355, 73 SEC Dkt. 2987, 2000 WL 1867969.

<sup>148</sup> *Chiquita Brands*, *supra* note 144; *In the Matter of Chiquita Brands*, *supra* note 144.

Banadex had a \$1 million facility in Turbo, a Colombian port facility. Banadex was concerned that its license might not be renewed due to two previous citations for failing to comply with customs regulations.<sup>149</sup>

Under Colombian law, companies were required to engage licensed customs brokers to interact with customs officials. Banadex's customs broker was Comercio Exterior Asesores Limitada ("CEA"). According to the SEC, "[w]ithout the knowledge or consent of any Chiquita employee and in contravention of Chiquita's policies, Banadex's chief administrative officer authorized CEA's agent to make a payment to Colombian customs officials to obtain the license renewal."<sup>150</sup>

Acting on that authority, the CEA agent made two payments totaling \$30,000. The first payment was recorded in the Banadex accounting records as a "maritime donation." The second payment was recorded as relating to a "maritime agreement." The SEC noted in regard to these payments that "Banadex did not request permission from, or otherwise inform, any Chiquita employee within the United States regarding the transaction."<sup>151</sup>

The SEC also noted that, just as in *IBM*, Banadex failed to comply with Chiquita's internal controls policies and procedures. For example, Banadex had failed to comply with Chiquita's "strict guidelines regarding the use of a discretionary expense account." Additionally, Banadex failed to identify the payments to the Colombian customs officials in contravention of Chiquita's requirement that all payments to foreign officials (including political candidates and political parties) be disclosed and identified on a quarterly basis.<sup>152</sup>

Again, notwithstanding the frustration of the parent corporation's internal controls procedures and the resulting lack of knowledge on the part of the parent regarding the falsification of accounting records, the SEC held the parent corporation responsible for failing to ensure the subsidiary's compliance with the accounting requirements.<sup>153</sup>

---

<sup>149</sup> Chiquita Complaint at ¶¶ 1-8.

<sup>150</sup> *Id.* ¶¶ 10-12.

<sup>151</sup> *Id.* ¶¶ 12-13.

<sup>152</sup> *Id.* ¶¶ 13-15.

<sup>153</sup> See *In the Matter of Chiquita Brands*, *supra* note 144.

## ABOUT THE AUTHORS

**Sharie A. Brown** is a partner and chair of the White Collar Defense & Corporate Compliance Practice at Foley & Lardner LLP. She is also a member of the Transactional & Securities Practice and the International Business and Automotive Industry Teams. Ms. Brown represents multinationals and conducts investigations and merger due diligence worldwide in the areas of the Foreign Corrupt Practices Act (“FCPA”), OFAC compliance and export controls, corporate ethics and compliance, World Bank procurement frauds, the Economic Espionage Act (“EEA”), and USA Patriot Act antimoney laundering. Ms. Brown chairs the Litigation Department’s Diversity Committee, and serves on the Litigation Program Committee and the Women’s Network Steering Committee. Ms. Brown recently published an article titled “Steps to an Effective Foreign Corrupt Practices Act Compliance Program,” in the Summer 2006 edition of the *Committee on Corporate Counsel Newsletter*.

Her professional memberships include the National Foreign Trade Council (“NFTC”); Steering Committee of USA\*ENGAGE; OFAC Working Group; Iran Working Group; and advisory board of the Georgetown Corporate Counsel Institute. She is also an ABA, ACI, and D.C. Bar conference speaker in her practice areas, and serves on ABA and D.C. Bar Continuing Legal Education programming committees.

Previously, as senior counsel at Mobil Oil Corporation, Ms. Brown practiced in the above practice areas, and defended an antidumping case involving Saudi Arabia, Venezuela, Mexico, and Iraq. Ms. Brown co-drafted Mobil’s application to swap crude oil with Iran, developed sanctions repositioning strategies, and wrote employee guides relating to corporate compliance, embargoed countries, and the FCPA. As a Mobil compliance officer and ethics officer, she developed a worldwide ethics and compliance program, a code of conduct, and employee training videos, as well as pamphlets on the FCPA, and Iran, Iraq, Cuba, and Libya sanctions compliance. As Mobil’s policy adviser in corporate planning and economics, she handled trade, tax, and sanctions issues. Previously, Ms. Brown directed Mobil’s state government relations in key states.

Prior to Mobil, as an assistant U.S. attorney in the Eastern District of Pennsylvania, she handled tax, bank fraud, and securities fraud cases. She was commended by federal law enforcement agencies, including FBI Director William Sessions, for her co-prosecution of a securities fraud RICO. Ms. Brown clerked for the Honorable Richard M. Bilby, U.S. District Court, District of Arizona.

Ms. Brown received her law degree from Georgetown University Law Center in 1982 (dean’s list), and her Bachelor of Arts and Master of Arts degrees in 1979 from the University of Pennsylvania (dean’s list). She is a member of the bars of the District of Columbia, Pennsylvania, and the U.S. Supreme Court.

**Brian S. Chilton** is senior counsel with Foley & Lardner LLP. A member of the White Collar Defense & Corporate Compliance Practice, he focuses on counseling corporations and conducting internal investigations and transactional due diligence regarding compliance with the Foreign Corrupt Practices Act (“FCPA”) and other federal criminal laws. Numerous of those FCPA investigations, conducted all over the world, have been for publicly traded companies, ultimately resulting in cooperation and resolution of the matters disclosed before the United States Department of Justice and the Securities and Exchange Commission. Before joining Foley & Lardner LLP, he was a federal prosecutor, with service as senior counsel in the Office of the Independent Counsel, *In re: Madison Guaranty/Whitewater/Lewinsky*. Mr. Chilton writes frequently about the FCPA, corporate compliance, constitutional law, and the federal sentencing guidelines, and has previously published with *Compliance Week*, *Compliance Magazine*, *Compliance Today*, BNA’s *Corporate Accountability*, United Press International, the Heritage Foundation and the *National Law Journal*, among others.

Mr. Chilton also successfully represented Sandra Banning and her daughter in the Pledge of Allegiance case, *Elk Grove Unified School District et al. v. Michael A. Newdow, et al.*, 542 U.S. 1 (2004), assisting them as amicus in arguing to the Ninth Circuit, and then the U.S. Supreme Court that the atheist father lacked standing to challenge the constitutionality of the words “under God.” Mr. Chilton was the chief architect of the standing-

based argument ultimately adopted by the Supreme Court when denying the father's claim.

Mr. Chilton was awarded his J.D. in 1992 by the University of Virginia School of Law, where he was a member of the editorial board and managing board executive editor of the *Virginia Law Review*. He graduated with honors, including being awarded the *Order of the Coif* for finishing in the top tenth of his class, and received the Eppa Hunton IV Memorial Book Award awarded to the graduate demonstrating a keen sense of ethics. Following law school graduation, Mr. Chilton clerked for Chief Judge James C. Cacheris, United States District Court, Eastern District of Virginia. Mr. Chilton graduated in 1988, with distinction, from the University of Rochester/Eastman School of Music, with a Bachelor of Music degree in vocal performance and opera, and has sung and acted professionally throughout the eastern United States, as well as singing the "National Anthem" for the Washington Nationals, a major league baseball team.

## NATIONAL LEGAL CENTER

### *Bridging Business and Government*

The mission of the National Legal Center for the Public Interest is to foster knowledge about law and the administration of justice in a society committed to the rights of individuals, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and a fair and efficient judiciary.

The Center does not litigate. It fulfills its mission by contributing to the development of public debate and policy through its educational publications and educational forums, which bring senior federal governmental and judicial officials together with members of its constituency. The Center also sponsors a legal intern program for students of law and government.

The National Legal Center for the Public Interest is a Washington, D.C.-based private, nonprofit law and educational foundation under I.R.C. Section 501(c)(3) qualified to receive tax-deductible contributions. The Center provides its products and services to the citizenry as a public service.

## BOARD OF DIRECTORS

*National Legal Center for the Public Interest*

**Stephen F. Gates**

Acting Chairman, NLCPI  
Senior Vice President  
and General Counsel  
ConocoPhillips

**Terrence B. Adamson**

Executive Vice President  
National Geographic Society

**Joan D. Aikens**

Former Chair  
Federal Election Commission

**William P. Barr**

Executive Vice President  
and General Counsel  
Verizon Corporation, Inc.

**Barbara Barrett**

President and CEO  
Triple Creek Ranch

**K. David Boyer**

Chief Executive Officer  
GlobalWatch Technologies, Inc.

**Carolyn S. Chambers**

Chairman and CEO  
Chambers Communications Corp.

**Arnaud de Borchgrave**

Senior Advisor, CSIS

**R. William Ide, III**

McKenna Long & Aldridge LLP

**Dean R. Kleckner**

Chairman  
Truth About Trade

**Ambassador Charles T. Manatt**

Manatt, Phelps & Phillips, LLP

**Harry C. McPherson**

DLA Piper

**Christine P. Richards**

Executive Vice President,  
General Counsel, and Secretary  
FedEx Corporation

**Jay B. Stephens**

Senior Vice President  
and General Counsel  
Raytheon Company

**Larry P. Thompson**

Senior Vice President  
and General Counsel  
PepsiCo, Inc.

**John R. Towers**

Vice Chairman (Retired)  
State Street Corporation  
Chairman (Retired)  
State Street Bank Europe

**Carlton E. Turner, Ph.D., D.Sc.**

President and CEO  
Carrington Laboratories, Inc.

**William H. Webster**

Milbank, Tweed, Hadley & McCloy

**Professor Walter E. Williams**

Professor of Economics  
George Mason University

**Wendell L. Willkie II**

Senior Vice President  
and General Counsel  
MeadWestvaco Corporation

**DIRECTORS EMERITI**

**The Honorable Griffin B. Bell**

King & Spalding, LLP

**Ernest B. Hueter**

Past President, NLCPI



NATIONAL  
LEGAL  
CENTER

*for the Public Interest*

1776 K Street, NW, 8th Floor  
Washington, DC 20006

202-466-9360

202-466-9366 *fax*

*nlcpi.org*