# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>The Foreign Corrupt Practices Act</td>
<td>2</td>
</tr>
<tr>
<td>Overview of the FCPA</td>
<td>3</td>
</tr>
<tr>
<td>Overview of the Anti-Bribery Provisions</td>
<td>3</td>
</tr>
<tr>
<td>Overview of the Recordkeeping &amp; Internal Accounting Provisions</td>
<td>6</td>
</tr>
<tr>
<td>Disclosure of Potential Violations: Sarbanes-Oxley and SEC Reporting Requirements</td>
<td>7</td>
</tr>
<tr>
<td>Recent FCPA Developments</td>
<td>9</td>
</tr>
<tr>
<td>Continued Focus on FCPA Investigations and Enforcement Actions</td>
<td>10</td>
</tr>
<tr>
<td>Revised FCPA Corporate Enforcement Policy and Voluntary Disclosures</td>
<td>10</td>
</tr>
<tr>
<td>Increased “Whistleblowing” Under the Dodd-Frank Act</td>
<td>11</td>
</tr>
<tr>
<td>Recent Cases</td>
<td>11</td>
</tr>
<tr>
<td>Opinion Procedure Releases</td>
<td>17</td>
</tr>
<tr>
<td>1. Mergers and Acquisitions</td>
<td>17</td>
</tr>
<tr>
<td>2. Seminars, Travel, and Training</td>
<td>18</td>
</tr>
<tr>
<td>3. Contributions and Other Payments</td>
<td>20</td>
</tr>
<tr>
<td>4. “Foreign Official” Definition</td>
<td>22</td>
</tr>
<tr>
<td>5. Other Areas of Interest</td>
<td>23</td>
</tr>
<tr>
<td>New Trends: Increasing Focus on Prosecutions of Individuals</td>
<td>25</td>
</tr>
<tr>
<td>New Trends: Increasing Intersection with Money Laundering and Use of Conspiracy Charges</td>
<td>27</td>
</tr>
<tr>
<td>FCPA Red Flags and Due Diligence</td>
<td>29</td>
</tr>
<tr>
<td>Red Flags: Guidelines for Identifying Suspicious Business Transactions</td>
<td>29</td>
</tr>
<tr>
<td>Due Diligence: Guidelines for Protecting Against Liability</td>
<td>32</td>
</tr>
<tr>
<td>FCPA Compliance Program</td>
<td>35</td>
</tr>
<tr>
<td>Overview of the FCPA Compliance Program</td>
<td>36</td>
</tr>
<tr>
<td>Internal Investigation Action Plan</td>
<td>38</td>
</tr>
<tr>
<td>Mergers &amp; Acquisitions: FCPA Considerations</td>
<td>41</td>
</tr>
<tr>
<td>International Anti-Bribery Action: UK and OECD</td>
<td>45</td>
</tr>
<tr>
<td>The United Kingdom’s Bribery Act of 2010</td>
<td>46</td>
</tr>
<tr>
<td>The United Nations Convention Against Corruption</td>
<td>47</td>
</tr>
<tr>
<td>Helpful Online References</td>
<td>50</td>
</tr>
</tbody>
</table>
# Table of Contents

- About Wiley ................................................................. 52
- About the Firm ........................................................... 53
- About the Authors ....................................................... 54
- Wiley's FCPA and Anti-Corruption Team ....................... 56
**Introduction**

Since 1977, U.S. companies conducting business with foreign government entities and officials have had to comply with the Foreign Corrupt Practices Act (FCPA or the Act). Under the Act, U.S. companies may not bribe any foreign official to obtain or retain business. Companies and individuals that violate the FCPA may be subject to substantial fines, imprisonment, and/or forfeiture of property.

Since the last edition of this publication (2011), the FCPA has remained an enforcement priority for the U.S. Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC). In 2016, annual corporate FCPA penalties reached their all-time peak, with 27 companies paying nearly $2.5 billion to resolve enforcement actions. And last year saw the single largest corporate FCPA enforcement action in history, as Swedish telecommunications firm Telia Company AB agreed to pay total penalties of $965 million for violations of the statute’s anti-bribery provisions. Heightened enforcement activity has resulted from the rise in voluntary disclosures, the increased resources committed to enforcement activities at the DOJ and the SEC, and the strict reporting requirements imposed by the Sarbanes-Oxley Act. Criminal enforcement actions against individuals also have risen sharply, and some have resulted in significant prison sentences and asset forfeitures. And, as discussed further in this handbook, in November 2017, the DOJ announced a revised FCPA Corporate Enforcement Policy, aimed at further increasing voluntary disclosures of FCPA violations.

Also since the last edition of this publication, the DOJ and the SEC released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the Resource Guide). The Resource Guide is the U.S. enforcement authorities’ detailed compilation of information about the FCPA, its provisions, and enforcement. However, particularly as the Resource Guide has not been updated since its November 2012 release (with the exception of minor updates in 2015), we believe that additional materials can provide a helpful resource to companies that may have FCPA exposure.

This handbook briefly reviews the principal provisions of the FCPA, outlines issues and factors likely to signal FCPA-sensitive situations, and summarizes recent developments that have kept international bribery and corruption in the political spotlight. U.S. companies should periodically and rigorously review their FCPA compliance programs and ensure that their overseas branches, subsidiaries, managers, agents, and joint venture partners are aware of corporate procedures for handling business with foreign government entities or involving government officials. Compliance policies should also respond to anti-corruption legislation outside the United States, such as anti-bribery laws in the United Kingdom and Mexico, as well as increasing enforcement in foreign jurisdictions such as Brazil. Well-conceived and diligently implemented compliance programs can be effective in preventing bribery and preserving hard-won company reputations. They are also a critical mitigating factor under the corporate sentencing guidelines.

**For More Information**

Wiley attorneys are prepared to answer your questions on the FCPA and respond to specific corporate compliance concerns and enforcement concerns. FCPA inquiries can be directed to Daniel B. Pickard (202.719.7285 or dpickard@wiley.law), Kevin B. Muhlendorf (202.719.7052 or kmuhlendorf@wiley.law), or the other attorneys listed on page 56.
The Foreign Corrupt Practices Act
Overview of the FCPA

Congress enacted the FCPA in response to disclosures in the early 1970s that hundreds of U.S. corporations had made billions of dollars in “questionable payments” to foreign officials, politicians, and political parties. The FCPA, passed by Congress in 1977, is meant to halt the bribery of foreign officials by U.S. citizens and companies, to improve recordkeeping and internal accounting controls to detect illegal payments, and to restore public confidence in the integrity of the American business system. In 1988, as part of the Omnibus Trade and Competitiveness Act, Congress amended the FCPA to clarify and narrow the scope of the statute. The Act also was amended in 1998 after the ratification of the Organization for Economic Cooperation and Development (OEC&D) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This handbook provides a general overview of both the anti-bribery and accounting and recordkeeping provisions of the FCPA. It also describes recent international and domestic developments with regard to the FCPA and other anti-bribery initiatives.

Overview of the Anti-Bribery Provisions

The FCPA prohibits U.S. companies (and certain foreign entities), their officers or employees, and third-party representatives or persons acting on their behalf, from corruptly giving or offering to give anything of value to any foreign official for the purpose of influencing that individual in his or her official capacity or causing such official to influence the foreign government in order to obtain or retain business. The DOJ has exclusive jurisdiction over criminal prosecutions under the FCPA’s anti-bribery provisions.

Who Is Covered

The anti-bribery provisions of the FCPA apply to:

- U.S. and foreign issuers of U.S. securities;
- Any entity that has its principal place of business in the United States, or that is organized under the laws of the United States, or a territory, possession, or commonwealth of the United States;
- Any individual who is a citizen or resident of the United States; and
- Some foreign non-U.S. residents.

The statute applies to any U.S. firm, officer, director, employee, or agent of the firm and any stockholder acting on behalf of the firm, including U.S. employees of foreign companies. A U.S. parent corporation may be liable for a controlled foreign subsidiary’s violation if the U.S. parent authorized, participated in, or “knowingly” permitted such corrupt payments. Beyond evidence of overt authorization or participation, the DOJ will also examine the extent to which the U.S. parent controls the foreign subsidiary. If the DOJ determines that the foreign subsidiary is an “alter ego” or “agent” of the U.S. parent, then it may attribute the actions of the foreign subsidiary to the U.S. parent even without actual knowledge.
Payment

The FCPA prohibits paying, offering, promising to pay, or authorizing someone else to pay money or anything of value to a foreign official with the requisite corrupt intent. There is no minimum threshold amount (i.e., the payment or offer to pay anything of value will satisfy the payment requirement). Under this definition, gifts of any type or entertainment with any value could constitute an illegal “payment.” Further, since “authorization” of a payment is prohibited, a U.S. executive may be held liable even though he or she neither makes the arrangements nor handles the money. Each officer, director, or organization authorizing an illegal payment may be held liable for separate FCPA violations.

Recipient

The FCPA covers corrupt payments to:

- Foreign officials;
- Foreign political parties or party officials;
- Candidates for foreign political office; and
- Officials of public international organizations.

A “foreign official” is any officer or employee of a foreign government or any department or agency of the government, or any person acting in an official capacity on behalf of the government. The definition may include a member of a legislative body or a royal family. A number of courts have considered the issue of whether employees of state-owned enterprises (SOEs) are “foreign officials” under the FCPA. Courts have generally affirmed the expansive definition advocated by the DOJ, finding that the status of an SOE is a question of fact and depends on a number of factors related to the degree to which the SOE can be considered an “instrumentality” of the foreign government. A federal appeals court has defined “instrumentality” as “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” As a conservative approach, those doing business with foreign SOEs should assume that the FCPA will apply.

Corrupt Intent

The person making the payment must have a corrupt intent. The payor must intend to induce the recipient to misuse his or her official position in order to obtain or retain business for the payor or another party. Specifically, the FCPA prohibits the corrupt use of the mail or other means of interstate commerce in furtherance of a payment to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, or to induce a foreign official to use his or her position improperly to affect or influence any act or decision. Notably, the FCPA does not require that a corrupt act succeed in its purpose. The mere offer of a corrupt payment may constitute a violation.

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2 U.S. v. Joel Esquenazi and Carlos Rodriguez, 1:09-cr-21010-JEM-1 (11th Cir.).
Business Purpose

The FCPA prohibits corrupt payments made, “in order to assist [a covered individual or entity] in obtaining or retaining business for or with, or directing business to, any person.” The Fifth Circuit has held 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.” In enacting the FCPA, Congress was concerned with “the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country.” In this regard, for example, illicit payments to officials to obtain favorable but unlawful tax treatment are proscribed.  

Third-Party Payments

The FCPA also prohibits corrupt payments to foreign officials through third-party intermediaries, such as agents or joint venture partners. It is unlawful to make a payment to a third party while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term “knowing” encompasses such notions as conscious disregard for the truth, deliberate ignorance, or a “head in the sand” attitude. A U.S. citizen or company may be found culpable under the Act even without affirmative knowledge of illicit payments by a third party.

Permissible Payments

The FCPA excepts so-called “grease payments” from the prohibition on bribery. Grease payments are defined as “facilitating payments” for “routine government action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pickup and delivery, phone service, and power and water supply; loading and unloading cargo, or protecting perishable products; and the scheduling of inspections associated with contract performance or transit of goods across the country. This list is illustrative only, and other actions also may be covered by the exception.

This exception should be interpreted very narrowly. While the exception for “grease payments” remains on the books, the Fifth Circuit’s decision in United States v. Kay significantly restricts a company’s ability to use this exception and permits the government to prosecute a broad array of conduct. Further, “grease payments” are increasingly prohibited in other jurisdictions.

Affirmative Defenses

There are statutory “affirmative defenses” to some actions that appear to violate the FCPA. A person charged with a violation of the FCPA’s anti-bribery provisions may assert as an affirmative defense that the payment was lawful under the written laws of the foreign country (the “local law” defense). In practice, this is extremely difficult to prove. The DOJ may consider indicators such as (i) the issuance of an advisory opinion by a foreign government agency; (ii) the issuance of regulations by a unit of a local government; or (iii) a course of conduct of a foreign government indicating that the payment is legal.

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4 For example, the UK Bribery Act, passed in April 2010, explicitly prohibits such payments. And in October 2017, Canada repealed the facilitation payments exception in its Corruption of Foreign Public Officials Act.
However, most countries (including many where corruption is widespread) have laws on the books prohibiting bribes and kickbacks.

A person also may assert that the payment was a reasonable and bona fide expenditure directly related to promoting, demonstrating, or explaining products or services or performing a contractual obligation (the “reasonable and bona fide marketing expense” defense). This provision allows for reasonable expenditures for business hospitality, such as travel and lodging for foreign officials. The person accused of an FCPA violation bears the burden of demonstrating the applicability of these affirmative defenses.

**Penalties**

The DOJ may seek criminal penalties for violations of the FCPA’s anti-bribery provisions, including imprisonment and substantial fines against a firm and – when they are acting on behalf of the firm – its officers, directors, stockholders, employees, and agents. Companies may be fined up to $2 million for each violation. Officers, directors, shareholders, employees, and agents who willfully violate the FCPA may receive a sentence of not more than five years imprisonment and/or $250,000 in fines per violation. The DOJ or the SEC also may seek civil penalties of up to $16,000 against any firm as well as against any officer, director, agent of the firm, or stockholder acting on behalf of the firm. The DOJ may seek an injunction against any act or practice of a firm or an officer, director, shareholder, employee, or agent in violation of the FCPA. In an SEC enforcement action, a court can impose an additional fine not to exceed (i) the gross pecuniary gain as a result of the violation, or (ii) a specific dollar value, which depends on the type of violation. Civil and criminal fines imposed on individuals may not be paid by the firm.

Companies and individuals also may face collateral punishment, such as suspension or debarment from participating in federal contracts or programs. In addition, a person or firm found in violation of the FCPA may be ruled ineligible to receive export licenses for defense articles under the International Traffic in Arms Regulations. The circumstances that give rise to an FCPA violation could also lead to a violation of other federal antifraud statutes, which can provide an alternative basis for fines up to twice the amount of any pecuniary gain to the company. FCPA violations also can serve as predicates in Racketeer Influenced and Corrupt Organizations (RICO) actions and certain state law tort claims.

**Overview of the Recordkeeping and Internal Accounting Provisions**

The FCPA requires companies that are registered with the SEC under the Securities and Exchange Act of 1934 (the 1934 Act), or are required to file periodic and other reports with SEC, to keep accurate accounts of the disposition of the firm’s assets and the assets of any majority-owned (more than 50 percent of the voting stock) domestic or foreign subsidiary. Where a reporting company holds 50 percent or less of the voting stock of a domestic or foreign affiliate or subsidiary, the company must make a reasonable and good faith attempt to use its influence to cause such domestic or foreign firm to

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5 While fines range up to $100,000 under the FCPA, fines up to $250,000 may be imposed under the Alternative Fines Act.
6 The fine can range from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company.
7 The EU’s European Union Directive 2004/18/EC similarly provides that companies convicted of corruption offenses shall be mandatorily excluded from government contracts.
devise and maintain a system of internal accounting controls consistent with the FCPA. The SEC will evaluate the facts on a case-by-case basis to determine, *inter alia*, whether the company’s ownership interest affords it a “significant degree of control” over the operations of the affiliate such that the company can be held responsible for the affiliate’s or subsidiary’s accounting and recordkeeping practices.

**Recordkeeping**

All companies subject to the 1934 Act, foreign or domestic, are required to maintain records and accounts that accurately reflect transactions and the disposition of the firm’s assets. These records are for financial statement preparation and asset accountability purposes. This requirement is intended to eliminate slush funds, off-the-book accounts, and improperly classified expenses that are often used to conceal corrupt payments. However, the provision can be invoked against 1934 Act reporting companies with inadequate recordkeeping that is also unrelated to bribery of foreign officials.

**Internal Accounting Controls**

All companies subject to the FCPA are required to “devise and maintain” systems that will provide reasonable assurance that transactions and access to the company’s assets are permitted in accordance with management’s general or specific authorization. The system also must provide reasonable assurance that transactions are recorded for the purposes of preparing financial statements, accounting for assets, and taking corrective action when discrepancies arise. A company must have and maintain a system of internal accounting controls that provide reasonable assurance that:

- All transactions are properly authorized;
- Transactions are recorded in accordance with applicable accounting standards;
- Access to company assets is controlled and requires specific authorization; and
- Transactions and asset spending are reviewed at reasonable intervals.

**Disclosure of Potential Violations: Sarbanes-Oxley and SEC Reporting Requirements**

While the FCPA does not impose a duty to disclose potential violations of its anti-bribery or accounting and recordkeeping provisions, the certification and reporting requirements imposed on “issuers” may compel a company to disclose problematic payments. In particular, the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley), which made sweeping reforms in various aspects of corporate governance, may require a company to disclose its FCPA issues.

Sarbanes-Oxley provisions significantly affect companies’ decisions regarding the disclosure of FCPA violations. Section 302 requires a certification regarding the disclosure to the auditors and board of directors of any fraud involving persons with significant roles in corporate internal controls. FCPA violations are considered a type of fraud. Additionally, Sarbanes-Oxley requires periodic reports filed with the SEC to identify any significant change in internal controls, including corrective actions with respect to material deficiencies and weaknesses. This requirement could apply to corrective measures implemented in the wake of an internal investigation of an FCPA violation. Sarbanes-Oxley also increases the role and responsibilities of independent audit committees and the board of directors in corporate
compliance matters, including the oversight of internal investigations. Sarbanes-Oxley requirements prompted a significant increase in the number of voluntary disclosures of FCPA violations.

Sarbanes-Oxley also significantly increased penalties for willful violations of the 1934 Act, including the FCPA’s accounting provisions. The maximum penalty for violations by individuals was increased to a fine of not more than $5 million (from $1 million) and/or up to 20 years imprisonment (from 10 years). Maximum fines for violations by a corporation increased from $2.5 million to $25 million.

Sarbanes-Oxley requires companies to develop and oversee internal controls and compliance programs, including FCPA compliance. Moreover, reporting under Sarbanes-Oxley has fostered a more aggressive approach to enforcement of the FCPA, along with other federal securities and corporate compliance laws. Given the escalating costs of FCPA violations, it is increasingly important that companies demonstrate constant attention to their compliance programs.
Recent FCPA Developments
Continued Focus on FCPA Investigations and Enforcement Actions

In recent years, and despite changing Administrations, the DOJ and the SEC have continued to prioritize FCPA investigations, resulting in a consistently high number of enforcement actions and substantial penalty levels. As noted above, in 2016, annual corporate FCPA penalties reached their all-time peak, with 27 companies paying nearly $2.5 billion to resolve enforcement actions. And 2017 saw the second-highest corporate enforcement penalty amounts in history, including the single largest corporate FCPA enforcement action.

Heightened international coordination and regulators’ emphasis on FCPA compliance have also contributed to the growth of enforcement actions, many of which have targeted individuals as well as their employers. Perhaps more important than the rise in enforcement actions has been the government’s expansive assertions of jurisdiction. Faced with the prospect of prolonged and expensive public litigation, companies and individuals often choose to settle FCPA claims, forgoing the opportunity to contest jurisdiction.

Revised FCPA Corporate Enforcement Policy and Voluntary Disclosures

The number of FCPA voluntary disclosures has also risen dramatically, in part as a result of new DOJ programs and policies to encourage self-disclosures. Many companies are opting to voluntarily disclose FCPA violations, at least in part because cooperation typically reduces penalties. After an FCPA Pilot Program in place for a year-and-a-half yielded 30 voluntary disclosures to the DOJ’s FCPA Unit, the DOJ introduced a revised FCPA Corporate Enforcement Policy in November 2017. The policy provides a “presumption” that a company will receive a declination if the company voluntarily self-discloses its FCPA misconduct, fully cooperates with the DOJ, and “timely and appropriately” remediates, and there are no “aggravating circumstances” present. If aggravating factors exist and a declination is not appropriate, the DOJ may still recommend a reduced fine and “generally” will not require a compliance monitor if the company has implemented an effective compliance program. The presence and application of internal FCPA compliance procedures also remain critical factors in the government’s decisions to prosecute, defer prosecution, or drop an investigation. In addition, the DOJ and the SEC both consider a company’s ability to supervise and conduct due diligence on its foreign branches and agents through its internal FCPA compliance program.

It largely remains to be seen how the new Corporate Enforcement Policy will affect FCPA enforcement in practice; however, it is important to note that the guidelines are nonbinding, concern only DOJ enforcement actions, and leave the U.S. government with significant discretion. In addition, “disgorgement [of profits], forfeiture, and/or restitution” is required in order to qualify for the benefits of the new program. Companies that voluntarily disclose FCPA violations are also often required to implement or improve internal compliance systems and procedures and cooperate with any further investigations by the enforcing agency.

Even under the new policy, voluntary disclosure provides no guarantee of lenient treatment, and quantifying potential benefits from a disclosure is highly speculative. As the cases summarized later in this section demonstrate, penalties for FCPA violations can be severe, and even more so in the absence of a company’s disclosure and cooperation.
Increased ‘Whistleblowing’ Under the Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act. The Dodd-Frank Act includes whistleblower provisions that raised new FCPA risks for public companies and could be a contributing factor to the significant uptick in FCPA prosecutions since that time. The whistleblower provisions apply to violations of securities laws, including the FCPA, by public companies. Whistleblowers can recover between 10 percent and 30 percent of the sanctions imposed in enforcement actions brought by the SEC (and related actions brought by the DOJ) resulting in a recovery of $1 million or more. The Dodd-Frank Act protects whistleblowers and permits them to remain anonymous until an award is to be paid.

There has been a moderate increase in FCPA-related whistleblower reports since the implementation of Dodd-Frank. According to annual reports of the SEC, from only 115 whistleblower tips regarding FCPA allegations in fiscal year 2012, the number of whistleblower tips grew to 210 in fiscal year 2017.

Recent Cases

SocGen and Legg Mason Agree to Pay Combined $649 Million to Resolve FCPA Anti-Bribery Violations in First Coordinated Overseas Enforcement Action by DOJ and French Authorities (June 4, 2018)

From 2004 until at least 2009, Société Générale S.A. (SocGen), one of France’s largest banks, and its subsidiary SGA Société Générale Acceptance N.V. (SGA), paid more than $90 million in bribes through brokers to high-ranking Libyan government officials in order to secure investments worth around $3.66 billion, which resulted in $523 million in profits. Permal Group Ltd. (Permal), a subsidiary of Maryland investment management firm Legg Mason, Inc., participated in the scheme by managing seven of the investments and earning almost $32 million in profits. In addition to FCPA violations, SocGen participated in a rate manipulation scheme ordered by senior executives, which manipulated the LIBOR interest rate and improved the appearance of the bank’s financial health.

In June 2018, the DOJ filed a two-count information in the Eastern District of New York, charging the bank with one count of conspiracy to violate the FCPA’s anti-bribery provisions and one count of transmitting false commodities reports. SocGen entered into a deferred prosecution agreement (DPA), and SGA pled guilty to the FCPA violation. Pursuant to the terms of the DPA, SocGen agreed to pay a $585 criminal penalty, half of which will be offset by a payment of around $292 million as part of a related settlement with French authorities. SocGen also agreed to continued cooperation with the DOJ’s investigation and implementation of enhanced compliance procedures. The hefty monetary penalty reflected SocGen’s substantial – but not full – cooperation with the DOJ and the bank’s failure to voluntarily self-disclose their improper behavior, among other factors. SocGen also agreed to pay additional penalties to resolve the allegations relating to LIBOR manipulation.

Legg Mason entered into a nonprosecution agreement with the DOJ for their role in the bribery scheme and agreed to pay a total penalty of $64 million. The company is also expected to settle civil allegations with the SEC. The DOJ noted that Legg Mason’s penalty was substantially lower than SocGen’s due to

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several considerations, including the involvement of only mid- and low-level employees of Permal and the lack of pervasive behavior. In addition, neither Legg Mason nor Permal was responsible for the initial plans for the scheme or for maintaining the relationship with the Libyan broker, the profits earned through their role were less than 10 percent of those earned by SocGen, and Legg Mason and Permal had no history of corrupt behavior.

The FCPA settlement is the fifth largest enforcement action in history and the first coordinated DOJ enforcement action in an overseas foreign bribery case with French authorities — a stark departure from a 2014 case where the French government criticized the United States for an $8.9 billion fine levied against BNP Paribas. Further underscoring the growing global efforts to combat corporate corruption, the DOJ also noted “significant cooperation” from the UK Serious Fraud Office, the Office of the Attorney General in Switzerland, and the Federal Office of Justice in Switzerland.

Panasonic Agrees to Pay Nearly $280 Million in Combined Penalties to Resolve Alleged FCPA Violations Through SEC and DOJ Settlements (April 30, 2018)

From around 2007 until 2016, Panasonic Avionics Corporation (PAC), a U.S.-based wholly owned subsidiary of Japan’s Panasonic Corporation (Panasonic), paid a government official at a state-owned airline consulting fees to procure contracts from the airline, falsely recording payments to sales agents as legitimate business expenses. The SEC enforcement action pointed to a scheme carried out by a PAC senior executive that involved $875,000 in payments to a Middle Eastern government official for help in negotiating two amendments to contracts that were valued at more than $700 million and resulted in more than $92 million in profits. PAC admitted that a senior executive falsely recorded payment to two other consultants of $885,000 for non-legitimate expenses including obtaining confidential information about negotiations between PAC’s competitors and the domestic airline. PAC also admitted that numerous employees misreported over $7 million as legitimate commissions to sales agents, some of which could not be directly hired because of PAC’s due diligence requirements, so were instead hired as sub-agents.

PAC agreed to enter into a three-year DPA with the DOJ after the Department charged PAC in the U.S. District Court for the District of Columbia with one count of knowingly and willfully falsifying books and records in violation of the FCPA. Under the DPA, PAC agreed to pay $137 million in criminal penalties, which included a 20 percent discount on the penalty due to cooperation and remediation. The DOJ did note that the cooperation with the investigation occurred only after receiving a request for documents from the SEC. In addition to monetary penalties, PAC agreed to hire an independent compliance monitor for a minimum of two years, continue to aid the DOJ’s investigation, enhance its compliance program, and implement strict internal regulations. In a related proceeding, the SEC issued a cease and desist order requiring PAC’s parent company, Panasonic, to disgorge $126.9 million and pay prejudgment interest of over $16 million. The SEC also noted Panasonic’s remedial and cooperative efforts in its decision to enter into the company’s settlement offer.

With bribes going to an official of a state-owned airline, the Panasonic enforcement action serves as an example of U.S. enforcement authorities’ broad interpretation of “foreign official” to include employees of SOEs.
Dun & Bradstreet Pays Over $9 Million to the SEC to Resolve FCPA Charges Against Chinese Subsidiaries for Improper Payments (April 23, 2018)

Dun & Bradstreet Corporation (D&B), a company incorporated in Delaware and headquartered in New Jersey, provides business data and information to clients around the globe and has international entities in Europe, Asia, Canada, and Latin America. The SEC alleged FCPA violations committed by two Chinese subsidiaries of D&B – Shanghai Huaxia Dun & Bradstreet Business Information Consulting Co., Limited (HDDBC) and Shanghai Roadway D&B Marketing Services Co., Ltd. (Roadway). D&B China held a 51 percent stake in HDDBC, while Roadway was a Chinese company that D&B acquired in 2009 through a wholly owned subsidiary.

According to allegations in the SEC’s order, from around 2006 until at least 2012, Roadway and HDDBC utilized third parties to facilitate unlawful payments in order to retain or obtain Chinese business. Specifically, HDDBC made illegal payments to the Chinese State Administration for Industry and Commerce to obtain otherwise protected financial data of potential Chinese customers. Roadway also made improper payments through third parties to obtain nonpublic personal information, as well as to 150 Chinese state-owned enterprises or government agencies to obtain or retain business. The payments were later documented as legitimate business expenses. Notably with regard to FCPA liability in connection with mergers and acquisitions, Roadway’s payments began prior to D&B’s 2009 acquisition of the company and continued well afterward, until March 2012. The SEC faulted D&B for not taking appropriate action to end the payments after the company’s pre-acquisition due diligence had raised potential concerns.

In April 2018, the SEC settled an administrative proceeding with D&B that required the company to cease and desist their violations of internal control and books and records provisions of the FCPA. While not admitting or denying wrongdoing, D&B agreed to pay a disgorgement penalty of over $7 million – an amount that included a prejudgment interest of around $1.1 million and a civil penalty of $2 million. The SEC noted D&B’s cooperation, remediation, and self-disclosure in agreeing to the settlement. The DOJ declined to criminally prosecute D&B due to similar factors.

Kinross Gold Corporation Pays $950,000 Civil Penalty to Settle FCPA Charges Brought by SEC (March 26, 2018)

Kinross Gold Corporation (Kinross), a Canadian gold mining company registered with the SEC and traded on the NYSE, paid a $950,000 civil penalty to resolve FCPA violation allegations arising from conduct by two of the company’s African subsidiaries – Tasiast Mauritanie Limited S.A. (Tasiast), a wholly owned subsidiary operating in Mauritania, and Chirano Gold Mines Ltd. (Chirano), a 90 percent-owned subsidiary operating in Ghana. As part of the settlement order, Kinross agreed to implement internal controls, improve compliance systems, and report to the SEC during a one-year period on these efforts.

According to allegations in the SEC’s March 2018 cease and desist order, Kinross violated the books and records and internal control provisions of the FCPA. The order alleged that in September 2010, Kinross acquired both mining operations from a Canadian mining company for $7.1 billion. During the acquisition, Kinross’ due diligence efforts found that the companies did not have controls on internal accounting or programs for anti-corruption compliance. However, Kinross did not address these issues following their acquisition, and in April 2011 and April 2012, an internal audit group issued reports finding that Tasiast and Chirano continued to lack adequate controls on internal accounting and anti-
corruption measures. When Kinross did eventually implement controls, almost three years later, it neglected to maintain them. For example, Kinross made payments to vendors and consultants, often with government connections, absent assurances the payments were in compliance with the FCPA. Other alleged improper actions included awarding a logistics contract to a company preferred by government officials and contracting with a consultant with high-level links to government officials without applying heightened due diligence.

**Transport Logistics Enters into Deferred Prosecution Agreement and Agrees to Pay $2 Million Criminal Fine to Resolve FCPA Anti-Bribery Violations (March 12, 2018)**

Beginning around 2004 and continuing until at least 2014, Transport Logistics International, Inc. (TLI), a Maryland-based company that assists U.S. and international customers in transporting nuclear materials, conspired to bribe a Russian official at JSC Techsnabexport (TENEX), a subsidiary of Russia’s State Atomic Energy Corporation. By using fake invoices for services that were never performed, TLI executives and others funneled more than $1.7 million into offshore bank accounts tied to shell companies in Latvia, Switzerland, and Cyprus. The bribes were for the purpose of receiving inappropriate business advantages and retaining or obtaining business with TENEX.

The DOJ, working with the U.S. Department of Energy’s Office of Inspector General (DOE-OIG) and the FBI, filed a single-count information against TLI in the District of Maryland for conspiracy to violate the FCPA anti-bribery provisions. To resolve the criminal charges, the company entered into a DPA. Per the terms of the agreement, TLI agreed to pay a $2 million criminal penalty. While DOJ sentencing guidelines suggested a fine of over $21 million, even after a 25 percent discount for TLI’s cooperation and remediation efforts, the final $2 million amount was found to represent the maximum fine the company would be able to pay. TLI also agreed to implement heightened compliance procedures and to report to the DOJ for a period of three years on the status of the company’s anti-corruption compliance.

The DOJ also charged three individuals connected to the bribery scheme – two owners and executives of TLI, as well as the Russian official who received the bribes. The TLI investigation underscores the increasingly multi-agency and global effort to combat anti-bribery as the DOJ worked with the DOE-OIG, the FBI, and law enforcement in Switzerland, Latvia, and Cyprus, as well as the targeting of the bribe recipient – a trend discussed later in this handbook.

**Elbit Imaging Settles SEC Action Alleging FCPA Violations and Pays $500,000 Civil Fine (March 9, 2018)**

Between 2007 and 2012, Elbit Imaging Ltd. (Elbit), an Israeli holding company registered with the SEC and traded on the NASDAQ, and its indirect subsidiary incorporated in the Netherlands, Plaza Centers N.V. (Plaza), allegedly made improper payments to third-party sales agents and consultants for services without confirmation that the services were ever performed and without sufficient internal controls to ensure funds were used as authorized. The SEC alleged that these payments were recorded as legitimate business expenses in Elbit and Plaza’s books and records, even though they included embezzled funds and improper payments to the Romanian government in connection with a real estate development project.

In the first corporate enforcement action of the year, in March 2018, the SEC issued a cease and desist order alleging that these actions violated the books and records and internal control provisions of the
FCPA. Elbit resolved the matter by agreeing to pay a $500,000 civil fine. The SEC noted that the company’s penalty was capped at $500,000 due to Elbit’s cooperation and remedial actions. Specifically, Elbit had voluntarily disclosed the questionable payments made by Plaza during the Romanian project, they cooperated extensively with SEC requests throughout the investigation, and Elbit directed company management to implement internal accounting and anti-bribery procedures following advice from outside counsel. This enforcement action is a notable example of the SEC using the civil accounting provisions of the FCPA, even in circumstances where the evidence may not justify a charge under the anti-bribery provisions of the statute.

**Keppel Offshore and U.S. Subsidiary Agree to Pay Over $422 Million for Conspiracy to Violate FCPA Anti-Bribery Provisions (December 22, 2017)**

Keppel Offshore & Marine Ltd. (KOM), a Singaporean corporation operating shipyards globally, and Keppel Offshore & Marine, USA Inc. (KOM USA), KOM’s Houston-based wholly owned subsidiary, paid bribes totaling around $55 million to secure 13 contracts with Brazilian state-owned oil company Petroleo Brasileiro S.A. (Petrobras), from 2001 to 2014. The payments were concealed as legitimate consulting agreement commissions and paid to an intermediary to be transferred to Petrobras officials.

In a single-count information filed in the Eastern District of New York, the DOJ charged the company with conspiracy to violate the FCPA anti-bribery provisions. To resolve the allegations, KOM agreed to pay a monetary fine of $422 million as part of a three-year DPA, and KOM USA pled guilty to one count of conspiracy to violate the anti-bribery provisions. The monetary penalty was discounted 25 percent because of KOM’s cooperation and remediation efforts with the DOJ, including the implementation of enhanced compliance systems and internal controls. Notably, the DOJ did not give the company self-reporting credit, as the Department was already aware of the alleged conduct when it was reported. Of the $422 million, about $100 million will be paid to the U.S. government, an amount that also included a criminal penalty close to $5 million for KOM USA. Brazil and Singapore divided the rest of fine with around $200 million going to Brazil as part of a related settlement with the Ministério Público Federal (MPF), and around $100 million going to Singapore as part of a related settlement with the Attorney-General’s Chambers (AGC) in Singapore. The terms of the agreement also required ongoing improvement of compliance and internal controls, continued cooperation with the DOJ, and annual reports concerning compliance efforts. The DOJ also charged a former senior lawyer, who pled guilty, with conspiracy to violate anti-bribery provisions of the FCPA.

This investigation represented the DOJ’s first FCPA resolution with Singapore. In conducting the investigation, the DOJ and the Criminal Division’s Office of International Affairs worked closely with the MPF in Brazil and the AGC in Singapore.

**SBM Offshore and U.S. Subsidiary Pay $238 Million to Settle DOJ Enforcement Action (November 29, 2017)**

From around 1996 until at least 2012, SBM Offshore N.V. (SBM), a publicly traded Dutch oil and gas equipment company, along with its wholly owned subsidiary SBM Offshore USA, Inc. (SBM USA), paid more than $180 million to intermediaries knowing that portions of those payments would be used to bribe foreign officials in Angola, Brazil, Kazakhstan, and Iraq. The government officials were bribed to gain improper advantages in business with state-owned oil companies. SBM made $2.8 billion in profits from improperly secured projects.
In November 2011, the DOJ filed a one-count information in the Southern District of Texas charging SBM with conspiracy to violate the anti-bribery provisions of the FCPA. Subsequently, SBM USA pled guilty to one count of conspiracy to violate the anti-bribery provisions, and SBM entered into a DPA and consented to pay a penalty of $238 million in criminal sanctions. The final amount accounted for a 2014 settlement of $240 million the company had paid to the Dutch Public Prosecutor’s Office and expected fines forthcoming from Brazilian authorities. While SBM fully cooperated with the DOJ and engaged in remedial measures by firing and demoting complicit employees and implementing enhanced internal controls, the company waited a full year before disclosing the improprieties to the DOJ and thus was given a 25 percent reduction in the fine. The DOJ further reduced the fine due to SBM’s inability to pay the full amount recommended by the sentencing guidelines. In two separate proceedings, the DOJ brought charges against the CEO of SBM and a marketing executive at SBM USA, which both resulted in guilty pleas.

**Swedish Company Telia Agrees to Pay $965 Million in the Largest-Ever Corporate Bribery Enforcement Action (September 21, 2017)**

Beginning around 2007 and continuing until at least 2012, Telia Company AB (Telia), a Swedish telecommunications corporation, and a majority-owned subsidiary operating as part of Telia’s Eurasian arm, Coscom LLC (Coscom), paid over $331 million in bribes to a high-ranking official in the Uzbek government with influence over Uzbek telecom regulation. The bribes were paid to gain entry into the Uzbek telecommunications market, continue operation in the market, and acquire beneficial telecom assets. The bribery scheme involved Telia, Coscom, and affiliated entities making a variety of payments, including to a shell company that was known by managerial employees of both companies to be owned by the foreign government official. One of the illicit payments involved Telia giving a 26 percent stake in Coscom to the shell company. Telia subsequently repurchased most of that stake three years later for $100 million more than the initial sale amount.

The DOJ worked with Dutch and Swedish law enforcement to uncover the scheme. In September 2017, the DOJ filed a one-count information, alleging conspiracy to violate the anti-bribery provisions of the FCPA against Telia and Coscom in the Southern District of New York. Telia entered into a three-year DPA with the DOJ, and Coscom pled guilty to the charge. Under the terms of the DPA, Telia agreed to pay a penalty of almost $550 million, with about $275 million being paid as a criminal penalty to the United States, an amount that included a $40 million criminal forfeiture and a criminal fine of $500,000 imposed on Coscom as part of their plea deal. The other half of the penalty would be offset by payment to Dutch authorities of around $274 million in criminal penalties. While the total penalty was discounted for Telia’s cooperation, the company did not voluntarily report the conduct to the Department and thus did not receive full cooperation credit. Telia also consented to carry out improved compliance measures and to fully cooperate with the investigation.

The SEC also ordered Telia to cease and desist behavior in violation of the anti-bribery and internal control provisions of the FCPA. The SEC ordered Telia to pay $457 million in disgorgement, representing profits gained via the bribery conspiracy. In total the combined amount in penalties levied by the DOJ and SEC amounted to more than $965 million, representing the largest corporate FCPA penalty ever, of which $483 million would be paid to the U.S. government. The Swedish government also brought charges against three former executives of Telia.
Opinion Procedure Releases

Under the Foreign Corrupt Practices Act Opinion Procedure, companies may submit a description of proposed business actions and request that the DOJ issue an advisory statement regarding its enforcement intentions under the FCPA’s anti-bribery provisions with respect to the conduct. The Attorney General is required to respond to a request within 30 days of the submission. Subsequent conduct that is consistent with behavior explicitly approved in an Opinion Procedure is entitled to a “presumption of conformity with the FCPA.” While the releases may only be relied upon by the parties who requested the Opinion Procedure, and while use of the Opinion Procedure has declined in recent years (with the most recent Opinion having been issued in 2014), issued opinions can provide helpful guidance to the public regarding the DOJ’s current enforcement stance on certain issues.

1. Mergers and Acquisitions

When a buyer discovers FCPA violations by a target company, the DOJ expects the buyer to undertake a prompt investigation, discipline employees who participated in the violations, implement a comprehensive FCPA compliance program (including adequate training and monitoring), promptly disclose the violations, and cooperate with the DOJ during any subsequent investigation. In limited situations in which pre-acquisition due diligence is impossible, the DOJ may allow companies to avoid liability if they move quickly post-closing to discover and remedy past FCPA violations and establish strong compliance programs to prevent future problems.

Successor liability and jurisdiction, No. 14-02 (November 7, 2014)

A U.S.-headquartered multinational firm requested a DOJ opinion regarding its intent to acquire a foreign consumer products company and that company’s foreign subsidiary. During its pre-acquisition due diligence, the requestor uncovered a number of potentially improper payments from the target to government officials of the foreign country in which it was located, which did not appear to have a jurisdictional nexus to the United States. The requestor also identified substantial weaknesses in the target’s accounting and recordkeeping processes. The requestor sought an opinion from the DOJ as to its FCPA liability for the target’s pre-acquisition conduct.

In response, the DOJ largely confirmed prior guidance it has provided regarding successor liability (including in its FCPA Resource Guide), stating that the acquisition of a foreign entity does not create FCPA liability where it did not previously exist. Thus, if there was no FCPA jurisdiction at the time the improper payments were made by the target, the DOJ would not take enforcement action against the requestor for the target’s pre-acquisition conduct.

The DOJ further stated that it encourages companies engaged in mergers and acquisitions to (1) conduct thorough risk-based due diligence; (2) implement the acquirer’s code of conduct and anti-corruption policies as quickly as practicable; (3) conduct FCPA and other relevant training for the acquired entity’s directors and employees, as well as third-party agents and partners; (4) conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and (5) disclose any corrupt payments discovered through the due diligence. According to the DOJ, adherence to these elements, among several other

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9 See 28 C.F.R. Pt. 80.
10 See id. § 80.5.
factors, may determine whether and how the agency would seek to impose post-acquisition successor liability in case of a putative violation.

**Local law restricts pre-acquisition investigations and FCPA due diligence, No. 08-02 (June 13, 2008)**

Halliburton sought guidance on a proposed purchase of a public UK company. Under UK bidding laws, much of the information Halliburton needed to carry out a full due diligence investigation was inaccessible before closing. Halliburton also could not place conditions on its bid, because competitors had already placed unconditional bids. Given these factors, Halliburton sought clarification on three points: (1) whether acquiring the target company without knowledge of the target’s FCPA compliance would itself violate the FCPA; (2) whether Halliburton would inherit the target company’s FCPA liabilities for pre-acquisition conduct; and (3) whether Halliburton would be held criminally liable for the target’s post-acquisition unlawful conduct, if any.

Halliburton promised to conduct extensive due diligence in the aftermath of its acquisition. Those measures included: (1) presenting a comprehensive due diligence work plan to the DOJ; (2) retaining independent counsel to review records at the target; (3) disclosing to the DOJ any initial information made available to Halliburton suggesting potential FCPA issues; (4) requiring all target employees to sign contracts mandating FCPA compliance; (5) taking necessary remedial action towards FCPA violations and violators, if any; (6) training the target’s employees on Halliburton’s code of business ethics and FCPA compliance program; and (7) disclosing all results of the completed investigation to the DOJ.

The DOJ determined that no enforcement action would be necessary in response to: (1) the acquisition itself; (2) any pre-acquisition unlawful conduct that Halliburton disclosed to the DOJ within 180 days of the closing; and (3) any post-acquisition unlawful conduct that Halliburton disclosed to the DOJ within 180 days of the acquisition, as long as that conduct did not continue after the 180 days, or – if the DOJ deemed that Halliburton could not fully investigate within 180 days – a reasonable amount of time. Although the DOJ could hold Halliburton liable for any further post-acquisition FCPA violations, the DOJ reasoned that, in this case, Halliburton’s inability to access key information prior to the acquisition meant that Halliburton could not be expected to remedy FCPA violations until a reasonable time after the purchase. The DOJ clarified that if any of Halliburton’s employees acquiesced or assisted in post-acquisition violations, they would face enforcement action.

**2. Seminars, Travel, and Training**

The DOJ appears willing to permit U.S. companies to pay for seminars, training, and travel expenses of foreign officials, particularly where: (1) there are assurances that the arrangement is not illegal under the foreign government’s laws; (2) the U.S. company does not have any pending or potential business before the foreign agencies in question, or the requestor has only routine business pending before the agency that is governed by administrative rules with identified standards; (3) the U.S. company does not participate in selecting the participating foreign officials; (4) any souvenirs the company gives to the foreign officials reflect the company’s business or name/logo and are of nominal value; (5) payments for expenses incurred are made either directly to the service provider upon the presentation of a receipt, or in the form of a reasonable stipend; (6) the U.S. company pays only for the expenses incurred by the
foreign officials, and not those incurred by any guests of the foreign officials; and (7) the U.S. company keeps a record of all expenses.\textsuperscript{11}

**U.S. adoption agencies pay for foreign officials’ U.S. travel, No. 12-02 (October 18, 2012)**

A group of U.S. adoption agencies wished to host a trip for 18 foreign government officials involved in the adoption approval process in the foreign country. The requestors represented that the purpose of the trip was to allow the foreign government officials to learn more about the requestors’ work, which included processing adoptions in the foreign country. During the trip, the government officials would interview the requestors’ staff members, inspect the requestors’ files, and meet with families who adopted children from the foreign country.

The DOJ stated in the Opinion that the requestors’ proposed funding of the trip to the United States by the foreign government officials was a reasonable and bona fide expenditure directly related to the promotion, demonstration, or explanation of the requestors’ products or services, and so the proposed funding could go forward without enforcement action.

**U.S. company hosts journalists at Chinese press conference, No. 08-03 (July 11, 2008)**

TRACE International planned to pay the expenses of Chinese journalists to attend TRACE’s press conference in Shanghai. At the press conference, TRACE planned to announce the results of a new website that assists in tracking and reporting incidents of bribery. TRACE’s stated purpose for funding the press conference was to increase its membership, enhance its reputation, promote its initiatives, and promote commercial transparency.

According to the request, in the People’s Republic of China (PRC), most journalists are employed by state-owned media companies, and companies customarily pay journalists’ expenses incident to attending press conferences. TRACE planned to pay for the journalists’ local transportation, one meal, and incidental expenses, for a total of RMB 200 (approximately $28). For journalists based outside of Shanghai, TRACE also planned to pay for economy-class travel to Shanghai and one night in a hotel (cost of hotel not to exceed $229). The stipend for out-of-town journalists would increase to RMB 425 (approximately $62) in order to cover two additional meals and other expenses. Hotel and out-of-town transport costs were to be paid directly to providers; stipends would be given to journalists when they checked into the conference. The payments were not conditioned on the content of the journalists’ coverage of the press conference.

The requestor made additional representations, including the following: (1) journalists for PRC-owned media typically receive no reimbursement from their employers for traveling to such press conferences; (2) the stipends provided would be reasonable approximations of the costs incurred by journalists attending press conferences in Shanghai; (3) TRACE would send letters to the journalists’ employers detailing the stipend, its purpose, and explaining TRACE’s understanding that this arrangement is permitted under PRC law; (4) TRACE has no business pending with any PRC government agency; and (5) TRACE obtained a written assurance from an international law firm that its actions would not violate the PRC’s laws.

\textsuperscript{11} See, e.g., Opinion Procedure Release No. 11-01 (June 30, 2011).
The DOJ stated that it did not plan to take any enforcement actions with respect to the planned stipends or travel arrangements detailed in the request as the expenses were reasonable and directly related to the promotional expenses affirmative defense in the FCPA.

**Insurance company gives foreign officials tour of company headquarters, No. 07-02 (September 11, 2007)**

The requestor, a U.S. insurance company, planned to bring six foreign officials to the United States for an educational program at company headquarters. Prior to the visit, the officials would be attending an internship program held for foreign insurance regulators by the National Association of Insurance Commissioners (the requestor had no part in planning this earlier leg of the trip). The stated purpose for the visit was to familiarize the officials with the operation of a U.S. insurance company.

The requestor indicated that it would pay for the officials’ domestic air travel to the requestor’s headquarters, lodging during the visit, local transport, meals, daily incidental expenses, and a four-hour sightseeing tour. In addition to this and other representations, the requestor stated that: (1) the requestor had no non-routine business under consideration by the foreign government; (2) the routine business pending before the foreign government consisted primarily of reporting of operational statistics and reviewing the qualifications of additional agents and onsite inspections of operations, and it was governed by administrative rules with identified standards; (3) the requestor collaborated with other entities within the foreign government in insurance-related research, studies, and training; (4) the foreign government, not the requestor, selected the trip participants; (5) the requestor would not host the officials’ spouses or families; (6) souvenirs for the visitors, if any, would be of nominal value; (7) where possible, the requestor would pay costs directly to the providers and not to the visitors; (8) while the visitors would be reimbursed for daily expenses, the reimbursement amount was limited and reimbursements required a receipt; (9) the expenses would be limited to those reasonably necessary to educate the visiting officials about the operation of a U.S. company in the requestor’s industry – neither the foreign government nor the officials would receive any additional compensation; and (10) the requestor would keep records of all expenses.

The DOJ stated it did not plan to take any enforcement actions because the expenses were reasonable and directly related to the FCPA affirmative defense for promotional expenses.

**3. Contributions and Other Payments**

The DOJ may permit U.S. companies to contribute to foreign governments, their agencies, and foreign officials for limited purposes, such as supporting a foreign government’s efforts to enforce anti-corruption laws, provided that generally: (1) the contributions are not related to any pending or potential business activity; (2) there are procedural safeguards to ensure that the funds are used for the stated purpose; and (3) there are specific criteria and methods established to distribute the funds.

**Purchase of a foreign official’s shares in a foreign subsidiary, No. 14-01 (March 17, 2014)**

The requestor was a U.S. financial services company and investment bank, which owned a foreign financial services firm. It had committed to buying a minority interest in a firm held by a foreign businessman, after he had been appointed to a senior government position in the foreign country and thus become a foreign official. After his appointment, the foreign shareholder became a passive
shareholder in the relevant company, and he recused himself from any decisions concerning the award of business to the requestor or its affiliates.

The requestor and the foreign shareholder initially tried to value the shares using a formula in their 2007 shareholders agreement, but this produced a negative value, due to unanticipated losses by the requestor’s foreign subsidiary after the financial crisis. Thus, instead, the requestor and the foreign shareholder hired a highly regarded global accounting firm to determine share value. The requestor said that the foreign official would continue to recuse himself from decisions involving the requestor and that the share deal would not violate any laws in the foreign shareholder’s country, and the requestor asked the DOJ to approve its share acquisition at the newly appraised value.

The DOJ stated that it did not intend to take any enforcement action with respect to the proposed buyout arrangement, noting the lack of indicia of corrupt intent. The DOJ said the purpose of the payment “is to sever the parties’ existing financial relationship, which began before the foreign shareholder held an official position. Doing so would also avoid what would otherwise be an ongoing conflict of interest.”

**Payment of foreign official’s relative’s medical expenses, No. 13-01 (December 19, 2013)**

The requestor was a partner with a U.S. law firm, which represented a foreign country in various international arbitrations. Through this representation, the requestor had become a personal friend of a foreign official employed by the foreign country’s Office of the Attorney General (OAG). While the OAG was responsible for selecting international legal counsel, the relevant foreign official himself had not had and would not have any role in the selection of the requestor or his law firm as counsel. The foreign official’s daughter suffered from a severe medical condition, and the requestor wished to pay between $13,500 and $20,500 for her medical expenses.

The requestor represented that his intention in paying for the medical treatment was purely humanitarian, and that it would be paid from his personal funds and not reimbursed by the law firm. The requestor would make the payment directly to the medical facility, which was located in a third country. The requestor also provided a letter from the foreign country’s OAG certifying that the decision to pay for this medical treatment would have no impact on the office’s decisions on the hiring of international legal counsel and that the payment would not violate any of the foreign country’s laws.

Based on these and other facts, the DOJ asserted that it did not intend to take any enforcement action with respect to the proposed payment, due to the apparent lack of corrupt intent. The DOJ noted its typical lack of enforcement intent in matters where the requestor provided adequate assurances that the proposed benefit to the foreign official would have no impact on the requestor’s present or future business operations. The DOJ, however, was careful to note that paying the medical expenses, or any other expenses, of a foreign official’s family member could under certain other circumstances violate the FCPA.

**U.S. person pays foreign court’s fees in order to settle relative’s estate, No. 07-03 (December 21, 2007)**

The requestor was involved in the settlement of a deceased relative’s estate in a foreign country. The court overseeing the division of assets asked the requestor to pay the equivalent of $9,000, which the
court said was required in order to cover the costs of the court-appointed administrator and other court costs. Requestor waited to make the payments until it received the DOJ’s guidance.

The requestor represented to the DOJ that: (1) it had obtained a written legal opinion from a lawyer who graduated from both a U.S. law school and a law school in the foreign country that the payment is a routine element of the foreign country’s legitimate court procedure; (2) the requestor would make the payment to the court clerk and not directly to the individual judge; (3) the requestor would request an official receipt and details regarding the use of the funds; and (4) as required under the foreign country’s laws, the requestor would receive a refund of any unused portion of the funds. The requestor also provided the DOJ with translations of the foreign country’s legal code verifying the payment’s legal validity.

The DOJ indicated that it would not take enforcement action against the requestor because: (1) the payment was to be made to a government entity – the clerk – and not to the foreign official; and (2) the payment was lawful under the foreign country’s laws.

4. ‘Foreign Official’ Definition

Royal family member’s status as a foreign official, No. 12-01 (September 18, 2012)

The requestor wished to represent the embassy and Foreign Ministry of a foreign country in its lobbying activities in the United States. To facilitate that lobbying representation, the requestor wished to contract with a consulting company to introduce the requestor to the foreign country embassy, to advise the requestor on cultural awareness issues in dealing with the foreign country’s officials and businesses, to act as the requestor’s sponsor in the foreign country (sponsorship was required by the foreign country’s law), to help the requestor establish an office in the foreign country, and to identify additional business opportunities for the requestor in the foreign country.

One of the partners in the consulting company was a member of the foreign country’s royal family. The royal family member held no title or position in the government, had no governmental duties or responsibilities, was a member of the royal family through custom and tradition rather than blood relation, and had no benefits or privileges because of his status. The royal family member had held only one governmental position in the foreign country: In the late 1990s, he served for less than a year in a position overseeing a governmental construction project. Other than that one position, the royal family member did not act – and had never acted – in any capacity for, or on behalf of, the foreign country, or any of its departments, agencies, or instrumentalities. The royal family member had never had any role in any public organization, and his position in the royal family did not put him in line to ascend to any governmental role.

Based on this narrow and unique set of facts, the DOJ stated that the royal family member did not qualify as a “foreign official” under the FCPA, so long as he did not directly or indirectly represent that he was acting on behalf of the royal family or in his capacity as a member of the royal family. Accordingly, the DOJ noted that the requestor’s proposed engagement of the consulting company could proceed without enforcement action.
5. Other Areas of Interest

Nonprofit microfinance institution grants, No. 10-02 (July 16, 2010)

The requestor was a U.S.-based microfinance institution (MFI) that operates in many countries around the world. The requestor proposed to convert one of its local operations, a wholly owned subsidiary in a country in Eurasia (“Eurasian Subsidiary”), to a commercial entity licensed as a financial institution. The Eurasian Subsidiary was organized as a limited liability company that operated under a special non-banking financial institution license from the Central Bank of the Eurasian country, and was overseen by an agency of the Eurasian country (the “Regulating Agency”). As part of the Eurasian Subsidiary’s transition to commercial status, the Regulating Agency had pressed the Eurasian Subsidiary to “localize” its grant capital to ensure that its grant funds remain in the Eurasian country for humanitarian assistance. The Regulating Agency insisted that the Eurasian Subsidiary make a grant to a local MFI in an amount equal to approximately one-third of the Eurasian Subsidiary’s original grant capital.

The Eurasian Subsidiary undertook a three-stage due diligence process to vet local grant recipients. First, it conducted an initial screening using publicly available information and information from third-party sources. After the screening process, it examined the remaining grant recipients’ ownership, management structure, and operations. This second round of due diligence narrowed the grant recipients down to one local MFI. As a third round of due diligence, the Eurasian Subsidiary undertook a targeted investigation designed to identify any ties to specific government officials, determine whether the organization faced any criminal prosecutions or investigations, and assess the organization’s reputation for integrity. The final round of due diligence uncovered that one of the board members of the local MFI was a sitting government official in the Eurasian country, and other board members were former government officials. However, the board members were not compensated for their work. Nevertheless, to ensure against FCPA violations, the Eurasian Subsidiary implemented the following controls: the staggered payments of grant funds; ongoing monitoring and auditing; the earmarking of funds for capacity-building; a prohibition on the compensation of board members; and the institution of an anti-corruption compliance program.

Based on these representations, the DOJ announced that it did not intend to take any actions against the requestor for its proposed grant.

Due diligence in hiring local counsel, No. 06-02 (December 31, 2006)

The requestor proposed to hire a law firm in Country A to assist in applying to Country A’s government for currency exchanges. Country A’s exchange agency regularly rejected the requestor’s applications for minor reasons; the requestor sought experienced local counsel that could assist in improving its applications. The requestor chose a law firm with which it had prior dealings and investigated the firm’s history for evidence of corruption, which it did not find. In addition, the requestor verified that neither the firm’s employees nor their relatives were government officials. The requestor also disclosed that the firm was an external advisor to Country A’s central bank but that the central bank was independent of the agency that processes the foreign exchange applications. The firm’s fee was determined to be lower than the rates quoted by two competing firms.

The DOJ declared that it would not take enforcement action against the requestor based on the following representations: (1) neither the requestor nor the law firm had made payments, nor did the
requestor contemplate making payments, that would be improper under the FCPA; (2) the requestor selected the law firm after appropriate inquiry into the firm’s background and reputation; (3) the contract between the requestor and firm included anti-corruption requirements and allowed the requestor to exit the relationship if FCPA problems arose; and (4) the fee was a competitive market rate.
New Trends: Increasing Focus on Prosecutions of Individuals

While the DOJ has demonstrated a continued commitment to aggressively pursuing companies that violate the FCPA, individuals also increasingly face criminal prosecution for FCPA violations. In recent years, this heightened focus on prosecuting individuals has resulted in significant jail time and criminal fines for many corporate executives and employees.

In 2017, 24 individuals were charged and 18 individuals pled guilty, compared to the only 17 individuals who either pled guilty or were charged in 2016. So far in 2018, at least 16 out of 18 active enforcement actions listed by the DOJ involve prosecutions against individuals.

For example, in March of this year, Eberhard Reichert, a manager at Siemens, pled guilty to participating in a decade-long scheme to bribe officials of the Argentine government for a billion-dollar contract to create national identity cards. The Acting Assistant Attorney General remarked that “[i]n this case, one of the largest public companies in the world paid staggeringly large bribes to officials at the uppermost levels of the government of Argentina to secure a billion-dollar contract.”

In January 2018, the DOJ announced an indictment against a former co-president of Maryland-based transportation company TLI for engaging in a scheme to bribe a Russian official of a subsidiary of the Russian State Atomic Energy Corporation. The executive, Mark Lambert, was charged with 11 counts, including one for conspiracy to violate the FCPA and seven for violating the FCPA, for bribing an official of TENEX, a supplier and exporter of Russian uranium and uranium enrichment services, to secure contracts with the company. That same month, a New Jersey-based real estate broker, Joo Hyun Bahn, aka Dennis Bahn, pled guilty to bribing a Middle Eastern official hundreds of thousands of dollars to secure an $800 million real estate deal for a South Korean construction company. Bahn was sentenced to 42 months in prison for his role in the scheme.

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16 Id.
18 Id.
20 Id.
As more evidence of this trend toward aggressive enforcement against individuals, a former sales executive of Brazilian-based aircraft manufacturer Embraer S.A. (“Embraer”) pled guilty in December 2017 to bribing a high-level foreign government official to secure an aircraft sale to Saudi Arabia’s national oil company. In November 2017, several executives, employees, and third parties affiliated with Rolls-Royce plc were charged for participating in a foreign bribery scheme to obtain benefits for a U.S.-based subsidiary of Rolls-Royce. According to the indictment, these individuals had Rolls-Royce pay kickbacks to employees of an international engineering consulting firm, and bribes to at least one foreign official, disguising these payments as commissions, in exchange for securing contracts with Asia Gas Pipeline LLP. Remarking on the case, U.S. Attorney Benjamin C. Glassman of the Southern District of Ohio noted that “[t]he charges unsealed today reflect the determination and ability of the United States to investigate and prosecute individuals who engage in foreign corrupt business practices, regardless of how sophisticated or far-flung the scheme may be.” He noted the geographical breadth in the case, announcing that the DOJ “can and will follow the evidence wherever it leads – from Columbus to Kazakhstan and beyond.”

As more evidence of this trend, Amadeus Richers, the former general manager of a Miami-based telecommunications company, pled guilty in July 2017 for participating in a scheme to pay $3 million in bribes to Haitian government officials to obtain a contract with Haiti Teleco, the state-owned and state-controlled telecommunications company of Haiti. Richers was the ninth defendant in that case to plead guilty or be convicted at trial. In 2016, Dmitrij Harder, former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. was sentenced to 60 months in prison, and ordered to forfeit $1.9 million, for bribing an official of the European Bank for Reconstruction and Development. Harder pled guilty to paying approximately $3.5 million in bribes between 2008 and 2009.

Given the recent trend toward prosecution of individuals for FCPA violations and the potential for severe criminal penalties, corporate executives and employees must be increasingly alert to risk factors, or “red flags,” that may be involved in a particular transaction.

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23 Id.

24 Id.

25 Id.


27 Id.


29 Id.
New Trends: Increasing Intersection with Money Laundering and Use of Conspiracy Charges

Unlike other international anti-corruption laws, the FCPA does not create liability for recipients of bribes. However, a count of money laundering under 18 U.S.C. § 1956 can be predicated upon a financial transaction involving proceeds of bribery of a foreign public official. Under the statute, any party with the requisite knowledge that conducts a financial transaction involving the proceeds of bribery or embezzlement valued greater than $10,000 can be criminally prosecuted when the transaction takes place in the territorial jurisdiction of the United States or involves a United States person.

The increasing intersection of FCPA violations and money laundering tracks the parallel trend of the prosecution of individuals under the FCPA. The DOJ has indicated its intent to aggressively prosecute not only FCPA violations, but also to pursue asset recovery from foreign officials who receive bribes. For example, in 2015, Vadim Mikerin, an official of TENEX, a subsidiary of Russia’s State Atomic Energy Corporation, pled guilty to a money laundering conspiracy. He was ordered to forfeit $2.1 million and is serving a four-year prison sentence. The DOJ brought charges against the company responsible for the bribing, TLI, in 2018.

A money laundering prosecution can impose harsher penalties than the FCPA. A conviction for money laundering can carry a sentence of up to 20 years imprisonment and a fine of up to $500,000 or twice the amount involved, whichever is greater. Individuals who violate the FCPA can receive sentences of up to five years and $100,000 (or $250,000, under the Alternative Fines Act) in fines per violation.

In addition to potential money laundering charges, a recent Supreme Court case may also pave the way to prosecute bribe recipients under FCPA conspiracy charges. Previously, the DOJ had followed a key decision of the Fifth Circuit, United States v. Castle, which held that foreign officials who received bribes could not be charged under the federal conspiracy statute with conspiracy to violate the FCPA. Thus, the DOJ has often resorted to charging such officials with money laundering violations, as described above. However, a 2016 decision by the Supreme Court in Ocasio v. United States, 18 U.S.C. § 1956 (2016), may provide a basis for the DOJ to assert FCPA jurisdiction over the bribe-taking foreign official under conspiracy charges. In Ocasio, the Court upheld a police officer’s conviction for a scheme in which he accepted funds from auto shop owners in return for referring automobile accident victims to the shop. This case thus appears to open the door to FCPA conspiracy charges for foreign official bribe recipients.

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31 Id. § 1956(f).
32 Press Release 09-020, DOJ, Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments (Jan. 9, 2009) (“Not only will the Department, for example, prosecute companies and executives who violate the Foreign Corrupt Practices Act, we will also use our forfeiture laws to recapture the illicit facilitating payments often used in such schemes.”), available at http://www.justice.gov/opa/pr/2009/January/09-crm-020.html.
New Trends: Increasing International Efforts and Cooperation

The United States undertakes significantly more anti-bribery investigations than other countries worldwide, with 236 of the 349 global enforcement actions from 1977 through 2017 led by the United States. However, international enforcement efforts, and international cooperation with DOJ enforcement activities, continue to rise. As of December 31, 2017, TRACE International reports that there were 266 global investigations concerning bribery of foreign officials being conducted in 30 countries.

An increase in international cooperation with the United States accompanies this increase in global enforcement efforts. In May 2018, Deputy Attorney General Rod Rosenstein explained in a speech:

Last November, the Department co-hosted a conference with the Securities and Exchange Commission and the OECD. The conference focused on strengthening international anti-bribery initiatives and improving coordination across borders. We ... benefit from the exceptional assistance of ... law enforcement partners around the world. The Department works closely with counterparts in the United Kingdom, France, Germany, Switzerland, the Netherlands, Brazil, and many other nations. Last December, we announced the first coordinated resolution with enforcement authorities in Singapore. That investigation secured a $400 million corporate resolution involving a deferred prosecution agreement, a related guilty plea by a subsidiary, and a guilty plea by an individual executive.

The December 2017 enforcement action brought in coordination with Singaporean enforcement authorities to which Deputy Attorney General Rosenstein referred, involving Keppel Offshore, is summarized under “Recent Cases” above. Other recent examples abound, including the January 2017 Rolls-Royce enforcement action (started by an inquiry of the UK Serious Fraud Office) and the largest-ever Telia enforcement action in September 2017 (investigated in conjunction with Swedish authorities).

Many countries still report major obstacles in anti-bribery enforcement, including lack of adequate resources for law enforcement and lack of protection for whistleblowers. Nevertheless, as this trend in increased international efforts continues, it will become critically important for business organizations to scrutinize their compliance procedures, as companies with substantial international operations are more likely to face regulatory and criminal investigations on multiple fronts.

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FCPA Red Flags and Due Diligence
Red Flags: Guidelines for Identifying Suspicious Business Transactions

Being aware of suspicious business transactions is increasingly crucial for companies to comply with the FCPA. Identifying red flags as soon as possible is especially important in light of increasing enforcement actions attributing personal liability to corporate executives and employees, and escalating corporate fines and penalties for failing to comply with the FCPA. Companies and compliance officers should keep the following issues in mind when performing due diligence and overseeing their business transactions.

Agents

Many FCPA enforcement actions are based on ignoring red flags related to agents and other third parties. For example, AGCO Corporation paid almost $20 million in penalties to resolve charges related to kickbacks paid through an agent under the U.N. Oil-for-Food Program in 2009. The SEC noted the lack of oversight used to track illegal payments by AGCO’s financial department. More recently, the 2017 enforcement action against Rolls-Royce uncovered that company’s widespread use of agents and other third parties to make corrupt payments around the globe. For example, in Kazakhstan, Rolls-Royce paid commissions of $5.4 million to “multiple advisors,” while knowing that some of the commissions would be used to bribe foreign officials involved in building a Kazakhstan-China pipeline.

When foreign nationals are retained to assist U.S. companies in locating or facilitating international business opportunities, U.S. companies should perform thorough background checks on those involved. If a foreign agent’s or business partner’s sole qualification is his personal relationship with government officials, the company should be extremely cautious. In particular, companies should be on the lookout for any foreign agent efforts to use front companies through which to make payments to foreign officials. Companies must also exercise appropriate oversight over their agents’ behavior throughout the duration of the relationship with the agent.

U.S. businesses also should be wary when an agent is engaged with officials of companies in which a foreign government has an ownership interest—a fairly common situation in many countries. These officials may be considered “foreign officials” for FCPA purposes.

Country

Certain regions of the world appear more prone to FCPA violations than others. In places where the standard costs of doing business are perceived to include bribes, payoffs, and “gifts” to foreign officials or their agents, extra care should be taken to ensure compliance with the FCPA. U.S. businesses have faced FCPA investigations and convictions in dealings with countries in Latin America, Africa, the Caribbean, and the Middle East. Extra care also should be taken when doing business in the former Soviet Union, Eastern Europe, China, and parts of Southeast Asia. A recent report tracked the rate at which U.S. enforcement actions involved bribery payments to a particular country. China, Brazil, India,

36 For a discussion of these trends, see infra “FCPA Enforcement Patterns.”
and Russia were at the top of the list, followed by Mexico and Poland. Opportunities for significant business, coupled with widespread corruption and unclear distinctions between the public and private sectors, have made these regions high-risk areas for FCPA violations.

**Business**

Certain industries present historically higher risks of FCPA violations than others. In particular, companies in any industry in which long-term, high dollar-value contracts are awarded by foreign governments should be on alert for potential FCPA violations. However, the DOJ and the SEC are increasingly targeting a wider variety of businesses. In this regard, since 2009-2010, the DOJ has announced at legal conferences that it is focusing its aggressive FCPA prosecution on the pharmaceutical and broader health care industry. For example, at a 2017 conference, Sandra Moser, the acting Chief of the Fraud Section of the DOJ, announced that the prosecutors from the FCPA Unit would collaborate with the Corporate Strike Force of the DOJ’s Health Care Fraud Unit to investigate U.S. and global corruption in the health care sector. She stated: “Investigations have revealed that health care companies overseas frequently interact with state-employed doctors and foreign public officials who worked for government-owned hospitals and medical institutions. As a result, we have seen a number of significant FCPA cases involving the payment of bribes and kickbacks by health care companies to foreign officials to obtain a wide variety of improper business advantages.” Thus, pharmaceutical companies with foreign operations face a particular risk under the FCPA because of the prevalence of state-owned or controlled health care systems. Under the FCPA’s expansive definition of “foreign officials,” and as reflected in Ms. Moser’s remarks, doctors, lab technicians, and other health professionals employed in a state-owned system could be covered by the Act. In light of this trend, pharmaceutical companies should review their existing compliance programs to ensure they contain sufficient anti-corruption provisions.

The oil, gas, and mining sectors also appear to be under close FCPA scrutiny, as shown by the recent Kinross Gold enforcement action and the FCPA Blog’s recent report that companies from the oil and gas industry had disclosed 28 open and ongoing FCPA-related investigations as of January 2018.

**Commissions**

Companies are advised to perform careful research on the terms, conditions, and amounts of commissions paid to foreign agents and foreign sales representatives. Many of the FCPA cases that have been prosecuted involved exorbitant commissions or fees. Companies should ensure that the commissions are both reasonable in light of the nature and extent of the services provided and when compared to other commissions paid for similar services in that country. Unreasonably high commissions increase the probability that money will be diverted to pay government officials. Situations where the amount of payment is linked to the value of the anticipated sale or contract to be awarded merit extra attention. Agents should be required to account precisely for their expenses and the services they provide. The submission of accounting reports should be a precondition for at least some payments.

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Guarantees

Foreign agents should operate under written contracts that confirm that no improper payments are being made to government officials. An agent’s refusal to sign such an agreement should prompt close scrutiny. In any subsequent investigation, prosecutors could view a company’s failure to insist on such guarantees as evidence of “conscious disregard” or “deliberate ignorance” of known circumstances that should reasonably alert one to the high probability of FCPA violations. Companies should also develop mechanisms to ensure that the original contract is not later changed in a manner that could lead to an FCPA violation.

Relationships

Agents who have previously held government positions or who have an ongoing relationship with a government official should be carefully examined. Employing an agent in a foreign country solely because of his or her connection to the government risks running afoul of the FCPA. It is prudent never to employ an agent who is a current government employee or official; this is exactly the focus of the statute (and of the growing number of local corruption prosecutions worldwide). Additionally, payments to dummy corporations or spouses of such officials can result in liability and severe penalties. For example, the recent record-breaking Telia enforcement action involved payments to a shell company that was known by managerial employees to be owned by a foreign government official. And this type of fact pattern is not new. In 2009, Avery Dennison Corporation agreed to pay $200,000 in penalties and disgorge profits and pay pre-judgment interest of $318,470 to settle FCPA violations related to improper payments that included hiring the husband of a foreign official.\(^39\)

Middlemen

Companies also should be wary of any situation in which multiple middlemen seem to be performing the same task. Contracts with agents should require the company’s approval of any subagents.

Cash Payments

One of the most obvious FCPA warning signs is the transfer of large amounts of cash. Cash payments raise questions under both the accounting and anti-bribery provisions of the FCPA. Failure to investigate cash payments to agents can lead to charges of liability on a “conscious avoidance” theory. It also may trigger reporting obligations under the Bank Secrecy Act and other anti-money laundering provisions.

Third Parties

The payment of fees or commissions through third parties or third countries is another warning sign of possible FCPA problems. While there may be legitimate accounting and financial reasons for directing an agent’s payments to a foreign bank or to an entity other than the agent, such payment terms should be investigated and the reason for them should be documented to avoid the appearance that the company intentionally disregarded evidence of an FCPA violation.

Bonuses and Reimbursements

Large payments to foreign agents or employees should be closely watched and carefully documented. Large bonus payments or reimbursements for unusually high entertainment, advertising, or other administrative expenses may be used as a device to mask illegal payments to government officials. This warning also encompasses advance payments made before any work has begun, which may be used to help ensure award of a contract or continuance of a business relationship.

Payroll Fraud

Much like large cash payments, the presence on the company payroll of persons who are relatives or associates of foreign government officials raises serious FCPA compliance concerns. Payroll audits as part of a compliance program can help prevent problems in this area.

Secrecy

Companies should be wary of any situation in which potential agents or partners seem reluctant either to explain fully the nature of a proposed activity or transaction, or to provide clear answers to routine commercial or technical questions. Likewise, companies should be wary of agents who request unusual or excessive confidentiality or secrecy regarding a transaction.

Research

It is very important to keep abreast of developments in the foreign countries in which your company conducts business. Publicly reported cases of bribery, payoffs, and public corruption should prompt a careful review of your company’s operations and FCPA compliance program in that country or region.

Competitor Violations

If you learn that your competitors (especially competitors not subject to the FCPA) are involved in bribery, payoffs, or other activities that may violate the FCPA, you should immediately conduct a careful investigation of your operations, or accelerate your usual training schedule to remind employees of the company’s standards, expectations, and responsibilities. In a difficult competitive environment, your employees may learn of a competitor’s tactics and may be tempted to follow suit to avoid falling behind.40

Due Diligence: Guidelines for Protecting Against Liability

Business Check

It is essential that companies undertake and document appropriate “due diligence” with specific attention to potential “red flags” before pursuing transactions or other business opportunities in foreign countries. A company considering doing business with a foreign agent or business partner should

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40 Enforcement officials from have indicated in the past that they receive leads on a significant number of enforcement cases from a target’s competitor who lost a bid or withdrew from consideration after refusing to violate the law.
thoroughly check the business reputation and past conduct of such party, and meticulously document all inquiries. Each due diligence contact or business check should result in a written report or file memorandum, which can be used to overcome a suggestion of “conscious disregard” or “deliberate ignorance” if a problem later arises.

The following are some of the steps a company can take in conducting a background check:

- Request the foreign party to provide a list of references, a professional resume, and a complete employment history;
- Contact all of the party’s references and former employers;
- Contact the country desks at the U.S. Department of State and the U.S. Department of Commerce to request all available information about the agent or partner;
- Contact the commercial attaché at the U.S. embassy in the country where the agent or partner will be working and make the same inquiry; and
- Contact the commercial representative of the embassy of the foreign country in the United States and make the same inquiry.

**Monitoring**

Monitoring of agents also is important in maintaining compliance with the FCPA. A company should:

- Ensure that agents are operating under written contracts;
- Ensure that payments are reasonable in light of the nature and extent of services and compared to payments made for similar services in that country;
- Require agents to account precisely for any reimbursable expenses and the services they provide;
- Perform periodic audits of the agent’s expenses and invoices; and
- Investigate any “red flags,” including cash transfers.

**Contract**

Companies should insist on FCPA compliance provisions in every foreign agency contract or other business agreement. The main purpose of such provisions is to inform foreign agents or business partners of the importance of the FCPA, and to provide evidence of intent to comply with the FCPA. The DOJ has recognized that such contract terms are an effective means of reducing the risk of FCPA violations. Contractual provisions will vary, but common provisions often include:

- An acknowledgment by the local agent or partner of familiarity with the requirements of the FCPA;
- Representations and covenants of past and future compliance with the FCPA;
• Representations that no person affiliated with the agent or partner is an official of a foreign government who is in a position to influence decisions regarding the contemplated activities, and agreement to notify the U.S. company if any such person assumes such a position;

• Agreement that, with reasonable notice, the U.S. company may audit the expenses and invoices of the local agent or partner; and

• The right to terminate the agreement upon any violation of its terms and conditions.

**Local Counsel**

Consider obtaining, or requiring the foreign agent or business partner to obtain, an opinion letter from mutually agreed-upon local counsel as to the legality of the proposed activities and transactions under the laws of the foreign country.

**Compliance**

Companies can greatly reduce the risk of FCPA violations with a comprehensive FCPA compliance plan designed to prevent and detect potential problems. A compliance program creates an internal system of checks and balances that is integrated into the routine business processes of the company. The program should involve all directors, officers, employees, and agents with responsibilities for planning, approving, monitoring, and recording international activities and transactions. Importantly, in the event of an FCPA violation, the existence and actual implementation of a compliance program is a mitigating factor under the corporate sentencing guidelines. The direct reporting line between a compliance officer and a board or board committee is an important component to a company’s compliance and ethics program that could result in penalty reduction.
FCPA Compliance Program
Overview of the FCPA Compliance Program

The broadening of individual directors’ liability for FCPA compliance, and continuing aggressive FCPA enforcement, emphasize the need for effective and appropriately tailored FCPA compliance programs. In February 2017, the DOJ issued its Evaluation of Corporate Compliance Programs, which notes that in conducting an investigation of a corporate entity, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider “the existence and effectiveness of the corporation’s pre-existing compliance program” and the corporation’s remedial efforts “to implement an effective corporate compliance program or to improve an existing one.”\(^4\) This section outlines certain key points and principles that should be considered in establishing an FCPA compliance program.

Policy Statement

The head of the company (CEO/president/board chair) should issue a formal corporate statement, stating the company’s resolution to maintain the highest ethical and legal standards of operation. This statement will show that those at the highest levels of corporate management are committed to maintaining the company’s reputation and integrity, and that the same standards are expected of all employees. The DOJ’s Evaluation of Corporate Compliance Programs specifically calls out as key components of a program the efforts and actions of senior and middle management on compliance, including the demonstrating of their shared commitment to compliance.

Ethics/Compliance Manual

In order to ensure employee familiarity with the restrictions imposed by the FCPA and the procedures in place to ensure compliance, each employee should receive an ethics or compliance manual upon the start of his/her employment with the company. While the manual need not be limited to a discussion of the FCPA, a separate FCPA section should be created that establishes the compliance standards and procedures to be followed by employees, consultants, and agents. In addition to a summary of the FCPA’s general provisions, the manual also should contain a full discussion of what employees’ responsibilities are in various real-world FCPA scenarios.

The size and complexity of the manual will vary depending on the size and structure of the company. However, while not mandating the elements of a code of ethics, the SEC has described a code as “written standards that are reasonably designed to deter wrongdoing and to promote (1) Honest and ethical conduct, including the ethical handling of conflicts of interest . . . ; (2) Full, fair, accurate, timely and understandable disclosure in reports and documents . . . file[d] with, or submit[ted] to, the [SEC] and in other public communications . . . ; (3) Compliance with applicable [] laws, rules and regulations; (4) The prompt internal reporting of violations of the code to an appropriate person . . . ; and (5) Accountability for adherence to the Code.”\(^4\) A company should also review and update its compliance manual, policies, and procedures regularly.

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Training Programs and Seminars

Training programs and seminars are important to any effective compliance program. Indeed, the DOJ’s Evaluation of Corporate Compliance Programs calls out “risk-based training” as a key element of an effective training program. A manual or other policies and procedures without a hands-on training program may not adequately educate employees about FCPA requirements. These programs, whether conducted by in-house ethics personnel or by outside legal counsel, should focus on real-world problems and solutions to FCPA problems. This training should be an integral part of any new employee orientation and should also include periodic refresher courses to reinforce company policy and address new developments.

Authorized Compliance Officer or Committee

The company should consider establishing a centralized position or committee for coordinating and operating the compliance program. This person, or group of persons in the case of a large company, should be responsible for creating and updating the ethics/compliance manual and conducting all corporate ethics training and education. As the DOJ notes, it is important for employees to have guidance relating to company compliance policies available to them, and a central compliance committee or specific designated personnel provide clarity to employees in terms of where to seek assistance.

Compliance committee members should be updated on statutory, regulatory, and business developments within their area of responsibility. The committee also should be tasked with drafting an annual ethics report. This report, presented to the board of directors at an annual meeting or other specified date, should summarize the past year’s compliance issues and list those areas of focus for the following year. Furthermore, the corporate officials who are assigned responsibility for oversight and compliance with the FCPA policies and standards should have the authority to implement and utilize monitoring and auditing systems in order to detect any potential violation.

It also would be prudent for the committee to review the retention of business development agents in foreign jurisdictions. The committee would be responsible for review of business development contracts as well as the suitability of prospective joint venture partners for purposes of compliance with the FCPA. All contracts reviewed should contain language that indicates that no payments of money or anything of value will be offered or paid to any foreign official to improperly influence the acts of such officials. The committee members ideally should be independent from any department involved in the relevant transaction.

Accounting and Recordkeeping Procedures

An effective FCPA compliance program requires a company to have strong accounting and recordkeeping systems in place to ensure that complete and accurate records of all corporate financial transactions are maintained. This is especially true in light of recent enforcement focus on the intersection between corruption and money laundering, which increasingly requires companies to impose rigid and effective controls concerning the method and location of all payments. In addition to the obvious need for accurate bookkeeping, regular audits are a part of any good compliance program. In this regard, both internal audits and independent outside audits should be conducted on a regular
basis to review the company books and ensure continued compliance. Considering the strict recordkeeping requirements of the FCPA, an effective compliance program is nearly impossible to achieve without accurate bookkeeping and regular audits. These policies and procedures should extend to a U.S. company’s foreign subsidiaries. Moreover, the company should ensure that it has an appropriate level of oversight of its agents, especially those operating in regions where corruption is a known problem.

**Reporting Procedures**

To encourage employees to report possible FCPA compliance problems without fear of repercussions, it is important to set up anonymous procedures for alerting the company of potential FCPA issues. Asking employees simply to report problems to their direct supervisor may be ineffective, especially in those cases where the supervisor may be personally involved in the problem. One solution to this problem is to establish a telephone line where reports can be made anonymously. In addition, the person or persons operating as the compliance officer or committee can be tasked with receiving anonymous written submissions raising FCPA concerns. While employees should be encouraged to provide their names to assist any resulting investigation, it should be made clear that such disclosure is not mandatory.

Additionally, in light of the Dodd-Frank whistleblower provisions, it may become important to educate employees about the benefits to be obtained by reporting information to internal compliance personnel as a way to minimize the possible undermining effect that the whistleblower rules may have on internal reporting mechanisms.

**Internal Investigation Action Plan**

If potentially problematic payments are discovered, it is essential that the company respond in a timely and effective manner. The days and weeks following the discovery of problematic payments are very important to ensure the overall integrity of an internal investigation and any subsequent disclosure to the DOJ or the SEC. The following is a list of high-level action items for the conduct of an internal investigation relating to potential FCPA issues.

1. **Ensure proper document retention.**

   The company must ensure that all documents (including hard copies and electronic versions) that could potentially be relevant to the investigation are preserved. In this connection, a “hold” order is typically distributed to all those who might possess relevant evidence/documents now or in the future.

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43 Audit schedules (and other timelines) should be reasonable and practical to implement. For example, a policy that requires monthly audits may not be practical, and a company that finds that it cannot meet its own deadlines may find itself penalized for being unable to meet internal deadlines. It is much safer to implement reasonable time frames, as the DOJ and the SEC typically examine a company’s compliance program to determine whether it is being followed.
2. **Protect privilege.**

From the outset, the confidential and privileged nature of the investigation must be maintained, including through the attorney-client privilege and the work product doctrine. All relevant documents/correspondence relating to the investigation should be marked accordingly.

3. **Collect and review relevant documents.**

Ensure that all potentially relevant documents are collected, reviewed, and analyzed. Potentially relevant documents include the following: all documentation related to the payments at issue (amount, date, purpose, form, proof of payment, etc.); the invoices, requests for payments and approvals; documents related to the underlying projects/contracts and parties involved; and financial statements and the portions of the company’s books and records that reflect the payments at issue (general ledger, account ledgers, expense reports, cash books, bank statements, petty cash accounts, journal entries, etc.).

4. **Freeze problematic payments.**

Ensure that any pending problematic payments are frozen and that future problematic payments do not occur.

5. **Hire local counsel and any other members of the investigation team.**

The company should hire local counsel to advise on issues related to local law. Also, determine whether forensic accountants will be necessary to analyze documents and financial records.

6. **Identify and interview relevant employees.**

Obtain a list of company employees and a copy of the organizational chart to determine which employees may be in a position to provide information regarding the problematic payments.

Counsel should proceed with interviews and ensure that the employees are aware that the attorney-client privilege belongs to the company and not to the employee (i.e., administer Upjohn warning).

7. **Review and analyze all relevant information from document review, employee interviews, and other means.**

Identify and review all transactions and contracts with foreign government entities that could be implicated. Review the vendor list for vendors who are government officials or have other relationships with government-controlled entities. In addition, conduct due diligence on current vendors for FCPA-related issues, and institute procedures for due diligence on future vendors.

Further, it is important to identify and review all relationships with agents, contractors, or other third parties for red flags. Conduct due diligence on existing agents, contractors, and other third parties for FCPA-related issues, and institute procedures for due diligence on future agents, contractors, and other third parties.
Finally, review and analyze the company’s books and records, including the cash book, bank statements, expense reports, payroll, general ledger, etc., for red flags.

8. Develop and implement (or improve) a comprehensive FCPA compliance program.

Evaluate whether there is an effective FCPA compliance program and adequate internal controls in place. A thorough understanding of existing internal controls will determine potential liability and any potential weakness in the compliance structure that must be corrected.

If the company does not have an FCPA compliance program, develop and implement a program, including a statement of management policy. Conduct FCPA training for all relevant employees.

If the company does have a compliance program, improve and add to existing procedures and protective measures to ensure that such problems do not recur.

In either case, ensure that protective language is included in all contracts/agreements with agents and other third parties.

Memorialize the findings in an internal memorandum and determine next steps.
Mergers & Acquisitions:
FCPA Considerations
Mergers & Acquisitions: FCPA Considerations

FCPA issues increasingly arise in the context of mergers and acquisitions. The acquiring company may become liable for any FCPA violations previously committed by the target, so it is essential to conduct thorough due diligence with respect to FCPA compliance. For recent examples, see the Dun & Bradstreet and Kinross Gold Corporation FCPA enforcement actions discussed under “Recent Cases” above.

In many cases, issues uncovered through such due diligence are voluntarily disclosed in order to resolve the acquiring company’s potential liability. Failure to reach such a resolution may prevent a deal from being consummated, as evidenced in 2004 when Lockheed Martin walked away from the potential acquisition of Titan Corporation because Titan was unable to settle allegations of FCPA violations with the DOJ.

A key 2003 Opinion Procedure Release issued by the DOJ indicates that the DOJ will look favorably upon the voluntary disclosure of FCPA violations in the context of mergers and acquisitions, especially where that disclosure is coupled with appropriate corrective measures. The Opinion involved a situation where due diligence prior to an acquisition uncovered violations of the FCPA’s anti-bribery provisions by officers of a foreign subsidiary of the target corporation. The acquiring company and the target voluntarily disclosed the violation to the DOJ and the SEC, and the target company made appropriate disclosures to the investing public, instructed its foreign subsidiaries to cease all payments to foreign officials, and suspended senior officers and employees involved in the illicit payment. Additionally, the acquiring company committed to undertake the following remedial measures upon completion of the acquisition:

- Continued cooperation with the DOJ and the SEC in the investigation;
- Appropriate discipline of all employees and officers of the target company found to have made or authorized unlawful payments;
- Disclosure of any additional payments to foreign officials by the target company or its subsidiaries discovered after the acquisition;
- Extension of the acquiring company’s FCPA compliance program to the target company; and
- Implementation by the target company of an appropriate internal control system.

In light of these remedial measures, the DOJ indicated that it did not intend to take enforcement action against the acquiring company for the pre-acquisition conduct of the target company’s subsidiaries.

The DOJ has revisited the issue of due diligence a number of times. In Opinion Procedure Release 08-01, a U.S. company had negotiated with a foreign company to enter into a joint venture to acquire control of a company in which a foreign government was divesting its controlling share. As part of its due diligence, the U.S. company investigated the joint venture partner; hired an expert to investigate due diligence procedures in the foreign company; obtained company profiles on the joint venture partner and the target company from the U.S. Department of Commerce; searched for the names of all parties involved in public and private databases, including employing a private due diligence service; met with representatives of the U.S. embassy in the foreign country; obtained outside counsel to conduct due diligence; and hired a second law firm to review the due diligence. The U.S. company also obtained
disclosures and warranties regarding past and future anti-corruption compliance, and retained the contractual right to discontinue its business relationship with the foreign company in the event of a violation of anti-corruption laws. The DOJ responded that, in light of these actions, it would not initiate an enforcement proceeding on the proposed deal.\(^4^4\)

In what remains a key Opinion Procedure Release from 2008, Number 08-02, the DOJ addressed the question of whether the inability to conduct appropriate FCPA due diligence before closing an acquisition deal would mean that the acquisition itself would violate the FCPA or that the purchaser would inherit liability for the subsidiary’s prior and potential violations before post-closing due diligence was conducted. The DOJ responded that the purchase price itself would not be a payment in furtherance of a bribe that would violate the FCPA. The DOJ further concluded that it would not initiate enforcement actions for pre-deal violations of the FCPA as long as the purchaser followed a specific timeline of due diligence and disclosure actions, including a due diligence review within 180 days of closing. The DOJ maintained that it would not bring any enforcement action against the purchaser for violations committed by the target during the 180-day due diligence period, so long as no employee of the purchaser was involved in the violation; however, the DOJ reserved its right to bring an action against the target for any discovered violations.\(^4^5\)

The DOJ stated in a 2014 Opinion Procedure Release, Number 14-02, that it encourages companies engaged in mergers and acquisitions to (1) conduct thorough risk-based due diligence; (2) implement the acquirer’s code of conduct and anti-corruption policies as quickly as practicable; (3) conduct FCPA and other relevant training for the acquired entity’s directors and employees, as well as third-party agents and partners; (4) conduct an FCPA-specific audit of the acquired entity as quickly as practicable; and (5) disclose any corrupt payments discovered through the due diligence.

Despite these Releases, a company should not presume it is immune from prosecution after conducting rigorous due diligence. In some cases where FCPA violations were disclosed as the result of due diligence in the mergers and acquisitions context, the DOJ and the SEC nonetheless imposed significant monetary fines. In 2010, for example, GE, despite a well-regarded compliance system, agreed to pay $23.4 million to resolve claims that arose from a $3.6 million kickback scheme by four GE subsidiaries, two of which were acquired after the offenses occurred.\(^4^6\)

**Practice Pointers**

When one company is acquiring another, it also may be inheriting the target company’s FCPA violations. The acquiring company should conduct thorough due diligence *before* closing the acquisition deal. Companies that discover FCPA violations prior to completing a transaction have options: (1) choose not to proceed; (2) lower their offer; and/or (3) disclose any violations and negotiate reduced civil and criminal penalties. If pre-closing due diligence is not practicable due to the circumstances of the deal, the acquiring company should quickly conduct post-closing due diligence, ensure that adequate

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compliance systems are in place in the acquired company, and be prepared to follow detailed reporting and disclosure requirements following the closing, including the potential imposition of an independent monitor.
International Anti-Bribery Action: UK and OECD
The United Kingdom’s Bribery Act of 2010

The Bribery Act of 2010 (Bribery Act), which went into effect on July 1, 2011, replaced UK anti-bribery common law and statutes dating back to 1889 by creating four new criminal offenses – the general offenses of paying and receiving bribes, the bribery of foreign officials, and the failure of commercial organizations to prevent bribery. Some of the Bribery Act’s provisions are stricter than those found in the FCPA. Therefore, business organizations subject to both the FCPA and the Bribery Act should ensure their compliance programs contain adequate procedures to address both laws.

Key Provisions

Scope of the Bribery Act. The Bribery Act reaches far beyond the territorial boundaries of the UK, covering: (1) any person who commits an act or omission forming part of a bribery offense in the United Kingdom, regardless of the person’s nationality; (2) any company or partnership formed in the United Kingdom, regardless of where the illegal conduct occurs; (3) any person who resides in the United Kingdom, regardless of the person’s nationality or where the illegal conduct occurs; and (4) any citizen of the United Kingdom or British Overseas Territories, regardless of the person’s residency or where the illegal conduct occurs.

General Bribery Offenses. The Bribery Act defines bribery broadly as offering, promising, or giving an advantage to another person with the intent to induce the person to perform a function improperly or to reward a person for performing a function improperly. Similarly, receiving bribes is defined as receiving a financial or other advantage intending that a function should be performed improperly as a result, whether by the recipient of the bribe or by a third party.

Bribery of Foreign Officials. Section 6 of the Bribery Act closely tracks the FCPA. Under the Bribery Act, a person may be guilty of bribery of a foreign official if that person, directly or through a third party, offers, promises or gives any financial or other advantage to a foreign public official in an attempt to influence him/her in his/her capacity as a public official. A person also must seek to obtain or retain business, or an advantage in the conduct of business, as a result of the bribe.

Corporate Failure to Prevent Bribery. The Bribery Act creates a strict liability offense for commercial organizations that fail to prevent bribery occurring within their organization. A commercial organization

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47 While we are not licensed to practice law in the United Kingdom and are not UK law experts, Wiley regularly provides U.S. companies with an overview of laws in the United Kingdom and European Union.
49 Id. § 1, 2, 6, 7.
51 Bribery Act 2010 at §§ 7(5) and 12.
52 Id. § 1.
53 Id. § 2.
54 Id. § 6.
55 Id.
could be guilty of bribery where a person associated with the organization bribes another person to obtain or retain business for the organization or to obtain or retain an advantage in the conduct of business for the organization.\textsuperscript{56} Persons “associated” with the organization could include employees, agents, or subsidiaries.\textsuperscript{57}

**Penalties.** The offenses of bribing another person, being bribed, and bribing a foreign public official are punishable by an unlimited fine, imprisonment of up to 10 years, or both. The corporate offense of failure to prevent bribery is punishable by an unlimited fine.

### Major Differences Between the Bribery Act and the FCPA

**Application to Commercial Activity.** The Bribery Act covers the bribery of private citizens. Therefore, unlike the FCPA, which only applies to bribes made to foreign officials, the Bribery Act also applies to foreign commercial activity.\textsuperscript{58}

“**Grease Payments” Forbidden.** The FCPA excepts “facilitation payments” or “grease payments” from its bribery prohibition. The Bribery Act does not maintain any exception for nominal payments made to obtain routine, nondiscretionary governmental services.

**Fewer Affirmative Defenses.** Under the Bribery Act there is no defense for reasonable and bona fide expenditures directly related to promotional activity. Therefore, corporations subject to the Bribery Act should take care to monitor any promotional or hospitality-related payments. Furthermore, while the FCPA does not prohibit payments that are legal under the written local law, the Bribery Act permits such payments only where the foreign official is specifically allowed by law to be influenced by a payment.\textsuperscript{59}

“**Adequate Procedures” Defense.** The Bribery Act provides a defense under which a company can avoid liability by demonstrating that it maintained adequate procedures to prevent bribery.\textsuperscript{60} The Bribery Act itself contains no guidance as to what constitutes “adequate procedures,” which may be different from procedures required to avoid a violation or to obtain penalty mitigation under the FCPA. Guidance provided by the UK Ministry of Justice indicates that adequate procedures include top-down compliance programs that are tailored to an organization’s particular structure.

### The United Nations Convention Against Corruption

Opened for signature in December 2003, the United Nations Convention Against Corruption (UNCAC or Convention) had 185 parties by May 2018. Because U.S. law already incorporated all of the Convention’s mandatory provisions, the U.S. ratification of the UNCAC in 2006 required no amendments to the FCPA or other U.S. laws.

\textsuperscript{56} Id. § 7.
\textsuperscript{57} Id.
\textsuperscript{58} Id. § 3.
\textsuperscript{59} Id. § 6(3)(b).
\textsuperscript{60} Id. § 7(2).
Key provisions of the Convention include the following:

**Criminalization**

The Convention requires countries to establish criminal and other offenses to cover a wide range of corrupt acts, if these are not already crimes under domestic law. In particular, the Convention requires countries to make the following criminal offenses:

- The promise, offering, or giving of bribes to a national public official in order that the official act or refrain from acting in the exercise of his or her official duties;
- The solicitation or acceptance of bribes by a national public official in order that the official act or refrain from acting in the exercise of his or her official duties;
- The promise, offering, or giving of bribes to a foreign public official, in order that the official act or refrain from acting in the exercise of his or her official duties, to enable the payor to obtain or retain business or other undue advantage in relation to the conduct of international business;
- Embezzlement, misappropriation, or other diversion of property by public officials; and
- Money laundering and obstruction of justice.

The UNCAC also contains non-mandatory provisions encouraging signatories to adopt measures criminalizing trading in influence, private sector bribery, private sector embezzlement, and other related offenses.

**International Cooperation**

The parties to the Convention agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, and to extradite offenders where consistent with domestic law. Countries also are required to undertake measures to support the tracing, freezing, seizure, and confiscation of the proceeds of corruption.

**Asset Recovery**

Several provisions of the Convention specify how parties will cooperate to recover illicitly appropriated assets. In particular, in the case of embezzlement of public funds, the confiscated property would be returned to the state requesting it; in the case of other proceeds covered by the Convention, the property is to be returned upon proof of ownership or recognition of the damage caused to a requesting state. In all other cases, priority consideration is given to: the return of confiscated property to the requesting state; the return of such property to the prior legitimate owners; or compensation of the victims.
Prevention

One chapter of the Convention is dedicated to prevention, with measures directed at both the public and private sectors. These include model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. The Convention calls on countries to actively promote the involvement of non-governmental and community-based organizations, as well as other elements of civil society, and to raise public awareness of corruption. Article 5 of the Convention encourages each signatory to establish and promote effective practices aimed at the prevention of corruption.

The Convention is further evidence of continuing global efforts to address corruption along with other measures, such as the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, the Inter-American Convention Against Corruption, the Council of Europe Criminal Law Convention on Corruption, and the African Union Convention on Preventing and Combating Corruption. Despite this growing international legal framework, the United States remains the primary country to vigorously enforce laws criminalizing the bribery of foreign public officials. However, international enforcement efforts are increasing.

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Helpful Online References
Helpful Online References


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Blogs

- [http://www.fcpablog.com/](http://www.fcpablog.com/)

Studies and Reports

- [http://www.oecd.org/department/0,3355,en_2649_34859_1_1_1_1_1,00.html](http://www.oecd.org/department/0,3355,en_2649_34859_1_1_1_1_1,00.html)
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- [http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html](http://www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html)

Laws and International Treaties

- African Union Convention on Preventing and Combating Corruption: [https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf](https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf)
About Wiley
About the Firm

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