

*50 New  
FCPA Resolutions  
Plus the Brazil, Canada, China,  
India, Mexico, Russia, and UK Statutes*

# THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK

A Practical Guide for  
Multinational General Counsel,  
Transactional Lawyers and  
White Collar Criminal Practitioners

**Robert W. Tarun  
and Peter P. Tomczak**

FIFTH EDITION



*Complimentary  
Chapter 1*

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MULTINATIONAL GENERAL COUNSEL,  
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WHITE COLLAR CRIMINAL PRACTITIONERS  
from New York, Silicon Valley, Washington, D.C.,  
London, Chicago, Boston, Houston, Indianapolis,  
San Francisco, Toronto, and Shanghai.**

“The FOREIGN CORRUPT PRACTICES ACT HANDBOOK is ridiculously good.”

—**John S. Siffert, Founding Partner,  
Lankler Siffert & Wohl LLP, New York**

“This is a must read for any lawyer handling FCPA matters. It is a comprehensive and well written book by Bob Tarun, one of the country’s outstanding white-collar criminal lawyers.”

—**Robert S. Bennett, Partner,  
Hogan Lovells LLP, Washington, DC**

“Thanks to a first-rate mind and vast practical experience in the FCPA field, Peter Tomczak has become one of the foremost authorities sought out by sophisticated clients. THE FCPA HANDBOOK is an indispensable asset for both inside corporate counsel and law firm attorneys who want to be ‘on the top of their game’ when facing the rough anti-corruption terrain. Like Peter, the handbook is exceptionally practical and deeply insightful at the same time.”

—**Vincent J. Connelly, Co-Chair,  
White Collar Criminal Practice,  
Mayer Brown LLP, Chicago**

“With its comprehensive analysis of potential FCPA liabilities and sound practical suggestions as to how to deal with them, this book is a very valuable asset for both unseasoned and seasoned FCPA practitioners.”

—**Robert B. Fiske, Jr., Senior Counsel,  
Davis Polk & Wardwell LLP, New York**

“In order to operate successfully, international companies must be alert to and effectively manage a number of key risk areas including the Foreign Corrupt Practices Act and the UK Bribery Act. To assist these companies in meeting their ethical and legal responsibilities, Bob Tarun, one of the most accomplished white-collar criminal lawyers in the United States, and Pete Tomczak, his brilliant colleague, have now updated and expanded the supremely valuable FOREIGN CORRUPT PRACTICES ACT HANDBOOK, which was first published in 2010. I found the fifth edition

of the new HANDBOOK, which is 1,200 pages in length, to be even better than the prior editions. This HANDBOOK is very well organized, comprehensive, scholarly, well written, and surprisingly easy to navigate. In addition to setting forth in the HANDBOOK all the relevant legal requirements and potential liabilities in the anti-corruption area, the two give the reader dozens of valuable observations, insights, and practical compliance suggestions. Every attorney at any level of experience who works in the international arena will benefit tremendously by having a copy of Tarun and Tomczak's HANDBOOK within arms length of their desk."

**—Jay G. Martin, Associate General Counsel and  
Chief Compliance Officer, Baker Hughes,  
a GE Company, Houston**

"Bob Tarun first taught me about the FCPA 15 years ago, when I was a student in his WHITE COLLAR CRIMINAL PRACTICE course at the University of Chicago Law School—a truly exceptional course that inspired me to become an anti-corruption attorney. Mr. Tarun continues to share his deep knowledge of the FCPA and related anti-corruption laws in the fifth edition of THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK, which contains over 1,200 pages of practical guidance that is grounded in reality and easy to understand. THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK provides solutions across the full spectrum of anti-corruption issues and, as my dog-eared copies of the prior editions attest, is a must-have tool for any anti-corruption attorney. The fifth edition is an invaluable anti-corruption resource that will stay on your desk, not in your bookcase."

**—Trent J. Sandifur, FCPA and International Anti-Corruption  
Practice Area Leader, Taft Stettinius & Hollister LLP,  
Indianapolis**

"Bob Tarun's book is both a highly accessible and deeply authoritative treatment of the FCPA. It has been invaluable to me, as a practitioner, on several occasions. UK and European lawyers will especially appreciate the way in which the main concepts behind the legislation are explained early, in a thoughtful and comprehensive 'overview' section. The key issue of jurisdiction is also explained straightforwardly and from first principles. As well as detailed legal analysis, the book contains a multitude of practical advice on 'real world' issues and is complemented by very useful appendices containing source material."

**—Eoin O'Shea, Lawrence Graham, London**

"No one knows the Foreign Corrupt Practice Act better than Bob Tarun. The book is a valuable reference guide for all FCPA practitioners and is a must read for all."

**—Lori-Ann Beausoleil, Forensic Partner, PwC Canada and  
Steven Henderson, Forensic Partner, PwC Canada, Toronto**

“One of the most experienced practitioners in the field, Bob Tarun delivers exactly what his title promises: a practical guide to the FCPA. This is the best FCPA book in my library, and I have them all.”

—**Peter B. Clark, Former Deputy Chief, Fraud Section,  
U.S. Department of Justice 1977–2005, Washington, DC**

“We have found Bob Tarun to be an invaluable resource in our assisting both corporate and private equity clients in evaluating the complexities of the FCPA and related compliance issues for portfolio companies and transactions throughout Asia. Having worked in various interim management, restructuring and investigative matters throughout Asia, Bob’s book has served as an excellent reference source as it captures his specific, hands on experience across multiple issues and countries in Asia.”

—**Michael Murphy and Brent Carlson, AlixPartners, Asia**

“An exceptional resource for the forensic accounting professional, Bob Tarun and Peter Tomczak’s book is an essential for any professional seeking to better understand the FCPA in real world applications. Whether evaluating potential violations, considering practical compliance measures or gaining an appreciation of the evolving issues in FCPA enforcement, Bob and Pete provide thoughtful insights and practical suggestions evident of their significant experience with all aspects of the FCPA. This book should be required reading for any professional working in FCPA matters.”

—**John LaBella, Director, AlixPartners LLC, San Francisco**

“Increasingly aggressive enforcement of the Foreign Corrupt Practices Act during the past 10 years has spawned an entire industry of counselors and investigators—many with limited experience and a few with broad and deep experience, possessing insights founded in experience and practice. There have also been many articles and books written on compliance with the FCPA, most looking the same in addressing the requirements and interpretation of the Act, but lacking the sound, thorough practical advice that corporate counsel need to address both general and specific strategic issues—whether in the early stages of investigation triage or in final negotiations with prosecutors and regulators. In this industry, Bob Tarun and Pete Tomczak stand out—they have a firm grasp of the practical application of the FCPA based upon their hands-on experience as investigators of alleged misconduct in dozens of countries, Bob as a former federal prosecutor and a nationally recognized white-collar criminal defense lawyer, and Pete, as a brilliant legal analyst with an exceptional corporate background. Both truly understand how companies operate and what will—and won’t—work in different business environments. The first edition of the FCPA HANDBOOK was the first book to provide a comprehensive investigative and reference text for not only practitioners but also their audience—companies struggling with proactive and reactive compliance with the Act and challenging investigations. The fifth edition expands the advice and coverage of

the prior editions and further succeeds in crossing the chasm between a technical reference text and a highly practical FCPA investigative and defense guide. The 1,200-page fifth edition is a must-have book that should be on the desk of anyone wishing to understand today's application of the Foreign Corrupt Practices Act as well as the direction prosecutors and regulators are moving in international anticorruption enforcement."

**—Joe Zier, retired Partner and Silicon Valley FCPA  
Practice Chair, Deloitte Financial Advisory Services LLP,  
Silicon Valley**

"Bob Tarun brings a wealth of experience and common sense to a challenging area of the law. His sensible advice addresses all aspects of FCPA and corruption practice and is applicable throughout the globe. Drawing upon his substantial international experience, Tarun identifies the critical issues about which all lawyers and investigators covering this field should be aware. His deep understanding of the relevant issues enables him to explain complicated technical concepts and procedures in a way that is understandable and compelling. In this fifth edition, Tarun, along with Peter Tomczak, analyzes the most recent cases and identifies trends currently adopted by prosecutors and regulators. Armed with their insights and suggested approaches, investigators and lawyers can manage cases in this highly charged area with confidence. Failing to take advantage of this resource would be a mistake."

**—Lisa Osofsky, Regulatory Advisor, Control Risks, London,  
and former Deputy General Counsel,  
Federal Bureau of Investigation, Washington, DC**

"An indispensable guide for FCPA practitioners. Bob Tarun and Peter Tomczak achieve a distinctive blend of scholarly analysis with sage practical advice in one invaluable package."

**—Bruce Singal, Donoghue Barrett & Singal, Boston**

## CHAPTER 1

# Foreign Corrupt Practices Act Overview

### **I. HISTORICAL PERSPECTIVE AND FCPA HANDBOOK PREVIEW**

The United States Foreign Corrupt Practices Act (FCPA)<sup>1</sup> was enacted in 1977, in the wake of public revelations that more than 400 companies admitted to having made more than \$300,000,000 in questionable or illegal payments to foreign government officials, politicians and political parties. As forcefully set forth in the U.S. House of Representatives Report from the FCPA's legislative history:

The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too *lazy* to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business.<sup>2</sup>

Citing scandals in Japan, the Netherlands, and Italy involving the corrupt activities of US-based multinationals, Congress concluded that these profound problems created by bribery conduct compromised the effectiveness of US foreign policy during some of the coldest years of the Cold War.<sup>3</sup> Nothing less than criminal enforcement, according to Congress, would adequately deter individuals and companies from engaging in such destructive misbehavior. Yet for its first quarter century, FCPA enforcement was largely episodic.

During the past decade, however, the FCPA has come to exemplify and drive many aspects of corporate compliance programs globally. Aided by technological advances, while confronting new geopolitical currents, individuals and business based in or operating through the United States today conduct more economic activity with a larger global footprint. Concurrently, U.S. government authorities

have come to consistently and expansively enforce the FCPA, and more recently other nations' governments have enacted and/or enforced strong local anticorruption laws. Together, these trends have caused the FCPA to be relevant to a wide swath of businesses and persons, including through its broad jurisdiction over businesses and entities that are not based in but whose activities sufficiently touch upon the United States.

As a U.S. federal statute, the starting point is the language chosen by Congress for the FCPA. So this Handbook begins with an overview of the key provisions, terms and concepts of the FCPA statute, but also countenances how the FCPA has been interpreted by the judiciary and is understood by government authorities such as the United States Department of Justice (DOJ) and United States Securities and Exchange Commission (SEC), which enforce the FCPA criminally and civilly, respectively. Chapter 1 addresses liability under the statute.

The FCPA contains two types of provisions: (1) antibribery provisions, which generally and expansively prohibit certain categories of persons and entities from corruptly paying or providing things of value to foreign government officials, political parties, or candidates for foreign political office to influence the official in the exercise of his or her official duties to assist in obtaining or retaining business or securing any improper advantage; and (2) accounting provisions, which impose certain obligations on all companies that have their securities registered for trading in the United States or that are required to file reports with the SEC, regardless of whether the companies have foreign operations, to make and keep books and records that, in reasonable detail, accurately and fairly reflect their transactions and the dispositions of their assets, and devise and maintain an adequate system of internal controls.

Compared to other U.S. white-collar criminal laws, FCPA enforcement is formed less by Congressional revisions, agency rulings or judicial decisions than by the resolutions entered into by defendant companies and individuals with the DOJ and SEC to settle allegations of bribery conduct. This Handbook therefore refers often to important FCPA resolutions, with Chapter 10 summarizing the key aspects of almost all FCPA settlements since 2000. While voluntary settlements do not have the force of law, from them the DOJ's and SEC's theories of enforcement may be gleaned. Moreover, the factual background presented in the pleadings and accompanying Statement of Facts documentation illustrate the actual business issues that arise in multinational business enterprises, against which mindful companies and individuals may undertake proactive, mitigating steps. Chapter 2 covers potential penalties—criminal, civil and administrative—under the statute and other sanctions, including government contractor debarment and suspension proceedings, monitorships, and reporting obligations.

After having established the fundamentals of the FCPA, as to both what the statute requires as well as what are the penalties for violating it, this Handbook explores in Chapter 3 the increasingly important international aspects of anticorruption laws and implications of parallel foreign investigations. For any company operating outside the United States, and any lawyer conducting a cross-border investigation, local laws and coordination among international government authorities and law enforcement are increasingly important. Other countries have

become vigorous enforcers of their own antibribery and anticorruption laws, and the inherently international nature of bribery conduct punished under the FCPA raises a host of jurisdictional and other international legal issues. Descriptions of the anticorruption laws and enforcement activities pertaining to seven key jurisdictions—Brazil, Canada, China, India, Mexico, Russia and the United Kingdom—are also provided.

The Handbook explores, practically, how the FCPA applies to particular activities that commonly give rise to antibribery and anticorruption risks, and how business entities and individuals approach the legal risks presented by the FCPA. It devotes substantial attention to third-party intermediaries that have presented the greatest anticorruption challenges to multinational companies and to merger and acquisition and joint venture transactions and solutions (Chapter 5). Gifts, travel, lodging and entertainment (Chapter 6), along with charitable contributions and political donations (Chapter 7) present unique challenges in conducting business internationally, and to which lawyers and compliance professionals seek answers that are effective “in the field.” Equally important, from a corporate governance perspective, and through compliance programs and internal investigations, companies seek to mitigate legal risk both before and after the proverbial rainy day.

The Handbook focuses on perhaps the most formidable challenges to defense counsel conducting corruption investigations, often in foreign lands (Chapter 8) and defending an FCPA investigation before the U.S. authorities (Chapter 9). Again, the final chapter summarizes twenty years of FCPA enforcement by the DOJ and the SEC (Chapter 10).

## II. THE FCPA’S ANTIBRIBERY PROVISIONS

### A. Application to Individuals and Entities

To begin at the beginning, the FCPA’s antibribery provisions potentially apply to four categories of individuals and entities: (1) “issuers”<sup>4</sup> (or any officer, director, employee or agent of any such issuer, or any stockholder acting on behalf of any such issuer); (2) “domestic concerns”<sup>5</sup> (or any officer, director, employee, or agent of any such domestic concern, or any stockholder acting on behalf of any such domestic concern); and (3) foreign nationals or businesses<sup>6</sup> (or any officer, director, employee or agent of such foreign business or national, or any stockholder acting on behalf of such foreign business.) who take any action in furtherance of a corrupt payment while within the territory of the United States. Because these terms define who and what are possibly subject to enforcement of the FCPA’s antibribery (and, as discussed later, accounting) provisions and, consequently, whether by the DOJ or the SEC, any analysis of potential FCPA liability should begin with an analysis as to what categories any individual or entity may qualify. “Issuer” means any entity which has a class of securities that are registered pursuant to Section 12(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) or that is required to file periodic reports with the SEC under Section 15(d) of the Exchange Act.<sup>7</sup> Notably, this may include entities that have established a certain level of American Depositary Receipt, or ADR, program. “Domestic concern” means any individual who is a citizen, national, or resident of the United States,

and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States or is organized under the laws of a state of the United States or a territory, possession, or commonwealth of the United States.<sup>8</sup>

Issuers and domestic concerns, along with their officers, directors, employees and agents, and shareholders acting on behalf of an issuer or domestic concern, are prohibited from using “the mails or any other instrumentality of interstate commerce corruptly in furtherance of” an offer or an actual payment to any foreign official.<sup>9</sup> “Interstate commerce” is defined by the FCPA as “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof.”<sup>10</sup> Notably, in today’s “connected” world, the FCPA expressly states that interstate commerce “includes the intrastate use of . . . a telephone or other interstate means of communication,” and the jurisdictional trigger of interstate commerce has been expansively interpreted as to be satisfied by electronic communications, such as phone calls, facsimiles, e-mails and text messages that travel through or are otherwise located in computers and networks in the United States. The *Resource Guide to the U.S. Foreign Corrupt Practices Act* published by the DOJ and SEC (the *Resource Guide*, appended hereto as Appendix 4) offers the following illustrations of interstate commerce:

Placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.<sup>11</sup>

In addition, the transmission of payments to and from bank accounts located in the United States likely satisfies the interstate commerce requirement.

Significantly, issuers and domestic concerns that qualify as “United States persons” may be held liable for violating the antibribery provisions of the FCPA whether or not they took any action in the United States in furtherance of the corrupt foreign payment. Prior to the 1998 FCPA amendments, only issuers and domestic concerns could be held liable, and only if they used the U.S. mails or instrumentalities of interstate commerce in furtherance of the illicit foreign payment. The 1998 amendments expanded the FCPA’s jurisdiction to cover corrupt foreign payments outside the United States by “United States persons” without any link to interstate commerce; the FCPA amendments make it illegal for any United States person to violate the FCPA “irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of [the illegal foreign activity].”<sup>12</sup> Thus, a U.S. company or issuer can be liable for the conduct of overseas employees or agents, even if no money was transferred from the United States and no U.S. person participated in any way in the foreign bribery. The DOJ and SEC in the *Resource Guide* offer the following examples:

Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject

to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.<sup>13</sup>

Until 1998, foreign persons were not subject to the FCPA's antibribery provisions unless they were issuers or domestic concerns. The amendments, however, expanded the statute to allow for the prosecution of any (foreign) person who takes any act in furtherance of a corrupt payment while in the territory of the United States.<sup>14</sup> Thus, for example, a foreign subsidiary that causes directly, or through agents, an act in furtherance of a bribe to take place within the United States is liable under the FCPA. The 1998 amendments were passed to implement the 1997 Organization for Economic and Cooperative Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (*see* Chapter 3).

Under the third category of covered persons and entities, non-U.S. companies and their officers, directors, employees and agents have substantial exposure to anticorruption risk, regardless of whether the person is a resident or does business in the United States.<sup>15</sup> The FCPA covers foreign persons and entities who, while in the territory of the United States, corruptly make use of instrumentalities of interstate commerce or do "any act in furtherance of an illegal payment to a foreign official."<sup>16</sup> The legislative history is clear that Congress intended that "the territorial basis for jurisdiction . . . be interpreted broadly so that an extensive physical connection to the bribery act is not required."<sup>17</sup> In *United States v. Syncor Taiwan, Inc.*, the DOJ alleged that the mere e-mailing of budgets to the parent company in the United States containing line items for corrupt payments was sufficient to establish jurisdiction.<sup>18</sup>

## B. Elements

A violation of the antibribery prohibition by a person as defined above consists of five elements:

1. A payment, offer, authorization, or promise to pay money or anything of value, directly or indirectly (through a third party);
2. To (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any official of a public international organization, or (e) any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;
3. Using an instrumentality of interstate commerce (such as telephone, telex, e-mail, or the mail) by any person (whether U.S. or foreign) or an act outside the United States by a domestic concern or U.S. person, or an act in the United States by a foreign person in furtherance of the offer, payment, or promise to pay;
4. For the corrupt purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit doing any act in violation of

- his or her lawful duty, (c) securing an improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision; and
5. In order to assist the company in obtaining or retaining business for or with any person or directing business to any person.<sup>19</sup>

### C. Key Concepts

#### 1. Offers, Payments, Promises to Pay, or Authorizations of Payments

A company or person can be liable under the FCPA not only for making improper payments, but also for an offer, promise, or authorization of a corrupt payment, even if the employee or agent does not ultimately make a payment. In other words, a bribe need not actually be paid, and a corrupt act need not succeed in its purpose.

#### 2. Money or Anything of Value

The FCPA prohibits paying, offering, or promising to pay (or authorizing to pay or offer) money or making a gift of anything of value.<sup>20</sup> Although neither has the statute defined nor has any FCPA decision addressed the concept of a “thing of value,” it certainly includes cash equivalents and other forms of valuable inducements such as travel and travel-related expenses, jewelry, housing expenses, country club memberships, luxury cars, entertainment, shopping excursions for the foreign official or his or her relatives, and positions of employment for relatives. By the ordinary and natural meaning of its words, a “thing of value” is not limited to any particular form of benefit. Federal courts addressing similar domestic bribery statutes have construed the term broadly to include tangible and intangible property such as “information,”<sup>21</sup> the testimony of a witness,<sup>22</sup> loans,<sup>23</sup> promises of future employment,<sup>24</sup> a college scholarship,<sup>25</sup> medical expenses,<sup>26</sup> and sports equipment.<sup>27</sup>

In *United States v. King*, the Eighth Circuit Court of Appeals found that the planned payment of a \$1 million “kiss payment” or “closing cost” to senior Costa Rican officials and political parties to obtain land concessions on which a port development was to be built satisfied the “thing of value” requirement.<sup>28</sup> Improper payments frequently have been disguised as consultancy payments for which no services or expertise was really needed or present, or no services were in fact provided—a practice that may likely violate the FCPA’s accounting provisions (*see infra*). The DOJ and SEC recently have also scrutinized and prohibited hiring practices that awarded internships and employment positions to relatives of foreign officials who were less than qualified, on the expectation of obtaining or retaining business.

The FCPA contains no de minimis exception. Read literally, the FCPA prohibits in theory almost any kind of gift or form of entertainment, even nominal ones, assuming that all other elements are met. However, the *Resource Guide* indicates that the DOJ and SEC will not pursue items of nominal value and have “focused on small gifts and payments only when they comprise part of a systemic or longstanding course of conduct that evidences a scheme to corruptly pay for foreign officials to obtain or retain business.”<sup>29</sup> The provision or gifting of such items must also satisfy the other elements under the FCPA to be punishable. The FCPA’s antibribery provisions prohibit payments “only if the result they are intended to produce—their

quid pro quo—will assist (or is intended to assist) the payor in efforts to get or keep some business for or with ‘any person.’”<sup>30</sup> In particular, evidentiary issues and the nature of the underlying business activity may ultimately determine whether there is sufficient demonstrable linkage between any thing of value and any business obtained or advantage secured.

### 3. *Corrupt Intent*

#### a. Corruptly

To violate the FCPA’s antibribery provisions, a payment, offer, or promise to pay or making of a gift must be made corruptly.<sup>31</sup> Unlike with willfulness, *infra*, the government must prove corrupt intent as to both individuals and corporations.<sup>32</sup> Although the FCPA does not define “corruptly,” the legislative history indicates there must be an “evil motive” or purpose or intent to wrongfully influence the recipient to “misuse his official position” in order to wrongfully direct, obtain, or retain business.<sup>33</sup> The history indicates that the motive or purpose is the same as that required under 18 U.S.C. § 201(b), which addresses domestic bribery.<sup>34</sup> Courts have further held that in order for a defendant to act corruptly and act with the requisite “bad” purpose, that defendant must first know that he or she is dealing with a foreign official.<sup>35</sup>

Jury instructions further direct finders of fact as to what they should consider in their deliberations of whether defendants acted “corruptly.” In *United States v. Liebo*,<sup>36</sup> the Eighth Circuit Court of Appeals affirmed the following jury instruction definition of the term “corruptly”:

[T]he offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so. . . . [A]n act is “corruptly” done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.<sup>37</sup>

In 2007, the Fifth Circuit Court of Appeals upheld the *Liebo* jury instruction definition in *United States v. Kay (Kay III)* and further held that the prosecution must prove both that the defendant knew he was doing something generally “unlawful” and that his misconduct was willful.<sup>38</sup> Willfulness, however, does not require a defendant to have known that he was violating the specific provisions of a law, that is, the FCPA.<sup>39</sup>

In 2009 in *United States v. Bourke*, the Southern District of New York court gave the following “corruptly and willfully” instruction as part of the jury charge for a conspiracy to violate the FCPA and the Travel Act:

The third element of an FCPA bribery violation is that the defendant intended to act “corruptly” and “willfully.”

A person acts “corruptly” if he acts voluntarily and intentionally, with an improper motive of accomplishing either an unlawful result, or a lawful result by some unlawful method or means. The term

“corruptly” is intended to connote that the offer, payment, and promise was intended to influence an official to misuse his official position.

A person acts “willfully” if he acts deliberately and with the intent to do something that the law forbids, that is, with a bad purpose to disobey or disregard the law. The person need not be aware of the specific law and rule that his conduct may be violating, but he must act with the intent to do something that the law forbids.<sup>40</sup>

Bourke unsuccessfully appealed his one-count conviction, principally contending a “conscious avoidance” instruction was error.<sup>41</sup> Similarly, the jury instructions in *United States v. Green* provided that an act was done “corruptly” if it was “done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result but by some unlawful method or means. The term ‘corruptly’ in [the] FCPA is intended to connote that the offer, payment, or promise was intended to induce the recipient to misuse his or her official position.”<sup>42</sup>

#### b. Willfully

While the term “willfully” is not defined in the FCPA, the government must prove an individual acted purposefully and with knowledge he or she was doing a “bad act” under the general rules of law.<sup>43</sup> The government must prove an individual acted willfully to be held criminally liable.<sup>44</sup> However, proof of willfulness is not required to establish corporate criminal or civil liability.<sup>45</sup>

#### c. Factual Considerations

Prosecutors look at potential bribery allegations to both see whether a foreign official recipient has personally benefited or whether the target or subject giving something of value has so benefited. While there is no such requirement under the FCPA antibribery section, the DOJ understands there is much less jury appeal when a defendant has not personally benefited. In at least one FCPA opinion release the DOJ has declined to take enforcement action where a recipient has not personally benefited. Still, as to a businessperson paying foreign officials or authorizing a payment, travel, or gift, the DOJ customarily maintains that a subject or target maintained his employment, earning a good salary or a bonus, and thus personally benefited. The failure of the government to prove any personal benefit to the foreign official bribee rather than to the businessperson briber is usually a more persuasive defense argument.<sup>46</sup>

Although officers and employees routinely rebuff or deny any suggestion in interviews that they acted corruptly or with an evil motive in offering or giving money or things of value to foreign officials, a review of the relevant facts, circumstances, openness, and motivations surrounding payments or gifts to foreign officials can prove telltale and troublesome. For example, a multinational employee will have difficulty explaining or justifying a conspicuously timed substantial cash payment or expensive gift to a mid-level foreign official whom he or she has met only once or twice in his or her life. Similarly, a pharmaceutical company’s payment of a luxurious conference trip for a state-employed physician and his spouse

requires very careful and thorough analysis. That said, there are many gift, travel, lodging, and entertainment investigations involving undisputed isolated or one-off conduct and relatively small amounts of cash or gifts where lack of a corrupt intent is the most viable defense to otherwise indisputable gifts or small cash payments to local officials.

#### 4. *Directly or Indirectly*

The FCPA statute contains the explicit language “directly or indirectly,” which is meant to cover individuals and companies that use third parties to handle bribes intended to obtain or retain business. Stanford Law School’s Foreign Corrupt Practices Act Clearinghouse reports that of 239 FCPA enforcement actions filed between 1977 and 2017, 218, or 91 percent, of the schemes relied on third party intermediaries such as agents, consultants or contractors.<sup>47</sup> This high percentage is unsurprising, as many companies cannot employ salespersons to cover the globe and have outsourced functions to reduce costs and focus on core competencies, and in light of the near necessity of using local third parties to interact with foreign governments. In addition, a number of companies have designed and maintain internal accounting controls that seek to prevent illicit or unsupported payments by company employees, therefore often prompting collusion between the employee and a third party to circumvent those controls. Nevertheless, it remains remarkable how many officers and employees still believe or at least claim that the use of third parties to conduct bribery activity shields them from criminal liability.

#### 5. *Recipients*

The FCPA prohibition extends only to corrupt payments (or offers, promises to pay, or authorizations of payment) to a foreign official, foreign political party, party official, or a candidate for foreign political office, and any other person while the payer “knows” that the payment or promise to pay will be passed on to one of the above persons or party.

##### a. *Foreign Officials*

The term “foreign official” is defined under the FCPA as “any officer or employee of a foreign government or any department, agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of, any such public international organization.”<sup>48</sup> The *Resource Guide* asserts that the term covers low-ranking employees as well as high-ranking officials of governments.<sup>49</sup> This broad definition is normally considered to encompass executive branch employees, elected legislators or parliamentarians and their family members. The government need not prove the identity of a particular foreign official in its pleadings.<sup>50</sup> The FCPA has long been interpreted to preclude prosecution of foreign officials, party officials, or candidates who are recipients of bribes.<sup>51</sup>

##### (i) *“Instrumentality”*

As noted above, the FCPA defines a foreign official as “any officer or employee of a foreign government or any department, agency or instrumentality thereof.”<sup>52</sup> It

further prohibits payments to foreign officials to induce them to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.<sup>53</sup> Nowhere does the statute define “instrumentality” or provide guidance about what types of partially state-owned or state-controlled entities are foreign government “instrumentalities” such that their officers or employees are foreign officials. In 2014, the Eleventh Circuit Court of Appeals in *United States v. Esquenazi* affirmed a broad definition of “instrumentality” and upheld the longest sentence—15 years—ever imposed in an FCPA case. In 2011, two California district courts addressed the definition of “instrumentality” in adjudicating whether a state-owned or state-controlled enterprise qualified as an instrumentality under the FCPA. Each of these decisions is discussed in further detail, below.

(a) *United States v. Aguilar* (Lindsey Manufacturing Co.)

In April 2011, a Central District of California court addressed in *United States v. Aguilar* the issue of whether an officer or employee of a state-owned entity could be “a foreign official” for purposes of the FCPA liability.<sup>54</sup> The quasi-government entity at issue in *Aguilar* was the Comisión Federal de Electricidad (CFE), an electric utility company wholly owned by the Mexican government. Defendants argued that under no circumstances could a state-owned entity be a department, agency, or instrumentality of a foreign government, emphasizing that despite an amendment in 1998, Congress did not define foreign officials to include persons of state-owned or state-controlled entities. Judge A. Howard Matz denied the defendants’ motion to dismiss, finding that a state-owned corporation having the attributes of the CFE can be an “instrumentality” of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation may therefore be “foreign officials” within the meaning of the statute.<sup>55</sup>

Recognizing that “instrumentality” is not defined in the FCPA, Judge Matz pointed out five characteristics of government agencies and departments that fall within the following common dictionary definitions of “instrumentality”:

[T]he ordinary meaning of instrumentality is “the quality or state of being instrumental,” which, in turn, means “serving as a means or agency; implemental,” or “of, relating to, or done with an instrument or tool.” Webster’s II New College Dictionary (Webster’s II) 589 (3d ed. 2005). See also American Heritage Dictionary 908 (4th ed. 2000) (defining instrumentality as “[a] means; an agency,” or “[a] subsidiary branch, as of a government, by means of which functions or policies are carried out”); Black’s Law Dictionary 870 (9th ed. 2009) (defining instrumentality as “[a] thing used to achieve an end or purpose,” or “[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body”).<sup>56</sup>

The nonexhaustive list of five characteristics the district court found that support a quasi-government entity being an “instrumentality” are:

- the entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction;

- the primary officers and directors of the entity are government officials, or are appointed by them;
- the entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees, or royalties, such as entrance fees to a national park;
- the entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
- the entity is widely perceived and understood to be performing official (i.e., governmental) functions.

The district court in *Aguilar* found that CFE possessed all these characteristics and, in a possible acknowledgment of the application of local law in deciding whether an entity is indeed an instrumentality of that local jurisdiction's government, added that the Mexican Constitution recognizes that the supply of electric power is "exclusively a function of the general nation."<sup>57</sup> Still, the Court held that the FCPA's legislative history on "instrumentality" is inconclusive in that it does not demonstrate Congress intended to include or exclude all state-owned corporations within the ambit of the FCPA.<sup>58</sup> The facts in *Aguilar* surrounding the nexus of the state-owned utility to the Mexican government as well as the unique constitutional language were compelling. FCPA prosecutions alleging as instrumentalities other state-owned or state-controlled entities with a less clear connection to their governments may prove more susceptible to challenge.

(b) *United States v. Carson* (Control Components, Inc.)

In May 2011, another Central District of California court addressed the "instrumentality" issue in *United States v. Carson*, in which Judge James V. Selna ruled that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact."<sup>59</sup> Acknowledging that "a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality," the district court nonetheless held that "when a monetary investment is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality."<sup>60</sup> Judge Selna stated that several factors "bear on the question of whether a business entity constitutes a government instrumentality," including

- the foreign state's characterization of the entity and its employees;
- the foreign state's degree of control over the entity;
- the purpose of the entity's activities;
- the entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- the circumstances surrounding the entity's creation; and
- the foreign state's extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).

The district court in *Carson* stated that "[s]uch factors are not exclusive, and no single factor is dispositive," explaining that the "chief utility" of the factors "is

simply to point out that several types of evidence are relevant when determining whether a state-owned company constitutes an ‘instrumentality’ under the FCPA—with state ownership only one of several considerations.’<sup>61</sup>

(c) *United States v. Esquenazi*

In *United States v. Esquenazi (Haiti Teleco)*,<sup>62</sup> the Eleventh Circuit Court of Appeals reviewed the definition of “instrumentality,” which the appellants argued was overbroad in the district court’s jury instruction. Appellants Esquenazi and Rodriguez co-owned Terra Communications Comp (Terra), a Florida reseller that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Telecommunications D’Haiti S.A.M. (Teleco) was a major vendor of Terra and was owned by the Haitian government. Teleco was given a government monopoly on telecommunications services at the time of its formation in 1968. It became 97 percent owned by the National Bank of Haiti in the 1970s. The country’s President appointed all of its board members. A 2001 Haitian anticorruption law listed Teleco as a public administration of the government. During the Internal Revenue Service’s investigations of the case, Esquenazi admitted that he bribed Teleco’s director of international relations and other Teleco officials.

In determining whether an entity is an “instrumentality” under the FCPA, the Eleventh Circuit in 2014 provided a non-exhaustive list of nine factors to consider. First, in determining whether the government “controls” the entity, courts and juries should look at the following five factors:

- the foreign government’s formal designation of that entity;
- whether the foreign government has a majority interest in the entity;
- the foreign government’s ability to hire and fire the entity’s principals;
- the extent to which the government profits from or subsidizes the entity; and
- the length of time that these indicia have existed.

Second, courts and juries should assess whether “the entity performs a function the government treats as its own” by examining the following four factors:

- whether the entity has a monopoly over the function it exists to carry out;
- whether the government subsidizes the costs associated with the entity providing services;
- whether the entity provides services to the public at large; and
- whether the public and government generally perceive the entity to be performing a governmental function.

The Eleventh Circuit observed that “it will be relatively easy to decide what functions a government treats as its own” by considering objective factors, including control, exclusivity, governmental authority to hire and fire, subsidization, and whether an entity’s finances are treated as part of the public fisc. The Court determined that Teleco was an “instrumentality” of Haiti, noting that throughout the years that the defendants were involved with Teleco, it was 97 percent owned by the government; the company’s director general was chosen by the Haitian president with the consent of the prime minister and the ministers of public works and finance; and the Haitian president appointed all of its board members. *Esquenazi*

is the first appellate decision to interpret “instrumentality” under the FCPA and essentially buttressed the decisions in *Aguilar* and *Carson*, broadly interpreting “instrumentality.” The test remains highly contextual, and an instrumentality owned by a government with 50 percent or less interest and involving less government oversight and control will likely present a more challenging legal test and, perhaps, lead to a different result.

(d) *Resource Guide* Instrumentality Factors

Courts are not alone in employing multifactor tests. In the *Resource Guide*, the DOJ and SEC cited the factors outlined in *Esquenazi*, *Aguilar*, and *Carson*, and added that they have long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.<sup>63</sup> The *Resource Guide* does clarify that “as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.”<sup>64</sup> But citing the example of *Alcatel-Lucent*, the *Resource Guide* cautions that under certain circumstances—there a minority (43 percent) government shareholder that may exercise veto power over all major expenditures, enjoys “special shareholder” status, and controls operational decisions—the DOJ and SEC may still bring an action.<sup>65</sup>

(e) Foreign Sovereign Immunities Act Precedent

Another foreign conduct-directed statute and the U.S. anti-boycott regulations give some guidance on the likely breadth of the term “instrumentality.” First, the Foreign Sovereign Immunities Act of 1976,<sup>66</sup> enacted one year before the FCPA, defines “an agency or instrumentality of a foreign state” as an entity that is “a separate legal person or otherwise,” and “which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign or political subdivision thereof.”<sup>67</sup>

Second, under the U.S. anti-boycott regulations, an SOE will be presumed governmental if:

- the foreign government entity owns or controls, directly or indirectly, more than 50 percent of the voting rights;
- the foreign government owns or controls 25 percent or more of the voting securities, and no other entity or person owns or controls an equal or larger percentage;
- a majority of members of the board are also members of the governing body of the government department;
- the foreign government has the authority to appoint the majority of the members of the board; or
- the foreign government has the authority to appoint the chief operating officer.

An entity majority-owned or controlled by a foreign government will very likely be considered an “instrumentality” for FCPA purposes.<sup>68</sup> The most relevant factor in determining whether a company, partnership, or joint venture is an instrumentality remains whether a foreign government exercises “effective control” over it.<sup>69</sup>

(ii) *State-Owned or State-Controlled Entity as an Instrumentality*

As shown by the decisions noted above, many FCPA resolutions and the *Resource Guide*, the term “foreign official” also encompasses employees of state-owned or state-controlled enterprises and officials of quasi-governmental entities, which generally are deemed to be “instrumentalities” of the foreign government. State-owned or state-controlled enterprises may be more prevalent in emerging economies, in Communist countries (e.g., China), and in certain industries. As the *Resource Guide* points out, many foreign governments operate through state-owned or state-controlled entities, especially in industries like aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.<sup>70</sup> For example, it is currently estimated that 75 percent of all oil and gas reserves in the world are owned in whole or in part by state-owned entities. Further, some foreign governments have invested in minority interests in foreign ventures, muddling the instrumentality issue, while other governments are investing in second- or third-tier state-owned subsidiaries.

Multinational companies thus often conduct business with foreign government partners, for example, joint ventures doing business with SOEs including oil, steel, telecommunication, and transportation companies.<sup>71</sup> This interaction presents anticorruption risks, as demonstrated by the cases summarized above and other resolutions. In the decisions in *United States v. Aguilar* and *United States v. Esquenazi*, the courts held that employees of the state-owned electrical utility in Mexico and the state-owned telecommunications company of Haiti have been charged as *foreign officials* in FCPA cases. The *Resource Guide* acknowledges that whether an entity or organization is a government “instrumentality” depends on a “fact-specific analysis of the entity’s ownership, control, status, and function.”<sup>72</sup> By way of further examples, the U.S. government charged Dow Chemical with making payments to a key member of a committee in India that determined when certain chemical products would receive government registrations;<sup>73</sup> it charged Monsanto with improper payments to 140 current and former Indonesian government officials and their families under a bogus product registration scheme in Indonesia;<sup>74</sup> and it charged Schnitzer Steel with making payments to a scrap metal manager of a state-owned enterprise in Asia.<sup>75</sup>

(iii) *Sovereign Wealth Funds*

A sovereign wealth fund (SWF) is a state-owned investment fund that holds financial assets such as stocks, bonds, property, precious metals, or other financial instruments. The original SWF is the Kuwait Investment Fund, an entity created in 1953 from vast oil revenues. Major SWFs include the Abu Dhabi Investment Authority, Government Pension Fund of Norway, Government of Singapore Investment Corporation, Kuwait Investment Authority, China Investment Corporation, Singapore’s Temasek Holdings, and Qatar Investment Authority. For FCPA purposes, investment goals, internal checks and balances, due diligence of placement agents, and disclosure of relationships raise issues for SWFs.

The SEC has looked into whether financial institutions, including banks, private equity firms, and hedge funds, violated the FCPA in seeking investments from and partnering or otherwise conducting business with SWFs. Possible issues

include whether these financial institutions have “made (or promised) payments or conferred other benefits, including travel or entertainment, in connection with efforts to transact business with SWFs or foreign, state-owned pension funds.”<sup>76</sup> The DOJ and SEC no doubt broadly view the latter as government “instrumentalities” and their employees as “foreign officials” for purposes of the FCPA. Payments or in-kind benefits, such as travel and lodging not directly related to the promotion of products or services or the execution of contracts, made corruptly to SWF or pension fund employees are prohibited. Equally important, payments to placement agents, consultants, or third parties, while knowing or disregarding that the payee will pass monies to a foreign official to secure access to benefits such as an investment or asset purchase for the SWF, are prohibited.<sup>77</sup> Finally, allowing a state-owned entity’s employee or related party to co-invest could be considered an illicit benefit to the employee.<sup>78</sup>

The September 2016 *Och-Ziff* resolution illustrates the significant anticorruption and other compliance risks for hedge funds and members of the investment and asset management industry in dealing with sovereign wealth funds. Och-Ziff Capital Management Group LLC, a hedge fund based in New York, agreed to among other things pay the DOJ and SEC \$412,000,000, and its CEO agreed to pay approximately \$2,200,000, to settle criminal and civil FCPA violations arising out of improper payments made to foreign officials of several African nations, including Chad, the Democratic Republic of the Congo, Guinea, Libya and Niger. Among other things, Och-Ziff used a third-party agent to make payments to two senior officials at the Libyan Investment Authority (“LIA”), a sovereign wealth fund established to manage the country’s oil and other assets, to obtain the LIA’s investment of \$300,000,000 into Och-Ziff funds in 2007 as well as additional investments in subsequent years. The background due diligence conducted by Och-Ziff on the agent and the circumstances attendant to their business dealings represented clear red flags of potential bribery conduct. Nevertheless, Och-Ziff paid millions of dollars to the agent through a network of shell companies, expenses that were inaccurately described in Och-Ziff’s books and records as “Professional Services—Other.” See *United States v. Och-Ziff Capital Management Group LLC*, in Chapter 10.

The FCPA bribery provision only prohibits the payment for giving of things of value to foreign officials, not to foreign governments.<sup>79</sup> Thus, in the numerous UN Oil-for-Food program prosecutions involving kickbacks to the Iraqi government by publicly traded companies, the DOJ charged books-and-records violations and not bribery conduct. (See Chapter 10.) This distinction may have particular relevance to the operation of corporate social responsibility programs. However, donating funds or providing other things of value to a foreign government or state-owned or state-controlled enterprise at the request of and benefit to a foreign official may violate the FCPA’s antibribery provisions.

#### b. Public International Organization Officials

The 1998 amendments to the FCPA added “public international organization officials” to the definition of “foreign official.” A “public international organization” is defined as “(1) an organization that is designated by Executive Order pursuant to section 288 of title 22; or (2) any other international organization that is designated

by the President by Executive Order for the purposes of this section.”<sup>80</sup> Examples include the World Bank, the International Monetary Fund, the World Trade Organization, the Organization for Economic Cooperation and Development, the Organization of American States (OAS), the Red Cross, and the African Union.<sup>81</sup> A list of those organizations designated as “public international; organizations” is available online and published in the Federal Register.

In 2015, defendant Dmitrij Harder moved to dismiss his indictment for allegedly bribing a senior banker at the European Bank for Reconstruction and Development (“EBRD”), a London-based financier of European development projects which had been designated as a public international organization by the President of the United States. Noting that the FCPA “contemplates that a ‘foreign official’ includes ‘any officer or employee of . . . a public international organization,’”<sup>82</sup> the Eastern District of Pennsylvania court held that “[p]lainly, the FCPA thus proscribes unlawful conduct in connection with a public international organization—itsself an association of foreign governments,” and that “whether EBRD falls within the FCPA’s ambit is necessarily a ‘fact-bound question[]’ properly decided by a jury.”<sup>82</sup>

c. Foreign Political Parties, Political Party Officials, and Candidates for Foreign Office

The FCPA prohibits an illicit offer and payment not only to a foreign official but also to a foreign political party, an official of a foreign political party, or a candidate for foreign office.<sup>83</sup> A potential problem can arise when a U.S. person’s foreign agent or partner makes political campaign contributions to persons in the country where a multinational company is doing business. The multinational company should consider instituting a policy that prohibits its foreign agents, partners, or consultants from making any political contributions whatsoever for or on behalf of their venture or relating in any way to a venture. Absent a blanket corporate prohibition, proposed foreign political contributions by an agent, consultant, or employee should be reviewed in advance on a formal, case-by-case basis by a company’s legal department or outside counsel. Any such review should also ascertain compliance with local laws, which may broadly prohibit donations of money to political parties, officials thereof, and candidates for political office, especially by non-resident businesses and individuals.

d. Royal Family Members

Royal family members can present complex facts and determinations as to whether they constitute foreign officials for purposes of the FCPA; the problems often arise when they are asked to serve as local sponsors. In some countries and situations, royal family members wield enormous influence over government contracts and awards. In other countries and cases, royal family members are members only through custom and tradition, and have no real privileges, benefits, or influence. Royal family member “foreign official” and local sponsorship analyses tend to be very fact intensive and, typically, no single factor is dispositive.

In 2012, the DOJ received an FCPA opinion request relating to a consultancy that had three partners, one of whom was a royal family member in an unidentified foreign country. The requestor, a partnership engaged in lobbying activities,

sought guidance as to whether, under the facts presented, the consultancy's partner qualified as a foreign official under the FCPA.<sup>84</sup> The requestor wished to represent the embassy of the foreign country to the United States and the foreign country's foreign ministry in its lobbying activities in the United States. To facilitate this representation, the requestor further wished to contract with a third-party consulting company to introduce the requestor to the foreign country embassy, to advise on cultural awareness issues in dealing with the foreign country's officials and businesses, to act as a local sponsor in the foreign country, to help establish an office in the foreign country, and to identify additional business opportunities in the foreign country.

In finding that the proffered facts did not qualify the royal family member as a "foreign official" under the FCPA, DOJ FCPA Opinion Release 12-02 commented:

A person's mere membership in the royal family of the Foreign Country, by itself, does not automatically qualify that person as a "foreign official." Rather, the question requires a fact-intensive, case-by-case determination that will turn on, among other things, the structure and distribution of power within a country's government; a royal family's current and historical legal status and powers; the individual's position within the royal family; an individual's present and past positions within the government; the mechanisms by which an individual could come to hold a position with governmental authority or responsibilities (such as, for example, royal succession); the likelihood that an individual would come to hold such a position; an individual's ability, directly or indirectly, to affect governmental decision-making; and numerous other factors.<sup>85</sup>

In declining to take enforcement action, the DOJ also considered the careful steps that the requestor and the consultancy took to comply with the FCPA and other antibribery laws. This opinion and its prophylactic measures should be considered by multinational companies wishing to engage royal family members as local sponsors—along with a thorough analysis of the royal family member's actual power, benefits, and privileges; the transparency of the relationship; and the particular compensation arrangement.

## 6. *Business Purpose Test*

The FCPA prohibits payments, offers, or promises to pay made in order to assist a company in obtaining or retaining business for or with, or directing business to, any person. Business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality. As a result of the 1998 amendments, the FCPA also prohibits payments to foreign officials for the purpose of "securing any improper advantage." Although it remains unclear what conduct falls within the scope of this language, it certainly can include payments to foreign customs and tax officials.

The leading FCPA business purpose decision is *United States v. Kay*<sup>86</sup> (*Kay II*), in which the Fifth Circuit reversed a district court dismissal of an indictment that

charged a businessman with bribing a Haitian official to understate customs duties and sales taxes on rice shipped to Haiti, in order to assist American Rice, Inc., in obtaining or retaining business. The district court had ruled that as a matter of law, illicit payments to foreign officials to avoid portions of customs duties and sales taxes were not the type of bribes that the FCPA criminalizes. On appeal, the Fifth Circuit held that such bribes could (but do not necessarily) come within the ambit of the FCPA, but “[i]t still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would assist in obtaining or retaining business.”<sup>87</sup> In other words, bribes need not, in order to obtain or retain business, be direct payments to foreign officials to win contracts.<sup>88</sup> Local bribes to tax or customs officials that enable companies to compete with other companies can satisfy the “retain business” language of the FCPA and similarly run afoul of the statute’s books-and-records provisions for public companies.

a. Government Business and Contract Cases

Most multinational companies and their general counsel are well aware of the Telia, VimpelCom, Siemens, Daimler, and KBR FCPA prosecutions involving multimillion-dollar bribes to secure foreign government or state-owned enterprise (SOE) contracts or business. Some multinational management, legal departments, and compliance departments mistakenly assume that the FCPA essentially applies to bribes of foreign officials to procure contracts with a foreign government or SOE. To be sure, many FCPA prosecutions and enforcement actions do involve substantial bribes to obtain government goods and services contracts, such as the following examples: bribes to obtain state-owned oil company contracts (*see United States v. Braskem*);<sup>89</sup> bribes to obtain multibillion-dollar engineering, procurement, and construction contracts in Nigeria (*see United States v. Marubeni*); bribes to obtain insurance contracts related to large government projects in Indonesia (*see In re Allianz SE*); and bribes to foreign officials to purchase products for state-owned hospitals in Mexico (*see United States v. Orthofix International N.V.*). But as *Kay* holds, cases involving less than a direct linkage between an improper payment and the award of business by the recipient foreign official can make multinational companies and their employees equally liable under the FCPA.

b. Retention of Business Cases

Many multinationals fail to focus on *Kay*’s broad interpretation of the FCPA’s business purpose test and do not evaluate their risks in obtaining or retaining business in noncontract contexts. The *Resource Guide*’s examples of improper actions taken to obtain or retain business include overlooking rules for importation of products; gaining access to nonpublic tender business information; evading taxes or penalties; influencing the adjudication of lawsuits or enforcement actions; obtaining exceptions to regulations; and avoiding contract termination.<sup>90</sup> Numerous and perhaps less sensational FCPA matters have involved improper payments to foreign officials for purposes other than securing a contract. The statutory language expressly prohibits payments to foreign officials with the intention of: (1) influencing an act or decision by that official in his or her official capacity; (2) inducing that foreign official to do or omit to do any act in violation of his or her lawful duty;

(3) securing any improper advantage; or (4) inducing the foreign official to use his or her influence to affect or influence any act or decision, in order to assist the payor in obtaining or retaining business, or directing business to any person. This language accordingly has been used to prosecute corporations and individuals who have paid foreign officials to keep food inspectors from disrupting operations of a meat-production facility (see *United States v. Tyson Foods Inc.*), to influence approval and registration of products (see *United States v. Pfizer H.C.P. Corp.*), to improve production quotas and brew beer after hours (see *In re Anheuser Busch InBev*); to avoid tax investigations (see *United States v. Alliance One International Inc.*), to improve product placement (see *In re Diageo PLC*), to obtain a permit for a chocolate factory (see *SEC v. Mondelez*), and to influence the transfer of 3G frequencies for a telecom giant (see *United States v. Vimpelcom*).

### c. Import-Export Operations

An area susceptible to improper payments to foreign officials and false books-and-records abuses, yet perhaps less carefully monitored than direct sales activities, is a multinational's import and export operations. International trade expert John F. McKenzie has thoughtfully identified seven areas where FCPA compliance risk and problems are most likely to be encountered in connection with import/export operations:

1. avoidance of customs duties and import taxes—especially in a number of emerging countries that impose high customs duties and import taxes on imported merchandise;
2. under invoicing schemes whereby foreign customers ask United States suppliers to understate a declared value for local customs purposes;
3. avoidance of import regulatory requirements and restrictions including import licensing requirements, product certification and detailed technical data filing requirements, and product testing and inspection requirements;
4. offshore payments to third-party intermediaries including customs brokers, import/export agents, and trade consultants who may provide bona fide services, or be a vehicle to avoid dealing directly with wayward local officials;
5. hospitality and gifts for foreign customs and import regulatory officials;
6. export compliance with respect to the export of defense articles under the International Traffic in Arms Regulations (ITAR); and
7. merger and acquisition transactions and the failure to engage international trade professionals in the FCPA compliance pre- and post-acquisition due diligence.<sup>91</sup>

As Mr. McKenzie warns, each of these areas presents not only potential bribery challenges but false books-and-records issues for issuers and their officers, employees, and agents.

The *Resource Guide* highlights multinational companies' anticorruption risks with customs officials by citing the Panalpina investigation, in which oil services companies bribed customs officials in more than ten countries for benefits including

- evading customs duties on imported goods;
- improperly expediting the importation of goods and services;

- extending drilling contracts and lowering tax assessments;
- obtaining false documentation related to temporary import permits for drilling rigs; and
- enabling the release of drilling rigs and other equipment from customs officials.<sup>92</sup>

Multinational companies are wise to thoroughly and regularly examine their direct or indirect foreign government touchpoints, and their use of agents, brokers and third-party intermediaries, in the import/export area.

### 7. *Knowledge—Actual and Constructive*

The FCPA allows for, but does not require proof of, actual knowledge that a payment to or promise to pay an intermediary will be passed on to a foreign official. Instead, a person or entity may be deemed to have violated the FCPA's antibribery provisions on the basis of constructive knowledge. Unlike the terms "corruptly" and "willfully," the FCPA defines the knowledge requirement, stating:

- (2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
  - (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.<sup>93</sup>

When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.<sup>94</sup> The statute does not require the government to prove that the defendant knew the FCPA existed or appreciated his or her conduct violated the FCPA.<sup>95</sup> Moreover, courts in two civil cases have held that a defendant utilizing an intermediary need not know the identity of the foreign official involved.<sup>96</sup>

The FCPA's legislative history speaks of "willful blindness," "deliberate ignorance," and taking a "head in the sand" attitude as constituting knowledge under the statute. The *Resource Guide* cited the following legislative history in addressing this statute's unique knowledge standard:

[T]he so-called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.<sup>97</sup>

Individuals or corporations who consciously disregard or deliberately ignore known circumstances that should have put them on notice of an improper payment may be prosecuted for "knowing" that a payment would be passed on to a foreign official.

A company may be liable for a payment by an agent or third-party intermediary if the company authorized such payment or if it “knew” the improper payment would be made. Many companies regularly employ or contract with third parties, such as sales or marketing agents, consultants, joint venture partners, consortium partners, freight forwarders, customs agents, brokers, law firms, accountants, distributors, and resellers. These relationships can greatly increase FCPA risks, which usually arise in one of two ways: (1) a third party makes improper payments to foreign officials, or (2) a third party is owned by or affiliated with a foreign official.<sup>98</sup> Because a company may be deemed to have knowledge of an offer, promise to pay, or payment if it is aware of red flags indicating a “high probability” that such an offer, promise, or payment will be made, companies and individuals subject to the FCPA must undertake significant steps to minimize the risk of becoming liable due to actions by their agents, brokers, consultants, distributors, subcontractors or other third parties. Indeed, third-party misconduct represents the most common violation of the FCPA.

#### 8. Authorization

The FCPA prohibits the “authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value”<sup>99</sup> to foreign officials for improper purposes. The statute does not define “authorization,” but the legislative history makes clear that authorization can be either implicit or explicit. Authorization issues frequently arise when U.S. companies fund overseas operations, approve budgets, and take similar actions with respect to foreign subsidiaries or joint ventures. In suspicious circumstances, U.S. directors and managers should disavow any possible improper payments and take affirmative steps to avoid even the appearance of acquiescence or approval.<sup>100</sup>

#### 9. Permissible Payments and Affirmative Defenses

##### a. Facilitating-Payment Exception for Routine Governmental Actions

As a result of the 1998 amendments, the FCPA provides an exception for so-called “facilitating,” “expediting,” or “grease” payments to low-level foreign officials who perform “routine governmental actions.”<sup>101</sup> The purpose of this limited exception is to avoid FCPA liability when small sums are paid to facilitate certain routine, nondiscretionary government functions such as the processing of permits, licenses, visas, work orders, or other official documents; providing police protection, power and water supply, cargo handling, or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across the country.<sup>102</sup> “Routine governmental actions” do not include decisions by foreign officials to award new business or to continue business with a particular party.<sup>103</sup>

The *Resource Guide* points out that a routine government action does not include acts that are within an official’s discretion or that would constitute misuse of an office—offering as an example that paying an official a small amount to have the power turned on at a factory is a facilitating payment while paying an inspector to allow a company without a permit to operate is not.<sup>104</sup> The DOJ–SEC guidance cautions that this exception focuses on the *purpose* of a payment rather than its *value*, but concedes that the size of a payment can be telling as “a large payment is

more suggestive of corrupt intent to influence a non-governmental action.”<sup>105</sup> The *Resource Guide* also warns that “labeling a bribe as a ‘facilitating payment’” in a company’s books and records does not make it so.<sup>106</sup>

While the FCPA exempts facilitating payments, the bribery laws of many foreign countries do not. For example, the U.K. Bribery Act prohibits facilitation payments, with the U.K. Serious Fraud Office deeming facilitation payments as a type of bribe. Some multinational companies have decided as a matter of policy to ban all facilitating payments in order to comply with conflicting treatment of facilitation payments by the laws of various jurisdictions. As these laws conflict, and in light of the risk that employees may misconstrue, uninformed or wishfully, the scope of the limited exception for facilitation payments under the FCPA, it is generally wiser for a multinational company to adopt the more demanding standard.

#### b. Affirmative Defenses

The 1998 FCPA amendments incorporated two affirmative defenses to the anti-bribery provisions. First, the FCPA provides an affirmative defense where the payment, gift, offer, or promise of anything of value at issue was permitted by the written laws of the foreign official’s or political candidate’s country.<sup>107</sup> Second, an affirmative defense exists where a payment, gift, offer, or promise of anything of value was for “reasonable and bona fide” expenditures related to the execution or performance of a contract with a foreign government or agency thereof, or the promotion, demonstration, or explanation of products or services.<sup>108</sup> For each of these affirmative defenses, the company or its officers or employees bears the burden of establishing in the first instance facts underlying the defense.

##### (i) *Written Laws of Foreign Country*

A person or entity charged with an antibribery violation may assert as an affirmative defense that the payment was lawful under the written laws and regulations of the foreign country. Expatriates frequently assert that bribery is permitted and recognized in the host or work country. However, contrary to practices, a country’s written laws rarely, if ever, expressly permit bribery, and absent a written law or regulation, this affirmative defense fails. Further, in legislating this defense in 1988, Congress sought “to make clear that the absence of written law in a foreign officials country would not by itself be sufficient to satisfy this defense.”<sup>109</sup>

The issue of what constitutes a payment permissible under the laws of a country to a commercial agent or foreign official can, in select circumstances, be a matter of significant debate. Although no country has “written laws” permitting bribery, it can be far less clear whether a payment to a foreign official who can, under local law, undertake commercial activities constitutes a permissible payment under the FCPA. Similarly, a significant political contribution that is legal under foreign law may make a payment to a foreign political party candidate or official permissible. However, if an individual makes a foreign political contribution with a corrupt intent, for example, to obtain or retain business, the mere fact that a sizable political contribution is lawful in the foreign country will not negate an offense under U.S. law. In *United States v. Kozeny*, the defense argued that an exception under Azeri law that permitted voluntary disclosure absolved bribe payors who voluntarily

reported bribe payments; the district court rejected the argument that this narrow exception somehow made the underlying bribery legal in Azerbaijan.<sup>110</sup> The transparent nature of a particular transaction or payment will in many cases determine whether the DOJ prosecutes or the SEC files an enforcement action.

(ii) *Reasonable and Bona Fide Expenditures*

An affirmative defense to an antibribery violation also exists where a payment, offer, or promise of anything of value was a reasonable and bona fide expenditure, such as travel and lodging expenses incurred by or on behalf of a foreign official, party official, or candidate, and was directly related to the promotion, demonstration, or explanation of products or services; or the execution or performance of a contract with a foreign government or agency. Thus, a company may pay the reasonable, necessary, and bona fide expenses of foreign officials who are transported to a corporate location to inspect equipment or facilities in connection with a potential sale of the equipment or facilities. Similarly, a company may cover the reasonable and bona fide expenditures involved in bringing foreign officials to review and/or approve contractual work (e.g., fabrication of equipment at other locations). A side trip to a luxury resort en route to a corporate location, the payment for the travel of a foreign official's spouse and children, or funding of entertainment such as gambling, will generally not be found reasonable, necessary, or bona fide.

The reasonable expenses affirmative defense does not give companies carte blanche to pay travel expenses for foreign officials. In a 1999 civil enforcement action, the DOJ took the position that a U.S. company, Metcalf & Eddy, Inc., violated the FCPA by providing an Egyptian official and his family with first-class air travel to the United States and with food, lodging, and other expenses because the purpose of the visit allegedly was to influence the official to use his authority to help direct a U.S. Agency for International Development contract award to Metcalf & Eddy. The DOJ alleged, among other things, that the Egyptian official received 150 percent of the estimated per diem expenses in a lump-sum payment and then was not required to pay for any of his expenses while in the United States. Metcalf & Eddy settled the case with a consent decree, without admitting or denying culpability, and agreed to pay a \$400,000 civil fine as well as \$50,000 to reimburse the U.S. government for the cost of the investigation.<sup>111</sup>

Counsel for companies considering the payment of travel expenses for foreign officials should scrutinize the proposed travel carefully to ensure that it falls within the confines of this affirmative defense including, for example, that it is directly related to the explanation, promotion, and demonstration of a product or service, and is not a disguised attempt to provide compensation for help in securing business. Some companies compare the proposed government travel expense to their own employee travel reimbursement policies and approve only foreign official travel expenses that are consistent with employee travel reimbursement policies.

The *Resource Guide* states perhaps the obvious: the analysis of whether a particular payment is a bona fide expenditure is fact-specific.<sup>112</sup> It offers the following list of safeguards that are helpful in evaluating whether a particular expense is appropriate or more likely problematic under this statute. The *Resource Guide* summarizes that where certain expenditures are more likely to raise red flags, they will not give rise to prosecution if they are

- reasonable,
- bona fide, and
- directly related to
- the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.<sup>113</sup>

Gifts, travel, lodging and entertainment risks, scenarios, and precautions are covered in detail in Chapter 6.

#### D. Parent-Subsidiary Liability

The *Resource Guide* offers two ways a parent company may be liable under the FCPA's antibribery provisions for bribes paid by a subsidiary: (1) direct liability arising out of sufficient parent activity in the bribery activity; and (2) agency liability where under circumstances of sufficient control, a subsidiary's action and knowledge are imputed to the parent.<sup>114</sup> Under direct liability, a parent company whose officers knowingly funded bribery payments for a subsidiary can be held criminally liable. The *Resource Guide* points out as to agency, its fundamental characteristic is control,<sup>115</sup> and that the DOJ and SEC will "evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction, when evaluating whether a subsidiary is an agent of the parent."<sup>116</sup>

#### E. Commercial Bribery

The FCPA antibribery provisions do not govern or prohibit bribes paid to officers or employees of wholly private, nongovernmental entities. These provisions apply only to improper payments made, directly or indirectly, to a foreign official, political party or official thereof, or political candidate in order to obtain or retain business or to direct business to any business or to secure an improper advantage.<sup>117</sup> However, commercial bribery payments that are mischaracterized or undercharacterized on the books and records of a public company may constitute FCPA books-and-records or internal controls violations. In addition, the DOJ has charged private improper payments or kickbacks along with foreign official bribes in FCPA cases<sup>118</sup> under the general conspiracy statute<sup>119</sup> and the Travel Act.<sup>120</sup> The DOJ has also required in some deferred prosecution agreements (DPAs) that the company not engage in acts of commercial bribery. Other countries, such as the United Kingdom, have enacted legislation that prohibits both public- and private-sector bribery.<sup>121</sup>

### III. RECORD-KEEPING AND INTERNAL CONTROLS

In addition to the antibribery provisions, the FCPA imposes record-keeping and internal controls requirements on issuers (though not on domestic concerns or other United States persons that do not qualify as issuers). Essentially, these requirements mandate that publicly traded companies keep accurate books and records and sound systems of internal controls. Neither the record-keeping nor

the internal controls provisions limit themselves to transactions above a certain amount or impose a materiality requirement. In the civil context, the accounting provisions impose essentially strict liability on issuers, and do not require the showing of knowledge by an issuer to sustain a civil violation of the FCPA's accounting provisions. Persons who are not issuers must have "knowingly" circumvented or failed to implement a system of accounting controls in order to violate the FCPA's accounting provisions.

The FCPA accounting provisions are primarily enforced civilly by the SEC.<sup>122</sup> The SEC can bring civil accounting provision enforcement actions for which the burden of proof is only preponderance of the evidence and there is no scienter requirement. However, the DOJ can bring, and in select cases has brought, criminal charges of knowing circumvention of internal controls as well as knowing falsification of books, records, and accounts.<sup>123</sup> As with the antibribery provisions, individuals are subject to criminal liability only for willful accounting violations.<sup>124</sup> While the DOJ has exclusive jurisdiction to prosecute criminal violations of the FCPA, both the DOJ and the SEC may obtain injunctive relief to prevent bribery and record-keeping violations of the Act.<sup>125</sup> The DOJ and SEC frequently resort to the accounting provisions when they cannot sustain all the elements of bribery against a public company.<sup>126</sup>

The rationale behind the books-and-records and internal controls provisions being complementary to the antibribery provisions was explained by Stanley Sporkin, the former federal judge and SEC general counsel who played a major role in drafting the FCPA legislation in the late 1970s. According to Judge Sporkin, the SEC proposed the record-keeping and financial control provisions because investigations had revealed that multinational companies that paid bribes overseas never accurately recorded the illicit transactions on their books. Instead, he had found companies had concealed the bribes by falsely describing the payments as other transactions. Judge Sporkin theorized that "requiring the disclosure of all bribes paid would, in effect, foreclose that activity."<sup>127</sup>

## A. Application

The record-keeping and internal controls provisions of the FCPA apply to issuers, those companies whose securities are registered with the SEC, or those who are required to file reports with the SEC, pursuant to the Securities Exchange Act of 1934, regardless of whether they have any foreign operations.<sup>128</sup>

## B. Record-Keeping Provisions

### 1. "Records"

The FCPA requires every issuer to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets."<sup>129</sup> The Act broadly defines "records" to include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type."<sup>130</sup> "Reasonable detail" means such level of detail as would satisfy prudent officials in the conduct of their own affairs.<sup>131</sup> Congress noted when it adopted this version that "the concept of reasonableness of

necessity contemplates the weighing of a number of factors, including the costs of compliance.<sup>132</sup> There is no materiality requirement for a books-and-records violation.<sup>133</sup> An individual or entity may be found criminally liable only if he knowingly falsifies a book, record, or account,<sup>134</sup> and inadvertent mistakes will not give rise to enforcement actions or prosecutions.<sup>135</sup>

In *United States v. Jensen*,<sup>136</sup> the District Court for the Northern District of California rejected a defendant's argument that the "books and records" statute was too vague and did not give a person of ordinary intelligence fair notice of what is proscribed. The defendant, a corporate human-resources director, had falsified minutes of a committee meeting during which stock option grants had been discussed. In dismissing the "void for vagueness" argument as applied to these facts, the district court ruled that "helping to create false committee meeting minutes that have the effect of understating corporate expenses constitutes the falsification of a record that 'reflects the transactions and dispositions of the assets of the issuer.'"<sup>137</sup>

Record-keeping violations, for which it is not necessary that the inaccurately recorded transactions in question be material under U.S. federal securities laws, often involve one or more of three types of offenses:

1. records that simply fail to record improper transactions at all, for example, off-the-books transactions such as bribes and kickbacks;
2. records that are falsified to disguise aspects of improper transactions otherwise recorded correctly; and
3. records that correctly set forth the quantitative aspects of transactions but fail to record the qualitative aspects of the transactions that would reveal their illegality or impropriety, such as the true purpose of particular payments to agents, distributors, or customers.<sup>138</sup>

## 2. *Examples of Transactions That Accounting Records May Fail to Adequately or Accurately Record or Disclose*

Certain transactions have been found to be inaccurately or inadequately recorded on company books and records:

- substantial payments to mid- or high-level foreign officials;
- "facilitating payments" to low-level foreign officials;
- commercial bribes or kickbacks;
- political contributions;
- charitable donations;
- smuggling activities;
- income tax violations;
- customs or currency violations; and
- extraordinary or lavish gifts.

## 3. *Bribe Mischaracterizations in Books and Records*

The DOJ-SEC *Resource Guide* lists 14 examples of how bribes have been mischaracterized on books and records:

- commissions on royalties;
- consulting fees;

- sales and marketing expenses;
- scientific incentives or studies;
- travel and entertainment expenses;
- rebates or discounts;
- after-sales service fees;
- miscellaneous expenses;
- petty cash withdrawals;
- free goods;
- intercompany accounts;
- supplier vendor payments;
- write-offs; and
- “customs intervention” payments.<sup>139</sup>

This list is not exhaustive. General counsel often ask whether a mischaracterization of one or two entries in a company’s books and records will lead to a criminal or civil charge. For both the DOJ and SEC, the decision will frequently depend on whether there was “misreporting of large bribery payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.”<sup>140</sup>

#### 4. *Foreign Subsidiaries*

The *Resource Guide* makes clear that responsibility for the FCPA’s accounting provisions extends to foreign subsidiaries and joint ventures under an issuer’s control.<sup>141</sup> Thus, an issuer can violate the books-and-records provisions if a majority-owned foreign subsidiary creates false records to conceal an illicit payment, and the issuer parent then consolidates the subsidiary’s information into its books and records. For example, in 2000 the SEC brought a books-and-records action against IBM Corp. related to “presumed illicit payments” to foreign officials by one of IBM’s wholly owned subsidiaries. The SEC alleged that IBM-Argentina paid money to a subcontractor, which payment in turn was given to certain foreign officials. The SEC charged that IBM-Argentina’s then-senior management overrode IBM’s procurement and contracting procedures and fabricated documentation to conceal the details of the subcontract. IBM-Argentina allegedly recorded the payments to the subcontractor as third-party subcontractor expenses, and IBM incorporated this information into the annual Form 10-K it filed with the SEC in 1994. Without admitting or denying the SEC’s allegations, IBM consented to the entry of a cease-and-desist order and agreed to pay a \$300,000 civil penalty.<sup>142</sup> The IBM settlement with the SEC was unusual in that it did not include an internal controls violation.

In 2010, the DOJ and SEC brought enforcement actions against RAE Systems, Inc., a California company, for violating the FCPA’s accounting provisions when two Chinese joint ventures in which RAE Systems was a partner paid over \$400,000 in bribes for it to obtain business in China.<sup>143</sup> Chinese employees of the joint venture made improper payments from “cash advances” to state-owned entity officials who recorded the payments on the books as “business fees” or “travel and entertainment” expenses. The SEC alleged that the public company failed to have adequate internal controls and failed to act on red flags indicating that its affiliates were engaged in bribery.<sup>144</sup> RAE Systems was required to disgorge \$1,150,000 and to pay \$4,700,000 in penalties.

If the issuer holds 50 percent or less of the voting power with respect to a domestic or foreign firm, then the issuer is required only to “proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with” the FCPA’s accounting provisions.<sup>145</sup> Notably, the FCPA expressly provides that an issuer which demonstrates good faith efforts to use such influence will be conclusively presumed to have complied with the FCPA’s accounting provisions.<sup>146</sup>

### C. Internal Controls

The FCPA’s internal controls provisions codify existing auditing standards<sup>147</sup> and require issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that

1. transactions are executed in accordance with management’s general or specific authorization;
2. transactions are recorded as necessary:
  - a. to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and
  - b. to maintain accountability for assets;
3. access to assets is permitted only in accordance with management’s general or specific authorization; and
4. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.<sup>148</sup>

“Reasonable assurances” means such a degree of assurance as would satisfy prudent officials in the conduct of their own affairs.<sup>149</sup>

The FCPA does not mandate “any particular kind of internal controls systems.”<sup>150</sup> Rather, the test for compliance is “whether a system, taken as a whole, reasonably meets the statute’s specified objectives.”<sup>151</sup> Because there are no specific standards by which to evaluate the sufficiency of controls, any evaluation is a highly subjective process.<sup>152</sup> Still, in conducting an FCPA controls assessment, one should evaluate among other things: (1) the industry(ies) in which the company operates; (2) the countries where the company does business, and their corruption reputations; (3) whether customers in those countries are government or state-owned or state-controlled entities; and (4) the company’s business model.<sup>153</sup>

The *Resource Guide* stresses that an effective anticorruption compliance program is a critical component of an issuer’s internal controls:

Fundamentally, the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its workforce; the degree of regulation; the extent of its government

interaction; and the degree to which it has operations in countries with a high risk of corruption. A company's compliance program should be tailored to these differences. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.<sup>154</sup>

The *Resource Guide* cited the *Daimler* case to illustrate an internal controls failure:

[T]he company used dozens of ledger accounts, known internally as “internal third party accounts,” to maintain credit balances for the benefit of government officials. The accounts were funded through several bogus pricing mechanisms, such as “price surcharges,” “price inclusions,” or excessive commissions. The company also used artificial discounts or rebates on sales contracts to generate the money to pay the bribes. The bribes also were made through phony sales intermediaries and corrupt business partners, as well as through the use of cash desks. Sales executives would obtain cash from the company in amounts as high as hundreds of thousands of dollars, enabling the company to obscure the purpose and recipients of the money paid to government officials.<sup>155</sup>

Daimler was charged with bribery and books-and-records and internal controls violations (see Chapter 10 summary of *United States v. Daimler*).

A person or entity that knowingly circumvents or fails to implement an internal accounting controls system may be criminally liable.<sup>156</sup> No criminal liability, however, is imposed for insignificant or technical accounting errors.<sup>157</sup> One well-respected FCPA commentator, Stuart H. Deming, has observed that the internal controls provisions will always be applied in hindsight, with the DOJ or SEC rarely finding the controls to be adequate.<sup>158</sup> As noted previously, if an issuer holds 50 percent or less of the voting power with respect to a foreign or domestic firm, the FCPA requires only that the issuer proceed in good faith to cause the affiliate to devise and maintain a system of internal accounting controls to the extent reasonable under the circumstances.<sup>159</sup>

Certain industries, such as the energy, pharmaceutical/healthcare, and chemicals industries, have presented widely known bribery challenges. However, the variety of DOJ and SEC enforcement actions demonstrate that no industry is immune from FCPA investigation or prosecution. Importantly, multinational companies must examine not only their own core business, but also supporting business operations and activities of the company as well as those provided by third parties. By way of example, a company should review the nature of the logistics services they require and the companies that provide such services, as there is a risk that multinationals may knowingly use vendors and service providers to handle more problematic local government tasks.

Companies that conduct business in geographic locales where corruption risks are high require a stronger set of internal controls for those operations and dealings. The Transparency International Corruption Perception Index (CPI) ranks each of 176 countries from 1 (highly corrupt) to 100 (very clean) (*see* Chapter 5), and multinational companies must consider the countries or regions where corruption risk profiles are substantial. Controls for countries or regions with high-risk profiles require greater oversight of accounting and purchasing functions. Internal audits and, in particular, FCPA audits should be undertaken with greater frequency in high-risk jurisdictions.

Many multinational companies, including aircraft maintenance companies, energy and pharmaceutical companies, find foreign governments and agencies their largest customers or partners in developing regions or economies. If potential customers or partners are state-owned or state-controlled entities, companies must be careful not only in the direct procurement process, but also with travel, lodging, and entertainment related to customer product or service demonstrations. Controls should be established to identify all government-related customers, to identify and monitor customer expenses, and to ensure appropriate advance authorizations and proper record-keeping.

A particular business model may necessitate additional internal controls. For example, if a company employs a limited sales force and relies largely on a multi-tiered sales channel consisting of distributors and resellers, then the company should address the risks created by the activities of its distributors and resellers and evaluate their background, draft and enter into contracts with appropriate FCPA representations and warranties and covenants (such as anticorruption audits), and monitor their activities on an ongoing basis. If a company uses consultants or marketing personnel as “agents” to help develop business, that business model significantly increases FCPA risks. Policies and procedures for conducting thorough due diligence and the retention of agents, consultants, and distributors should be developed and implemented. A due diligence file should be created and centrally maintained to ensure a strong record of the background and industry qualifications of the agent, contractor, distributor, or vendor engaged to represent the company. Ongoing due diligence is also an important internal control. For example, documentation of payments to agents (such as banking and payee details and changes) should be compiled during contracting and compared to payment instructions received with invoices from the third party over time to ensure that discrepancies do not exist or unexpectedly occur. Similarly, if a company’s business model involves substantial customer travel and entertainment, then budgets for, expenditures from and policies related to such practices must be carefully reviewed and monitored (*see* Chapter 6).

Other practices unique to certain industries will demand special attention. In certain industries, charitable donations and political contributions are more prevalent, and companies in such industries should consider prior approval requirements and regular monitoring of related general ledger accounts (*see* Chapter 7). If a company operates in a highly regulated industry, for example, pharmaceuticals or state-owned telecommunications, specific internal controls should be implemented regarding licenses, permits, and other approvals. Companies that engage

in merger and acquisition activity must implement detailed due diligence practices and preserve a record of the same (*see* Chapter 5). “Day One” compliance plans should be organized well in advance for any new acquisitions or joint venture operations—and adhered to after a deal closes.

The senior management of companies committed to compliance regularly analyze their particular risks and their industry’s risks, implement controls to reduce the same, consider and benchmark against the “best practice” internal controls of others in the industry(ies), constantly reassess their control environment, and establish due diligence, post-closing integration processes and “Day One” compliance controls for mergers and acquisitions.

#### **IV. CONSPIRACY AND OTHER FEDERAL STATUTES USED BY THE FRAUD SECTION OF THE CRIMINAL DIVISION IN FCPA ENFORCEMENT**

##### **A. General Conspiracy Statute: 18 U.S.C. § 371**

The DOJ’s Fraud Section frequently includes a conspiracy count in FCPA prosecutions utilizing the federal general conspiracy statute (18 U.S.C. § 371). The statute provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do not act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment for such misdemeanor.<sup>160</sup>

This statute addresses two types of conspiracies: (1) conspiracies to commit violations of specific federal statutes (the “offense clause”) and (2) conspiracies to defraud the United States (the “defraud clause”). In the FCPA area, the United States typically charges the “offense clause” conspiracy and, specifically, a conspiracy to violate the antibribery section of the FCPA. On occasion, the United States will charge a conspiracy to violate the FCPA and another statute, such as the wire fraud statute.<sup>161</sup>

##### **1. Elements**

The four elements of the general conspiracy statute are:

1. an agreement by two or more persons;
2. to commit the unlawful object of the conspiracy;
3. with knowledge of the conspiracy and with actual participation in the conspiracy; and
4. at least one coconspirator committed one overt act in furtherance of the conspiracy.<sup>162</sup>

To sustain a conviction, the United States must prove beyond a reasonable doubt that a defendant knew of the conspiracy and its essential objective(s). The essence of the crime of conspiracy is the agreement and not the commission of an objective substantive crime.<sup>163</sup> The government need not prove that the victim of the conspiracy lost money or that the defendant intended that the victim lose money.<sup>164</sup>

## 2. *Agreement*

The essence of a conspiracy is an agreement to commit an unlawful act.<sup>165</sup> The offense of conspiracy necessarily involves an agreement by at least two persons.<sup>166</sup> The courts are split over whether a corporation may conspire with its officers and employees.<sup>167</sup> A corporation may be indicted as a coconspirator,<sup>168</sup> but the acquittal of a corporation's employee of conspiracy does not require acquittal of the corporation.<sup>169</sup> Proof of conspiratorial conduct is frequently established by circumstantial evidence, such as travel records.<sup>170</sup>

## 3. *Overt Act*

The crime of general conspiracy is not complete until an overt act has been committed.<sup>171</sup> The overt act need not be a crime.<sup>172</sup> For example, it may consist of merely purchasing office supplies, opening a bank account, or transmitting an e-mail as long as that act is in furtherance of the conspiracy.

## 4. *Government Advantages in Charging the General Conspiracy Statute*

The government gains considerable advantage by including a conspiracy count in a criminal case. First, the ongoing nature of conspiracy lends itself to expansive drafting, particularly in temporal scope. Conspiracies frequently are alleged to have continued for years and occasionally decades. Second, the breadth and vagueness of a conspiracy count allow the admission of much evidence that might otherwise be inadmissible, particularly as against a select member of the conspiracy. Third, a conspiracy count enables the government to broadly join persons and allegations. A conspiracy can allege an agreement to defraud multiple entities, individuals, and companies or both the government (e.g., the SEC) and private entities and individuals. Fourth, evidentiary rules with respect to coconspirator declarations enlarge the admissibility of often-damaging statements in conspiracy trials.<sup>173</sup> Fifth, because conspiracy is a continuing crime, its five-year statute of limitations does not begin to run until either the conspiracy's objectives are met,<sup>174</sup> the conspiracy is abandoned,<sup>175</sup> its members affirmatively withdraw,<sup>176</sup> or the last overt act committed in furtherance of the conspiracy occurs.<sup>177</sup>

## B. *Other Federal Statutes Used by the Fraud Section of the Criminal Division in FCPA Enforcement*

The DOJ Fraud Section not only charges the FCPA and the federal conspiracy statute,<sup>178</sup> but has also used the false statements,<sup>179</sup> money laundering,<sup>180</sup> mail fraud,<sup>181</sup> and wire fraud<sup>182</sup> statutes in FCPA prosecutions. In addition, the Fraud Section increasingly collaborates with the Antitrust Division to investigate price-fixing or bid-rigging violations<sup>183</sup> and also pursues tax<sup>184</sup> and export<sup>185</sup> violations. The

conspiracy statute in particular enables the government to charge relevant conduct five or more years old.

### 1. *Money Laundering*

Bribery routinely generates significant financial gain. Criminal enforcement of money laundering generally falls within four federal statutes involving: the laundering of monetary instruments; the receipt of ill-gotten gains; the Currency Transaction Reporting provisions of the Bank Secrecy Act; and the Trades or Business Case Reporting statute. These statutes have taken on major importance because almost all financial crimes can be prosecuted as money laundering offenses, and the Sentencing Guidelines for money laundering are exceptionally harsh.<sup>186</sup>

### 2. *Mail and Wire Fraud*

The U.S. federal mail and wire fraud statutes have been widely used to prosecute business crimes.<sup>187</sup> As long as there is a scheme or artifice to defraud and mailings or wire communications, most federal prosecutors will consider filing these charges.

## C. Foreign Subsidiaries

### 1. *Bribery Conduct*

While the legislative history and one case indicate that foreign subsidiaries of U.S. companies acting on their own and not as agents of a U.S. parent are not subject to the antibribery provisions,<sup>188</sup> the *Resource Guide* states that a parent company can be liable under the FCPA's antibribery provisions in two ways for bribes paid by a subsidiary:

First, a parent may have participated sufficiently in the activity to be directly liable for the conduct—as, for example when it directed its subsidiary's misconduct or otherwise directly participated in the bribe scheme. Second, a parent may be held liable for its subsidiary's conduct under traditional agency principles.<sup>189</sup>

Noting that the fundamental characteristic of agency is control,<sup>190</sup> the *Resource Guide* makes clear that both the formal relationship between the parent and the subsidiary and the practical realities of how the two interface are important.<sup>191</sup>

The FCPA does not specifically address foreign subsidiaries, and no court has directly addressed the Act's coverage of foreign subsidiaries. Still, FCPA investigations have regularly resulted in charges against parent companies and/or their foreign subsidiaries. Professor Julie O'Sullivan has identified five statutory and common law theories under which a U.S. parent company may be liable for the misconduct of a foreign subsidiary. First, a U.S. company may be liable for bribery under agency principles and it had knowledge of or was willfully blind to the misconduct of its subsidiary. Second, a U.S. parent corporation that authorizes, directs, or controls the wayward acts of a foreign subsidiary may be liable. Third, a U.S. company may be held liable under principles of respondeat superior where its corporate veil can be pierced. Fourth, a U.S. company that takes actions abroad in

furtherance of a bribery scheme may be found liable under the Act's 1998 alternative theory of nationality jurisdiction. Fifth, foreign subsidiaries may be liable if any act in furtherance of an illegal bribe took place in the U.S. territory.<sup>192</sup>

## 2. *Accounting Misconduct*

The DOJ may charge a publicly traded parent company with FCPA accounting violations by a foreign subsidiary when the books and records of the parent and subsidiary are consolidated in SEC filings. Specifically, a parent company issuer may be criminally liable where it fails to keep accurate books and records or maintain internal controls sufficient to provide "reasonable assurances" that transactions are executed in a proper manner.<sup>193</sup> Companies may also be liable for books-and-records misconduct by the employees of foreign subsidiaries if the parent owns or controls more than 50 percent of a subsidiary's voting securities.<sup>194</sup>

## V. LEGAL DEFENSES TO THE FCPA

### A. The Statute

The FCPA is one of the most convoluted statutes in the federal criminal code, and one that in three and a half decades has had comparatively little judicial interpretation. For this reason, there are more untested defense arguments for clients facing FCPA charges than with many other federal criminal statutes. Under the FCPA, defense counsel must pay particular attention to who is covered and in what circumstances such persons are covered.<sup>195</sup>

The defense strategy may well differ depending on whether counsel represents an issuer, a domestic concern, a foreign company or citizen, an officer, a director, a stockholder, an employee, or an agent. In representing an issuer, a U.S. corporation, or a foreign company before the DOJ, the broad principles of corporate criminal liability apply, meaning that a corporation is criminally responsible for the acts carried out by its agents within the scope of the agent's employment for the benefit of the corporation.<sup>196</sup> For non-issuers, the SEC will have no jurisdiction.

After identifying under what section(s) a client may face liability, counsel will turn to the particular facts and circumstances. Because the statute is complex, convoluted, and with little precedent, and turns on who is acting and the specific facts and circumstances, there remain a significant number of legal and factual defenses available to companies and individuals.

### B. Beyond a Reasonable Doubt

In every criminal prosecution, the United States has the burden of proving each element of the alleged offense(s) beyond a reasonable doubt. If the defense can demonstrate that the government will likely fail to prove any single element beyond a reasonable doubt, it will in most instances be able to dissuade the DOJ from charging the client with that particular offense. Because most conduct in an FCPA investigation has taken place in a foreign country, and many relevant witnesses and documents are not in the United States, the DOJ's ability to secure reliable, admissible quality evidence before a U.S. grand or petit jury can be sometimes difficult.

### C. “The Search for Intent”

While defense counsel will attempt to challenge the DOJ’s ability to prove every element of a contemplated charge, the element most important to the government in many FCPA cases, and the most overriding one if there is questionable or inconclusive evidence, is corrupt intent or evil motive. The highly respected Washington, D.C., trial lawyer Robert S. Bennett has aptly described white-collar crime as a “search for intent.”<sup>197</sup> In FCPA investigations and trials, there is a search for corrupt intent, and the search will frequently turn on the transparency of a payment or relationship, direct or indirect, with a foreign official. While some transactions or relationships will be fully concealed and thus likely corroborative of a corrupt plan or scheme, others will reveal a confounding mixture of visibility and secrecy that can defeat a conclusion of evil motive beyond a reasonable doubt.

Related books-and-records entries will often be telltale: a willful mischaracterization of a payment or expense on the company’s books can confirm or corroborate an improper payment scenario. Conversely, a fair or reasonable description of a payment on the company’s books and records can belie a criminal motive by a payer or donor. In some investigations the DOJ and SEC cannot establish the payment of a bribe to a foreign official, but they can prove that a related or underlying expense in the books and records of the company was misleading, false, or did not occur, resulting in a “false books-and-records” charge and resolution. If defense counsel can undermine the corrupt intent proof, it will be a major step in avoiding an FCPA bribery prosecution and possibly result in less serious books-and-records and internal controls charges or in no charges at all.

### D. Outline of Potential FCPA Defenses

Defenses to the FCPA’s three central antibribery provisions, its false books-and-records and internal controls provisions, and the federal conspiracy statute are outlined below.

#### 1. *Defenses Available under 15 U.S.C. §§ 78dd-1 (Issuers), 78dd-2 (Domestic Concerns), and 78dd-3 (Persons Other than Issuers or Domestic Concerns)*

- Lack of corrupt intent:<sup>198</sup>
  1. Good faith;
  2. Advice of counsel;<sup>199</sup>
  3. Thorough due diligence of the company in contracting with a third party or acquiring a target;
- Insufficient proof of “conscious purpose to avoid learning the truth”;
- Insufficient proof of a payment, gift, offer, or promise of anything of value to a foreign official, party, party official, or candidate;
- Insufficient proof of a payment, gift, offer, or promise of anything of value to a foreign official, party, party official, or candidate for purposes of:
  1. Influencing any act or decision of such foreign official in his official capacity; inducing such foreign official to do or omit to do any act in violation of the lawful duty of the foreign official; or securing any improper advantage; or

2. Inducing a foreign official to use his influence with a foreign government or instrumentality to affect or influence any act or decision of such government official, in order to assist such person in obtaining or retaining business for or with, or directing business to any person;
    - Insufficient proof of a business nexus between the bribe and obtaining or retaining business;
    - Insufficient proof that an intermediary in fact made a payment, gift, offer, or promise of anything of value to a foreign official;
    - Insufficient proof of authorization of payment, gift, offer, or promise of anything of value;
    - “Routine government action” exception (facilitating or expediting payments);
    - Affirmative defense that the payment, gift, offer, or promise of anything of value that was made was lawful under the written laws and regulations of the foreign country;
    - Affirmative defense that the payment, gift, offer, or promise of anything of value that was made was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to:
      1. the promotion, demonstration, or explanation of products or services;
      2. the execution or performance of a contract with a foreign government or agency thereof;
    - Insufficient proof that an instrumentality of a foreign government is involved;
    - Insufficient proof that a company officer or employee knew a payment would be passed on to a foreign official, foreign political party or party official, or candidate for foreign political office—that is, that a company officer or employee was aware that an intermediary was engaging in misconduct, that such circumstance exists or that such result is substantially certain to occur, or that such person has a firm belief that such circumstance exists or that such result is substantially certain to exist;<sup>200</sup>
    - Extortion;<sup>201</sup> and
    - “Rogue employee defense” (see *United States v. Peterson*, *SEC v. Peterson*, and the related declination of Morgan Stanley in Chapter 10).
2. *Defenses Available under 15 U.S.C. § 78dd-3 (Persons Other than Issuers or Domestic Persons)*
    - Insufficient proof of a person while in the territory of the United States corruptly using the mails or any means of instrumentality of interstate commerce or doing any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of money, or offer, gift, promise to give, or authorization of the giving of anything of value.
3. *Defenses Available under 15 U.S.C. § 78m(b)(2)(A) (False Books and Records)*
    - Insufficient proof that any book, record, or account was false;
    - Insufficient proof that a person knowingly falsified any book, record, or account;
    - The person merely committed a technical violation;

- The books-and-record entries contained reasonable detail about the transactions or disposition of assets; and
  - Nonpublic company or issuer.
4. *Defenses Available under 15 U.S.C. § 78m(b)(2)(B) (Circumvention or Failure to Implement Internal Controls)*
- Insufficient proof that a person knowingly circumvented a system of internal accounting controls;
  - Insufficient proof that a person knowingly failed to implement a system of internal accounting controls; and
  - Nonpublic company or issuer.
5. *Defenses Available under 18 U.S.C. § 371 (Conspiracy)*
- Insufficient proof of an agreement by two or more persons to violate the FCPA;
  - Insufficient proof of an overt act in furtherance of a conspiracy;
  - Insufficient proof of a person’s knowing joinder of a conspiracy; and
  - Withdrawal from a conspiracy.

## E. Statute of Limitations

### 1. General Five-Year Statute

The statute of limitations begins to run when a crime is complete.<sup>202</sup> The criminal statute of limitations for most noncapital federal offenses,<sup>203</sup> including mail and wire fraud<sup>204</sup> and violations of the FCPA, is five years.<sup>205</sup> General conspiracy charges<sup>206</sup> have a five-year limitation unless the alleged conspiracy involves a substantive offense that has a different limitation provision period.<sup>207</sup> A charge of conspiracy to commit a substantive offense cannot have a longer statute of limitations from that provided for the substantive offense itself.<sup>208</sup>

### 2. Conspiracy and the “Continuing Offense” Doctrine Exception

Conspiracy prosecutions entail the important “continuing offense” doctrine. FCPA indictments typically include a conspiracy count.<sup>209</sup> A conspiracy ends when the central criminal purpose of the conspiracy has been attained.<sup>210</sup> The Supreme Court has held that in conspiracy prosecutions, “the period of limitation must be computed from the date of the overt act, rather than the formation of the conspiracy. And where, during the existence of the conspiracy, there are successive acts, the period of limitation must be computed from the date of the last of them.”<sup>211</sup> The fact that the conspiracy began outside the limitations period will not prevent prosecution as long as at least one overt act in furtherance of the conspiracy occurred within five years of the indictment.<sup>212</sup>

Acts of concealment, without more, will generally not “extend the life of the conspiracy after its main objective has been obtained.”<sup>213</sup> In addressing statute of limitations challenges, many courts, particularly in Sherman Act prosecutions, have focused on and upheld conspiracies through the point of receipt of economic benefits.<sup>214</sup> For example, in *United States v. Kozeny*, Judge Shira A. Scheindlin found

that the alleged conspiracy did not end until a return had been made on the bribe.<sup>215</sup> Courts have attempted to distinguish between overt acts in furtherance of a conspiracy and the result of a conspiracy.<sup>216</sup> To escape continuing liability for a conspiracy, a coconspirator must unequivocally and affirmatively withdraw.<sup>217</sup> Mere cessation of participation is not enough to constitute withdrawal.<sup>218</sup> The burden of proof is generally on a defendant to establish withdrawal.<sup>219</sup>

### *3. Potential Three-Year Suspension of Limitations to Obtain Foreign Evidence*

If in an FCPA criminal investigation the DOJ seeks evidence located in a foreign country, the running of the statute of limitations may be suspended for a period of up to three years.<sup>220</sup> The United States may, before the return of an indictment, apply to the grand jury supervisory court to suspend the running of the statute of limitations. To suspend the statute, the district court must find by a preponderance of the evidence that an official request has been made for evidence located in a foreign country and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in a foreign country.<sup>221</sup>

The period of suspension begins when the official request is made and ends when the foreign court or authority takes final action on the request. In no event may the suspension exceed three years, or extend the period within which a criminal case must be initiated for more than six months if all foreign authorities take final action on the request before the period would expire.<sup>222</sup> “Official request” as used in this context means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.<sup>223</sup>

### *4. Extensions of the Statute of Limitations*

Near the eve of the expiration of the criminal statute of limitations, federal prosecutors often will advise defense counsel that in the absence of a written waiver of the statute of limitations and tolling agreement, the United States will file a criminal complaint or return an indictment against the client in order to keep the charges within the statute of limitations. Under such threat, counsel must evaluate all facts and circumstances of the investigation and the prosecutor’s intentions and decide whether a waiver or tolling agreement is appropriate. If a company is generally cooperating with the DOJ, it will be difficult for it to refuse an extension of the statute of limitations, as often the DOJ will have sufficient evidence to return a charge against the company based on the conduct of one or more employees or agents. For this reason, companies cooperating with the prosecution typically accede to a government request for a limited or reasonable extension of the statute.

However, if counsel concludes that the DOJ has not conducted anywhere near an adequate investigation and is unlikely to file charges despite the threat, an individual client may decide to refuse to enter into a tolling agreement. If counsel concludes that the DOJ remains truly undecided about whether to file criminal charges, the client may be wise to consent to an extension. By agreeing to a limited

waiver, a target or subject may establish goodwill with the government and pave the way for a noncriminal disposition of the matter.

From an evidentiary point of view, an extension often will not disadvantage a client, since the passage of time generally favors the defense.<sup>224</sup> If a client agrees to execute a limited waiver or extension of the statute of limitations, it should not agree to any waiver of defenses that may exist as of the date of execution of the tolling agreement.

### 5. *Books-and-Records and Internal Controls Violations*

The government can argue that books-and-records and internal controls violations are “continuing offenses.” In *SEC v. Jackson*, the government charged the defendant with aiding and abetting, and asserted that the statute of limitations did not bar prosecution of these two violations because the violations will “inherently be continuing in nature.”<sup>225</sup> The district court in this civil action agreed, observing that these violations “inflict significant harm on the investing public” and Congress did not intend for “wrongdoers [to] continue to reap the benefit of their continuing violations with no threat of punitive enforcement actions.”<sup>226</sup> The Southern District of Texas court language speaks of “enforcement actions”; whether such a court in a criminal case would apply the “continuing offense” principle to books-and-records and internal controls violations remains unclear.

### 6. *Civil Statute of Limitations*

The general statute of limitation set forth in 28 U.S.C. § 2462 provides that “an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.” In cases against individuals who are not residents of the United States, the statute of limitations may be tolled for any period when the defendants are not “found within the United States in order that proper service may be made thereon.”<sup>227</sup>

The five-year limitation under 28 U.S.C. §2462 applies to when the SEC seeks statutory monetary penalties.<sup>228</sup> For many years, the SEC asserted that its seeking a remedy of disgorgement did not constitute a civil fine, penalty or forfeiture, and thus was not subject to the five-year statute of limitation. Writing for a unanimous court, in 2017 Justice Sonia Maria Sotomayor held in *Kokesh v. SEC*<sup>229</sup> that disgorgement in the securities-enforcement context is a “penalty” within the meaning of Section 2462, and therefore was subject to that section’s five-year statute of limitation,<sup>230</sup> though the Court cautioned that “[n]othing in th[e] opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.”<sup>231</sup> The imposition of the five-year statute of limitation under Section 2462 to the SEC’s ability to seek disgorgement is expected to impact the bargaining position of any FCPA defendant with the SEC and, in turn, how the SEC investigates and pursues remedies for FCPA violations.<sup>232</sup>

## VI. FIFTEEN IMPORTANT PRELIMINARY QUESTIONS

In the wake of allegations or otherwise suspicious facts and circumstances possibly implicating anticorruption laws, counsel at the outset should consider the following questions:

1. Is the client an issuer, a domestic concern or a foreign national who likely acted in furtherance of any misconduct in the territory of the United States?
2. Is the implicated recipient a foreign official, as defined under the FCPA statute, including a low-level employee of a state-owned or state-controlled entity?
3. What is the approximate dollar value of the thing of value, considering its fair market value, its value to the alleged recipient, and what is the likelihood it is a one-time incident or possibly reflective of a systemic practice in the organization?
4. Is there likely a quid pro quo involved?
5. How senior in the company is the officer or employee who offered or provided the thing of value to the foreign official?
6. Was there any contract, license, permit or other business advantage to the client pending at the time the thing of value was given or offered?
7. What is the overall intent evidence and does it fairly indicate a mistake or deliberate misconduct?
8. What is the source of the allegation, e.g., newspaper account, likely whistleblower, internal audit, anonymous report, departing or disgruntled employee?
9. For a public company, are there any books and records that are inaccurate and, if so, do they need to be corrected?
10. Has the conduct at issue been elevated promptly to appropriate legal or compliance officers for review?
11. Has the allegation or matter been reported to the Audit Committee?
12. Has the company and its counsel determined what type of document review and interviews are appropriate and by whom, and taken prompt steps to preserve hard-copy and electronic documents and information, such as all potentially relevant emails?
13. Has the company taken affirmative steps to stop the alleged misconduct including discipline of the key participants and any supervisors?
14. Has the company considered possible additional controls to identify and prevent the type of misconduct at issue from reoccurring?
15. Has the company fully considered the advantages and disadvantages of self-reporting to U.S. authorities or elsewhere, having reviewed current DOJ and SEC policies?

## VII. ADDITIONAL RESOURCES

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- Gibson Dunn, 2017 Year End FCPA Update, *available at* <http://www.gibsondunn.com/publications/pages/2017YearEndFCPAUpdate.aspx>.
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- Gary A. Naftalis, *The Foreign Corrupt Practices Act*, 11(8) White-Collar Crime Rep. 6 (Sept. 1997).
- *PBS/Frontline World: The Business of Bribes* (Feb. 2009), *available at* <http://www.pbs.org/frontlineworld/stories/bribe>.
- John Savarese, *The New Dodd-Frank Whistleblower Rules: Hype and Reality*, Harv. L. Sch. Forum on Corp. Governance & Fin. Regulation, July 5, 2011, *available at* <http://blogs.law.harvard.edu/corpgov/2011/07/28/hype-and-reality-in-the-dodd-frank-whistleblower-rules>.
- Eugene Scalia, Jason Schwartz & Thomas Johnson, *Whistleblower Protection under the SEC's New Dodd-Frank Regulations: A Practical Guide for Employers*, Daily L. Rep. (BNA) no. 117, June 17, 2011, at DLR1-1.

- Schiff Hardin, The SEC’s Final Rules Establishing Its Whistleblower Program (June 2011), *available at* <http://www.schiffhardin.com>.
- Shearman & Sterling, FCPA Digest (Mar. 2017) (comprehensive listing of every FCPA case since 1977), *available at* <http://www.shearman.com>.
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- Robert W. Tarun, *A Baker’s Dozen: Practical Foreign Corrupt Practices Act Advice for Multinational Executives, General Counsel, Boards of Directors and Audit Committees*, ETHISPHERE Quarter 1, 2011, at 58.
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- DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (PLI 2007).

## VIII. NOTES

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (1999)). The text of the Act is appended hereto as Appendix 1.

2. H.R. REP. NO. 95-650, at 4-5 (1977) (Conf. Rep.).
3. See *id.* at 5.
4. 15 U.S.C. § 78dd-1(a)(3) (for issuers).
5. 15 U.S.C. § 78dd-2(a)(3) (for domestic concerns).
6. 15 U.S.C. § 78dd-3(a)(3) (for “any person”).
7. 15 U.S.C. § 78dd-1(a).
8. 15 U.S.C. § 78dd-2(h).
9. 15 U.S.C. § 78dd-1(a), -2(a).
10. 15 U.S.C. § 78dd-2(h)(5); 15 U.S.C. § 78dd-3(f)(5).

11. Crim. Div., U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exch. Comm., FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012) (hereinafter Resource Guide), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guidance/> or <http://www.sec.gov/spotlight/fcpa.shtml>.
12. 15 U.S.C. § 78dd-2(i)(1); *see also* 15 U.S.C. § 78dd-1(g) (setting forth the same rule for "Issuers").
13. Resource Guide, *supra* note 11, at 12 (citing, *inter alia*, Criminal Info., United States v. JGC Corp., No. 11-CR-260 (S.D. Tex. Apr. 6, 2011)).
14. 15 U.S.C. § 78dd-3(a).
15. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).
16. 15 U.S.C. § 78dd-3(a).
17. S. Rep. No. 105-277, at 6 (1998) (quoting Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary re: Article 41)).
18. Info., United States v. Syncor Taiwan, Inc., No. CR-02-12441 (C.D.C.A. filed Dec. 5, 2002); *see also infra* Chapter 10.
19. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).
20. 15 U.S.C. §§ 78dd-1(a)(2), -2(a)(2), -3(a)(2) (1998).
21. United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980).
22. United States v. Zouras, 497 F.2d 1115, 1121 (7th Cir. 1974).
23. United States v. Crozier, 987 F.2d 893, 901 (2d Cir. 1993); United States v. Hare, 618 F.2d 1085 (4th Cir. 1980).
24. United States v. Gorman, 807 F.2d 1299 (6th Cir. 1987).
25. United States v. McDade, 827 F. Supp. 1153 (E.D. Pa. 1993).
26. Indictment, ¶ 23, United States v. Kozeny, No. 05-cr-00518 (S.D.N.Y. filed May 12, 2005), *available at* <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/01/05-12-05kozeny-indict.pdf>.
27. *Id.*
28. United States v. King, 351 F.3d 859, 863 (8th Cir. 2003).
29. Resource Guide, *supra* note 11, at 15.
30. United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004).
31. 15 U.S.C. §§ 78dd-1(a); -1(g); -2(a); -2(i); -3(a) (1998).
32. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).
33. S. Rep. No. 95-114, at 10 (1977).
34. H.R. Rep. No. 95-650, at 18 (1977) (Conf. Rep.); Chapter 4 of DON ZARIN, DOING BUSINESS UNDER THE FCPA (PLI 2007), has thorough coverage of domestic bribery cases that provide precedent for the Department of Justice in the FCPA area.
35. United States v. Jefferson, 594 F. Supp. 2d 655, 667 (E.D. Va. 2009).
36. 923 F.2d 1308 (8th Cir. 1991).
37. *Id.* at 1312.
38. 513 F.3d 461, 464 (5th Cir. 2007), *aff'g* 359 F.3d 738 (5th Cir. 2004), *cert. denied*, 129 S. Ct. 42 (Oct. 6, 2008).
39. 513 F.3d at 465.
40. Jury Charge, United States v. Bourke, S2 05 CR 518 (SAS) (S.D.N.Y. July 1, 2009).
41. United States v. Bourke, 667 F.3d 122, 132-35 (2d Cir. 2011).

42. Jury Instructions at 10, *United States v. Green*, No. CR 08-59-GW (C.D. Cal. Sept. 11, 2009) [Doc. No. 288]; *see also* Jury Charge at 5, *United States v. Mead*, No. 98-240-01 (AET) (D.N.J. 1998)

43. *United States v. Kay*, 513 F.3d 432, 448 (5th Cir. 2009).

44. *See* 15 U.S.C. §§ 78dd-1(c)(2)(A), -2(g)(2)(A), -3(3)(2)(A).

45. *Compare* 15 U.S.C. § 78ff(c)(1)(A) (corporate criminal liability under issuer provision) with § 78ff(c)(2)(A) (individual criminal liability under issuer provision); *compare* 15 U.S.C. § 78dd-2(g)(1)(A) (corporate provision) *with* § 78dd-2(g)(2)(A) (individual criminal liability under issuer provision); *compare* 15 U.S.C. § 78dd-3(e)(1)(A) (corporate criminal liability for territorial provision) *with* § 78dd-2(e)(2)(A) (individual criminal liability for territorial provision).

46. FCPA Opinion Procedure Release No. 82-03 (Apr. 22, 1982) (no expectation that any individual will personally benefit from the proposed agency relationship).

47. Third-Party Intermediaries, *available at* <http://fcpa.stanford.edu/chart-intermediary.html>.

48. 15 U.S.C. §§ 78dd-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A).

49. Resource Guide, *supra* note 11, at 20.

50. *SEC v. Jackson*, No. H-12-0563 (KPE), 2012 WL 6137551 (S.D. Tex. Dec. 11, 2012) (Ellison, J.).

51. *See, e.g., United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1999) (noting the “overwhelming evidence of a Congressional intent to exempt foreign officials from prosecution for receiving bribes”).

52. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).

53. 15 U.S.C. §§ 78dd-1(a)(2)(B), -2(a)(2)(B), -3(a)(2)(B).

54. *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011).

55. *Id.* at 1120.

56. *Id.* at 1113 (quoting Defendant’s Motion at 7, 7–8 n.6) (alterations in original).

57. *Id.* at 1115.

58. *Id.* at 1117–19.

59. *United States v. Carson*, 2011 U.S. Dist. LEXIS 88853, at \*11 (C.D. Cal. May 18, 2011).

60. *Id.* at \*17.

61. *Id.* at \*11–12.

62. *United States v. Esquenazi*, 2014 U.S. App. LEXIS 9096 (11th Cir. May 16, 2014), *cert. denied*, No. 14-189 (Oct. 6, 2014).

63. Resource Guide, *supra* note 11, at 20.

64. *Id.* at 21.

65. *Id.*

66. 28 U.S.C. §§ 1602–1611.

67. 28 U.S.C. § 1603(b)(2).

68. For a thoughtful discussion of “instrumentality” case law, *see* DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (PLI 2007), § 4:4.2.

69. Philip Urofsky, Recent Trends & Patterns in Enforcement of the U.S. Foreign Corrupt Practices Act, 2011 Shearman & Sterling LLP, PLI # 29082 (2011).

70. Resource Guide, *supra* note 11, at 20.

71. *See generally infra* Chapter 5.

72. Resource Guide, *supra* note 11, at 20.
73. See SEC v. Dow Chem. Co., No. 07-336 (D.D.C. Feb. 12, 2007).
74. See Press Release, U.S. Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005).
75. See In re Schnitzer Steel Indus., Inc., Exchange Act Release No. 54,606, 89 (Oct. 16, 2006).
76. Paul Berger & Sean Hecker, Doing Business with Sovereign Wealth Funds, Law360 (July 8, 2011), available at <http://www.law360.com/internationaltrade/articles/256492?htm>.
77. *Id.*
78. *Id.*
79. Resource Guide, *supra* note 11, at 20.
80. 15 U.S.C. §§ 78dd-1(f)(1)(B), -2(h)(2)(B), -3(f)(2)(B).
81. See 22 U.S.C. § 288 for a comprehensive list of organizations as “public international organizations.”
82. United States v. Harder, 168 F. Supp. 3d 732, 739 (E.D. Pa. March 2, 2016) (alterations in original).
83. 15 U.S.C. §§ 78dd-1(a), -1(g), -2(a), -2(i), -3(a) (1998).
84. Opinion Procedure Release No. 2012-01 (Sept. 18, 2012).
85. *Id.* at 5.
86. 359 F.3d 738 (5th Cir. 2004).
87. *Id.* at 756.
88. In remanding the *Kay* case, the Fifth Circuit Court of Appeals indicated that the prosecution would have to prove that the defendant intended for the foreign official's anticipated conduct in consideration of a bribe (the “quid pro quo”) to produce an anticipated result, in this case a diminution of customs duties or sales taxes that would assist in obtaining or retaining business. *Id.* at 740.
89. The italicized DOJ and SEC FCPA resolutions are detailed in Chapter 10, *infra*.
90. Resource Guide, *supra* note 11, at 13.
91. John F. McKenzie, *Foreign Corrupt Practices Act Compliance Issues for Import/Export Operations*, 47 INT'L LAW. 43 (2013).
92. Resource Guide, *supra* note 11, at 13.
93. 15 U.S.C. § 78dd-1(f)(2)(A).
94. 15 U.S.C. §§ 78dd-1(f)(2)(B), -2(h)(3)(B), -3(f)(3)(B).
95. United States v. Kay, 513 F.3d 432, 447–48 (5th Cir. 2007).
96. SEC v. Jackson, No. H-12-0563 (KPE), 2012 WL 6137551, at \*11 (S.D. Tex. Dec. 11, 2012); Mem. and Order, SEC v. Straub, No. 11 Civ. 9645 (RJS) (S.D.N.Y. Feb. 8, 2013).
97. Resource Guide, *supra* note 11, at 22 (quoting H.R. REP. NO. 100-576, at 922).
98. Roger M. Witten, Kimberly A. Parker & Thomas J. Koffer, *Navigating the Increased Anticorruption Environment in the United States and Abroad*, 20th Annual ACI Conference on the Foreign Corrupt Practices Act (Washington, D.C., Nov. 18, 2008).
99. 15 U.S.C. §§ 78dd-1(a), -2(a), -3(a).
100. See H.R. REP. NO. 95-640, at 18 (1977) (Conf. Rep.).
101. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b).

102. 15 U.S.C. §§ 78dd-1(f)(3), -2(h)(4), -3(f)(4).
103. *Id.*
104. Resource Guide, *supra* note 11, at 25.
105. *Id.*
106. *Id.*
107. 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).
108. *Id.* §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).
109. H.R. REP. NO. 100-576, at 920 (1988); Resource Guide, *supra* note 11, at 23.
110. 582 F. Supp. 2d 535, 537–40 (S.D.N.Y. 2008).
111. Complaint for Permanent Injunction and Ancillary Relief, United States v. Metcalf & Eddy, Inc., No. 99 Civ. 12566 NG (D. Mass. Dec. 14, 1999).
112. Resource Guide, *supra* note 11, at 24.
113. *Id.*
114. *Id.* at 27 (citing *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938); *United States v. Nynex Corp.*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992)).
115. *Id.*
116. *Id.*
117. 15 U.S.C. §§ 78dd-1(a), -2(a).
118. *See, e.g.*, Press Release, U.S. Dep’t of Justice, Schnitzer Steel Industries Inc.’s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a \$7.5 Million Criminal Fine (Oct. 16, 2006) (SSI Korea admitted that it violated the FCPA and the conspiracy and wire fraud statutes in connection with more than \$1.8 million in corrupt payments paid over a five-year period to officers and employees of nearly all Schnitzer Steel’s government-owned customers in China and private customers in China and South Korea to induce them to purchase scrap material from Schnitzer Steel.).
119. 18 U.S.C. § 371.
120. 18 U.S.C. § 1952.
121. U.K. Bribery Act, 2010, ch. 23. The text of the U.K. Bribery Act is appended hereto as Appendix 3.
122. 15 U.S.C. § 78m(a) (1994).
123. *See, e.g.*, *United States v. Rothrock*, 4 FCPA Rep. 699.818801 (W.D. Tex. 2001) (plea to knowingly and willfully falsifying and causing to be falsified certain books, records, and accounts in violations of FCPA); *United States v. UNC/Leah Servs.*, 2 FCPA Rep. 600.050 (W.D. Ky.) (recording \$140,000 payments to a subcontractor falsely as engineering fees).
124. 15 U.S.C. § 78ff(a); *see also* Resource Guide, *supra* note 11, at 44.
125. 15 U.S.C. §§ 78dd-2(d)(1), -3(d)(1).
126. Resource Guide, *supra* note 11, at 39.
127. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on Its Twentieth Birthday*, 18 Nw. J. INT’L. L. BUS. 269, 274 (1998).
128. 15 U.S.C. § 78(m)(a).
129. Reasonableness, rather than materiality, is the threshold standard. Criminal liability under the accounting provisions requires that a person “knowingly” falsify its books and records and “knowingly” circumvent a system of internal accounting records. 15 U.S.C. §§ 78m(b)(4)–(5).
130. 15 U.S.C. § 78c(a)(37).

131. 15 U.S.C. § 78m(b)(7).
132. H.R. REP. NO. 100-576, at 917 (1988); *see also* Harold Williams, Chairman, Sec. & Exch. Comm'n, Address to the SEC Developments Conference of AICPA (Jan. 13, 1981), Exchange Act Release No. 17,500 (Jan. 29, 1981).
133. Resource Guide, *supra* note 11, at 39.
134. *Id.* at 44.
135. *See* Williams, *supra* note 132, at 16.
136. 532 F. Supp. 2d 1187 (N.D. Cal. 2008).
137. *Id.* at 1196–97.
138. DONALD CRUWER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT (ABA, 2d ed. 1999).
139. Resource Guide, *supra* note 11, at 39-40.
140. *Id.*
141. *Id.* at 43.
142. *See* SEC v. Int'l Bus. Machs. Corp., SEC Litig. Release No. 16,839 (Dec. 21, 2000).
143. *See, e.g.*, Complaint, SEC v. RAE Sys., Inc., No. 10-CV-2093 (D.D.C. Dec. 10, 2010); ECF No. 1; Non-Pros. Agreement, In re RAE Sys., Inc. (Dec. 10, 2010), *available at* <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-10-10rae-systems.pdf>.
144. *Id.*; *see also infra* Chapter 10 (discussing RAE Systems, Inc.).
145. 15 U.S.C. § 78m(b)(6).
146. *Id.*
147. Am. Inst. of Certified Pub. Acct., Statement on Auditing Standard No. 1,320.28 (1973), *cited in* Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, May 12, 1976, at 12, *reprinted in* Sec. Reg. & L. Rep. (BNA), No. 353, Special Supp. (May 19, 1976).
148. 15 U.S.C. § 78m(b)(2).
149. 15 U.S.C. § 78m(b)(7).
150. Williams, *supra* note 132, at 22.
151. *Id.*
152. SEC v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 751 (N.D. Ga. 1983).
153. Kelly Gentenaar & William Olsen, "Controlling" FCPA Risk: Assessing Internal Controls to Ensure Risk Is Mitigated, Corp. Compliance Insights, Aug. 10, 2009, *available at* <http://www.corporatecomplianceinsights.com/controlling-fcpa-risk-assessing-internal-controls>.
154. Resource Guide, *supra* note 11, at 40.
155. *Id.* at 41.
156. 15 U.S.C. §§ 78m(b)(4)–(5).
157. 15 U.S.C. § 78m(b)(4) (1994).
158. Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act*, 96 J. CRIM. L. & CRIMINOLOGY 465, 500 (2006).
159. 15 U.S.C. § 78m(b)(6).
160. 18 U.S.C. § 371.
161. 18 U.S.C. § 1343.

162. *See generally* First Circuit: *United States v. Brandon*, 17 F.3d 409 (1st Cir.), *cert. denied sub nom.* *Granoff v. United States*, 513 U.S. 820 (1994); Second Circuit: *United States v. Svoboda*, 374 F.3d 471, 476 (2d Cir. 2003); *United States v. Ferrarini*, 219 F.3d 145, 155 (2d Cir. 2000); Fifth Circuit: *United States v. Parks*, 68 F.3d 860, 866 (5th Cir. 1995); *United States v. Williams*, 12 F.3d 452, 458 (5th Cir. 1994); *United States v. Medrano*, 836 F.2d 861, 863 (5th Cir.), *cert. denied*, 488 U.S. 818 (1988); Sixth Circuit: *United States v. Dolt*, 27 F.3d 235, 238 (6th Cir. 1994); *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988); Seventh Circuit: *United States v. Jones*, 317 F.3d 363, 366 (7th Cir. 2004); *United States v. Gee*, 226 F.3d 885, 893 (7th Cir. 2000); *United States v. Knox*, 68 F.3d 990 (7th Cir. 1995); *United States v. Brown*, 31 F.3d 484, 488 (7th Cir. 1994); *United States v. Sophie*, 900 F.2d 1064, 1080 (7th Cir.), *cert. denied sub nom.* *Duque v. United States*, 498 U.S. 843 (1990); Eighth Circuit: *United States v. Powell*, 853 F.2d 601, 604 (8th Cir. 1988); Ninth Circuit: *United States v. Chong*, 419 F.3d 1076 (9th Cir. 2005); *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir. 2000); *United States v. Indelicato*, 800 F.2d 1482, 1484 (9th Cir. 1986); Tenth Circuit: *United States v. Daily*, 921 F.2d 994, 999 (10th Cir. 1991); *Nelson v. United States*, 406 F.2d 1136, 1137 (10th Cir. 1969); 11th Circuit: *United States v. Cure*, 804 F.2d 625, 628 (11th Cir. 1986); *United States v. Kammer*, 1 F.3d 1161, 1164 (11th Cir. 1993).

163. *See* *United States v. Rabinowich*, 238 U.S. 78, 87–89 (1915).

164. *See* *United States v. Easton*, 54 F. App'x 242 (8th Cir. 2002).

165. *See* Supreme Court: *Ianelli v. United States*, 420 U.S. 770, 777 (1975); Second Circuit: *United States v. Savarese*, 404 F.3d 651 (2d Cir. 2005); *United States v. Mittelstaedt*, 31 F.3d 1208, 1218 (2d Cir. 1994); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989); Third Circuit: *United States v. Applewhaite*, 195 F.3d 679, 684 (3d Cir. 1999); Fifth Circuit: *United States v. Bright*, 630 F.3d 804 (5th Cir. 1980); Seventh Circuit: *United States v. Hooks*, 848 F.2d 785, 792 (7th Cir. 1988); Tenth Circuit: *United States v. Arutunoff*, 1 F.3d 1112, 1116 (10th Cir. 1993); 11th Circuit: *United States v. Chandler*, 376 F.3d 1303, 1314 (11th Cir. 2004); *United States v. Toler*, 144 F.3d 1423, 1425 (11th Cir. 1998); D.C. Circuit: *United States v. Lam Kwong-Wah*, 924 F.2d 298, 303 (D.C. Cir. 1991).

166. *See* *Morrison v. California*, 291 U.S. 82, 92 (1934).

167. Several courts have held that a corporation can conspire with its officers and employees. *See, e.g.*, Fifth Circuit: *Alamo Fence Co. v. United States*, 240 F.2d 179, 181 (5th Cir. 1957); Sixth Circuit: *United States v. Ames Sintering Co.*, 916 F.2d 713 (6th Cir. 1990); *United States v. S & Vee Cartage*, 704 F.2d 914, 920 (6th Cir.), *cert. denied*, 464 U.S. 935 (1983); 11th Circuit: *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031 (11th Cir. 2000). On the other hand, the Seventh Circuit Court of Appeals, in *Pearson v. Youngstown Sheet & Tube Co.*, 332 F.2d 439, 442 (7th Cir. 1964), held that a corporation is not capable of conspiring with its own officers and employees.

168. *See* *Joplin Mercantile Co. v. United States*, 213 F. 926, 936 (8th Cir. 1914), *aff'd*, 236 U.S. 531 (1915).

169. *United States v. Hughes Aircraft Co.*, 1994 U.S. App. LEXIS 12526 (9th Cir., Mar. 28, 1994).

170. *See, e.g.*, Supreme Court: *Glasser v. United States*, 315 U.S. 60, 80 (1942); Second Circuit: *United States v. Svoboda*, 374 F.3d 471, 476 (2d Cir. 2003); *United States v. Samaria*, 239 F.3d 228, 234 (2d Cir. 2001); Third Circuit: *United States v. Helbling*, 209

F.3d 226, 238 (3d Cir. 2000); *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994); Fourth Circuit: *United States v. Wilson*, 135 F.3d 291, 306 (4th Cir. 1998); *United States v. Whittington*, 26 F.3d 456, 465 (4th Cir. 1994); Sixth Circuit: *United States v. Salgado*, 250 F.3d 438, 447 (6th Cir. 2001); *United States v. Mullins*, 22 F.3d 1365, 1368 (6th Cir. 1994); Seventh Circuit: *United States v. Miller*, 405 F.3d 551 (7th Cir. 2005); *United States v. Viezca*, 265 F.3d 597 (7th Cir. 2001); *United States v. Redwine*, 715 F.2d 315 (7th Cir. 1973); Eighth Circuit: *United States v. Fletcher*, 322 F.3d 508 (8th Cir. 2003); *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988); Ninth Circuit: *United States v. Daychild*, 357 F.3d 1082, 1097 (9th Cir. 2004); Tenth Circuit: *King v. United States*, 402 F.2d 289, 292 (10th Cir. 1968).

171. *Compare with* RICO conspiracy (18 U.S.C. § 1962(d)), which has been interpreted by some courts as not requiring an overt act. *See, e.g., United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

172. *See generally* Supreme Court: *Yates v. United States*, 354 U.S. 298, 334 (1957); First Circuit: *United States v. Hurley*, 957 F.2d 1, 3 (1st Cir. 1992); *United States v. Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987); *United States v. Medina*, 761 F.2d 12, 15 (1st Cir. 1985); Second Circuit: *United States v. Montour*, 944 F.2d 1019, 1026 (2d Cir. 1991); Sixth Circuit: *United States v. Reifsteck*, 841 F.2d 701, 704 (6th Cir. 1988); Seventh Circuit: *United States v. Crabtree*, 979 F.2d 1261, 1267 (7th Cir. 1992), *cert. denied*, 510 U.S. 878 (1993); Eighth Circuit: *United States v. Fletcher*, 322 F.3d 508 (8th Cir. 2003); *United States v. Hermes*, 847 F.2d 493, 496 (8th Cir. 1988).

173. *See* OTTO G. OBERMAIER & ROBERT G. MORVILLO, *WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES* § 4.01 (1989); *see also Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987); Fed. R. Evid. 801(d)(2)(E).

174. *United States v. Roshko*, 969 F.2d 9, 12 (2d Cir. 1992).

175. *Fiswick v. United States*, 329 U.S. 211 (1946).

176. *See, e.g.,* Second Circuit: *United States v. Diaz*, 176 F.3d 52, 98 (2d Cir. 1999); *United States v. Cruz*, 797 F.2d 90, 96–97 (2d Cir. 1986); Fifth Circuit: *United States v. Mann*, 161 F.3d 840, 859–60 (5th Cir. 1998); Sixth Circuit: *United States v. Rogers*, 118 F.3d 466, 473–74 (6th Cir. 1997); Seventh Circuit: *United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000); *United States v. Read*, 658 F.2d 1225, 1232 (7th Cir. 1981); 11th Circuit: *United States v. LaQuire*, 943 F.2d 1554, 1563 (11th Cir. 1991); *cert. denied*, 505 U.S. 1223 (1992).

177. *See, e.g.,* Second Circuit: *United States v. Guerro*, 694 F.2d 898, 903 (2d Cir. 1982); Eighth Circuit: *United States v. Perry*, 152 F.3d 900, 904 (8th Cir. 1998); Ninth Circuit: *United States v. Koonin*, 361 F.3d 1250, 1254–55 (9th Cir. 2004), *vacated on other grounds*, 544 U.S. 945 (2005); 11th Circuit: *United States v. Anderson*, 326 F.3d 1319 (11th Cir.), *cert. denied*, 540 U.S. 825 (2003); *United States v. Butler*, 792 F.2d 1528, 1532 (11th Cir. 1986).

178. 18 U.S.C. § 371.

179. 18 U.S.C. § 1001.

180. 18 U.S.C. §§ 1956, 1957.

181. 18 U.S.C. § 1341.

182. 18 U.S.C. § 1343.

183. 15 U.S.C. § 1.

184. 26 U.S.C. §§ 7201 et seq.

185. 50 U.S.C. app. §§ 1701–1706 (2000).
186. DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, CORPORATE INTERNAL INVESTIGATIONS, § 2.04[13] (1993–2017).
187. See 18 U.S.C. §§ 1341 & 1343.
188. H.R. CONF. REP. NO. 95-831, at 15; *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992).
189. Resource Guide, *supra* note 11, at 27.
190. *Id.* (citing *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938); *United States v. Nynex Corp.*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992)).
191. *Id.*
192. This discussion reflects the analysis of Professor Julie O’Sullivan of Georgetown Law Center in DAVID LUBAN, JULIE O’SULLIVAN & DAVID STEWART, *Corruption*, ch. 14 in INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW (Aspen 2009).
193. 15 U.S.C. § 78m(b)(4).
194. See generally H. Lowell Brown, *Parent Subsidiary Liability under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1–29 (1998).
195. See DAVID LUBAN, JULIE O’SULLIVAN & DAVID STEWART, INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW, ch. 14, at 4 (Aspen 2d ed. 2014).
196. *United States v. N.Y. Cent. & Hudson River R.R. Co.*, 212 U.S. 481 (1909).
197. E-mail from Robert S. Bennett to author (Sept. 1, 2009).
198. 15 U.S.C. §§ 78dd-1(F)(2), 78dd-2(H)(3), 78dd-3(F)(3).
199. See, e.g., *Stichting v. Schreiber*, 327 F.3d 173 (2d Cir. 2003).
200. 15 U.S.C. §§ 78dd-1(F)(2), 78dd-2(H)(3), 78dd-3(F)(3).
201. See Philip Urofsky, *Extortionate Demands under the Foreign Corrupt Practices Act*, BNA White Collar Crime Rep., Dec. 19, 2008.
202. For a thorough discussion of federal statute of limitation issues, see J. Anthony Chavez, *Federal Criminal Statutes of Limitations: Shifting the Balance toward Punishment*, 1994 COMPLEX CRIMES J. 1.
203. *United States v. Eckhardt*, 843 F.2d 989, 993 (7th Cir.), *cert. denied*, 488 U.S. 839 (1988).
204. See, e.g., Second Circuit: *United States v. Scop*, 846 F.2d 135, 138 (2d Cir.), *modified in part on other grounds on reh’g*, 856 F.2d 5, 7 (1988); Fourth Circuit: *United States v. United Med. & Surgical Supply Corp.*, 989 F.2d 1390 (4th Cir. 1993); Tenth Circuit: *United States v. Jensen*, 608 F.2d 1349, 1355 (10th Cir. 1979).
205. 18 U.S.C. § 371.
206. For example, the six-year statute of limitations provided in 26 U.S.C. § 6351(1) applies to conspiracies to commit tax fraud. See *United States v. Fletcher*, 928 F.2d 495, 498 (2d Cir.), *cert. denied*, 502 U.S. 815 (1991).
207. *Id.*
208. *Bridges v. United States*, 346 U.S. 209, 223 (1952).
209. 18 U.S.C. § 371.
210. See, e.g., Supreme Court: *Grunewald v. United States*, 353 U.S. 391, 402–03 (1957); Seventh Circuit: *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir.), *cert. denied*, 506 U.S. 1023 (1992).
211. See, e.g., *Brown v. Elliott*, 225 U.S. 392, 401 (1912) (quoting *Lonabaugh v. United States*, 179 F. 476 (8th Cir. 1910)); see also *Fiswick v. United States*, 329 U.S. 211, 216 (1946).

212. See *United States v. Scop*, 846 F.2d 135, 139 (2d Cir.), *modified in part on reh'g on other grounds*, 856 F.2d 5, 7 (1988); *United States v. Head*, 641 F.2d 174, 177 (4th Cir. 1981); *United States v. Andreas*, 458 F.2d 491 (8th Cir.), *cert. denied*, 409 U.S. 848 (1972).

213. *Grunewald*, 353 U.S. at 405–06 (1957); see also Second Circuit: *United States v. Crozier*, 987 F.2d 893, 898 (2d Cir.), *cert. denied*, 510 U.S. 880 (1993); Seventh Circuit: *United States v. Eisen*, 974 F.2d 1362, 1368 (7th Cir.), *cert. denied*, 507 U.S. 1029 (1993); *but see United States v. Masters*, 924 F.2d 1362, 1368 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991).

214. See, e.g., Supreme Court: *United States v. Lane*, 474 U.S. 438, 451–53 (1986); Second Circuit: *United States v. Mennuti*, 679 F.2d 1032, 1035 (2d Cir. 1982); Fourth Circuit: *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 244 (4th Cir. 1986); Fifth Circuit: *United States v. Girard*, 744 F.2d 1170, 1172 (5th Cir. 1984); Seventh Circuit: *United States v. Dick*, 744 F.2d 546, 552 (7th Cir. 1984); Eighth Circuit: *United States v. N. Improvement Co.*, 814 F.2d 540 (8th Cir.), *cert. denied*, 484 U.S. 846 (1987); Ninth Circuit: *United States v. Walker*, 653 F.2d 1343, 1350 (9th Cir. 1981), *cert. denied*, 484 U.S. 846 (1987); *United States v. Inryco, Inc.*, 642 F.2d 290, 293–94 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982); 11th Circuit: *United States v. Helmich*, 704 F.2d 547, 549 (11th Cir.), *cert. denied*, 464 U.S. 939 (1983).

215. *United States v. Kozeny*, 638 F. Supp. 2d 348, 354 (S.D.N.Y. 2009).

216. See, e.g., Second Circuit: *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); Fifth Circuit: *United States v. Bradsby*, 628 F.2d 901, 905 (5th Cir. 1980); 11th Circuit: *United States v. Roper*, 874 F.2d 782, 787 (11th Cir.), *cert. denied*, 493 U.S. 867 (1989).

217. 18 U.S.C. § 3292.

218. 18 U.S.C. § 3292(a)(1).

219. 18 U.S.C. § 3292(c).

220. 18 U.S.C. § 3292(d).

221. 18 U.S.C. § 3292(a)(1).

222. 18 U.S.C. § 3292(c).

223. 18 U.S.C. § 3292(d).

224. DAN K. WEBB, ROBERT W. TARUN & STEVEN F. MOLO, *CORPORATE INTERNAL INVESTIGATIONS* § 15.09(1) (1993–2017).

225. *SEC v. Jackson*, No. H-12-0563, 2012 U.S. Dist. LEXIS 17494, at \*101–02 (S.D. Tex. Dec. 11, 2012).

226. *Id.* at \*105; see also Richard W. Grime et al., *Potential Defenses in FCPA Enforcement Actions: Key Issues and Open Questions*, ABA National Institute on White Collar Crime (Las Vegas, Mar. 6–8, 2013).

227. 28 U.S.C. § 2462.

228. See *Gabelli v. SEC*, 568 U.S. 442, 454 (2013).

229. 137 S. Ct. 1635 (2017).

230. *Id.* at 1643–44.

231. *Id.* at 1642 n.3.

232. See *infra*, Chapter 2.

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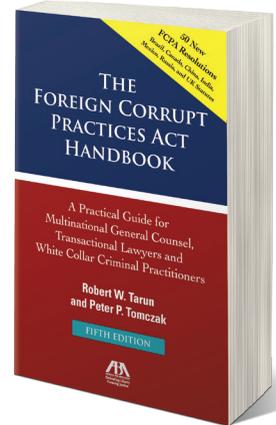
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