

**ENFORCEMENT OF THE U.S. FOREIGN CORRUPT PRACTICES ACT:
EXTRATERRITORIAL REACH
AND THE EFFECTS OF INTERNATIONAL STANDARDS**

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INTRODUCTION: THE EXPANDING EXTRATERRITORIAL REACH OF THE FCPA

In recent years, the U.S. Foreign Corrupt Practices Act (“FCPA” or “the Act”) has become an increasingly important compliance issue not only for U.S. companies doing business abroad, but also for foreign companies and persons as well. Although the FCPA is not a new statute, its reach continues to grow. It was passed in 1977, in response to abuses that came to light as a result of an SEC voluntary disclosure program in the mid-1970’s, through which it was revealed that large U.S. companies had used bribes to government officials obtain business in both developed and developing countries. The 1998 amendments to the FCPA, adopted in anticipation of U.S. accession to the OECD Convention discussed below, significantly expanded the law in its coverage of both U.S. persons and non U.S. persons.² In doing so, the reach of the Act – already inherently extraterritorial -- has been significantly enlarged. In the wake of these amendments, both the U.S. DoJ of Justice (“DoJ”) and the U.S. Securities and Exchange Commission (“SEC”), the two agencies that share responsibility for FCPA enforcement, have stepped up their enforcement efforts against U.S. and foreign persons.

The FCPA criminalizes the bribery by covered persons of foreign government officials, political party officials, and candidates for political office in order to obtain business.³ It also mandates that U.S. or foreign companies with publicly-traded securities in the United States adhere to prescribed standards of recordkeeping, maintain internal controls, and take other steps to ensure that investors could obtain a true and complete financial picture of those companies’ activities.⁴ Coupled with a prior amendment to U.S. tax laws denying any tax deduction for

¹ Copyright 2006 Lucinda A. Low. All Rights reserved. Portions of this Article are derived from a paper entitled, “The FCPA in Investment Transactions” (co-authored with John E. Davis of Miller & Chevalier Chartered), *Foreign Corrupt Practices Reporter* (Bus. Laws April 2005)

² International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302. See Section I below for a discussion of some of these changes.

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

⁴ *Id.* § 78m.

bribes,⁵ and the normal panoply of criminal laws addressing fraud (such as mail and wire fraud prohibitions, money laundering statutes, prohibitions on interstate travel, and of racketeering and conspiracy laws), the FCPA has provided the U.S. government with a range of tools for combating improper payments in the overseas business activities of the companies and individuals to which it applies.

The last few years have seen a significant increase in both the number of FCPA enforcement actions and the penalties imposed for violations. Despite controversy engendered almost from its enactment by the FCPA's unilateral application, extraterritorial focus, and aggressive vicarious liability provisions, and despite efforts to abolish or weaken it the law has endured. As a result, the last decade has found subject companies in a second or third generation compliance effort, responding to higher compliance standards recently articulated by courts, the Federal Sentencing Guidelines, enforcement pronouncements, and the challenges of doing business in new and often difficult foreign markets.⁶ U.S.-listed companies have focused on ethics and compliance programs with new urgency since the enactment of the Sarbanes-Oxley legislation in 2002⁷ and amendments to the Federal Sentencing Guidelines for Corporations (which took effect in November 2004) that provide substantial new detail regarding the U.S. government's view of an "effective compliance program."⁸ At the same time, foreign companies, especially those with publicly-traded stock in the United States, have devoted increased attention to FCPA compliance in the wake of the first enforcement actions against them and the beginnings of enforcement of the FCPA's foreign counterpart laws in foreign countries.⁹

As U.S. compliance standards have been strengthened and enforcement expanded, dramatic changes have occurred in the international landscape. Governments in developed and developing countries alike, as well as international institutions, have become far less tolerant of corrupt activity by and toward government officials. Among the most significant recent

⁵ I.R.C. § 162(c) (26 U.S.C. § 162(c)).

⁶ See, e.g., L.A. Low, "Consequences for FCPA Compliance: What Sarbanes-Oxley Has Wrought," *Corporate Compliance & Regulatory Newsletter* (Sept. 2003).

⁷ Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745.

⁸ See *Sentencing Guidelines for United States Courts*, 69 Fed. Reg. 28994 (May 19, 2004). On January 12, 2005, the Supreme Court determined that mandatory application of the Sentencing Guidelines was unconstitutional, though the Guidelines would remain as one of many potential advisory factors that judges could use in determining an actual sentence. *United States v. Booker*, 543 U.S. 220 (2005). Even though the Guidelines are now considered advisory, U.S. enforcement officials likely will continue to look to the Guidelines' standards for effective compliance programs in weighing decisions to prosecute in individual cases.

⁹ *SEC v. Montedison, S.p.A.*, 1:96CV02631 (RWR) (D.D.C.), Lit. Rel. No. 16948, Mar. 30, 2001; *SEC v. ABB Ltd.*, 1:04CV1141 (RBW) (D.D.C.), Lit. Rel. No. 18775, July 6, 2004; *SEC v. Samson, Munro, Campbell, and Whelan*, 06-CV-01217 (D.D.C.), Lit. Rel. 19754, July 5, 2006. See Section III.G for details regarding enforcement in other countries.

developments in the international arena are several international conventions that have been adopted or have entered into force with substantial participation in a relatively short period of time. These include the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, sponsored by the Organization for Economic Cooperation and Development (“the OECD Convention”),¹⁰ the Inter-American Convention Against Corruption, adopted by the Organization of American States (“the OAS Convention”),¹¹ the Criminal Law Convention Against Corruption of the Council of Europe (“the CoE Convention”),¹² the African Union’s anti-corruption convention,¹³ and the UN Convention Against Corruption.¹⁴ In addition to establishing new international standards for countries that participate in these conventions, each of the conventions includes provisions to facilitate cross-border investigations and enforcement. Other countries are beginning to bring enforcement actions under their laws implementing these treaties.¹⁵

Also significant in the expanded enforcement picture is the adoption by the World Bank and other international financial institutions (“IFIs”) of new anticorruption rules applicable both to Bank personnel and to outside contractors and consultants in connection with Bank-financed projects.¹⁶ These rules are being applied and enforced, resulting in sanctions, including

¹⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, <http://www.oecd.org/daf/nocorruption/0,2688,en_2649_34859_1_1_1_1_1,00.html>.

¹¹ Inter-American Convention Against Corruption, March 29, 1996, reprinted in 35 I.L.M. 724 (1996), <<http://www.oas.org/juridico/english/Treaties/b-58.html>>.

¹² Criminal Law Convention on Corruption, Jan. 27, 1999, Council of Europe, European Treaties, ETS No. 173, <<http://conventions.coe.int/treaty/EN/searchsig.asp/NT=174&CM=8&DF=>>. [hereinafter COE Criminal Convention].

¹³ African Union Convention on Preventing and Combating Corruption, July 11, 2003, <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf>.

¹⁴ United Nations Convention Against Corruption, Dec. 9, 2003, <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>.

¹⁵ See 2006 TI Progress Report: Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials (“TI Progress Report”), available at <http://www.transparency.org/news_room/in_focus/2006/oecd_progress>.

¹⁶ These include procurement rules for the World Bank and the Inter-American Development Bank, anti-corruption guidelines for companies doing business with the European Bank for Reconstruction and Development, and the actions of the European Union to develop protocols and a convention in this area. See World Bank, “Guidelines: Procurement under IBRD Loans and IDA Credits” § 1.14 (May 2004), <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf>>; Inter-American Development Bank, “Basic Procurement Policies and Procedures,” § 1.4, <<http://www.iadb.org/ros/prm/english/docs/Policies.pdf>>; European Bank for Reconstruction and Development, “Guidelines for Sound Business Standards and Corporate Practices,” Pub. No. 2829,

debarment leading to losses of business opportunities and criminal referrals to national authorities.¹⁷

This paper reviews recent U.S. enforcement of the FCPA against both U.S. and foreign persons and attempts to assess what effects, if any, international standards have had on that enforcement. It begins with a brief overview of the Act. The paper then details the efforts by various international institutions and instruments noted above to address corruption. Next, the paper reviews recent enforcement actions and trends, including an assessment of the impact of international standards. The final section discusses conclusions and strategies companies employ to minimize liability risk.

I. THE FCPA: AN OVERVIEW OF THE STATUTE

The FCPA contains two types of provisions-- the antibribery prohibitions and the accounting requirements. The antibribery prohibitions were designed to address what were perceived as corrupt practices used by U.S. companies in obtaining business in foreign countries. Paradigm examples historically included large bribes to foreign government officials to secure government contracts and the payments of large fees to “consultants” who performed no services, but passed money through to government officials. These payments were often masked by slush funds, off-book accounts and other financial practices, both in the United States and abroad, which led to the enactment of the accounting provisions.

A. Antibribery Prohibitions

1. Elements of a Violation

The antibribery provisions of the Act -- which consist of three distinct but largely parallel provisions reaching different but overlapping universes of persons discussed more fully below¹⁸ -- criminalize bribery of a foreign official to secure business.¹⁹ A violation of the antibribery provisions consists of the following elements:

- a covered person, with a nexus to U.S. commerce (when required),
- takes an action in furtherance of
- a payment of -- or an offer, authorization, or promise to pay money or the giving of anything of value

27/08/97 (Sept. 1997). *See also* Joint Statement of Multilateral Development Banks, “The Fight Against Corruption,” Dec. 9, 2004, <http://www.iadb.org/oii/joint_statement.cfm/English.htm>.

¹⁷ *See, e.g.*, List of Debarred Firms: Fraud and Corruption, <<http://web.worldbank.org/wbsite/external/projects/procurement/debarred.html>>.

¹⁸ The relationship between these universes of subject persons is discussed in Section I.A.2.

¹⁹ In 1988, Congress added a provision to the FCPA granting the DoJ civil injunctive and subpoena authority with respect to “domestic concerns.” *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(c), 102 Stat. 1107, 1421 (1988).

- to (a) any “foreign official,” (b) any foreign political party or party official, (c) any candidate for foreign political office, or (d) any official of a public international organization, or (e) any other person while “knowing”²⁰ that the payment or promise to pay will be passed on to one of the above
- “corruptly”
- for the purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit to do any act in violation of his or her lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with a foreign government to affect or influence any government act or decision,
- in order to obtain, retain, or direct business to any person.²¹

While the “classic” FCPA cases involve a money payment to a government official having decision-making authority over the award of a contract, even a quick perusal of the foregoing elements of a violation reveals their potential application to a much wider set of circumstances. “Anything of value” can, for instance, include a stock interest in a joint venture company, a contractual right or interest, real estate, personal property, or other interests arising from business relationships. Gifts, entertainment, charitable contributions, travel and travel-related expenses can also raise FCPA issues and have been the subject of several enforcement actions in recent years.

FCPA issues can arise at any stage of trade or investment activity—not only the formative stage, but during the course of operations, or while winding up or terminating an activity. The ability of a company to operate in a host country, for instance, and the success of those operations, often turns on discretionary government decisions relating to foreign investment or trade approvals, concessions (as in the natural resources sector), franchises, permits, or licenses (as in the telecommunications sector in many countries or in other “sensitive” sectors), tax or customs rulings, and other regulatory actions or benefits. As a condition to trade or investment transactions, the government may require the foreign investor to partner with a local firm, subcontract certain work to local firms, meet specified local employment standards, build infrastructure, or satisfy other performance conditions. The process of positioning oneself to do business in a foreign country thus typically gives rise to a variety of occasions for government approvals that fall under the broad rubric of “obtaining business” as that element of the FCPA has been developed.²²

²⁰ Under this vicarious liability provision, the definition of “knowing” is broader than actual knowledge: a company is deemed to “know” that its agent will use money provided by the company to make an improper payment or offer if it is aware of, but consciously disregards, a “high probability” that such a payment or offer will be made. 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), and 78dd-3(f)(3)(B). The purpose of this standard is to prevent companies from adopting a “head in the sand” approach to the activities of their foreign agents and partners. *See* H.R. Conf. Rep. No. 100-576, at 920 (1988).

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

²² The more ministerial of these approvals may well fall under the exception for routine governmental action, discussed below in Section I.A.3; the discretionary decisions do not. The line

Mergers and acquisitions involving companies doing business abroad, especially in risky countries, raise risks of successor liability either for the past activities of the acquiree, or, even more troublesome, liability for any improper activities that may be ongoing at the time of the acquisition and continue post-closing. How much due diligence is sufficient in the M&A context, and what other steps an acquirer can take to reduce the risk of liability, is one of the hottest issues in FCPA compliance today.²³

FCPA issues also can arise in either the context of direct dealings with the foreign government or third-party relationships, including joint ventures with either a private partner or a government official/entity that has passed FCPA muster in its formation. Joint venture partners not themselves subject to the FCPA can, by their actions, trigger FCPA liability in the same way an agent or consultant might if they take actions within the United States or if there is “knowledge” or authorization of their improper actions by the U.S. partner. The risk that the FCPA-subject party may acquire “knowledge” or authorize risky actions may be even greater in a shared enterprise than in the agency context.

Finally, although less frequently, exiting a trade or investment activity may trigger issues. The process of winding up a project may involve government approvals, the resolution of outstanding issues with the government, and other activities that may trigger requests for payments.

2. *Persons Subject to the Antibribery Provisions*

The FCPA’s antibribery provisions apply to “domestic concerns,” “issuers,” and “any person” acting in U.S. territory.²⁴ These terms encompass both U.S. and non-U.S. persons, although U.S. jurisdiction over the former is more ample than that over the latter.

a. *Nationality Jurisdiction over “U.S. Persons”*

In the wake of the 1998 amendments to the FCPA, proof of a U.S. territorial nexus for U.S. individuals and companies is no longer required.²⁵ Thus, a violation by these “U.S.

between ministerial and discretionary is not always clear. The scope of this element has been challenged recently in U.S. courts. In the case of *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002), a federal district court held, as a matter of law, that bribes to customs officials in order to reduce import taxes did not meet the statute’s definition of “obtaining or retaining business.” On February 4, 2004, the U.S. Court of Appeals for the Fifth Circuit reversed that decision, holding that the District Court erred in holding as a matter of law that such payments could never fall within the scope of the FCPA; rather, the inquiry is factual, examining whether “the bribery was intended to produce an effect -- here, through tax savings -- that would ‘assist’ in obtaining or retaining business.” *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004). On remand, the defendants were convicted. This decision is discussed below in Section III.B.3.

²³ This issue has even found its way into public lore through the 2005 film *Syriana*.

²⁴ 15 U.S.C. §§ 78dd-1(a), 78dd-1(g), 78dd-2(a), 78dd-2(i), 78dd-3(a), 78dd-3(f)(1).

persons” can occur even if the prohibited activity takes place entirely outside of the United States and does not involve the use of any instrument of U.S. interstate commerce.²⁶ Non-U.S. persons covered as foreign “issuers” or under the new “any person” prohibition must still act with the necessary territorial nexus to the United States for there to be U.S. jurisdiction.

b. “Domestic Concerns”

The definition of “domestic concern” covers a large universe of persons and entities, including individual U.S. citizens (wherever located), U.S. resident aliens,²⁷ corporations and other business entities (including partnerships) organized under the laws of a state of the United States or having their principal place of business in the United States, and officers, directors, employees and agents of any of these entities, regardless of their nationality.²⁸

c. “Issuers”

“Issuers” constitute a narrower range, being defined as companies that register securities in accordance with 15 U.S.C. § 78l or are required to file reports under 15 U.S.C. § 78o(d), or any officer, director, employee or agent of such company. This definition captures those selected foreign companies that issue stock on a U.S. securities exchange and their personnel, in addition to certain U.S. companies (which are already subject to the statute as “domestic concerns”). The first category would include, for example, foreign companies that list American Depository Receipts (“ADRs”) on a U.S. stock exchange. The individuals caught by the “issuer” provisions can include non-U.S. citizens and residents as well as U.S. citizens.²⁹

²⁵ 15 U.S.C. §§ 78dd-1(g), 78dd-2(i).

²⁶ *United States v. Salam*, Case No. 06-CR-00157 (D.D.C. 2006) (Criminal Complaint, March 2006) (FCPA anti-bribery prosecution against naturalized US citizen with respect to conduct in Iraq; based on alternative national jurisdiction under 15 U.S.C. § 78dd-2(i)(2)).

²⁷ “Residency” is not defined in statute; the test for jurisdiction presumably would use the immigration standards for permanent residency. *See, e.g.*, 8 U.S.C. § 1101(a)(20).

²⁸ 15 U.S.C. § 78dd-2(h)(1). There are some jurisdictional limits to the law’s coverage. Any non-U.S. citizens subject to the FCPA’s coverage would have to be subject to the personal jurisdiction of the U.S. courts before they could be prosecuted. Indeed, recently an FCPA conspiracy charge was dismissed against a Swiss attorney allegedly acting as an agent for a U.S. domestic concern based on the court’s interpretation of the pre-1998 amendment FCPA, which excluded such agents from criminal penalties if they were not “otherwise subject to the jurisdiction of the United States.” *U.S. v. Bodmer*, 342 F. Supp. 2d 176, 192-193 (S.D.N.Y. 2004).

²⁹ Again, any non-U.S. citizen would have to be subject to the personal jurisdiction of the United States.

d. “Any Person”

Finally, any “person” (no matter what nationality) acting within U.S. territory is covered by the FCPA. 15 U.S.C. § 78dd-3(a). Given that U.S. persons can be covered without regard to a territorial nexus, and foreign issuers are covered as issuers, this section will primarily catch foreign companies and individuals who are not issuers or affiliated with issuers.

e. Foreign Subsidiary

Although the statute is ambiguous, the legislative history of the Act and case law confirm that foreign subsidiaries of U.S. companies acting on their own behalf and not as agents of covered persons generally are not treated as U.S. persons under the antibribery provisions.³⁰ Furthermore, foreign individuals who are not officers, directors, employees or agents of a U.S. company or a foreign issuer generally are not covered by these provisions. However, if either a foreign subsidiary or a foreign person not otherwise covered performs any acts in furtherance of a prohibited payment within the United States, they could be directly liable under the FCPA’s territoriality jurisdictional prong covering “any person.”

f. Vicarious Liability

In addition, due to the potential for liability for acts of a third party under the third FCPA element cited above (the “knowledge” or “vicarious liability” provisions), reliance on foreign incorporation where there is U.S. management and control can be a weak shield.³¹ Indeed, the legislative history affirms that U.S. parent corporations may remain indirectly liable for FCPA violations by a foreign subsidiary.³² The U.S. Congress enacted these provisions to prevent companies from adopting a “head-in-the-sand” approach to the activities and identities of their foreign agents and business partners.³³ This problem also has been characterized as ‘willful

³⁰ See H.R. Conf. Rep. No. 95-831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4126; *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992) (legislative history excludes foreign subsidiaries from FCPA coverage).

³¹ See, e.g., *United States v. Titan Corporation*, Case No. 05-CR-0314 (S.D. Ca. 2005) (Information); *SEC v. Titan Corporation*, Case No. 05-CV-0411 (D.D.C. 2005) (Complaint) (prosecuting The Titan Corporation for improper payments, some of which were funded by its African affiliate); *In the Matter of Monsanto Company*, Admin. Proc. File No. 3-11789, Exchg. Act Rel. No. 50978, Jan. 6, 2005 (cease-and-desist order) (finding Monsanto Company in violation of anti-bribery provisions for improper payments, including payments made by affiliates in Indonesia); *In the Matter of Diagnostic Products Corporation*, Admin. Proc. File No. 3-11933, Exchg. Act Rel. No. 51724, May 20, 2005 (cease-and-desist order) (finding DPC in violation of anti-bribery provisions for improper payment activity by its subsidiary in China).

³² H.R. Conf. Rep. No. 95-831, at 14 (1977) (“the conferees intend to make clear that any issuer or domestic concern which engages in bribery of foreign officials indirectly through any other person or entity would itself be liable under the [FCPA]”).

³³ See H.R. Conf. Rep. No. 100-576, at 920 (1988).

blindness or ‘unwarranted obliviousness’ to any action or fact, including applicable ‘red flags’ (discussed in more detail below) that reasonably should alert a company’s management to a “high probability” of an FCPA violation.³⁴ In such cases, “knowledge” may be inferred even if a company does not have actual knowledge of a payment.

3. *Exceptions and Affirmative Defenses*

a. *Exceptions*

The sole statutory exception in the FCPA is for gratuities to government officials who perform “routine governmental action.”³⁵ The statutorily-enumerated examples of such action are: (1) obtaining business permits (that do not involve the obtaining of business); (2) processing governmental papers such as visas; (3) providing police protection, mail delivery or scheduling inspections associated with contract performance or the shipment of goods; (4) providing phone, power or water service, loading and unloading cargo, or protecting perishable products from deterioration; or (5) other similar activities which are ordinarily and commonly performed by an official. These so-called “facilitating” or “grease” payments -- which are used to expedite the processing of permits, licenses, or other routine documentation or action -- are not prohibited by the antibribery provisions of the FCPA.

This exception is not mirrored in many countries’ domestic bribery laws or FCPA analogues, raising conflict-of-law issues. Moreover, it remains an exception of very limited scope, in part because there is no parallel exception on the books and records side of the statute for such payments.

b. *Affirmative Defenses*

The 1988 amendments to the FCPA added two affirmative defenses for certain types of payments. First, the statute provides for an affirmative defense where the payment at issue “was lawful under the written laws and regulations of the foreign official’s . . . country.”³⁶ The second affirmative defense is for certain payments made to reimburse foreign officials for expenses directly associated with visits to product demonstrations or tours of company facilities or in connection with the execution or performance of contracts.³⁷

The facts of most cases rarely support the application of the first defense, especially if it is construed in accordance with its literal terms. Nevertheless it may be applied -- at least by analogy -- to transactions or activities which are legally compelled by host country’s written laws

³⁴ *Id.*

³⁵ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b).

³⁶ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (emphasis added). The legislative history of this provision states that “the absence of written laws in a . . . country would not by itself be sufficient to satisfy” the defense. H.R. Rep. No. 100-576, at 922 (1988).

³⁷ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

and authorities -- for example, the requirement that a parastatal entity participate in a project, or that the investor satisfy other terms or conditions mandated by the government.³⁸ The second defense is much more frequently used in practice.

4. *Official Guidance*

Despite its age, only limited guidance exists on how to comply with the FCPA. Except for the Opinion Procedure regulations (described below), which have led to limited substantive guidance through only a trickle of review and opinion procedure releases, there are no implementing regulations and no guidelines issued by the DoJ.³⁹ Most cases are settled rather than litigated, especially where companies are involved. Thus, even after the statute has been in force for almost thirty years, many unresolved issues, even of a basic character, remain. The 2004 *Kay* case referred to earlier⁴⁰ involved construction of the “obtain or retain business” element – a key aspect of the statute present since its inception. As another example, the question often arises how much government ownership or control is necessary for an entity to qualify as an “instrumentality,” making a payment to its employees a payment to a government official. Neither the statute nor the case law answers this question.⁴¹ Another frequent question

³⁸ Such requirements may not fully insulate companies from FCPA risks; for example, a law might require participation by a local company, but may not call for one owned by a foreign official.

³⁹ The DoJ has identified several factors as “red flags” that should warn U.S. companies of potential FCPA violations. The existence of one or more of these factors in a transaction could be considered sufficient to alert a U.S. company to the “high probability” of an improper payment or offer by a foreign agent:

- a history of corruption in the country in question;
- unusually high commissions or “unusual payment patterns or financial arrangements”;
- the agent or venture partner is related to a government official or the agent’s company is owned in part by a government official or his family, or has been recommended by an official;
- a refusal by the venture partner or representative to certify that they will not make payments or cause the principal to violate the FCPA;
- the agent or venture partner has an apparent lack of qualifications or resources to perform the work agreed upon; or
- there is a lack of transparency in accounting and expense records, or the agent or venture partner has requested that the company prepare false invoices or any other type of false documentation.

Foreign Corrupt Practices Act: Antibribery Provisions, at <http://www.usdoj.gov/criminal/fraud/text/dojdocb.htm> (Sep. 11, 2006).

⁴⁰ See note 22, *supra*.

⁴¹ The Act itself provides no definition of “instrumentality.” The OECD Convention, which the FCPA was designed to implement when amended in 1998, in its official Commentaries defines state ownership to include those “public enterprise[s],” regardless of legal form, over which a government may, directly or indirectly, “exercise a dominant influence.” Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions ¶ 14 (Nov. 21, 1997), *reprinted* 37

on which there is no guidance is whether payments above a certain monetary threshold cannot qualify as facilitating payments.

B. Accounting Provisions

In addition to the antibribery prohibitions, the FCPA requires listed companies to maintain certain recordkeeping standards and internal accounting controls. These are designed to fight accounting devices -- which include off-book accounts and slush funds -- designed to hide the existence of bribery payments. The accounting controls are intended to ensure that shareholders receive an accurate picture of the company's expenditures.

1. Requirements of the Recordkeeping and Internal Control Provisions

The recordkeeping provision of the statute requires companies to make and keep books and records "which, in reasonable detail, accurately and fairly reflect the transactions and

I.L.M. 8 (1998) ("Commentaries"). The Commentaries provide further, "This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board." *Id.*

The Commentaries thus look not only to ownership, but to functional control. Applying their definition to the privatization scenario, they appear to treat an entity as a public enterprise until the moment when the government gives up control. Although the Commentaries do not address explicitly the issue of negative control -- veto power -- the "dominant influence" language appears to suggest affirmative rather than negative control. If correct, this interpretation would mean, for example, that 50/50 joint ventures, or "golden share" arrangements, would not confer public enterprise status under the OECD Convention, and thus under the FCPA.

The OECD Commentaries also look to another factor to determine whether officials or employees of "public enterprises" fall within the scope of the OECD Convention's prohibitions: whether officials of such enterprises should be deemed to perform a "public function." This analysis reflects the common sense notion that, when governments enter into private enterprise, not all of the enterprise's actions should be deemed to be "public functions." Sometimes these state-owned enterprises are just commercial actors and the prohibitions on corruption of public officials should not extend to such actors just because some countries choose, unlike the U.S., to be commercial actors. The OECD Commentaries state that, "An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." Commentaries, ¶ 15.

Whether U.S. courts will look to the OECD Convention for guidance on this topic in interpreting the FCPA remains to be seen. The fact that the Commentaries focus on facts regarding the enterprise at issue that may not be easily ascertained (for example, whether an entity operates on a regular commercial basis) may discourage reliance on the Commentaries' standard in compliance practice.

dispositions of the assets of the issuer.”⁴² All the transactions of issuers are covered, not just their foreign transactions. The internal accounting controls require companies to “devise and maintain a system” that, among other things, “provide[s] reasonable assurances that . . . transactions are executed in accordance with the management’s general or specific authorization.”⁴³ The accounting provisions apply without regard to the existence or extent of a company’s foreign operations (although several enforcement actions, such as *Monsanto*⁴⁴, *Triton Energy*⁴⁵ and *IBM*⁴⁶, discussed later in this paper, involved operations of a foreign subsidiary).

The FCPA requires “reasonable” rather than absolute assurance that accounting controls are adequate.⁴⁷ The records must be sufficient to “satisfy prudent officials [as in] the conduct of their own affairs.”⁴⁸ The Senate Report accompanying the original Act recognizes that “standards of reasonableness must apply” and that “management must necessarily estimate and evaluate the cost/benefit relationship” in establishing a system of controls.⁴⁹

2. *Persons Subject to Accounting Provisions*

Unlike the antibribery provisions, the accounting provisions apply only to “issuers.”⁵⁰ The issuer’s responsibility is broad, however, extending not just to its domestic operations but also to foreign subsidiaries that are majority-owned. Where an issuer holds 50 percent or less of the voting power of a foreign subsidiary, however, a 1988 amendment to the accounting provisions requires only that the issuer make a “good faith” attempt to cause the affiliated company to maintain the internal accounting controls.⁵¹

42 15 U.S.C. § 78m(b)(2)(A).

43 15 U.S.C. § 78m(b)(2)(B)(i).

44 *SEC v. Monsanto Company*, Case No. 1:05CV00014 (2005), Lit. Rel. No. 19023 (D.D.C. Jan. 6, 2005) (Indonesian subsidiary);

45 *SEC v. Triton Energy Corp., Philip Kever and Richard McAdoo*, No. 97CV00401 (Complaint and Undertakings) (D.D.C. Feb. 27, 1997) (Indonesian subsidiary).

46 *In the Matter of International Business Machines*, Exch. Act Rel. No. 34-43761 (2000) (Argentine subsidiary).

47 *Id.*

48 *Id.* § 78m(b)(7).

49 S. Rep. No. 95-114, at 8, *reprinted in* 1978 U.S.C.C.A.N. 4106.

50 15 U.S.C. § 78m(b).

51 *See id.* § 78m(b)(6).

Thus, the application of the accounting provisions to foreign subsidiaries turns strictly on equity ownership and not a broader concept of control. Although issuers with minority status in foreign affiliates still need to take steps to satisfy the “good faith” attempt requirement, having satisfied that, the affiliates themselves will not be caught.

C. Other Relevant Laws

The preceding sections have detailed the core provisions of the FCPA. The reach of the FCPA is effectively extended by other statutes that can be used in place of, or in addition to, the FCPA in cases involving allegedly corrupt conduct. These include conspiracy laws, the federal law prohibition on interstate travel in aid of racketeering, mail and wire fraud laws, and, especially in recent years, anti-money laundering laws.

Federal money laundering laws now include in the list of “specified unlawful activities” (SUAs) that serve as predicate offenses several corruption-related offenses: felony violations of the FCPA; and foreign bribery, whether or not a violation of the FCPA.⁵² Moreover, the money laundering laws can be used to prosecute the funding of an transaction, including monetary transfers, through 18 U.S.C. § 1956(a)(2), which criminalizes the interstate or foreign transfer of funds to further an SUA. This provision may capture many transactions that would not otherwise be caught because they do not involve proceeds of crime – no proceeds are required under this section.

II. THE DEVELOPING WEB OF INTERNATIONAL ANTI-CORRUPTION CONVENTIONS

For almost than 25 years, the FCPA stood alone as the sole statute worldwide that criminalized the bribery of foreign public officials. In the last decade, dramatic changes have occurred in the international landscape with regard to the issue of corruption, and especially public corruption. Driven in part by economists’ recognition of corruption’s deleterious effects on development and by high-profile corruption in various countries, both the developed and the developing world’s attitudes towards corruption have changed. This opened the way for initiatives to develop international standards to combat corrupt practices, resulting in a myriad of new international anti-corruption treaties and regimes. These treaties are designed to facilitate cross-border enforcement of anti-corruption laws as well as strengthen those laws, and their impact can already be seen in recent prosecutions.

This section briefly summarizes each multilateral initiative, highlighting key areas. How these conventions have affected enforcement will be discussed in Section III.

A. Inter-American Convention

In 1996, the OAS countries signed the Inter-American Convention Against Corruption, which became effective on March 20, 1997, the first of a series of international treaties

⁵² 18 U.S.C. § 1956(c)(7).

addressing transnational corruption.⁵³ With the deposit of Brazil's instrument of ratification on July 24, 2002, the OAS Convention covered the United States, Canada, and all major economies in Latin America. The OAS Convention obliges states, among other things, to criminalize the bribery of both domestic and foreign officials as well as the solicitation or receipt of a bribe. The OAS Convention also requires criminalization of "illicit enrichment" of or by a public official.⁵⁴ It also provides for extradition of and asset seizure against offending parties. In addition to emphasizing heightened government ethics, improved financial disclosures, and transparent bookkeeping through non-mandatory provisions, the OAS Convention facilitates international cooperation in the gathering of evidence.⁵⁵ It explicitly limits the use of bank secrecy laws as a defense to such cooperation. The addition of a monitoring mechanism subsequent to the Convention's entry into force has served to strengthen accountability of countries for implementation.⁵⁶

B. OECD Convention

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was ratified by the requisite number of parties and entered into force on February 15, 1999. At this writing, 36 countries, including most of the major capital exporting countries, had ratified the OECD Convention.⁵⁷

The OECD Convention is short and focused -- it consists of only seventeen articles covering the offense of transnational bribery, ancillary or related offenses, jurisdiction and penalties, international cooperation in the investigation and prosecution of transnational bribery (including, uniquely, standards for addressing jurisdictional conflicts), a process for monitoring implementation, and entry into force, reservations and implementation. It is accompanied by official commentaries that expand on the text.⁵⁸ The main purpose of the OECD Convention is

⁵³ All but one of the 34 OAS member states have become party to this treaty. Barbados, which has signed the treaty, has not yet deposited its instrument of ratification.

⁵⁴ The U.S. opted out of the illicit enrichment provisions for constitutional reasons related to the presumption of guilt. *See* Resolution of Ratification of the Inter-American Convention Against Corruption, § (a)(4), *reprinted in* S. Exec. Rpt. 106-15, Report of the Committee on Foreign Relations, at 9 (2000).

⁵⁵ For an overview of the Convention and a comparison to the FCPA, see Low, Atkinson & Bjorklund, *A Comparison of the Inter-American Convention Against Corruption and the U.S. Foreign Corrupt Practices Act*, 38 Va. J. Int'l L. 243 (1998).

⁵⁶ This mechanism was ratified by the OAS General Assembly in June 2001. The first country reviews began in February 2003.

⁵⁷ *See* OECD Convention: Ratification Status, <<http://www.oecd.org/dataoecd/59/13/1898632.pdf>> (Sep. 11, 2006).

⁵⁸ Commentaries on the Convention on Combating Bribery of Officials International Business Transactions, Nov. 21, 1997, *reprinted in* 37 I.L.M. 1, 8 (1998) [hereinafter Commentaries].

to require countries to proscribe the bribery of foreign public officials in the same way that countries prohibit the bribery of their domestic officials. To this end, the OECD Convention requires that parties enact national laws criminalizing the bribery of foreign public officials with the focus on the supply of funds -- the person who promises or gives the bribe, in contrast to the offense committed by the official who receives the bribe.⁵⁹

The key provisions of the OECD Convention are mirrored in most ways by the FCPA, with a few exceptions, such as the Convention's lack of an exception for "facilitating" payments.⁶⁰ In the investment context, the OECD Convention's requirements for penalties are relevant. The OECD Convention requires parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the party's own domestic officials.⁶¹ Where a party's domestic law does not subject non-natural persons (*e.g.*, corporations) to criminal responsibility (*e.g.*, Japan), the OECD Convention requires the party to ensure that legal persons are "subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions."⁶² In all cases, the OECD Convention requires each party to take such measures as are necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of "comparable effect" are applicable.⁶³ The Commentaries define the "proceeds" of bribery as "the profits or other benefits derived by the briber from the transaction or other improper advantage."⁶⁴ Finally, the OECD Convention requires each party to consider the imposition of additional civil or administrative sanctions, including exclusion from public benefits or aid; temporary or permanent disqualification from participation in public procurement; judicial supervision; and judicial "winding-up."⁶⁵

⁵⁹ For a detailed discussion of the OECD Convention and its effects, *see* Lucinda A. Low, "The New Global Legal Framework: The OECD, OAS, and Council of Europe Antibribery Conventions: New International Standards and National Anti-Corruption Laws: Challenges for Effective Implementation and Enforcement," Conference of the International Bar Association, International Chamber of Commerce, and Organization for Economic Cooperation and Development, *The Awakening Giant of Anti-Corruption Enforcement*, Paris, France, 22-23 April 2004.

⁶⁰ However, the Convention's commentary suggests that conformity with local law would be considered a defense and that small "facilitating" payments are not prohibited, both of which are consistent with the FCPA. *See* Commentaries, ¶ 1(8).

⁶¹ OECD Convention, art. 3(1).

⁶² *Id.* art. 3(2).

⁶³ *Id.* art. 3(3).

⁶⁴ Commentaries, ¶ 21.

⁶⁵ Commentaries, ¶ 24.

C. Council of Europe Conventions

The Council of Europe, in which the United States has observer status, has adopted two conventions related to transnational corruption. The Criminal Law Convention on Corruption entered into force on July 1, 2002; the United States signed the Convention at the end of September 2000, but has not ratified it.⁶⁶ A more ambitious Civil Law Convention on Corruption (which the United States has not signed at this date) devoted to the issue of civil liability for corruption practices entered into force January 11, 2003.⁶⁷ On May 4, 1998, the Council's Committee of Ministers adopted a resolution that authorized the establishment of the "Group of States Against Corruption -- GRECO," whose purpose is to improve the capacity of its members to fight corruption by following up on compliance with their undertakings.⁶⁸

The Criminal Law Convention requires the criminalization of both active and passive (i.e., receipt) domestic bribery. It then goes beyond both the OAS and OECD Conventions to require criminalization of both active and passive bribery in the private sector.⁶⁹ The Convention also requires criminalization of transnational bribery of officials.⁷⁰ Article 12 of the Convention criminalizes "trading in influence," and recordkeeping issues are addressed using criminal law provisions, a unique approach among the international conventions.⁷¹

A unique feature of the Criminal Law Convention from other anticorruption treaties is its explicit provisions regarding corporate liability. Parties are required to adopt measures necessary to ensure that non-natural persons can be held responsible for the offenses of active bribery, trading in influence, and money laundering, when the offenses are committed for their benefit by a natural person, "who has a leading position within the legal person -- based on a power of representation, or decisionmaking or control authority."⁷² Where such natural persons

⁶⁶ At this writing, 34 parties (though not the United States) had ratified this convention. An additional Protocol to the Criminal Law Convention on Corruption, ETS No. 191, opened for signatures on May 15, 2003, entered into force on February 1, 2005, and currently has 17 parties.

⁶⁷ Civil Law Convention on Corruption, Nov. 11, 1999, Council of Europe, European Treaties, ETS No. 174, <<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>>. At this writing, 27 parties had ratified or acceded to this convention.

⁶⁸ See Council of Europe, Final Communiqué of the 102d Session of the Committee of Ministers, May 4-5, 1998, <[http://press.coe.int/cp/98/320a\(98\).htm](http://press.coe.int/cp/98/320a(98).htm)> (announcing adoption of Resolution (98) 7 creating the GRECO). GRECO was activated in the summer of 1999; as of September 4, 2006, it had 42 members, plus observers from the EU and several international organizations. The United States joined GRECO in September 2000.

⁶⁹ COE Criminal Convention, arts. 7, 8.

⁷⁰ *Id.* arts. 5-6, 9-11.

⁷¹ *Id.* art. 14.

⁷² *Id.* art. 18(1).

are accessories or instigators, corporate liability should accrue as well. In addition, parties are required to take measures

to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offenses mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.⁷³

Such corporate liability does not exclude the possibility of individual liability for the perpetrators, instigators, or accessories.⁷⁴

D. Other Regional Conventions

The European Union and the African Union have also adopted broad anti-corruption conventions.⁷⁵ The EU Convention is in force, while the African Union Convention, adopted only in 2003, has been ratified by 15 parties and requires five additional states to become party before entering into force. These regional instruments make Asia the only region not to have embraced the convention approach.⁷⁶ However, the UN's pursuit of a global convention, described in the next section, may make the absence of an Asian regional convention less significant.

E. UN Convention

The most recent, and conceptually the most ambitious, international convention addressing transnational corruption is the United Nations International Convention Against Corruption, which was opened for signature on December 9, 2003, and entered into force December 14, 2005. The UN Convention addresses six principal topics:

- Mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards and the promotion of codes of conduct and compliance programs for private companies;

⁷³ *Id.* art. 18(2).

⁷⁴ *Id.* art. 18(3).

⁷⁵ *See* European Union Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union, 1997 O.J. (C195) 1, 25.06.1997 (May 26, 1997); African Union Convention on Preventing and Combating Corruption, July 11, 2003, <http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf>.

⁷⁶ Instead, APEC has agreed on a series of measures to promote transparency and reduce corruption. *See* APEC Course of Action on Fighting Corruption and Ensuring Transparency (Sept. 2004), <http://www.apecsec.org.sg/apec/apec_groups/other_apec_groups/anti-corruption.html>.

- Mandatory and permissive criminalization obligations, including obligations with respect to public and private sector bribery, trading in influence, and illicit enrichment;
- The availability of private rights of action for the victims of corrupt practices;
- Extensive anti-money laundering measures;
- Cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and
- Asset recovery.⁷⁷

Although the response to the UN Convention has been strong, it is too early to tell what impact it will have on enforcement. U.S. law already includes most if not all of the provisions that the UN Convention would make mandatory once it takes effect. Its impact on U.S. enforcement of the FCPA and related statutes will therefore not be in new legislation, but on the extent to which its provisions for international cooperation facilitate enforcement. In this regard, it is noteworthy that U.S. government officials testifying in support of U.S. ratification of the Convention emphasized the support it would provide for U.S. enforcement efforts.⁷⁸

The UN Convention could, moreover, spawn other types of litigation in the U.S. or abroad, including government-initiated asset recovery suits, government proceedings to revoke licensing and permits, and private civil suits. The UN Convention's asset recovery provisions primarily focus on strengthening inter-governmental mechanisms for the recovery of assets plundered by corrupt governments (such as efforts by Nigeria to recover assets deposited by members of the former Abacha regime in banks in various countries, including the UK and U.S.).⁷⁹

The UN Convention, through Article 34, obliges states to take measures to address the consequences of corruption, including through the annulment or rescission of contracts, withdrawal of concessions, or other similar instruments that may have been tainted by corrupt

⁷⁷ United Nations Convention Against Corruption, *supra* n. 14. To date, 140 countries have signed the UN Convention, and 61 have ratified it. The United States has signed the Convention and ratification is expected later this year. The Convention has been reported out of committee, and floor action in the Senate is expected this fall. See Senate Exec. Rept. 109-18, 109th Cong., 2d Sess. (Aug. 30, 2006) on the United Nations Convention Against Corruption (to accompany Treaty Doc. 109-6).

⁷⁸ Statement of Bruce C. Swartz, Deputy Asst. Att'y Gen., U.S. DoJ Criminal Division, Before the Senate For. Rel'n Committee, Concerning U.N. Convention against Corruption, June 21, 2006, at 7 ("The Justice Department believes that the international cooperation provisions in this Convention will increase our ability to obtain evidence from foreign countries, leading to more effective enforcement of the FCPA and other offenses.").

⁷⁹ See UN Asset Recovery Project in Nigeria, <http://www.unodc.org/unodc/en/corruption_projects_nigeria_project2.html>.

practices. Although written in mandatory terms, the provisions direct states to give due regard to the rights of third parties acquired in good faith, as well as to fundamental principles of the host state's domestic law.⁸⁰

With regard to private rights of action, Article 35 of the UN Convention requires states to take such measures as may be necessary, in accordance with their domestic law principles, "to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." The mandatory language of this article appears to require states to establish private rights of action in civil proceedings for damages. Although corruption issues have represented increasingly fertile ground for private civil litigation in recent years, recognizing private rights of action from criminal anti-corruption statutes such as the FCPA⁸¹ would almost certainly expand the scope, if not frequency, of such actions.

⁸⁰ However, the article is not limited by its terms to offenders -- that is, those convicted of violations of the offenses prescribed by the UN Convention. The absence of such a limitation may enable this article to be applied in a wider variety of situations than has traditionally been the case in enforcement actions, potentially even to third party investors. Thus, companies that do business abroad or at home through government contracts, concessions, licenses and permits (upon which substantial investments are often predicated) should be aware that this provision may prompt more widespread efforts by host countries to revoke acquired rights than has historically been the case.

How the "good faith" provision is interpreted will be critical. The presumably easy cases are where there is collusion between the third party and the prior corruptor, or the third party and the corruptor are related. But these may be the rare cases. A more difficult case would be the acquirer who identifies evidence of past corruption in a transaction but nonetheless proceeds with the acquisition. Would this acquirer be acting in good faith if he/it proceeds with, in effect, actual knowledge of such past corruption? And what of the acquirer who may identify "red flags" in the course of due diligence, but ultimately does not reach any conclusive determination regarding the past corruption (a situation which may be very common)? Is proceeding with knowledge of such red flags a "good faith" action? Or does the acquirer have to be blissfully ignorant of the past corruption? If so, does that not create incentives for acquirers to put their heads in the sand, contrary to the intent of the FCPA and international standards?

And what of the "due regard" obligation, a rather vague and even circular concept since what is due may depend on the third party's good faith? Presumably the lapse of time will be relevant to whether revocation is appropriate, as well as subsequent investments made by acquirers in reliance on good faith.

Finally, what remedies would a third party have in the event of rescission or annulment of a concession? If the third party were a foreign investor in a country having a bilateral investment treaty (BIT) with the investor's home country, the protections of the BIT, for example, against expropriation and unfair and inequitable treatment would apply. So would concepts of non-discrimination (national treatment, and most-favored-nation treatment). Although corruption might be asserted as a defense to claim under these provisions, the host government would therefore presumably want to proceed with great caution before revoking previously granted rights.

⁸¹ The FCPA has been traditionally held not to confer such rights. See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), cert. denied 111 S. Ct. 961 (1991); *J.S. Serv. Ctr. v. GE Tech. Servs. Co.*, 937 F. Supp. 216 (S.D.N.Y. 1996).

This is not likely to happen in the U.S., because the *travaux préparatoires* to the Convention make it clear that countries are free to determine to what extent to implement this provision,⁸² and the U.S. Government does not intend to adopt new legislation in this regard and intends to declare the Convention to be largely non-self-executing. Moreover, while questions have been raised about the possibility the Convention would provide a basis for action under the treaty prong of the Alien Tort Claims Act, a recent U.S. Supreme Court decision has confirmed the limited scope of this statute.⁸³ As a result of this decision, assuming certain steps are taken by the United States in the ratification process, the risk of such suits would appear to be extremely low.⁸⁴ However this issue plays out in U.S. ratification of the Convention with respect to the ability of plaintiffs to access U.S. courts seeking damages, it seems clear such damage actions will become more common in other countries.

Whether these mostly new remedies called for by the UN Convention are good or bad depends very much on which side of a claim one expects them to be on, and one's views about the importance of private actions as a supplement or complement to public enforcement. Although it is much too early to have a sense of how these provisions are likely to be

82 The specific language of the *travaux* is as follows:

“... this article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.”

Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions, Addendum, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention Against Corruption, A/58/422/Add.1, note 38, 7 October 2003, <http://www.unodc.org/unodc/en/corruption/session_7/422f.pdf>.

83 28 U.S.C. § 1350. The Alien Tort Claims Act, or, as some prefer to call it, Alien Tort Statute (ATS), is a 1789 statute which gives to aliens a right of action for a tort only in violation of the law of nations or a treaty of the United States. Most of the cases to date have involved alleged torture, genocide, and other acts alleged to violate the law of nations (customary international law) rather than a treaty. The U.S. Supreme Court recently held, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 1627, L. Ed. 2d 263 (2004), that the ATS, although jurisdictional, permits actions based on a limited set of claims of international law violations.

84 For a more detailed analysis of this issue, see Lucinda A. Low, “Towards Universal Anti-Corruption Standards: The United Nations Convention Against Corruption and Other International Anticorruption Treaties: Too Much of a Good Thing?,” January 2005, distributed to attendees of the April 2004 Conference of the International Bar Association, International Chamber of Commerce, and Organization for Economic Cooperation and Development, *The Awakening Giant of Anti-Corruption Enforcement* (publication pending).

implemented at the national level, there is no doubt they could have significant implications for investment transactions.

F. International Financial Institutions

Finally, as noted above, international financial institutions also have taken new initiatives to avoid financing corrupt activity. These initiatives, to the extent they lead to sufficient enforcement and are supported by various civil service reform efforts encouraged by the banks in borrower countries, may have a substantial long-term impact on corruption. Within the World Bank Group, the International Development Association (“IDA”) and the International Bank for Reconstruction and Development (“IBRD”) have issued revised guidelines for procurement under IBRD loans and IDA credits and for the use of consultants by borrowers that included anti-corruption provisions.⁸⁵ The procurement guidelines delineate immediate and specific consequences for violations. Upon discovery of fraudulent or corrupt conduct by a bidder or, once financing has been granted, by a borrower, the guidelines state that the Bank will reject the bidder’s proposals for awards, cancel the remaining portions of loans already granted to the borrower, and debar the borrower from future World Bank financing, either for a specified time period or indefinitely. To help Bank officials in policing possible corrupt activities, the guidelines give the Bank the right to inspect the books and records of any suppliers and contractors involved in the performance of a Bank-financed contract, and to submit the records to outside auditors appointed by the Bank. In early 2004, the Bank also determined to require that bidders on Bank-financed projects certify that they have a compliance program in place. Similar requirements are created by the consultant guidelines, which include provisions for canceling financing to borrowers if it is determined that their consultants engaged in corrupt or fraudulent behavior.

The International Finance Corporation and other IFIs involved in project lending also have adopted, or are adopting in this area, new rules and contractual standards to enforce these rules. For example, during its first year of operation, the Office of Institutional Integrity of the Inter-American Development Bank (“IDB”) handled more than 200 active cases. Most of the allegations received by that office in 2004 related to fraud or corruption. The IDB also has established a sanctions committee, effective in July 2006, to impose penalties on those persons found to have violated the IDB standards.

As noted in the introduction to this article, these rules are being enforced, even as the IFIs are subject to continuing criticism about not doing enough to stem corruption in donee countries. In July 2004, the World Bank debarred for three years a Canadian company, Acres International Limited, finding that Acres had made payments to its representative in Lesotho knowing that

⁸⁵ World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits*, §§ 1.14, 1.15; *Guidelines: Selection and Employment of Consultants by World Bank Borrowers*, §§ 1.22, 1.23 (May 2004), <<http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Consultant-May-2004.pdf>>.

they would be used to bribe the government official responsible for a Bank-financed project.⁸⁶ The debarment followed an August 2003 affirmation on appeal of Acres' conviction in Lesotho for bribery. Although many of the sanctioned companies are fly-by-night organizations, other major companies have been sanctioned by the World Bank as well.⁸⁷ To the extent investments involve IFI financing or funding, the risks of running afoul of the IFIs' new anti-corruption standards must be taken into account. In August 2006, the World Bank adopted on a permanent basis a voluntary disclosure program that provides immunity for sanctions under certain conditions.⁸⁸ However, the requirements of this program are stringent.⁸⁹

With the above summaries of the relevant U.S. law and international standards in mind, this paper now will discuss specific scenarios that can create the potential for FCPA liability.

III. RECENT FCPA ENFORCEMENT ACTIONS: TRENDS AND THE IMPLICATIONS OF INTERNATIONAL STANDARDS

FCPA enforcement has been at historically high levels for the past several years. Since 1998, there have been about 50 FCPA cases, and many more are in the pipeline. Both the DoJ and the SEC are active in the area,⁹⁰ and many companies have faced parallel enforcement actions by both entities. Penalties vary, but the multi-million dollar *Lockheed* penalty in the 1990s is no longer an isolated occurrence.

This section will focus on some of the more significant cases and the trends they represent. In addition to affecting the nature of U.S. enforcement activity, international conventions may at least be partly responsible for the increase in the number of cases brought by the United States, because the monitoring mechanisms established by treaties such as the OECD

⁸⁶ Combating Multilateral Development Bank Corruption: Hearing Before the Senate Comm. On Foreign Relations, 108th Cong., 2d Sess. (2004) (statement of Guido Penzhorn, SC, Advocate and Senior Counsel, Durban Bar).

⁸⁷ See, e.g., List of Debarred Firms: Fraud and Corruption, <<http://web.worldbank.org/wbsite/external/projects/procurement/debarred.html>>.

⁸⁸ The Voluntary Disclosure Program is described on the web site of the Bank at <<http://www.worldbank.org/vdp>>.

⁸⁹ Eligibility requirements include: (1) investigation of all of a contractor's or consultant's World Bank contracts and contract bids during the past five years; (2) submission to verification of the results of the investigation; (3) acceptance of a compliance monitor for three years (all three at the contractor or consultant's expense); and (4) effective ongoing submission by the company to the regulatory oversight of the Bank, with mandatory 10-year debarment for any future violations of Bank rules that are not disclosed to the Bank. See World Bank, Dept. of Institutional Integrity (INT), Voluntary Disclosure Program (VDP), Terms & Conditions (Aug. 16, 2006).

⁹⁰ As of 2006, there had been 50 prosecutions since 1998, compared with 35 as of 2005. See 2006 TI Progress Report at 4.

Convention and the Inter-American Convention place the United States under some pressure to enforce, and report their enforcement of, international anti-corruption standards. One can see in the recent U.S. cases and trends not only the impact of international conventions and the impact of the related 1998 amendments to the FCPA, but also the impact of recent corporate governance reforms in the United States, which have resulted in more voluntary disclosures to the government of FCPA issues faced by companies. The topics reviewed in this section are:

- mergers and acquisitions and the issue of successor liability;
- increased prosecutions of foreign persons;
- increased risks of parent company liability for violations of the books and records provisions;
- extension of the “business” element beyond contracts;
- increased number of cases involving gifts, entertainment, travel, and similar benefits;
- aggressive use of other statutory authority;
- increased international cooperation and multiple investigations; and
- civil liability risks associated with corruption cases.

A. Mergers and Acquisitions -- the Issue of Successor Liability

The recent return of mergers and acquisitions has given rise to a series of FCPA enforcement actions. As with most FCPA cases, these actions all have resulted in settlements with the SEC and/or DOJ, leaving the legal issues unsettled. The cases discussed in this section reflect both successful and unsuccessful transactions. A number of these cases also involved prosecutions of foreign persons, as discussed in more detail in Section B below.

The primary FCPA concern in the M&A context for the successor company is its potential for vicarious liability should it proceed with the transaction. Such liability concerns arise principally from ongoing commitments (for example, agent contracts) or practices of the business being acquired, or from the fact that the acquiree is owned or controlled by a foreign government official. In some of the cases discussed below, the FCPA issues were uncovered during due diligence performed on the target prior to closing of the deal. In others, the issues arose after the transaction was completed (thus transferring responsibility and liability to the acquirer), but prior to the complete implementation of compliance controls by new management.

1. Baker Hughes

The *Baker Hughes* case, although more renowned for issues that did not involve an M&A transaction, is the first case of relevance to this topic. It shows the potential consequences of a failure to conduct appropriate due diligence prior to closing an acquisition or making particular payments. The case primarily involved payments in Indonesia to tax authorities authorized by senior officers of the company, and resulted in a joint SEC/DOJ prosecution based on an aggressive jurisdictional theory of KPMG’s Indonesian affiliate and one of its name partners.⁹¹

⁹¹ See note 106, *infra*.

However, the SEC's order in the case noted that in investigating the Indonesian payments, Baker Hughes discovered that an acquired entity, Western Geophysical, had previously made payments through subsidiaries to agents in India and Brazil "without determining to whom the money ultimately would be paid or the specific purpose of the payment."⁹²

In India, an agent of the Indian subsidiary paid \$15,000 to obtain shipping permits in India and later sought reimbursement from the company. The subsidiary paid the agent and recorded the payment without determining to whom the money ultimately would be paid, thereby in the SEC's view, inaccurately describing it in its records. In Brazil, the company approved a \$10,000 payment made by its Brazilian agent to obtain an approval for the restructuring of Baker Hughes entities in Brazil. The company recorded this payment without determining to whom the money ultimately would be paid and again, in the SEC's view, inaccurately described it.

The public documents in *Baker Hughes* do not explicitly say that the payments in India and Brazil were actual bribes. The books and records violations asserted by the SEC seems to be based on the acquiring parent's responsibility for the subsidiary's failure to perform due diligence sufficient to ensure that the payments, whatever their size, were not bribes. In public statements, SEC officials have suggested that the payments may not have been accompanied by back-up documentation sufficient under generally-accepted accounting principles. The consent decree includes a specific requirement that due diligence be conducted in the future.

2. *Syncor*

The *Syncor* case arose out of a voluntary disclosure by Syncor International Corporation, a U.S. corporation, in November 2002, that its planned merger partner/acquirer, Cardinal Health Inc., had, in the course of its merger due diligence, discovered evidence of possible improper payments to officials of state-owned healthcare facilities abroad. According to public papers in the case, Syncor Taiwan, a foreign subsidiary of the acquiree, paid physicians employed by state-owned hospitals in Taiwan in order to secure sales of pharmaceuticals and to obtain referrals of patients to medical imaging centers owned and operated by the company. The improper payments, which totaled \$457,117, were made with the authorization of the chairman of the board of Syncor Taiwan. The payments were recorded as "promotional and advertising expenses." The investigation by Syncor and Cardinal also uncovered smaller payments by subsidiaries in Mexico, Belgium, Luxembourg, and France.⁹³

As a result, Syncor International paid a \$500,000 fine, at the time the largest fine ever in an SEC FCPA enforcement action.⁹⁴ At the same time, Syncor Taiwan paid a \$2 million fine to settle a single criminal FCPA charge.⁹⁵

⁹² *In the Matter of Baker Hughes Inc.*, SEC Accounting and Auditing Enforcement Rel. No. 1444 (Sept. 12, 2001) at 13.

⁹³ *SEC v. Syncor Int'l Corp.*, 1:02CV02421 (D.D.C. Dec. 10, 2002), Lit. Rel. No. 17887.

⁹⁴ *Id.*

3. *ABB*

Another recent case, the *ABB* case, arose out of a voluntary disclosure by ABB in late 2003 reportedly derived from internal due diligence performed in advance of an agreement between ABB and a consortium of private equity investors to sell two ABB subsidiaries to the consortium.⁹⁶ To resolve allegations that its affiliates had made over \$1.1 million in improper payments to government officials in Nigeria, Angola, and Kazakhstan through cash, gifts, entertainment, and sham consulting contracts, ABB Ltd., a Swiss-based issuer, agreed to a settlement requiring it to disgorge \$5.9 million in allegedly ill-gotten earnings and to pay a \$10.5 million civil penalty to the SEC. At the same time, the two ABB subsidiaries that engaged in the illicit transactions, ABB Vetco Gray, Inc. and ABB Vetco Gray (U.K.) Ltd., each agreed to plead guilty to a related two-count felony information in a plea agreement with the DoJ, and were each assessed \$5.25 million criminal fines. The SEC's \$10.5 million civil fine against the parent was deemed satisfied by the subsidiaries' payment of the criminal fines. Resolution of the potential liability and completion of internal due diligence reportedly were conditions of the Purchase and Sale Agreement, announced in January 2004, and these requirements were expressly acknowledged in the plea agreements entered into by ABB's subsidiaries.⁹⁷

In 2006, the SEC settled cases against several former executives of Vetco Gray US and UK. Of the four defendants, three (John Samson, John Munro, and Ian Campbell) were non-U.S. nationals, while the fourth, John Whelan, is a U.S. citizen who was based in the United States.⁹⁸

4. *GE/InVision*

On December 3, 2004, both InVision Technologies, Inc. ("InVision") and the General Electric Company ("GE") entered into a settlement agreement with the DoJ because of alleged violations of the FCPA by InVision relating to transactions in China, Thailand, and the Philippines. GE announced its intention to buy InVision on March 15, 2004. InVision disclosed potential violations of the FCPA to the DoJ and the SEC in late July 2004. Under the terms of the merger agreement, the merger could not go forward while there was any pending or threatened litigation.

⁹⁵ *U.S. v. Syncor Taiwan, Inc.*, No. 02-CR-1244-ALL (C.D. Cal.). Jurisdiction was based on the chairman's acts in the United States.

⁹⁶ *U.S. v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK, Ltd.*, Case No. 04-CR-279-01 (S.D. Tex. July 6, 2004). See ABB Press Release, "ABB concludes compliance review of upstream Oil, Gas and Petrochemicals business," July 7, 2004 (discussing due diligence aspects).

⁹⁷ See also Section IV.B.1, *infra* (discussing relevant Opinion Procedure releases).

⁹⁸ Samson was held liable for disgorgement of a \$50,000 kickback he received, while the other three defendants were assessed a civil penalty in the amount of \$40,000 each. *SEC v. Samson, Munro, Campbell, and Whelan*, Case No. 06-CV-01217 (D.D.C. 2006) (Final Judgments, July 14, 2006).

Under the agreement with the DoJ, InVision agreed to pay a penalty of \$800,000, and it accepted responsibility for FCPA violations. InVision agreed to continue to cooperate with the DoJ and the SEC. InVision also agreed to negotiate in good faith for a settlement with the SEC. It also required InVision to retain and pay for an outside, independent, law firm to monitor InVision's compliance with the FCPA and with the settlement agreement, and report to the SEC about its findings. Under the terms of the agreement, this commitment would not need to be fulfilled, however, if the company had merged with General Electric before January 1, 2005.

GE entered into a separate agreement with the DoJ at the same time. Under that agreement, GE was assured it would not be prosecuted for any transactions that occurred before the agreement, if they had been disclosed to the DoJ by InVision or GE. The agreement specified that GE was required to take steps to integrate InVision into its GE's FCPA compliance program. In addition, GE agreed to affirmatively disclose any violations discovered that would be relevant to the government's investigation.

On February 14, 2005, after the merger between GE and InVision had been completed, the SEC announced it had reached a settlement of charges against InVision.⁹⁹ Under the settlement, the new entity, GE InVision, agreed to disgorge the \$589,000 in profits arising from the alleged FCPA violations, to pay prejudgment interest of \$28,703.57, and to pay a \$500,000 civil penalty.

5. *Lockheed/Titan*

On March 1, 2005, the U.S. government announced that it had reached a settlement with Titan Corporation for civil and criminal violations of the FCPA -- the largest ever in the history of the Act. Under the settlement agreement, Titan is obligated to pay approximately \$28.5 million in criminal and civil fines, as well as hire an independent consultant to revamp the company's FCPA compliance program. Under the criminal plea agreement, Titan pleaded guilty to three criminal counts for violation of the FCPA, false books and records, and aiding and assisting in filing a false tax return.¹⁰⁰

The violations that were the subject of the Titan settlement took place in Benin. Titan Wireless, a subsidiary of Titan Corporation, was developing a telecommunications network in Benin. According to the plea agreement, Titan paid over \$2 million in so-called "social fees" to the presidential election campaign of the then-president in return for receiving a higher management fee for its contract in Benin. The payments were used to, among other things, purchase t-shirts for use in the re-election campaign. Titan recorded the payments in its books as "customs exoneration." According to the plea agreement, Titan had no FCPA compliance program in place when the violations occurred.

⁹⁹ SEC Exchange Act Release No. 51199 and Acctg. Release No. 2186; Litigation Release No. 19078 and Acctg. Release No. 2187 (all Feb. 14, 2005).

¹⁰⁰ *United States v. Titan Corp.*, S.D. Ca., Case No. 05CR0314-BEN (filed March 1, 2005) (Plea Agreement); *SEC v. Titan Corp.*, D.D.C., Civil Action No. 05-0411 (JR), March 1, 2005 (Complaint); SEC Litigation Release No. 19107 (March 1, 2005).

The Titan case grabbed headlines because of Titan's planned merger with Lockheed Martin Corporation. On September 15, 2003, an agreement to pursue a merger between Lockheed Martin and Titan was announced, with an initial value set at \$1.83 billion (\$22 per share of stock of Titan). As the transaction proceeded toward its scheduled early 2004 closing date, due diligence reportedly uncovered potentially improper payments by Titan business units to consultants in Benin, Saudi Arabia, and East Asia. Though reportedly Titan met with authorities in an effort to negotiate a resolution of the investigations, in early June 2004, the SEC apparently issued a "Wells" notice to Titan signaling the agency's intention to recommend an FCPA enforcement action against Titan. On June 26, 2004, Lockheed announced the termination of the merger agreement.

At the time it settled the FCPA case against Titan, the SEC, in a Section 21(a) Report, announced its intent to prosecute issuers for making FCPA-related public disclosures which they know or should know are misleading, and for failing to update earlier disclosures to prevent them from becoming misleading. In the case of Titan, representations were made in the company's proxy statement and publicly-released merger documents that the company was not aware of any past FCPA violations by the company that could create liability. The SEC noted that, although the merger agreement and Titan's proxy statement and merger agreement were amended several times due to subsequent investigations of Titan for FCPA violations, Titan did not modify the FCPA representation. The SEC's issuance of a 21(a) report served as a warning to companies that it may bring enforcement actions based just on FCPA violations, but also for violations of the anti-fraud provisions of the securities laws when it believes companies have made false or misleading public disclosures regarding FCPA compliance whether based on negligence, recklessness, or intent. As the report stated:

We will consider bringing an enforcement action under Sections 10(b) and 14(a) of the Exchange Act and rules 10b-5 and 14a-9 thereunder in the future if we determine that the subject matter of representations or other contractual provisions is materially misleading to shareholders because material facts necessary to make that disclosure not misleading are omitted.¹⁰¹

6. *Other Cases*

Other FCPA cases related to mergers and acquisitions continue to emerge, whether in the recently-settled Tyco litigation¹⁰² or in the pending merger between telecom giants Lucent and Alcatel, which raises the novel situation of an M&A transaction in which both sides are

¹⁰¹ *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on potential Exchange Act Section 10(b) and Section 14(a) liability*, SEC Release No. 51283, March 1, 2005, at 3.

¹⁰² *United States v. Tyco Int'l Corp.*, Case No. 06-CV-2942 (S.D.N.Y. 2006) (settling allegations of FCPA violations in post-acquisition dealings of Tyco subsidiaries acquired in Brazil and South Korea and citing insufficient pre-acquisition due diligence to identify FCPA issues in those subsidiaries).

embroiled in significant pre-existing anti-corruption investigations.¹⁰³ There are two other FCPA cases where the successor liability issue has not been addressed but could still emerge, one in the telecommunications area and one in the oil services industry.¹⁰⁴

B. Prosecutions Against Foreign Persons

Enforcement officials have shown an increased willingness, particularly since the 1998 amendments to the FCPA, to bring enforcement actions against foreign persons. These may include both foreign “issuers” of securities in the United States, “gatekeepers” such as lawyers and accountants, and corporate executives.

1. ABB

The *ABB* case discussed in the preceding section, featuring enforcement actions by both the DoJ and SEC, involved two subsidiaries of a foreign issuer and three non-U.S. employees as well as a U.S. employees of that subsidiary.

2. Montedison

The *Montedison* case, settled in 2001 after several years, involved allegations that the Italian company disguised hundreds of millions of dollars of payments that were used, among other things, to bribe politicians in Italy and other persons. The SEC alleged violations of the FCPA books and records and internal control provisions, as well as anti-fraud and financial reporting provisions of the Exchange Act. *Montedison*, after ownership changes which resulted in it ceasing to be an issuer, settled the charges and paid a fine of \$300,000.¹⁰⁵

¹⁰³ The parties to that transaction are working together to develop a new anti-corruption compliance program. *See* Alcatel, Form F-4/A, filed Aug. 4, 2006, at 101 (announcing that, in connection with the proposed transaction, “[t]he parties have agreed to develop a mutually acceptable compliance program to address the combined company’s compliance with the Foreign Corrupt Practices Act, rules related to the Convention on Combating Bribery of Foreign Public Officials and other laws. The parties have also agreed to implement a plan and procedures to review Alcatel’s and Lucent’s current compliance with such laws.”).

¹⁰⁴ Since Teleglobe International Holdings Corp. acquired ITXC Corp in late 2004, ITXC Corp. employees have been prosecuted for alleged involvement in improper payments. Yet, to date, neither Teleglobe nor ITXC have been subject to an enforcement action. Similarly, after Boots & Coots International Well Control, Inc. acquired Hydraulic Well Control, LLC, the former parent company of Hydraulic Well Control was prosecuted for books and records and internal controls violations related to payments made by Hydraulic Well Control. To date, that case has not led to an enforcement action against Hydraulic Well Control or Boots & Coots.

¹⁰⁵ *SEC v. Montedison, S.p.A.* (Civil Action No. 1:96CV02631), D.D.C. 2001; SEC Accounting and Auditing Enforcement Release No. 1380 (2001).

3. *Baker Hughes*

The *Baker Hughes* case in Indonesia gave rise not only to enforcement actions against the U.S. company and two of its executives, but also to the bringing of an unprecedented joint SEC-DoJ action against the Indonesian affiliate of KPMG and one of its named partners.¹⁰⁶ KPMG-SSH, the company's accountant, allegedly facilitated a payment to an Indonesian tax official to reduce the tax assessment on an Indonesian company beneficially owned by Baker Hughes. Harsono was a partner at KPMG-SSH who was directly involved in the matter. Although neither he nor anyone else from KPMG came to the United States in connection with the transaction at issue, the government's theory was apparently that their actions in Indonesia triggered U.S. jurisdiction because they were intended to cause an effect in the United States, or possibly that they had an indirect agency relationship with the U.S. company. The government alleged violation of the anti-bribery provisions of the FCPA and the books and records and accounting control provisions of the FCPA. Defendants consented to a final judgment that permanently enjoined them from further violations of the antibribery provisions of the FCPA and aiding and abetting violations of the FCPA, as well as the internal control provisions of the Exchange Act.

4. *Kozeny and Bodmer*

The *Bodmer* case, discussed in section F below, involved a Swiss lawyer who was central to an alleged scheme to acquire control of the State Oil Company of Azerbaijan through the purchase of privatization options and vouchers. Although the FCPA conspiracy count (based on the pre-1998 FCPA) failed on jurisdictional grounds, he was convicted on the money laundering conspiracy count which was based on the FCPA. Subsequently, his principal, Victor Kozeny, an Irish national resident in Bermuda, and other investors, were indicted in connection with the scheme.¹⁰⁷ At the same time these indictments were made public, the U.S. Government also recited its having obtained guilty pleas of three individuals, Clayton Lewis (a co-investor), Thomas Farrell, an employee of Kozeny companies, and Hans Bodmer, a Swiss lawyer who represented the Kozeny companies. Farrell and Bodmer are non-U.S. nationals.¹⁰⁸

5. *Syncor*

The *Syncor* case, discussed in the previous section, included a claim against a senior executive of Syncor Taiwan, a foreign national who acted in furtherance of the alleged bribes while in the territory of the United States. Unlike the *KPMG* case, therefore, the government's approach to jurisdiction in *Syncor* is easily squared with the language of the "any person" provision at 18 U.S.C. § 78dd-3.

¹⁰⁶ *U.S. & SEC v. KPMG-Siddharta, Siddharta & Harsono ("SSH") and Sonny Harsono* (Civil Action No. H-01-3105) S.D. Tex., September 2001; SEC Litigation Release No. 17127 (September 12, 2001).

¹⁰⁷ *United States v. Kozeny et al.*, Case No. 05-CR-518 (S.D.N.Y. 2005) (Indictment filed under seal May 12, 2005).

¹⁰⁸ *See* U.S. Announces Charges in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan, U.S. Dept. of Justice, Press Release (Oct. 6, 2005).

6. Others

Additional major cases reportedly under investigation involving foreign nationals include the SEC's actions against certain foreign oil companies, triggered by the Statoil scandal in Iran¹⁰⁹, the investigation of DaimlerChrysler AG of Germany¹¹⁰, and the Alcatel investigation.¹¹¹

C. Increased Risks of Parent Company Liability for the Books and Records and Internal Controls of Foreign Subsidiaries

The *Monsanto*, *IBM*, and *Triton Energy* cases illustrate the risk of parent company liability, especially under the FCPA's accounting provisions, with regard to the activities of a wholly-owned foreign subsidiary.¹¹²

The complaint in *Triton* alleged that the parent company violated the FCPA because it failed to exercise sufficient control over its subsidiary's activities, including failing to remove employees suspected of making illegal payments and ignoring a whistle-blowing report by an internal auditor, while the complaint in *Monsanto* suggested the parent was responsible for payments of its foreign subsidiary.¹¹³

The *IBM* case involved a wholly owned subsidiary in Argentina which had allegedly made payments in connection with a contract with a state-owned enterprise. While lack of evidence of corporate knowledge or approval of the payments likely saved the parent from a criminal prosecution, the parent still incurred a \$300,000 fine for accounting violations due to its consolidation of the Argentine affiliate's financial results.¹¹⁴

The SEC also has held a parent responsible for books-and-records violations by a minority-owned foreign subsidiary. The *BellSouth* case¹¹⁵ involved a Nicaraguan minority-owned (but controlled) subsidiary that allegedly did not properly record payments to a lobbyist on its books

¹⁰⁹ Statoil ASA, Form 2-F, filed Mar. 31, 2006, in discussion of Risk Factors.

¹¹⁰ DaimlerChrysler AG, Form 20-F/A, filed June 30, 2006, at F-73.

¹¹¹ Alcatel, Form 20-F, filed Mar. 31, 2006, at 59-61.

¹¹² Both *Monsanto* and *Triton Energy* involved subsidiaries operating in a high-risk country, Indonesia. Both involved alleged payments to secure administrative or regulatory action—tax and audit-related in *Triton*, and environmental in *Monsanto*.

¹¹³ *Monsanto* also involved alleged payments by a U.S. employee of the parent company. *SEC v. Monsanto Company*, SEC Lit. Rel. No. 19023 (Complaint) (Jan. 6, 2005).

¹¹⁴ *In the Matter of International Business Machines*, Exch. Act Rel. No. 34-43761 (2000).

¹¹⁵ *SEC v. BellSouth Corporation*, Exch. Act Rel. No. 34-45279 (2002).

and records and lacked insufficient controls with respect to the engagement of the lobbyist. The amount of payments involved was on the order of \$60,000. Although no bribery was proven, the SEC's action focused on the fact that the lobbyist was tasked with securing changes to telecommunications legislation in Nicaragua, legislation over which the lobbyist's husband, a member of Congress and the chair of its telecommunications commission, had significant authority.

D. Extension of the “Business” Element Beyond Contracts

Under the statute, the ultimate objective of a corrupt payment must be to obtain, retain or “direct business to any person.” The focus of this element is on specific business benefits, not on non-business interests. The scope of this element and, therefore, the very scope of the FCPA has been challenged in recent litigation in the *Kay* case. In that case, Douglas Murphy and David Kay, who were officers at American Rice, Inc., allegedly authorized payments to customs officials in Haiti to induce the officials to accept false documents underestimating by one-third the quantity of rice shipped, such that customs duties and sales taxes owed by the company were reduced. For this, they were charged with twelve counts of violating the antibribery provisions of the FCPA.

After a federal District Court in Houston dismissed the indictment, reasoning that improper payments made to reduce customs duties and sales taxes were outside of the FCPA because they were not made to “obtain or retain business,”¹¹⁶ the Court of Appeals for the Fifth Circuit reversed that decision, holding that payments to reduce taxes and duties could fall within the scope of the “obtain or retain” business element of the FCPA bribery offense. A key issue raised on appeal was the alleged inconsistency of the District Court’s narrow interpretation with U.S. obligations under the OECD Antibribery Convention.

The Fifth Circuit found that “Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business.”¹¹⁷ The court held that the “business” under the FCPA could be more than contracts. It could also include benefits derived from administrative or regulatory action. Under the appeals court decision in *Kay*, the test for a business nexus is whether the payment activity at issue “was intended to produce an effect that would assist in obtaining or retaining business.” *Kay*, 359 F.3d at 743.¹¹⁸

¹¹⁶ The *Kay* case was tried in the same court which heard the *Mattson & Harris* case, involving executives of Baker Hughes, *SEC v. Mattson and Harris* (Civil Action No. H-01-3106), S.D. Tex., 2001; SEC Accounting and Auditing Enforcement Release No. 1445 (Sept. 12, 2001).

¹¹⁷ *United States v. Kay*, 359 F.3d 738, 755 (5th Cir. 2004) reversing and remanding *U.S. v. David Kay and Douglas Murphy*, 200 F. Supp. 2d 681 (S.D. Tex. 2002).

¹¹⁸ See also *SEC v. David Kay, Douglas Murphy and Lawrence Theriot* (Civil Action No. H-02-2908), S.D. Tex. 2002; SEC Accounting and Auditing Enforcement Release No. 1607 (2002).

Enforcement authorities have brought other recent cases besides *Kay* involving administrative or regulatory action.¹¹⁹

E. Increased Numbers of Cases Involving Gifts, Entertainment, Hosting and Sponsorships, and Similar Benefits

Several recent cases have demonstrated a willingness of enforcement officials to look at a broader set of “things of value” than simply cash payments made to an official directly or through an intermediary. These cases show that a “thing of value” can include charitable and political contributions, sponsorship of travel and travel-related expenses, and gifts and entertainment.

1. Charitable Contributions

In June 2004, Schering-Plough Corporation settled SEC allegations that the company had violated the FCPA’s books and records provisions by making payments of \$76,000 between 1999 and 2002 to a Polish charity headed by the Director of the Silesian Health Fund, in exchange for the official’s influence on the government’s decision to purchase Schering-Plough products for the health fund. In the settlement, the company agreed to a cease-and-desist order and a civil penalty of \$500,000.¹²⁰

2. Travel and Travel-Related Expenses, Gifts and Entertainment

Metcalf & Eddy, a civil case brought by the DoJ in 1999, involved allegations that the company had provided travel advances and hotel upgrades for two trips to the United States and Europe by the Chairman of an Egyptian municipal sanitation and drainage organization, and his wife and two children, in return for his influence over the review of bids for a project with the U.S. Agency for International Development. The company was charged with violations of the antibribery and books and records provisions of the FCPA. The case was settled with the company’s agreement to pay a fine of \$400,000 and to reimburse the costs of the investigation. The company also agreed to implement a compliance program, financial and accounting controls, and conduct periodic reviews of these programs at least every five years. *Metcalf & Eddy* further consented to cooperate with continued investigation, promptly investigate and report any alleged FCPA violations itself, and include in future joint venture agreements a representation and undertaking by each partner on FCPA matters. Finally, the company received a permanent injunction against future FCPA violations.¹²¹

¹¹⁹ *In the Matter of BJ Services*, SEC Accounting and Auditing Enforcement Rel. No. 1972 (March 10, 2004) (customs official paid to prevent deportation of equipment and customs penalties); *SEC v. Chiquita Brands International, Inc.*, Civ. No. 1:01-02079 (D.D.C. Oct. 3, 2001).

¹²⁰ *In the Matter of Schering-Plough Corp.*, SEC Administrative Proceeding Filing No. 3-11517 (June 9, 2004).

¹²¹ *U.S. v. Metcalf & Eddy* (Civil Action No. 99-12566) D. Mass., December 1999.

The *ABB* case discussed in Section A above involved a host of alleged benefits, including travel, shopping sprees, the use of automobiles, and gifts to officials in Nigeria. A pending investigation involving Lucent Technologies also reportedly involves alleged payments relating to travel by officials.¹²² Lucent allegedly paid over \$15 million in cash, gifts and the use of private jets to a Saudi Arabian minister of Post Telephone and Telegraph between 1995 and 2002 to secure telecommunications projects in the Kingdom. Lucent has disclosed that it is cooperating with the SEC and DoJ in their investigation. The SEC staff has reportedly recommended a \$25 million penalty against Lucent; recently the company received a Wells notice of intended enforcement action against the company.¹²³

3. *Political Contributions*

Political contributions also have been very much in the spotlight in recent prosecutions. The *Titan* case discussed in the M&A section involved such contributions ultimately used for the Presidential re-election campaign in the country of Benin. And a series of related 2001 prosecutions involving a port project in Costa Rica involved a political contribution scheme in that country by officials of a U.S. company seeking to pave the way for the project.¹²⁴ As discussed below, the French telecommunications concern, Alcatel, also is under investigation for alleged payments including payments to political parties in Costa Rica.

F. Aggressive Use of Money Laundering Laws to Pursue Corruption Cases

Prosecutors continue to use other statutes liberally in FCPA cases. In criminal anti-corruption enforcement, the recent *Bodmer* case illustrates the expanding use of the money laundering statutes identified in Section I.C above, which may give prosecutors a potent weapon when the FCPA itself may be unavailing – for example, because of lack of the necessary jurisdictional nexus over a foreign person. *Bodmer*, a lawyer and Swiss citizen, acted as an agent on behalf of a group of investors formed to attempt to acquire interests in SOCAR, the Azerbaijan national oil company, which was due to be privatized. Several of the members of the consortium were U.S. persons. The U.S. government alleged that *Bodmer* facilitated the payment of millions of dollars in cash and wire transfers to acquire privatization instruments issued by the government of Azerbaijan, as well as to fund payments to senior officials of Azerbaijan, the oil company and the State Property Committee. For this conduct, *Bodmer* was

¹²² See Lucent 8-K filing (August 8, 2003); Wall Street Journal (March 18, 2004).

¹²³ This notice, however, involves China, so it is not clear whether the Saudi case is proceeding. See note 136, *infra*.

¹²⁴ See *U.S. v. Halford* (01 Cr. No. 221) W.D. Mo., August 2001; *U.S. v. Reitz* (01 Cr. No. 222) W.D. Mo., August 2001; *U.S. v. Robert Richard King and Pablo Barquero Hernandez* (Cr. No. 01-190) W.D. Mo., June 2001.

charged with one count of conspiracy to violate the FCPA's antibribery prohibition and one count of conspiracy to launder money.¹²⁵

In July 2004, a federal district court in New York dismissed the charge of conspiracy to violate the FCPA, based on its finding that the court did not have jurisdiction over Mr. Bodmer. The court held the FCPA, before its 1998 amendments, did not prohibit conduct allegedly committed prior to those amendments by a foreign national such as Mr. Bodmer, and that the court did not otherwise have jurisdiction over Mr. Bodmer because he was a foreign national who was not afforded access to counsel at the time of his extradition. His motion to dismiss the money laundering conspiracy charge, however, was denied. The court held that the Government could proceed with its money laundering conspiracy charge, even though the alleged corrupt practices were entirely extraterritorial, and even though the FCPA conspiracy count had been dismissed on jurisdictional grounds. The court reasoned that Mr. Bodmer could be found guilty of promoting unlawful activity, such as an FCPA violation, even though he could not be convicted of an FCPA violation for his conduct.¹²⁶ Mr. Bodmer subsequently pleaded guilty to the money laundering conspiracy charge.

In October 2005, the Government unsealed its indictment of Viktor Kozeny, a Czech national who reportedly resides outside the United States, for his role in the same pursuit of the same investment opportunity in Azerbaijan.¹²⁷ In that case, the Government has indicted Mr. Kozeny and two other individuals. Not only has the government brought charges under the antibribery provisions of the FCPA, but also under the same provision of the money laundering laws used in the *Bodmer* case: the provision of the Money Laundering Control Act, 18 U.S.C. § 1956 (a)(2), which criminalizes the interstate or international transfer of funds or monetary instruments to promote a specified unlawful activity. Other charges have been brought in this case for conspiracy to violate the FCPA, violation of the Travel Act, and the making of false statements. (The Government is again asserting a very large forfeiture claim -- of \$174 million in assets allegedly connected with the alleged unlawful conduct.)

The *Giffen* case brought in 2003 also involves use of the same provision of the money laundering laws at issue in the *Bodmer* case. In the *Giffen* case, Mr. Giffen, chairman of a New York-based merchant bank, allegedly made payments to senior Kazakh officials through the accounts of foreign shell organizations in connection with an investment opportunity in Kazakhstan. He was charged in 2003 with 62 criminal counts, including not only violations of the antibribery provision of the FCPA, but also money laundering and wire fraud. The case is currently pending in the District Court for the Southern District of New York.¹²⁸

¹²⁵ The indictment also sought \$150 million in restitution, among other claims. *See United States v. Bodmer*, No. 03-Crim. 947, 2004 U.S. Dist. LEXIS 959 (S.D.N.Y. Jan. 28, 2004).

¹²⁶ *See United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004).

¹²⁷ Indictment in *United States v. Kozeny et al.* (Cr. No. 05-518), S.D.N.Y. May 15, 2005.

¹²⁸ *United States v. Giffen* (Cr. No. 03-663) S.D.N.Y., March 2003.

G. Other Relevant Laws

The *Sengupta* and *Basu* prosecutions discussed in the following section also alleged a conspiracy to commit wire fraud as well as to violate the antibribery provisions of the FCPA. The *Reilly* case, involving a hospital contract in Saudi Arabia, involved criminal charges brought under the Travel Act as well as the FCPA.¹²⁹ Other cases have involved charges of tax evasion;¹³⁰ false statements;¹³¹ racketeering and conspiracy to defraud;¹³² among others. Increased use of the tax laws to prosecute bribery is being encouraged by the OECD.¹³³

In the case of civil and administrative enforcement, the recent 21(a) report of the SEC issued in connection with the *Titan* settlement shows the clear intention of the SEC to use the antifraud provisions of the securities laws when appropriate.¹³⁴

H. Increased International Cooperation and Multiple Investigations

The *Bodmer* and *Giffen* cases discussed in the preceding section also illustrate the effects of growing international cooperation in the anticorruption arena. Such cooperation – likely the direct result of international standards – is significant given the difficulty of prosecuting foreign bribery, given that accused persons and evidence often reside outside the United States. Mr. Bodmer was arrested by the Korean authorities while on a business trip in that country, and, after spending some time in confinement in Korea, was rendered to U.S. authorities for trial in the United States (the FCPA conspiracy charge against him was dismissed in part because he was not given access to counsel at the time of his being rendered, though). The *Giffen* case was the result of spontaneous information-sharing by the Swiss authorities, who had obtained relevant evidence in connection with a money-laundering investigation of Kazakh government officials. The initial information-sharing led to a series of mutual legal assistance requests. Similarly, in the ongoing U.S. investigation into certain Nigerian activities of a subsidiary of the U.S. company Halliburton Corp. (“Halliburton”), the DoJ reportedly has exercised a special letters rogatory procedure for the purpose of obtaining evidence with the cooperation of foreign authorities.

¹²⁹ *United States v. Reilly and Thomson* (Case No. 04-CR-240-ALL), N.D. Ala, July 2004.

¹³⁰ *U.S. v. Halford* (01 Cr. No. 221), W.D. Mo., August 2001

¹³¹ *U.S. v. Reitz* (01 Cr. No. 222), W.D. Mo., August 2001

¹³² *U.S. v. Robert Richard King and Pablo Barquero Hernandez* (Cr. No. 01-190), W.D. Mo., June 2001

¹³³ Tax examiners around the world are being trained to identify bribery issues in tax audits. *See generally* OECD Bribery Awareness Handbook for Tax Examiners, Centre for Tax Policy and Administration (2006).

¹³⁴ *See* Section III.A, *supra*.

National prosecutors also benefit from the anti-corruption programs at IFIs. The World Bank has made at least two criminal referrals to United States authorities. Both involved Bank personnel based in the United States involved in questionable activities. These referrals resulted in the *Sengupta* and *Basu* prosecutions and pleas.¹³⁵ Such referrals are becoming much more common. The World Bank reports that it made 18 such referrals to national governments between July 2003 and March 2004.

The cooperation reflected in these cases in particular suggests that cooperation between national governments in anti-corruption cases has been strengthened by the recently-established network of international treaties. At the same time, information about ongoing investigations suggests that these treaties, and the national laws implementing them, are bringing about an increase in foreign enforcement activity. As a result, it is becoming increasingly common for companies to be subjected to simultaneous or sequential investigations by U.S. authorities and foreign authorities, as well as investigations by international institutions. Several recent examples illustrate the trend toward multiple investigations:

- TSKJ/Halliburton. Allegations relating to participants and persons involved in a consortium of multinational companies operating in the natural gas sector in Nigeria, which includes a subsidiary of Halliburton, continue to be investigated by a French magistrate judge, the Nigerian legislature, Nigerian enforcement authorities, and U.S., U.K., and other enforcement authorities.
- Alcatel. In mid-2004, Costa Rican authorities sought to bring the former President of Costa Rica before the local courts in connections with an alleged bribery scheme involving the French telecommunications company, Alcatel. That company, which issues shares on a U.S. exchange, has disclosed that U.S. and Costa Rican authorities have launched probed related to the bribery allegations against the former President.
- China/Lucent. Chinese authorities recently announced that its anticorruption unit had launched an investigation into corruption in the telecommunications sector. Meanwhile, U.S. authorities reportedly continue to investigate whether a large U.S. telecommunications company engaged in FCPA violations in China, with Lucent reporting publicly on September 6, 2006, that it had received notice from the SEC of proposed enforcement action.¹³⁶ Some press reports suggest Chinese

¹³⁵ *U.S. v. Sengupta* (Cr. No. 02-40) D.D.C., January 2002; Africa News (February 6, 2004). *U.S. v. Basu* (Cr. No. 02-475) D.D.C., November 2002. Mr. Sengupta allegedly entered into an agreement to cause World Bank-funded business to be awarded to a Swedish consultant in return for a kickback. He also allegedly received a related request for money from a Kenyan official, which he relayed the request to the Swedish consultant, which paid the Kenyan official. Mr. Basu admitted to facilitating the payment of a \$50,000 bribe to a Kenyan government official via an American and a Swedish consultant. Both were charged with conspiracy to commit wire fraud and violation of the FCPA's antibribery prohibitions.

¹³⁶ Lucent Technologies Inc., Form 8-K (Sept. 6, 2006).

authorities are looking into the same conduct.

- Oil-for-Food. Companies that dealt with the United Nations or in Iraq in relation to the U.N. Oil-for-Food Program have been embroiled in investigations conducted not only by several U.S. agencies and Congressional committees, but also by the investigation recently completed by the *ad hoc* United Nations Independent Inquiry Committee (also known as the Volcker Commission), as well as by foreign authorities who are receiving evidence from the Volcker Commission.
- Immucor. In late 2005, Immucor, a U.S. pharmaceutical company, reported completing an internal investigation relating to the conduct of its Italian subsidiary finding books and records violations in connection with a payment to a physician. While the SEC pursues a formal investigation, the subsidiary and its former president await trial in Italy.
- Others. As noted earlier, the World Bank continues to actively refer cases to national authorities. It has also taken or is proposing to take sanctions against companies convicted by member states, with the prime example being those companies convicted of bribery in the Lesotho Highlands Water Project.

I. Civil Liability Risks Associated with Corruption Cases

As noted earlier, it does not appear likely that a new cause of action will be created under U.S. law to implement the U.N. Convention provisions calling upon states to provide a right of action for private parties to sue for damages incurred as a result of corrupt activities. One indication that a new cause of action may not be needed is that existing grounds for civil liability are being invoked regularly in cases involving allegations of corruption. Of particular note are recent cases relating to shareholder derivative suits, wrongful termination, and claims by competitors.

When allegations of corruption arise against a publicly-traded company, especially in the context of a merger and acquisition transaction, the risk of a shareholder derivative suit can increase. For example, multiple civil class action suits were filed against The Titan Corp. after allegations of foreign official bribery against it surfaced in the due diligence conducted in connection with efforts by Lockheed-Martin to acquire it.

Companies also tread on delicate ground when dismissing or terminating employees or third parties, even when these dismissals or terminations are based upon a finding or belief that the employee or third party has engaged in improper conduct. Indeed, in several recent cases employees terminated in connection with or coincidental to the investigation of corruption issues have brought suit against their former employers. In one case, a former lawyer and business advisor to a major U.S. company brought suit after he was no longer utilized by the company. In another case, a former employee criminally and civilly charged with FCPA violations has filed an employment law action against his former employer. Such actions by companies therefore need to be taken with careful consideration for applicable standards, including but not limited to

contractual rights, employment laws and whistleblower protection statutes such as the Sarbanes-Oxley Act. Nonetheless, it is also important for companies to understand that taking disciplinary measures that are a critical element of an effective FCPA compliance program may necessitate assuming the risk of having to defend against a civil suit.

A third area of significant civil liability risk facing companies is suits by competitors alleging improper competition based upon allegations of corruption. The civil racketeering statute is often invoked in such cases, which have been filed in the past two years against major U.S. companies in the telecommunications industry and in the oil industry.

IV. CONCLUSIONS AND COMPLIANCE STRATEGIES

The increase in FCPA enforcement makes prevention an even higher priority than it may have been in the past. Moreover, the absence of preventive measures, as the *Titan* and *ABB* cases show, is almost certain to result in substantially increased penalties if an issue arises. This makes an effective FCPA compliance program essential, for non-U.S. as well as U.S. companies. It also makes adequate preventive efforts in the transactional context critical. Finally, where prevention fails, as it sometimes will, companies need to respond to the issues presented in a way that will minimize their enforcement risks.

A. Compliance Programs

Although details will vary from company to company, the basic elements of an effective corporate compliance program have grown over the years.¹³⁷ A program that approximates “best practices” in the FCPA compliance area would include:

- A statement of company policy to comply with the FCPA, along with other indicia showing a culture of compliance;
- Articulation of compliance standards through accessible policies and procedures;
- Procedures to ensure accurate books and records and sufficient internal controls;
- Senior level responsibility (at both director and management levels) for compliance;
- Procedures to identify and prevent delegation of authority to high risk individuals who could use such authority to engage in improper conduct;
- Procedures for the due diligence and vetting of third party relationships;¹³⁸

¹³⁷ See note 8.

¹³⁸ Although many FCPA enforcement actions have been brought against companies on the basis of their activities *vis-à-vis* their agents, consultants, or representatives, it is important to underscore that activities *vis-à-vis* any third party could trigger FCPA liability. For example, in Opinion Release No. 04-02, the DoJ conditioned its view that no enforcement action was warranted upon a representation that a company would institute an FCPA compliance program that extended to dealings with “all business partners.” In addition, in the *Baker Hughes* case, the liability of the company was related to its dealings with its foreign tax advisor. Indeed, as discussed earlier in this paper, the Government has prosecuted a foreign lawyer, Hans Bodmer, with conspiracy to violate the FCPA. These are prominent recent examples that enforcement officials take an expansive view of which third parties need to be considered

- Systems to ensure appropriate contract provisions and other safeguards are in place in all relationships with third parties;
- Education and training measures for relevant company personnel and, as appropriate, for agents and other third parties;
- Auditing and monitoring;
- Periodic review and updates of the program that account for changing risk conditions faced by the company, prior program effectiveness, and external metrics;
- Provisions for whistleblowing and internal investigations;
- Disciplinary mechanisms for violators and personnel in major compliance roles who fail to detect violations; and
- Where appropriate, provisions for applying the necessary management and financial control over the operations of foreign affiliates, whether wholly-owned by the company or joint ventures with foreign partners.

These programs may address other payment issues as well, including foreign (host country) antibribery legislation, campaign contribution rules, tax provisions, foreign exchange controls, gifts, charitable contribution restrictions, and other payments issues governed by applicable U.S and foreign law.¹³⁹ Increasingly, with the proliferation of treaty norms, such programs are multijurisdictional in flavor, not just driven by the U.S. FCPA.

Of all these elements, the last -- controls over foreign affiliates -- may be the most difficult to establish; however, as shown by the cases discussed earlier in this paper, foreign affiliates are an increasing source of potential liability to their issuer parent companies through the operation of the FCPA's accounting provisions. At minimum, close attention should be paid to ensuring the sufficiency of the company's "good faith" efforts to assure that the affiliates are following the FCPA internal control and accounting rules, as required by the Act for all "issuers." As noted above, it should also provide training and advice for foreign employees and venture partners to use in fulfilling any contractual obligations not to make corrupt payments.

in the formulation of an FCPA compliance program. Accordingly, companies should consider disciplining their dealings with not only agents, consultants, and representatives, but also with distributors, contractors, professional service providers and advisors, joint venturers, and other types of business partners.

¹³⁹ U.S. enforcement authorities have not specifically set out the requirements for FCPA compliance programs. They have indicated that such programs need to be risk-based, and consequently may differ from company to company, depending on the nature and locations of their international business, among other factors. For guidance regarding anti-corruption compliance programs generally, see Partnering Against Corruption Initiative (materials downloadable from <<http://www.weforum.org/en/initiatives/paci/index.htm>>) and the International Chamber of Commerce Rules of Conduct and Regulations to Combat Extortion and Bribery (downloadable at <<http://www.iccwbo.org/policy/anticorruption/id4730/index.html>>).

B. Avoiding Successor Liability in M&A and Third-Party Transactions

1. The Importance of Due Diligence to FCPA Compliance

Third-party due diligence to avoid vicarious liability -- for example, in entering into agency and consulting agreements -- has always been a central feature of FCPA compliance. As noted by the DoJ, “[t]o avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives.”¹⁴⁰ With the recent focus on FCPA risks in M&A transactions, the issue of due diligence in that context has come into sharp focus.

The *Baker Hughes* and *Tyco* cases discussed above make it clear that an acquirer who conducts no due diligence will likely incur liability, should improper payments later be discovered. But assuming an acquirer performs due diligence, how much diligence is necessary?

The ranges of answers to this question, and the unsettled legal nature of the question, are illustrated by several opinion releases and cases, mostly cases in which pre-acquisition due diligence has uncovered payments by the potential acquiree. The most recent release, FCPA Opinion Procedure Release 04-02 (July 12, 2004) is related to the *ABB* enforcement action (discussed in Section III.A). While the release is the most direct indication yet by the DoJ on what measures it might consider necessary to avoid successor liability in the FCPA context, many may question whether it would be appropriate for the Government to use the extraordinary measures taken in that case as a standard for other cases.

According to the Opinion, after execution of a preliminary acquisition agreement in October 2003, the investor group acquiring certain ABB affiliates and ABB agreed to jointly conduct an “FCPA compliance review” as part of the pre-acquisition due diligence using separately-engaged outside counsel and forensic auditors, of the relevant entities for a five-year period. ABB provided the investors with access to relevant witnesses and records. The Opinion notes that this review entailed:

- Over 44,700 “man-hours” of work by more than 115 attorneys;
- Manual review of over 1,600 boxes and 4 million pages of documents and electronic files;
- Over 165 interviews of current and former employees and agents of the entities;
- Review by over 100 forensic accountants of details of hundreds of thousands of transactions in 21 countries; and
- 22 separate reports by investors’ counsel on the entities’ operations.

In keeping with the enforcement agencies’ recent emphasis on “real-time enforcement,” all documents and witness interview memoranda were provided to the DoJ and SEC *as they were produced to counsel*.

¹⁴⁰ DoJ and U.S. Dep’t of Commerce, *Foreign Corrupt Practices Act: Antibribery Provisions*, March 15, 2002, < <http://www.usdoj.gov/criminal/fraud/text/dojdocb.htm>>.

The extent and evident cost of the extensive measures cited in the Opinion are such that many companies would consider that level of diligence to be wholly impractical in many circumstances and thus consider the opinion of limited value as a template for other merger/acquisition situations. Over 44,700 man-hours of work by more than 115 attorneys – which could entail costs of \$10-20 million dollars, or even more – do not represent a plausible minimum standard for avoiding successor liability, even if the costs were shared between the acquiring and acquired companies.

In another recent release, FCPA Opinion Procedure Release 2003-01 (Jan. 15, 2003) which many believe to be related to the *Syncor* case discussed in Section III.A, a U.S. issuer requested clarification of how the DoJ would view the purchase of the stock of an unnamed company where due diligence revealed that officers of a foreign subsidiary of the acquiree had authorized and made payments to individuals employed by foreign state-owned entities to obtain and retain business. Both the requesting issuer and the acquiree had disclosed results of investigations into the payments to the DoJ and the SEC. The requestor expressed concern that by acquiring the company it would also acquire potential criminal and civil liability under the FCPA for the past acts of the acquiree.

The DoJ indicated that it would take no enforcement action against the issuer for the pre-acquisition conduct of its future subsidiary. Among the relevant facts cited in the release supporting this determination were the remedial actions taken by the acquiree, including disclosure to the public and suspension of senior officers and employees implicated in the payments pending the conclusion of acquiree's internal investigation. The acquiring issuer also represented that it would perform the following actions once the sale were completed: continued cooperation with the DoJ, SEC, and foreign law enforcement;¹⁴¹ appropriate discipline of employees found to have made the improper payments; disclosure of any additional pre-acquisition payments made by the acquiree; extension of requesting issuer's compliance program to the acquiree; implementation of a system of internal controls at the acquiree; and maintenance of accurate books and records.

Thus, in recent years, due diligence has emerged as the most fundamental FCPA safeguard to be taken by covered entities and persons in preparation for all transactions, whether they involve the retention of a consultant or the acquisition of a company. In the authors' views, the test for whether a due diligence effort has been sufficient should be thoroughness within the standards of reasonableness. This is not a "one size fits all" test: the necessary scope and depth of such due diligence will be driven by the facts and circumstances of each case, particularly the

¹⁴¹ Given DoJ guidelines, this cooperation likely included a waiver of the attorney-client privilege with regard to the subject of the investigation. In at least one recent case, however, the Government appears to have subscribed to a plea agreement that endorses the view that in at least some U.S. jurisdictions the disclosure of privileged materials to the Government would not constitute a waiver of those privileges as to third parties. See *United States v. DPC (Tianjin) Co. Ltd.*, 05-CR-482 (C.D. Ca. 2005). In addition, aggressive application of the guidelines on waiver has been successfully challenged as unconstitutional in one recent case in New York.

“red flags” present. A transaction involving only minimal or no red flags will likely require a very different level of effort than a transaction involving multiple or serious ones.

If the acquirer has conducted reasonable inquiries under the circumstances and has not become aware of or closed its eyes to the interest of a foreign official or of past improper payments by the acquiree, then as a result, payments in connection with the acquisition, even to the acquiree, should not be considered to be made with the knowledge of an impermissible pass-through payment.¹⁴² Obviously, the investor covered by the FCPA must be able to document the nature and results of the search to establish its reasonableness.

2. *Designing Appropriate Safeguards*

As shown by the outcomes of the cases discussed in Section III.A, pre-closing due diligence is an essential FCPA risk management tool. Indeed, failure to conduct such due diligence can lead to successor liability that can adversely affect the anticipated economic benefit of a transaction. Identifying potential issues before the closing is not sufficient, however, since discovery of past action of the other party that represents a “red flag” may give the U.S. company the “knowledge” requisite for future vicarious liability for any similar acts the other party might take post-closing. The *Tyco* prosecution hints at this possibility. To reduce these kinds of liability risks, an acquirer or venturer should design and implement safeguards that respond directly to the red flags identified.

In the acquisition context, both the DOJ and the SEC have made it clear they are looking to acquirers that uncover FCPA issues in pre-closing due diligence to commit to implement “rigorous” anti-corruption compliance programs that cover the acquired entity.¹⁴³ Section IV.A. below covers most of the non-remedial elements of such programs.¹⁴⁴

The need for implementing these compliance programs and any specific safeguards as soon as possible after the closing of the transaction is highlighted by the *Baker Hughes* case. As discussed above, Baker Hughes found that an affiliate had made payments through subsidiaries to agents in India and Brazil. The payment in India related to the activities of a wholly-owned

¹⁴² This statement should not be read to imply that the interest of a foreign official in the transaction always causes a violation. Although such interests raise significant issues, enforcement officials have recognized that not all transactions with foreign officials will be violations of the law.

¹⁴³ See FCPA Opinion Procedure Release 2004-02 (July 12, 2004).

¹⁴⁴ Several recent enforcement actions have required companies to retain independent third party FCPA experts to perform periodic audits of the program’s operation for a term of years, reporting any gaps or issues directly to U.S. enforcement officials. Most recently, as a condition of accepting a plea from the Chinese subsidiary of U.S.-based Diagnostic Products Corporation, the DOJ required the company to engage an independent compliance expert to audit the company’s compliance program and monitor its implementation of new policies and procedures. See *United States v. DPC (Tianjin) Co. Ltd.*, 05-CR-482 (C.D. Ca. 2005). While periodic assessments and testing of compliance programs are recommended standard procedures, the requirements established in these releases are remedial, designed to correct programs found to be inadequate.

subsidiary of a company, Western Geophysical Corporation, which Baker Hughes acquired in August 1998 as part of its acquisition of Western Atlas Corporation. The payment occurred only two months after Baker Hughes acquired Western Geophysical, but was not discovered until much later. The SEC order stated that Baker Hughes had violated the accounting provisions of the FCPA, as it was responsible for its newly-acquired subsidiary's actions.

The DoJ most recently has addressed safeguards relevant to potential past payments by a foreign joint venture partner in FCPA Opinion Procedure Release 2001-01 (May 24, 2001). In this release, a U.S. company requested clarification of how DoJ would view a fifty-fifty joint venture with a French company and, in particular, how the DoJ would view certain provisions of the joint venture that addressed contracts entered into by the French company prior to the enactment of French Law No. 2000-595 Against Corrupt Practices ("FLAC"), implementing French obligations under the OECD Convention.

The U.S. company's representations to the DoJ included assurances by the French company that none of the contracts originally were procured in violation of any applicable antibribery laws. In addition, all agency agreements entered into prior to January 1, 2000 (the FLAC's effective date), had been terminated, and any outstanding payment obligations under those agreements had been liquidated, prior to the formation of the joint venture. For agreements entered after January 1, 2000, neither the U.S. company nor the joint venture entity would expend their funds to pay any obligations going forward. The joint venture also developed a "rigorous" compliance program for all future agency relationships. Finally, the U.S. company retained the right to terminate the joint venture if the French company were convicted of, or admitted, violating the FLAC or if, in the opinion of the U.S. company, the French company violated anti-bribery laws in such a manner as to have a "materially adverse effect" on the joint venture. Although the DoJ agreed not to pursue enforcement action based on those safeguards, it qualified its decision in a number of respects.

The DoJ first noted that, regardless of whether contracts contributed to the joint venture on their face evidenced a violation of an anti-bribery law, the U.S. company could incur FCPA liability for any continuing payments to foreign officials pursuant to or in connection with those contracts. The DOJ also expressly declined to endorse the "materially adverse effect" standard as the appropriate trigger for termination, apparently because that standard was viewed as potentially too narrow to ensure that the U.S. company could remove itself from the joint venture in the case of continuing bribes. This statement illustrates the DoJ's aggressive views regarding withdrawal obligations in transactions where corruption issues have arisen. Finally, the DoJ commented favorably on the U.S. company's compliance program; however, it refused to endorse any specific parts of the program, and, in fact, the release did not discuss any of the program's details.

It is also worth noting that companies have faced these kinds of issues for a long time under the FCPA. In a Review Release from 1984, the DoJ decided not to pursue enforcement action against a U.S. company that wished to invest in a foreign company whose agent had expressed an apparent intent to offer to pay a gratuity to low-level government employees to

facilitate approval of a certain transaction.¹⁴⁵ Justice's position was based on several facts: (1) no payment was actually made; (2) the U.S. firm had no knowledge that a payment was made, and had discouraged any payment; (3) the U.S. firm would have a minority interest in the foreign concern after the transfer of assets; (4) the U.S. firm agreed to notify DoJ and the host country government of any FCPA violations or intent to commit such violations by the foreign company; and (5) the U.S. firm retained the right (but not the obligation) to sever the relationship if it learned of an FCPA violation.¹⁴⁶

C. Dealing with Problems

Even with the best preventive efforts, problems may sometimes arise. The recent cases show that prompt attention to such problems can pay dividends, at least in the form of reduced penalties. Thorough and timely investigation, remediation, and cooperation with enforcement investigations remain critical. For public companies, careful attention to public disclosures is also key.

Whether to make voluntary disclosures of issues identified internally to enforcement authorities remains an issue that must be addressed on a case-by-case basis. The enforcement agencies, not surprisingly, encourage such disclosures. Yet as long as the precise benefits of disclosure remain uncertain, there will be companies that determine that the potential costs of disclosure outweigh the benefits.

CONCLUSIONS

In the last decade, the impact of the FCPA on the international business activities of both U.S. and foreign companies has deepened and broadened. Although the statute was by its nature extraterritorial from the outset, the addition of nationality-based jurisdiction for U.S. persons, and the expansion of jurisdiction over foreign persons through the 1998 amendments, have already begun to have a significant impact on enforcement. At the same time, the development of international standards and the acceptance of transnational bribery as a crime by other countries, and the cooperation provisions of international treaties, have fueled U.S. prosecutions and cooperative multijurisdictional prosecutions. These trends will only continue and grow with the rapid adherence of countries to the United Nations Convention Against Corruption. While

¹⁴⁵ See FCPA Review Procedure Release 84-02 (Aug. 20, 1984).

¹⁴⁶ *Id.* Of these factors, (1) and (2) appear to be the critical basis for precluding liability under the statute. The importance of (3) is not obvious, as the existence of control gives rise to a possibility of liability, but the fact that the control was a minority interest makes the liability more difficult to establish. Factors (4) and (5) presage the more developed safeguards in Opinion Release 2001-01, highlighting the DoJ's emphasis on transparency to the U.S. Government and the ability to withdraw from any "tainted" relationship. See also FCPA Opinion Procedure Release 1997-01 (Feb. 27, 1997) (no enforcement action indicated where the requestor learned of possible involvement of a representative in past illegal payments, because the requestor was unable to substantiate that involvement after due diligence, obtained an FCPA certification by representative that was also communicated to the DoJ, and promised to monitor future performance closely).

enforcement will be imperfect, as it always is, companies need to take steps to prevent enforcement problems. Issues can arise not only in the context of government contracts, but in any overseas business activities involving dealings with government, international organizations, political parties, campaigns and candidates, and state-owned or controlled enterprises.