



FCPA



A Resource Guide to the U.S. Foreign Corrupt Practices Act
Second Edition

By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission

This guide is intended to provide information for businesses and individuals regarding the U.S. Foreign Corrupt Practices Act (FCPA). The guide has been prepared by the staff of the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission. [This guidance reflects the views of the Division of Enforcement, but it is not a statement by the Commission and the Commission has neither approved nor disapproved its content.](#) It is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. It is not intended to substitute for the advice of legal counsel on specific issues related to the FCPA. It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.

Companies or individuals seeking an opinion concerning specific prospective conduct are encouraged to use the U.S. Department of Justice's opinion procedure discussed in Chapter 9 of this guide.

This guide is United States Government property. It is available to the public free of charge online at <https://www.justice.gov/criminal-fraud/fcpa-and-criminal-fraud/fcpa-resource-guide> and <https://www.sec.gov/spotlight/fcpa.html/fcpa-resource-guide.pdf>.

A RESOURCE GUIDE TO THE
U.S. FOREIGN CORRUPT PRACTICES ACT
SECOND EDITION

By the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission

FOREWORD

We are pleased to announce the publication of [the Second Edition of](#) A Resource Guide to the U.S. Foreign Corrupt Practices Act. ~~The Foreign Corrupt Practices Act (FCPA) is a critically important statute for combating corruption around the globe. Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education, and infrastructure. When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage—and consumers lose. For these and other reasons, enforcing the FCPA is a continuing priority at~~ [Guide was originally published by](#) the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).

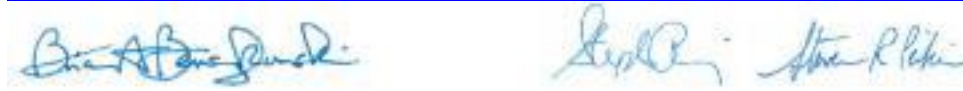
~~in November 2012. The Guide is the product of extensive efforts by experts at DOJ and SEC, and has benefited from valuable input from the Departments of Commerce and State. It endeavors to provide helpful information to enterprises of all shapes and sizes—from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The Guide addresses a wide variety of topics, including who and what is covered by the FCPA's anti-bribery and accounting provisions; the definition of a "foreign official"; what constitute proper and improper~~

~~gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. On these and other topics, the Guide takes a multi-faceted approach, setting forth in detail~~ to provide companies, practitioners, and the public with detailed information about the statutory requirements of the Foreign Corrupt Practices Act (FCPA) while also providing insight into DOJ and SEC enforcement practices through hypotheticals, examples of enforcement actions and anonymized declinations, and summaries of applicable case law and DOJ opinion releases. Then and now, the Guide represents one of the most thorough compilations of information about any criminal statute, and remains relevant to this day.

~~The Guide is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities. We are proud of the many lawyers and staff who worked on this project, and hope that it will be a useful reference for companies, individuals, and others interested in our enforcement of the Act.~~

Although many aspects of the Guide continue to hold true today, the last eight years have also brought new cases, new law, and new policies. The Second Edition of the Guide reflects these updates, including new case law on the definition of the term “foreign official” under the FCPA, the jurisdictional reach of the FCPA, and the FCPA’s foreign written laws affirmative defense. It addresses certain legal standards, including the mens rea requirement and statute of limitations for criminal violations of the accounting provisions. It reflects updated data, statistics, and case examples. And it summarizes new policies applicable to the FCPA that have been announced in the DOJ’s and SEC’s continuing efforts to provide increased transparency, including the DOJ’s FCPA Corporate Enforcement Policy, Selection of Monitors in Criminal Division Matters, Coordination of Corporate Resolution Penalties (or Anti-Piling On Policy), and the Criminal Division’s Evaluation of Corporate Compliance Programs.

Foreign bribery is a scourge that must be eradicated. It undermines the rule of law, empowers authoritarian rulers, distorts free and fair markets, disadvantages honest and ethical companies, and threatens national security and sustainable development. This updated Guide is meant not only to summarize the product of the dedicated and hardworking individuals who combat foreign bribery as part of their work for the U.S. government, but also to help companies, practitioners, and the public— many of whom find themselves on the front lines of this fight—prevent corruption in the first instance. We hope that the Guide will continue to be an invaluable resource in those efforts.



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The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American Public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.¹

- United States House of Representatives, 1977

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet. Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.^{1,2}

— United States Senate, 1977

eChapter 1

Introduction

INTRODUCTION

Congress enacted the U.S. Foreign Corrupt Practices Act (FCPA or the Act) in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt those corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.^{2,3}

The FCPA contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit U.S. persons and businesses (domestic concerns), U.S. and foreign public companies listed on stock exchanges in the United States or ~~which~~that are required to file periodic reports with the Securities and Exchange Commission (issuers), and certain foreign persons and businesses acting while in the territory of the United States (territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business. The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share FCPA enforcement authority and are committed to fighting foreign bribery through robust enforcement. An important component of this effort is education, and this resource guide, prepared by DOJ and SEC staff, aims to provide businesses and individuals with information to help them abide by the law, detect and prevent FCPA violations, and implement effective compliance programs.

The Costs of Corruption

Corruption is a global problem. In the ~~three~~four decades since Congress enacted the FCPA, the extent of corporate bribery has become clearer and its ramifications in a trans-national economy starker. Corruption impedes economic growth by diverting public

resources from important priorities such as

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health, education, and infrastructure. It undermines democratic values and public accountability and weakens the rule of law.³⁴ And it threatens stability and security by facilitating criminal activity within and across

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borders, such as the illegal trafficking of people, weapons, and drugs.⁴⁵ International corruption also undercuts good governance and impedes U.S. efforts to promote freedom and democracy, end poverty, and combat crime and terrorism across the globe.⁵⁶

Corruption is also bad for business. Corruption is anti-competitive, leading to distorted prices and disadvantaging honest businesses that do not pay bribes. It increases the cost of doing business globally and inflates the cost of government contracts in developing countries.⁶⁷ Corruption also introduces significant uncertainty into business transactions: Contracts secured through bribery may be legally unenforceable, and paying bribes on one contract often results in corrupt officials making ever-increasing demands.⁷⁸ Bribery has destructive effects within a business as well, undermining employee confidence in a company's management and fostering a permissive atmosphere for other kinds of corporate misconduct, such as employee self-dealing, embezzlement,⁸⁹ financial fraud,⁹¹⁰ and anti-competitive behavior.¹⁰¹ Bribery thus raises the risks of doing business, putting a company's bottom line and reputation in jeopardy. Companies that pay bribes to win business ultimately undermine their own long-term interests and the best interests of their investors.

Historical Background

Congress enacted the FCPA in 1977 after revelations of widespread global corruption in the wake of the Watergate political scandal. SEC discovered that more than 400 U.S. companies had paid hundreds of millions of dollars in bribes to foreign government officials to secure business overseas.¹¹² SEC reported that companies were using secret "slush funds" to make illegal campaign contributions in the United States and corrupt payments to foreign officials abroad and were falsifying their corporate financial records to conceal the payments.¹²³

Congress viewed passage of the FCPA as critical to stopping corporate bribery, which had tarnished the image of U.S. businesses, impaired public confidence in the financial integrity of U.S. companies, and hampered the efficient functioning of the markets.¹³⁴ ~~As Congress~~

No problem does more to alienate citizens from their political leaders and institutions, and to undermine political stability and economic development, than endemic corruption among the government, political party leaders, judges, and bureaucrats.

~~—~~ USAID Anti-Corruption Strategy

As Congress recognized when it passed the FCPA, corruption imposes enormous costs both at home and abroad, leading to market inefficiencies and instability, sub-standard products, and an unfair playing field for honest businesses.¹⁴⁵ By enacting a strong foreign bribery statute, Congress sought to minimize these destructive effects and help companies resist corrupt demands, while addressing the destructive foreign policy ramifications of transnational bribery.¹⁵⁶ The Act also prohibited off-the-books accounting through provisions designed to "strengthen the accuracy of the corporate books

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and records and the reliability of the audit process which constitute the foundations of our

system of corporate disclosure.”¹⁶⁷

In 1988, Congress amended the FCPA to add two affirmative defenses: (1) the local law defense; and (2) the reasonable and bona fide promotional expense defense.¹⁷⁸ Congress also requested that the President negotiate an international treaty with members of the Organisation for Economic Co-operation and Development (OECD) to prohibit bribery in international business transactions by many of the United States’ major trading partners.¹⁸⁹ Subsequent negotiations at the OECD culminated in the Convention on Combating Bribery of Foreign Officials in International Business Transactions (Anti-Bribery Convention), which, among other things, required parties to make it a crime to bribe foreign officials.¹⁹²⁰

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In 1998, the FCPA was amended to conform to the requirements of the Anti-Bribery Convention. These amendments expanded the FCPA’s scope to: (1) include payments made to secure “any improper advantage”; (2) reach certain foreign persons who commit an act in furtherance of a foreign bribe while in the United States; (3) cover public international organizations in the definition of “foreign official”; (4) add an alternative basis for jurisdiction based on nationality; and (5) apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.²⁰¹ The Anti-Bribery Convention came into force on February 15, 1999, with the United States as a founding party.

National Landscape: Interagency Efforts

DOJ and SEC share enforcement authority for the FCPA’s anti-bribery and accounting provisions.²¹² They also work with many other federal agencies and law enforcement partners to investigate and prosecute FCPA violations, reduce bribery demands through good governance programs and other measures, and promote a fair playing field for U.S. companies doing business abroad.

~~chapter 1 Introduction~~ [Department of Justice](#)

[DOJ has criminal FCPA enforcement authority over “issuers” \(i.e., public companies\) and their officers,](#) directors, employees, agents, or stockholders acting on the issuer’s behalf. DOJ also has both criminal and civil enforcement responsibility for the FCPA’s anti-bribery provisions over “domestic concerns”—which include (a) U.S. citizens, nationals, and residents and (b) U.S. businesses and their officers, directors, employees, agents, or stockholders acting on the domestic concern’s behalf—and certain foreign persons and businesses that act in furtherance of an FCPA violation while in the territory of the United States. Within DOJ, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters.²²³ ~~FCPA matters are handled primarily by the~~ [The FCPA Unit within the Fraud Section;](#) [handles all FCPA matters for DOJ, and](#) regularly ~~working~~ [works](#) jointly with U.S. Attorneys’ Offices around the country.

DOJ maintains a website dedicated to the FCPA and its enforcement at <http://www.justice.gov/criminal/fraud/fcpa/>. The website provides translations of the FCPA in numerous languages, relevant legislative history, and selected documents from FCPA-related prosecutions and resolutions since 1977, including charging documents, plea agreements, deferred prosecution agreements, non-prosecution agreements, press releases, and other relevant pleadings and court decisions. The website also provides copies of opinions issued in response to requests by companies and individuals under DOJ's FCPA opinion procedure.

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The procedures for submitting a request for an opinion can be found at <http://www.justice.gov/criminal/fraud/fcpa/docs/frgnrcrpt.pdf> and are discussed further in Chapter 9. Individuals and companies wishing to disclose information about potential FCPA violations are encouraged to contact the FCPA Unit at the telephone number or email address ~~above~~[below](#).

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~~Securities and Exchange Commission~~

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~~<http://www.sec.gov/complaint/tipcomplaint.shtml>~~

~~Office of Investor Education and Advocacy:~~

~~(800) SEC-0330~~

or stockholders acting on the issuer's behalf. SEC's Division of Enforcement has responsibility for investigating and prosecuting FCPA violations. In 2010, SEC's Enforcement Division created a specialized FCPA Unit, with attorneys in Washington, D.C. and in regional offices around the country, to focus specifically on FCPA enforcement.

The Unit investigates potential FCPA violations; facilitates coordination with DOJ's FCPA program and with other federal and international law enforcement partners; uses its expert knowledge of the law to promote consistent enforcement of the FCPA; analyzes tips, complaints, and referrals regarding allegations of foreign bribery; and conducts

public outreach to raise awareness of anti-corruption efforts and good corporate governance programs.

The FCPA Unit maintains a “Spotlight on FCPA” section on SEC’s website at <http://www.sec.gov/spotlight/fcpa.shtml>. The website, which is updated regularly, provides general information about the Act, [and](#) links to all SEC enforcement actions involving the FCPA, including both federal court actions and administrative proceedings, and contains other useful information.

Individuals and companies with information about possible FCPA violations by issuers may report them to the Enforcement Division via SEC’s online Tips, Complaints and Referral system, <https://www.sec.gov/complaint/tip-scomplaint.shtml>. They may also submit information to SEC’s Office of the Whistleblower through the same online system or by contacting the Office of the Whistleblower at (202) 551-4790. Additionally, investors with questions about the FCPA can call the Office of Investor Education and Advocacy at (800) SEC-0330.

For more information about SEC’s Whistleblower Program, under which certain eligible whistleblowers may be entitled to a monetary award if their information leads to certain SEC actions, see Chapter 8.

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Law Enforcement Partners

DOJ’s FCPA Unit regularly works with the Federal Bureau of Investigation (FBI) to investigate potential FCPA violations. The FBI’s International Corruption Unit has primary responsibility for international corruption and fraud investigations and coordinates the FBI’s national FCPA enforcement program. The FBI also has ~~a~~ dedicated FCPA squads of FBI special agents (~~located in the Washington Field Office~~) ~~that is that~~ [are](#) responsible for investigating many, and providing support for all, of the FBI’s FCPA investigations. In addition, the Department of Homeland Security ~~and~~ [Investigations](#), the Internal Revenue ~~Service-Criminal~~ [Service – Criminal Investigations, and the Postal Inspection Service](#) regularly investigate potential FCPA violations. A number of other agencies are also involved in the fight against international corruption, including the [Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, and the](#) Department of Treasury’s Office of Foreign Assets Control, ~~which has helped lead a number of FCPA investigations~~ [and Financial Crimes Enforcement Network](#).

Departments of Commerce and State

Besides enforcement efforts by DOJ and SEC, the U.S. government is also working to address corruption abroad and level the playing field for U.S. businesses through the efforts of the Departments of Commerce and State. Both ~~Commerce and State~~ [agencies](#) advance anti-corruption and good governance initiatives globally and regularly assist

U.S. companies doing business overseas in several

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important ways. Both agencies encourage U.S. businesses to seek the assistance of U.S. embassies when they are confronted with bribe solicitations or other corruption-related issues overseas.²³4

The Department of Commerce offers a number of important resources for businesses, including the International Trade Administration's United States and Foreign Commercial Service (Commercial Service). The Commercial Service has export and industry specialists located in over 100 U.S. cities and 70 countries who are available to provide counseling and other assistance to U.S. businesses, particularly small and medium-sized companies, regarding exporting their products and services. ~~Among other things, these~~The Commercial Service maintains a website with online resources to help companies perform due diligence on markets and partners, at: <https://www.trade.gov/perform-due-diligence>. For example, Country Commercial Guides provide market conditions, opportunities, regulations, and business customs for more than 70 major markets, prepared by ITA trade professionals at U.S. embassies worldwide.²⁵ Commercial Service specialists can also help a U.S. company conduct ~~due diligence~~background checks when choosing business partners or agents overseas. The International Company Profile Program, for instance, can be part of a U.S. ~~business'~~company's evaluation of potential overseas business partners.²⁴6 ~~Businesses~~U.S. companies may contact the Commercial Service through its website, [https://~~export~~ \[www.trade.gov/eac/let-our-experts-help-0\]\(https://www.trade.gov/eac/let-our-experts-help-0\)](https://export.www.trade.gov/eac/let-our-experts-help-0) or directly at its domestic and foreign offices.²⁵7

Additionally, the Department of Commerce's Office of the General Counsel maintains a website, [https://~~www.ogc.commerce.gov/os/oge/transparency-and-anti-bribery-initiatives,~~ \[collection/office-chief-counsel-international-commerce\]\(https://www.ogc.commerce.gov/os/oge/transparency-and-anti-bribery-initiatives/collection/office-chief-counsel-international-commerce\)](https://www.ogc.commerce.gov/os/oge/transparency-and-anti-bribery-initiatives/collection/office-chief-counsel-international-commerce) that contains ~~recent articles and speeches, links to translations of the FCPA, a catalogue of~~ anti-corruption resources,⁷ and a list of international conventions and initiatives. The Office of Trade Agreements Negotiations and Compliance Center in the Department of Commerce's International Trade Administration also hosts a website with anti-bribery resources, <https://tcc.export.gov/Bribery/index.asp>. This website contains a link to an online form through which U.S. companies can report allegations of foreign bribery by foreign competitors in international business transactions.²⁶ ~~The Department of Commerce also provides information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws. For example, the Department of Commerce has included a new anti-corruption section in its Country Commercial Guides, prepared by market experts at U.S. embassies worldwide, that contains information on market conditions for more than 100 countries, including information on the FCPA for exporters.~~²⁷ ~~The Department of Commerce has also published a guide, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, which contains information about corporate compliance programs for businesses involved in international trade.~~²⁸

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More information on resolving trade barriers can be found at: <https://www.trade.gov/resolve-foreign-trade-barrier>.²⁸

The Departments of Commerce and State also provide advocacy support, when

determined to be in the national interest, for U.S. companies bidding for foreign government contracts. The Department of Commerce's Advocacy Center, for example, supports U.S. businesses competing against foreign companies for international contracts, such as by arranging for the delivery of an advocacy message by U.S. government officials or assisting with unanticipated problems such as suspected bribery by a competitor.²⁹

The Department of State's Bureau of Economic and Business Affairs (specifically, its Office of Commercial and Business Affairs) similarly assists U.S. firms doing business overseas by providing advocacy on behalf of U.S. businesses and identifying risk areas for U.S. businesses; more information is available on its website, <https://www.state.gov/e-eb/eba/bureaus-offices/under-secretary-for-economic-growth-energy-and-the-environment/bureau-of-economic-and-business-affairs/office-of-commercial-and-business-affairs/>. Also, the Department of State's economic officers serving overseas provide commercial advocacy and support for U.S. companies at the many overseas diplomatic posts where the Commercial Service is not represented.

The Department of State promotes U.S. government interests in addressing corruption internationally through country-to-country diplomatic engagement; development of and follow-through on international commitments relating to corruption; promotion of high-level political engagement (e.g., the G20 Anticorruption Action Plan); public outreach in foreign countries; and support for building the capacity of foreign partners to combat corruption. In fiscal year 2019, the U.S. government provided more than \$112 billion for anti-corruption and related good governance assistance abroad.

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The Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) manages U.S. participation in many multilateral anti-corruption political and legal initiatives at the global and regional level. INL also funds and coordinates significant efforts to assist countries with combating corruption through legal reform, training, and other capacity-building efforts. Inquiries about the U.S. government's general anti-corruption efforts and implementation of global and regional anti-corruption initiatives may be directed to INL on its website, <https://www.state.gov/j/inl/e/crime/corr/index.htm>

[/combating-corruption-and-promoting-good-governance/](https://www.state.gov/j/inl/e/crime/corr/index.htm/combating-corruption-and-promoting-good-governance/), or by email to: anti-corruption@state.gov. In addition, the U.S. Agency for International Development (USAID) has developed several anti-corruption programs and publications, information about which can be found at <https://www.usaid.gov/what-we-do/democracy-human-rights-and-governance/promoting-accountability-transparency>. Finally, the Department of State's brochure "Fighting Global Corruption: Business Risk Management," available at http://www.oge.doc.gov/pdfs/Fighting_Global_Corruption.pdf, provides guidance about corporate compliance programs as well as international anticorruption initiatives.

International Landscape: Global Anti-Corruption Efforts

In recent years, there has been a growing international consensus that corruption must be combated, and the United States and other countries are parties to a number of international anti-corruption conventions. Under these conventions, countries that are parties undertake commitments to adopt a range of preventive and criminal law measures to combat corruption. The conventions incorporate review processes that allow the United States to monitor other countries to ensure that they are meeting their international obligations. Likewise, these processes in turn permit other parties to monitor the United States' anti-corruption laws and enforcement to ensure that such enforcement

and legal frameworks are consistent with the United States' treaty obligations.³⁰ U.S. officials regularly address the subject of corruption with our foreign counterparts to raise awareness of the importance of fighting corruption and urge stronger enforcement of anti-corruption laws and policies. As a result of the recognition by other countries of the need to combat corruption, as well as the significant efforts by organizations such as the OECD Working Group on Bribery and the Anti-Bribery Convention, a number of countries have implemented foreign bribery laws and significantly increased their enforcement efforts. For example, in December 2016, France enacted its Sapin II law, which significantly strengthened its existing foreign bribery legislation and enforcement regime.

OECD Working Group on Bribery and the Anti-Bribery Convention

The OECD was founded in 1961 to stimulate economic progress and world trade. As noted, the Anti-Bribery Convention requires its parties to criminalize the bribery of foreign public officials in international business transactions.³¹ As of ~~November 1~~ June 30, 2012, there were ~~39~~ 44 parties to the Anti-Bribery Convention: ~~34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa).~~ All of these parties are also members of the OECD Working Group on Bribery (Working Group).³²

The Working Group is responsible for monitoring the implementation of the Anti-Bribery Convention, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and related instruments. Its members meet quarterly to review and monitor implementation of the Anti-Bribery Convention by member states around the world. Each party undergoes periodic peer review.³³ This peer-review monitoring system is conducted in ~~three~~ four phases. The Phase 1 review includes an in-depth assessment of each country's domestic laws implementing the Convention. The Phase 2 review examines the effectiveness of each country's laws and anti-bribery efforts. The final phases ~~is a~~ are permanent cycles of peer review (the first cycle of which is referred to as the Phase 3 review and the next is the Phase 4 review) that evaluates a country's enforcement actions and results, as well as the country's efforts to address weaknesses identified during the ~~Phase 2~~ prior review.³⁴ All of the monitoring reports for the parties to the Convention can be found on the OECD website and can be a useful resource about the foreign bribery laws of the OECD Working Group member countries.³⁵

~~The United States was one of the first countries to undergo all three phases of review.~~ The reports and appendices for all of the phases of reviews for the United States can be found on DOJ's and SEC's websites.³⁶

chapter 1 Introduction

~~The IACAC requires parties (of which the United States is one) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) monitors parties' compliance with the IACAC. As of November 1, 2012, 31 countries were parties to MESICIC.~~

~~The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries' compliance with the Council of Europe's anticorruption standards, including the Council of Europe's Criminal Law Convention on Corruption.⁴² These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of November 1, 2012, GRECO member states, which need not be~~

~~members of the Council of Europe, include more than 45 European countries and the United States.⁴³~~

~~The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ's website.~~

Phase 3 review of the United States, which was completed in October 2010, the Working Group commended U.S. efforts to fight transnational bribery and highlighted a number of best practices developed by the United States. The report also noted areas where the United States' anti-bribery efforts could be improved, including consolidating publicly available information on the application of the FCPA and enhancing awareness among small- and medium-sized companies about the prevention and detection of foreign bribery. [This Initial publication of this guide ~~is was~~](#), in part, a response to these Phase 3 recommendations and is intended to help businesses and individuals better understand the FCPA.³⁷⁶

U.N. Convention Against Corruption

The United States is a state party to the United Nations Convention Against Corruption (UNCAC), which was adopted by the U.N. General Assembly on October 31, 2003, and entered into force on

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December 14, 2005.³⁸⁷ The United States ratified the UNCAC on October 30, 2006. The UNCAC requires parties to criminalize a wide range of corrupt acts, including domestic and foreign bribery and related offenses such as money laundering and obstruction of justice. The UNCAC also establishes guidelines for the creation of anti-corruption bodies, codes of conduct for public officials, transparent and objective systems of procurement, and enhanced accounting and auditing standards for the private sector. A peer review mechanism assesses the implementation of the UNCAC by parties to the Convention, with a focus in the first round on criminalization and law enforcement as well as international legal cooperation.³⁹⁸ The United States has been reviewed under the Pilot Review Programme, the report of which is available on DOJ's website. As of ~~November 1~~ [June 30, 20120](#), ~~163~~ [16387](#) countries were parties to the UNCAC.⁴⁰³⁹

Other Anti-Corruption Conventions

The Inter-American Convention Against Corruption (IACAC) was the first international anti-corruption convention, adopted in March 1996 in Caracas, Venezuela, by members of the Organization of American States.⁴¹⁰

[The IACAC requires parties \(of which the United States is one\) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption \(MESICIC\) monitors parties' compliance with the IACAC. As of June 30, 2020, 33 countries were parties to MESICIC.](#)

[The Council of Europe established the Group of States Against Corruption \(GRECO\) in 1999 to monitor countries' compliance with the Council of Europe's anti-corruption standards, including the Council of Europe's Criminal Law Convention on Corruption.⁴¹ These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of June 30, 2020, GRECO member states, which need not be members of the Council of Europe, include 49 European countries and the United States.⁴²](#)

[The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ's website.](#)

Anti-Bribery Provisions

THE FCPA:

ANTI-BRIBERY PROVISIONS

The FCPA addresses the problem of international corruption in two ways: (1) the anti-bribery provisions, which are discussed below, prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business; and (2) the accounting provisions, which are discussed in Chapter 3, impose certain record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failing to implement an issuer's system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.

In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.⁴⁴³

Who Is Covered by the Anti-Bribery Provisions?

The FCPA's anti-bribery provisions apply broadly to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and ~~share~~stockholders acting on behalf of an issuer; (2) "domestic concerns" and their officers, directors, employees, agents, and ~~share~~stockholders acting on behalf of a domestic concern; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Issuers—15 U.S.C. § 78dd-1

Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), which can be found at 15 U.S.C. § 78dd-1, contains the anti-bribery provision governing

How Can I Tell If My Company Is an “Issuer”?

- ~~It is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or~~
- ~~The company’s stock trades in the over-the-counter market in the United States and the company is required to file SEC reports.~~
- ~~To see if your company files SEC reports, go to SEC’s website at <http://www.sec.gov/edgar/searchedgar/webusers.htm>.~~

issuers.⁴⁵⁴ A company is an “issuer” under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act⁴⁶⁵ or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act.⁴⁷⁶ In practice, this means that any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in the United States and required to file periodic reports with SEC, is an issuer. A company thus need

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not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers.⁴⁸⁷ As of December 31, 2014⁴⁵, ⁹⁶⁵²³ foreign companies were registered with SEC.⁴⁹⁸ Officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals), ~~and any co-conspirators~~, also can be prosecuted under the FCPA.⁵⁰⁴⁹

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Domestic Concerns—15 U.S.C. § 78dd-2

The FCPA also applies to “domestic concerns.”⁵⁴⁰ A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, other than an issuer, that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States.⁵²¹ Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.⁵³²

Territorial Jurisdiction—15 U.S.C. § 78dd-3

The FCPA also applies to certain foreign nationals or entities that are not issuers or domestic concerns.⁵⁴³ Since 1998, the FCPA’s anti-bribery provisions have applied to foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in the territory of the United States.⁵⁵⁴ Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities may be subject to the FCPA’s anti-bribery ~~prohibitions~~provisions.⁵⁶⁵

What Jurisdictional Conduct Triggers the ~~Anti-~~ ~~Anti-Bribery~~ Bribery Provisions?

The FCPA's anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns—as well as their officers, directors, employees, agents, or stockholders—may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines “interstate commerce” as “trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof”⁵⁷⁶ The term also includes the intrastate use of any interstate means of communication, or any other interstate instrumentality.⁵⁸⁷ Thus, placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.

Those who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of

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~~The FCPA:~~

~~Anti-Bribery Provisions~~

~~whether they utilize the U.S. mails or a means or instrumentality of interstate commerce.⁵⁹⁸ Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.^{60.59}~~

In addition, under the “alternative jurisdiction” provision of the FCPA enacted in 1998, U.S. companies or persons may be subject to the anti-bribery provisions even if they act outside the United States.⁶⁴⁰ The 1998 amendments to the FCPA expanded the jurisdictional coverage of the Act by establishing an alternative basis for jurisdiction, that is, jurisdiction based on the nationality principle.⁶²¹ In particular, the 1998 amendments removed the requirement that there be a use of interstate commerce (e.g., wire, email, telephone call) for acts in furtherance of a corrupt payment to a foreign official by U.S. companies and persons occurring wholly outside of the United States.⁶³²

What Is Covered?—~~The Business~~

~~Purpose Test~~

The FCPA applies only to payments ~~intended to induce or influence, offers, or promises made for the purpose of: (i) influencing any act or decision of a foreign official in his official capacity, (ii) inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official, (iii) securing any improper advantage; or (iv) inducing a foreign official to use his or her position “influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality. In addition, the payment, offer, or promise must be made~~ in order to assist ~~—~~“in obtaining or retaining business for or with, or directing business to, any person.”⁶⁴³ This requirement is known as the “business purpose test” and is broadly

interpreted.⁶⁵4

Not surprisingly, many enforcement actions involve bribes to obtain or retain government contracts.⁶⁶5 The FCPA also prohibits bribes in ~~the~~connection with conducting ~~of~~business or to gain a business advantage.⁶⁶ For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, can all satisfy the business purpose test.⁶⁷

Hypothetical: FCPA Jurisdiction

Company A, a Delaware company with its principal place of business in New York, is a large energy company that operates globally, including in a number of countries that have a high risk of corruption, such as Foreign Country. Company A's shares are listed on a national U.S. stock exchange. Company A enters into an agreement with a European company (EuroCo) to submit a joint bid to the Oil Ministry to build a refinery in Foreign Country. EuroCo is not an issuer.

Executives of Company A and EuroCo meet in New York to discuss how to win the bid and decide to hire a purported third-party consultant (Intermediary) and have him use part of his "commission" to bribe high-ranking officials within the Oil Ministry. Intermediary meets with executives at Company A and EuroCo in New York to finalize the scheme. Eventually, millions of dollars in bribes are funneled from the United States and Europe through Intermediary to high-ranking officials at the Oil Ministry, and Company A and EuroCo win the contract. A few years later, a front page article alleging that the contract was procured through bribery appears in Foreign Country, and DOJ and SEC begin investigating whether the FCPA was violated.

Based on these facts, which entities fall within the FCPA's jurisdiction?

All of the entities easily fall within the FCPA's jurisdiction. Company A is ~~both~~an "issuer" and a "domestic concern" under the FCPA, and Intermediary is an "agent" of Company A. EuroCo and Intermediary are also subject to the FCPA's territorial jurisdiction provision based on their conduct while in the United States. ~~Moreover, even if EuroCo and Intermediary had never taken any actions in the territory of the United States, they can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under Pinkerton liability, namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.~~

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Examples of Actions Taken to Obtain or Retain Business

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid tender information
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination

~~to gain a business advantage~~.⁶⁷ For example, ~~bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test~~.⁶⁸

In 2004, the U.S. Court of Appeals for the Fifth Circuit addressed the business purpose test in *United States v. Kay* and held that bribes paid to obtain favorable tax treatment—which reduced a company’s customs duties and sales taxes on imports—could constitute payments made to “obtain or retain” business within the meaning of the FCPA.⁶⁹⁸

The court explained that in enacting the FCPA, “Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements.”⁷⁰⁶⁹ The Kay court found that “[t]he congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement.”⁷⁴⁰

Accordingly, Kay held that payments to obtain favorable tax treatment can, under appropriate circumstances, violate the FCPA:

Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.

* * *

[W]e hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage.⁷²¹
Paying Bribes to Customs Officials

In 2010, a global freight forwarding company and six of its corporate customers in the oil and gas industry resolved charges that they paid bribes to customs officials. The companies bribed customs officials in more than ten countries in exchange for such benefits as:

- evading customs duties on imported goods
- improperly expediting the importation of goods and equipment
- extending drilling contracts and lowering tax assessments
- obtaining false documentation related to temporary import permits for drilling rigs
 - enabling the release of drilling rigs and other equipment from customs officials

In many instances, the improper payments at issue allowed the company to carry out its existing business, which fell within the FCPA’s prohibition on corrupt payments made for the purpose of “retaining” business. The seven companies paid a total of more than \$235 million in civil and criminal sanctions and disgorgement.

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In short, ~~while~~although the FCPA does not cover every type of bribe paid around the world for every purpose, it does apply broadly to bribes paid to help obtain or retain ~~busi-~~businessness, which can include payments made to secure a wide variety of unfair business advantages.⁷³²

What Does “Corruptly” Mean?

To violate the FCPA, an offer, promise, or ~~authori-~~

~~zation~~authorization of a payment, or a payment, to a ~~government official~~government official must be made “corruptly.”⁷⁴~~As Congress noted when Congress noted when~~ adopting the FCPA, the word ~~“corruptly” means an intent “corruptly” means an intent or desire to wrongfully~~“corruptly” means an intent or desire to wrongfully or desire to wrongfully influence the recipient:

The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.⁷⁵

Where corrupt intent is present, the FCPA prohibits

paying, offering, or promising to pay money or anything

of value (or authorizing the payment, offer, or promise).~~By focusing of value (or authorizing the payment or offer).~~⁷⁶ By focus-

~~ing~~ing on intent, the FCPA does not require that a corrupt act succeed in its purpose.⁷⁷

Nor must the foreign official actually solicit, accept, or receive the corrupt payment for the bribe payor to be liable.⁷⁸ For example, in one case, a New York-based commercial real estate broker promised a middleman that he would pay a \$2.5 million dollar bribe—and in fact paid \$500,000 to the middleman as an upfront payment—to a government official at the sovereign wealth fund of a Middle Eastern country in order to induce the sovereign wealth fund to buy an \$800 million dollar office building complex owned by the broker’s client. However, unbeknownst to the real estate broker, the middleman did not have any relationship with the foreign official, and simply kept the \$500,000 payment. Even though there was no foreign official actually receiving the bribe, the defendant was convicted of violating the FCPA.⁷⁸

~~specialty chemical company promised Iraqi government officials approximately \$850,000 in bribes for an upcoming contract. Although the company did not, in the end, make the payment (the scheme was thwarted by the U.S. government’s investigation), the company still violated the FCPA and was held accountable.~~⁷⁹

Also, as long as the offer, promise, authorization, or

payment is made corruptly, the actor need not know the identity of the recipient; the attempt is sufficient.⁸⁰ Thus, an executive who authorizes others to pay “whoever you need to” in a foreign government to obtain a contract has violated the FCPA—even if no bribe is ultimately offered or paid.

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~~The FCPA:~~

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What Does “Willfully” Mean and When Does It Apply?

In order for an individual defendant to be criminally liable under the FCPA, he or she must act “willfully.”⁸¹ Proof of willfulness is not required to establish corporate criminal or civil liability,⁸² though proof of corrupt intent is.

The term “willfully” is not defined in the FCPA, but it has generally been construed by courts to connote an act committed voluntarily and purposefully, and with a bad purpose, i.e., with “knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law.”⁸³ As the Supreme Court explained in *Bryan v. United States*, “[a]s a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’ In other words, in order to establish a ‘willful’ violation of a statute, ‘the

Government must prove that the defendant acted with knowledge that his conduct was unlawful.”⁸⁴³

Notably, as both the Second Circuit and Fifth Circuit Courts of Appeals have found, the FCPA does not require the government to prove that a defendant was specifically aware of the FCPA or

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knew that his conduct violated the FCPA.⁸⁵⁴ To be guilty, a defendant must act with a bad purpose, i.e., know generally that his conduct is unlawful.

What Does “Anything of Value” Mean?

In enacting the FCPA, Congress recognized that bribes can come in many shapes and sizes—a broad range of unfair benefits⁸⁶⁵—and so the statute prohibits the corrupt “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to” a foreign official.⁸⁷⁶

An improper benefit can take many forms. While cases often involve payments of cash (sometimes in the guise of “consulting fees” or “commissions” given through intermediaries), others have involved travel expenses and

¹⁴

expensive gifts. Like the domestic bribery statute, the FCPA does not contain a minimum threshold amount for corrupt gifts or payments.⁸⁸⁷ Indeed, what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country.

Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official. The corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions. Thus, it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct. Moreover, as in all areas of federal law enforcement, DOJ and SEC exercise discretion in deciding which cases promote law enforcement priorities and justify investigation. Certain patterns, however, have emerged: DOJ’s and SEC’s anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business. These assessments are necessarily fact specific.

Cash

The most obvious form of corrupt payment is large amounts of cash. In some instances, companies have maintained cash funds specifically earmarked for use as bribes. One [Brazilian company that was a stockholder of a U.S. issuer headquartered in Germany disbursed developed and operated a secret financial structure that operated to make and account for corrupt payments from a corporate “cash desk” and used offshore bank accounts to bribe government officials to win contracts to foreign officials. Among other methods the company used, it would transfer funds to Brazilian moneychangers \(doleiros\) who would withdraw the amounts in cash and deliver them to the officials.](#)⁸⁹⁸ In another instance, a four-company joint venture used its agent to pay \$5 million in bribes to a Nigerian political party.⁸⁹⁹ The payments were made to the agent in suitcases of cash (typically in \$1 million installments), and, in one instance, the trunk of a car when

the cash did not fit into a suitcase.⁹¹
Gifts, Travel, Entertainment, and Other Things
of Value

A small gift or token of esteem or gratitude is often an appropriate way for business people to display respect for each other. Some hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.

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Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC. The larger or more extravagant the gift, however, the more likely it was given with an improper purpose. DOJ and SEC enforcement cases thus have involved single instances of large, extravagant gift-giving (such as sports cars, fur coats, and other luxury items) as well as widespread gifts of smaller items as part of a pattern of bribes.⁹² For example, in [one recent case, a publicly traded energy company in the Netherlands resolved with DOJ over bribes it paid that included extravagant gifts such as paying for foreign officials to travel to sporting events and providing them with "spending money," paying for school tuition for the children of foreign officials, and shipping luxury vehicles to foreign officials.](#)⁹²

[In another](#) case brought by DOJ and SEC, a defendant gave a government official a country club membership fee and a generator, as well as household maintenance expenses, payment of cell phone bills, an automobile worth \$20,000, and limousine services. The same official also received \$250,000 through a third-party agent.⁹³

In addition, a number of FCPA enforcement actions have involved the corrupt payment of travel and entertainment expenses. Both DOJ and SEC have brought cases where these types of expenditures occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent.

A case involving a ~~California-based~~[Sweden-based](#) telecommunications company ["issuer"](#) illustrates the types of improper travel and entertainment expenses that may violate the FCPA.⁹⁴ ~~Between 2002 and Beginning in the 1990s and continuing until at least 2007~~¹³, the company ~~spent nearly \$7 million on approximately 225 trips for its customers in order to obtain systems contracts in China, including for employees of Chinese~~[paid millions of dollars to various third parties, a portion of which was used to pay for gifts, travel, and entertainment, including overseas trips, for Chinese government officials in order to win business with state-owned telecommunications companies to travel to popular tourist destinations in the United States.](#)⁹⁵ Although [a portion of](#) the trips were purportedly for the individuals to ~~conduct~~[participate in](#) training at

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~~Examples of Improper Travel and Entertainment~~

- ~~■ a \$12,000 birthday trip for a government decision-maker from Mexico that included visits to wineries and dinners~~
- ~~■ \$10,000 spent on dinners, drinks, and entertainment for a government official~~
- ~~■ a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in "pocket money" for each official~~
- ~~■ a trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle~~

the company's facilities, in reality, no training occurred on many of these trips and the company had no facilities at those locations. ~~Approximately \$670,000 of the \$7 million was falsely recorded as "training" expenses.~~ Such trips included, among others, a luxury cruise through the Caribbean and trips to Las Vegas and London. The company also mischaracterized payments for these trips in its internal books and records.⁹⁶⁴

Likewise, a New Jersey-based telecommunications company spent millions of dollars on approximately 315 trips for Chinese government officials, ostensibly to inspect factories and train the officials in using the company's equipment.⁹⁷⁵ In reality, during many of these trips, the officials spent little or no time visiting the company's facilities, but instead visited tourist destinations such as Hawaii, Las Vegas, the Grand Canyon, Niagara Falls, Disney World, Universal Studios, and New York City.⁹⁸⁶ Some of the trips were characterized as "factory inspections" or "training" with government customers, but consisted primarily or entirely of sightseeing ~~to~~ at locations chosen by the officials, typically lasting two weeks and costing between \$25,000 and \$55,000 per trip. In some instances, the company gave the government officials \$500 to \$1,000 per day in spending money and paid all lodging, transportation, food, and entertainment expenses. The company either failed to record these expenses or improperly recorded them as "consulting fees" in its corporate books and records. The

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company also failed to implement appropriate internal controls to monitor the provision of travel and other things of value to Chinese government officials.⁹⁹⁷

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Companies also may violate the FCPA if they give payments or gifts to third parties, ~~like~~ such as an official's family members, as an indirect way of corruptly influencing a foreign official. For example, one defendant paid personal bills and provided airline tickets to a cousin and close friend of the foreign official whose influence the defendant sought in obtaining contracts.¹⁰⁰⁹⁸ The defendant was convicted at trial and received a prison sentence.¹⁰¹⁹⁹ In another example, a Hong Kong subsidiary of a Switzerland-based bank engaged in a systematic scheme to hire, promote, and retain the children of Chinese officials in order to win business with those officials.¹⁰⁰ The company ultimately disgorged approximately \$30 million and paid a \$47 million criminal fine for its FCPA violations.

Examples of Improper Travel and Entertainment

- a \$12,000 birthday trip for a government decision maker from Mexico that included visits to wineries and dinners
- \$10,000 spent on dinners, drinks, and entertainment for a government official
- a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in "pocket money" for each official
- a trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle

As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company's directors, officers, employees, and agents. Though not necessarily appropriate for every business, many larger companies have automated gift-giving clearance processes and have set

clear monetary thresholds for gifts along with annual limitations, with limited exceptions for gifts approved by appropriate management. Clear guidelines and processes can be an effective and efficient means for controlling gift-giving, deterring improper gifts, and protecting corporate assets.

The FCPA does not prohibit gift-giving. Rather, just like its domestic bribery counterparts, the FCPA prohibits the payments of bribes, including those disguised as gifts.

Charitable Contributions

Companies often engage in charitable giving as part of legitimate local outreach. The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens.

Companies, however, cannot use the pretense of charitable contributions as a way to funnel bribes to government officials.

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For example, a pharmaceutical company used charitable donations to a small local castle restoration charity headed by a foreign government official to induce the official to direct business to the company. Although the charity was a bona fide charitable organization, internal documents at the pharmaceutical company's subsidiary established that the payments were not viewed as charitable contributions but rather as "dues" the subsidiary was required to pay for assistance from the government official. The payments constituted a significant portion of the subsidiary's total promotional donations budget and were structured to allow the subsidiary to exceed its authorized limits. The payments also were not in compliance with the company's internal policies, which provided that charitable donations generally should be made to healthcare institutions and relate to the practice of medicine.¹⁰¹

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Hypothetical: Gifts, Travel, and Entertainment

Company A is a large U.S. engineering company with global operations in more than 50 countries, including a number that have a high risk of corruption, such as Foreign Country. Company A's stock is listed on a national U.S. stock exchange. In conducting its business internationally, Company A's officers and employees come into regular contact with foreign officials, including officials in various ministries and state-owned entities. At a trade show, Company A has a booth at which it offers free pens, hats, t-shirts, and other similar promotional items with Company A's logo. Company A also serves free coffee, other beverages, and snacks at the booth. Some of the visitors to the booth are foreign officials.

Is Company A in violation of the FCPA?

No. These are legitimate, bona fide expenditures made in connection with the promotion, demonstration, or explanation of Company A's products or services. There is nothing to suggest corrupt intent here. The FCPA does not prevent companies from promoting their businesses in this way or providing legitimate hospitality, including to foreign officials. Providing promotional items with company logos or free snacks as set forth above is an appropriate means of providing hospitality and promoting business. Such conduct has never formed the basis for an FCPA enforcement action.

At the trade show, Company A invites a dozen current and prospective customers out for drinks, and pays the moderate bar tab. Some of the current and prospective customers are foreign officials under the FCPA. Is Company A in violation of the FCPA?

No. Again, the FCPA was not designed to prohibit all forms of hospitality to foreign

officials. While the cost

here may be more substantial than the beverages, snacks, and promotional items provided at the booth, and the invitees specifically selected, there is still nothing to suggest corrupt intent.

Two years ago, Company A won a long-term contract to supply goods and services to the state-owned Electricity Commission in Foreign Country. The Electricity Commission is 100% owned, controlled, and operated by the government of Foreign Country, and employees of the Electricity Commission are subject to Foreign Country's domestic bribery laws. Some Company A executives are in Foreign Country for meetings with officials of the Electricity Commission. The General Manager of the Electricity Commission was recently married, and during the trip Company A executives present a moderately priced crystal vase to the General Manager as a wedding gift and token of esteem. Is Company A in violation of the FCPA?

No. It is appropriate to provide reasonable gifts to foreign officials as tokens of esteem or gratitude. It is

important that such gifts be made openly and transparently, properly recorded in a company's books and records, and given only where appropriate under local law, customary where given, and reasonable for the occasion.

During the course of the contract described above, Company A periodically provides training to Electricity Commission employees at its facilities in Michigan. The training is paid for by the Electricity Commission as part of the contract. Senior officials of the Electricity Commission inform Company A that they want to inspect the facilities and ensure that the training is working well. Company A pays for the airfare, hotel, and transportation for the

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Electricity Commission senior officials to travel to Michigan to inspect Company A's facilities. Because it is a lengthy international flight, Company A agrees to pay for business class airfare, to which its own employees are entitled for lengthy flights. The foreign officials visit Michigan for several days, during which the senior officials perform an appropriate inspection. Company A executives take the officials to a moderately priced dinner, a baseball game, and a play. Do any of these actions violate the FCPA?

(cont'd)

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No. Neither the costs associated with training the employees nor the trip for the senior officials to the Company's facilities in order to inspect them violates the FCPA. Reasonable and bona fide promotional expenditures do not violate the FCPA. Here, Company A is providing training to the Electricity Commission's employees and is hosting the Electricity Commission senior officials. Their review of the execution and performance of the contract is a legitimate business purpose. Even the provision of business class airfare is reasonable under the circumstances, as are the meals and entertainment, which are only a small component of the business trip.

Would this analysis be different if Company A instead paid for the senior officials to

travel first-class with their spouses for an all-expenses-paid, week-long trip to Las Vegas, where Company A has no facilities?

Yes. This conduct almost certainly violates the FCPA because it evinces a corrupt intent. Here, the trip does not appear to be designed for any legitimate business purpose, is extravagant, includes expenses for the officials' spouses, and therefore appears to be designed to corruptly curry favor with the foreign government officials. Moreover, if the trip were booked as a legitimate business expense—such as the provision of training at its facilities—Company A would also be in violation of the FCPA's accounting provisions. Furthermore, this conduct suggests deficiencies in Company A's internal controls. Company A's contract with the Electricity Commission is going to expire, and the Electricity Commission is offering the next contract through its tender process. An employee of the Electricity Commission contacts Company A and offers to provide Company A with confidential, non-public bid information from Company A's competitors if Company A will pay for a vacation to Paris for him and his girlfriend. Employees of Company A accede to the official's request, pay for the vacation, receive the confidential bid information, and yet still do not win the contract. Has Company A violated the FCPA?

Yes. Company A has provided things of value to a foreign official for the purpose of inducing the official to misuse his office and to gain an improper advantage. It does not matter that it was the foreign official who first suggested the illegal conduct or that Company A ultimately was not successful in winning the contract. This conduct would also violate the FCPA's accounting provisions if the trip were booked as a legitimate business expense and suggests deficiencies in Company A's internal controls.

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~~also were not in compliance with the company's internal policies, which provided that charitable donations generally should be made to healthcare institutions and relate to the practice of medicine.102~~

Proper due diligence and controls are critical for charitable giving. In general, the adequacy of measures taken to prevent misuse of charitable donations will depend on a risk-based analysis and the specific facts at hand. In Opinion Procedure Release No. 10-02, DOJ described the due diligence and controls that can minimize the likelihood of an FCPA violation. In that matter, a Eurasian-based subsidiary of a U.S. non-governmental organization was asked by an agency of a foreign government to make a grant to a local microfinance institution (MFI) as a prerequisite to the subsidiary's transformation to bank status. The subsidiary proposed contributing \$1.42 million to a local MFI to satisfy the request. The subsidiary undertook an extensive, three-stage due diligence process to select the proposed grantee and imposed significant controls on the proposed grant, including ongoing monitoring and auditing, earmarking funds for capacity building, prohibiting compensation of board members, and implementing anti-corruption compliance provisions. DOJ explained that it would not take any enforcement action because the company's due diligence and the controls it planned to put in place sufficed to prevent an FCPA violation.

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Other opinion releases also address charitable-type grants or donations. Under the facts presented in those releases, DOJ approved the proposed grant or donation,¹⁰³² based on due diligence measures and controls such as:

- certifications by the recipient regarding compliance with the FCPA;¹⁰⁴³
- due diligence to confirm that none of the

- recipient's officers ~~were~~was affiliated with the foreign government at issue;1054
- a requirement that the recipient provide audited financial statements;1065
- a written agreement with the recipient restricting the use of funds;1076
- steps to ensure that the funds were transferred to a valid bank account;1087
- confirmation that the charity's commitments were met before funds were disbursed;1098 and
- on-going monitoring of the efficacy ~~of the~~ of the program.1109

Legitimate charitable giving does not violate the FCPA. Compliance with the FCPA merely requires that charitable giving not be used as a vehicle to conceal payments made to corruptly influence foreign officials.

Five Questions to Consider When Making Charitable Payments in a Foreign Country:

1. What is the purpose of the payment?
2. Is the payment consistent with the company's internal guidelines on charitable giving?
3. Is the payment at the request of a foreign official?
4. Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
5. Is the payment conditioned upon receiving business or other benefits?

Who Is a Foreign Official?

The FCPA's anti-bribery provisions apply to corrupt payments made to (1) "any foreign official"; (2) "any foreign political party or official thereof"; (3) "any candidate for foreign political office"; or (4) any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these three categories.1140 Although the statute distinguishes between a "foreign official," "foreign political party or official thereof," and "candidate for foreign political office," the term "foreign official" in this guide generally refers to an individual falling within any of these three categories.

The FCPA defines "foreign official" to include:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof,

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or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.1121

As this language makes clear, the FCPA broadly

applies to corrupt payments to "any" officer or employee of a foreign government and to those acting on the foreign ~~of a foreign government and to those acting on the for-~~

~~eign~~-government's behalf.1132 The FCPA thus covers ~~corrupt~~ corrupt payments to low-ranking employees and high-level officials alike.1143

The FCPA prohibits payments to foreign officials, not

to foreign governments.1154 That said, companies ~~contem~~-contemplating ~~plating~~

contributions or donations to foreign governments should take steps to ensure that no monies are used for ~~corrupt~~ purposes, such as the personal benefit of individual foreign officials.

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Department, Agency, or Instrumentality of a Foreign Government

Foreign officials under the FCPA include officers

or employees of a department, agency, or instrumental-~~ity~~ ~~ity~~ of a foreign government.

When a foreign government is organized in a fashion similar to the U.S. system, what constitutes a government department or agency is typically clear (e.g., a ministry of energy, national security agency, or transportation authority).¹¹⁶ However,

governments can be organized in very different ways.¹¹⁷ Many operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, ~~bank~~ ~~banking~~ ~~ing~~ and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transporta-~~tion~~

~~.117 By including officers or employees of agencies and~~ ~~tion.118 By including officers or employees of agencies and~~

instrumentalities within the definition of “foreign official,” the FCPA accounts for this variability.

The term “instrumentality” is broad and can include

state-owned or state-controlled entities. Whether a particu-~~lar~~ ~~lar~~ entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.¹¹⁸ The Eleventh Circuit addressed the definition of “instrumentality” in United States v. Esquenazi, a case involving the state-owned and controlled telecommunications company of Haiti.¹¹⁹ The Eleventh Circuit concluded that an “instrumentality” under the FCPA is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”¹²⁰ Although the court noted that this test is a fact-bound inquiry, it provided the following non-exhaustive list of factors to determine whether the government “controls” an entity:

~~control, status, and function.119 A number of courts have approved final jury instructions providing a non-exclusive~~

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~~list of factors to be considered:~~

- ~~the foreign state’s extent of ownership of the entity;~~
 - ~~the foreign~~ ~~state’s degree of control over the entity~~ government’s formal designation
(including whether key officers and directors of of that entity;
- whether ~~the entity are, or are appointed by,~~ government has a officials);
- ~~the foreign state’s characterization of~~ majority interest in the entity ~~and its employees;~~
- the ~~circumstances surrounding~~ government’s ability to hire and fire the entity’s creation principals;
- the ~~purpose of~~ extent to which the entity’s activities; profits, if any, go directly into the governmental fiscal accounts, and, by the same token, the extent to which the government funds the entity if it fails to break even; and

- ~~the entity's obligations and privileges under the foreign state's law;~~
- the length of time these indicia have existed.¹²¹

To determine whether the entity performs a function that the government treats as its own, the Eleventh Circuit listed the following non-exhaustive factors:

- ~~the exclusive or controlling power vested in~~ whether the entity to administer its designated functions has a monopoly over the function it exists to carry out;
- ~~the level of financial support by the foreign state (including subsidies, special tax treatment, government mandated fees, and loans);~~
- ~~the~~ whether the government subsidizes the costs associated with the ~~entity's~~ providing of services to the jurisdiction's residents;
- ~~whether the governmental end or purpose sought~~ entity provides services to the to be achieved is expressed in the policies of the public at large in the ~~foreign~~ government ~~country;~~ and
- ~~the general perception that~~ whether the public and the government of that foreign country generally perceive the entity is to be performing ~~official or a~~ governmental functions.¹²⁰

In addition, a number of courts in other circuits have approved final jury instructions providing a similar non-exclusive list of factors to be considered.¹²³

Companies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs.

DOJ and SEC have pursued cases involving instrumentalities since the time of the FCPA's enactment and have long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government. For example, the second-ever FCPA case charged by DOJ involved a California company that paid bribes through a Mexican corporation to two executives of a state-owned

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Mexican national oil company.¹²⁴

And in the early 1980s, DOJ and SEC brought cases

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involving a \$1 million bribe to the chairman of Trinidad and Tobago's racing authority.¹²⁵

DOJ and SEC continue to regularly bring FCPA cases involving bribes paid to employees of agencies and instrumentalities of foreign governments. In one such case, the subsidiary of a Swiss engineering company paid bribes to officials of a state-owned and controlled electricity commission. The commission was created by, owned by, and controlled by the Mexican government, and it had a monopoly on the transmission and distribution of electricity in Mexico. Many of the commission's board members were

cabinet-level government officials, and the director was appointed by Mexico's president.¹²³⁶ Similarly, in ~~another recent case~~ [the case involving Haiti's state-owned and controlled telecommunications company](#), Miami telecommunications executives were charged with paying bribes to [the telecommunications company's](#) employees ~~of Haiti's state-owned and controlled telecommunications company~~. The telecommunications company was 97% owned and 100% controlled by the Haitian government, ~~and its director was appointed by Haiti's president.~~ [Haiti granted the company a monopoly over telecommunications service and gave it various tax advantages, the company's Director General was chosen by the Haitian President with the consent of the Haitian Prime Minister and the ministers of public works and economic finance, and the Haitian President appointed all of the telecommunications company's board members.](#)¹²⁴⁷

While no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares. However, there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership, which ~~is~~ [are](#) reflected in ~~the~~ [a](#) limited number of DOJ or SEC enforcement actions brought in such situations. For example, in addition to being convicted of funneling millions of dollars in bribes to two sitting presidents in two different countries, a French issuer's three subsidiaries were convicted of paying bribes to employees of a Malaysian telecommunications company that was 43% owned by Malaysia's Ministry of Finance. There, notwithstanding its minority ownership stake in the company, the Ministry held the status of a "special shareholder," had veto power over all major expenditures, and controlled important operational decisions.¹²⁵⁸ In addition, most senior company officers were political appointees, including the Chairman and Director, the Chairman of the Board of the Tender Committee, and the Executive Director.¹²⁶⁹ Thus, despite the Malaysian government having a minority shareholder position, the company was an instrumentality of the Malaysian government as the government ~~nevertheless~~ had substantial control over the company.

Companies and individuals should also remember that, whether an entity is an instrumentality of a foreign government or a private entity, commercial (i.e., private-to-private) bribery may still violate the FCPA's accounting provisions, the Travel Act, anti-money laundering laws, and other federal or foreign laws. Any type of corrupt payment thus carries a risk of prosecution.

Public International Organizations

In 1998, the FCPA was amended to expand the definition of "foreign official" to include employees and representatives of public international organizations.¹²⁷³⁰ A "public international organization" is any organization designated as such by Executive ~~O~~ [O](#) [r](#) [d](#) [e](#) [r](#) under the International Organizations Immunities Act, 22 U.S.C. § 288, or any other organization that the President so designates.¹²⁸³¹ Currently, public international organizations include entities such as the [United Nations, the](#) World

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Bank, the International Monetary Fund, the World Intellectual Property Organization, the World Trade Organization, the OECD, the Organization of American States, and numerous others. A comprehensive list of organizations designated as "public international organizations" is contained in 22 U.S.C. § 288 and can also be found on the U.S. Government ~~Printing~~ [Publishing](#) Office website at <https://www.epo.gov/info.gov/fdsys/content/pkg/USCODE-2018-title22/html/USCODE->

[2018-title22-chap7-subchapXVIII-sec288.htm](#). DOJ has brought charges against persons who pay bribes to such employees and representatives of such “public international organizations.”¹³²

How Are Payments to Third Parties Treated?

The FCPA expressly prohibits corrupt payments made through third parties or intermediaries.¹²⁹³³ Specifically, it covers payments made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly,”¹³⁰⁴ to a foreign official. Many companies doing business in a foreign country retain a local individual or company to help them conduct business. Although these foreign agents may provide entirely legitimate advice regarding local customs and procedures and may help facilitate business transactions,

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companies should be aware of the risks involved in engaging third-party agents or intermediaries. The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability.¹³¹⁵

~~For instance, a four company joint venture used two agents—a British lawyer and a Japanese trading company—to bribe Nigerian government officials in order to win a series of liquefied natural gas construction projects.¹³² Together, the four multi-national corporations and the Japanese trading company paid a combined \$1.7 billion in civil and criminal sanctions for their decade-long bribery scheme. In addition, the subsidiary of one of the companies pleaded guilty and a number of individuals, including the British lawyer and the former CEO of one of the companies’ subsidiaries, received significant prison terms.~~

~~Similarly, a medical device manufacturer entered into a deferred prosecution agreement as the result of corrupt payments it authorized its local Chinese distributor to pay to Chinese officials.¹³³ Another company, a manufacturer of specialty chemicals, committed multiple FCPA violations through its agents in Iraq: a Canadian national and the Canadian’s companies. Among other acts, the Canadian national paid and promised to pay more than \$1.5 million in bribes to officials of the Iraqi Ministry of Oil to secure sales of a fuel additive. Both the company and the Canadian national pleaded guilty to criminal charges and resolved civil enforcement actions by SEC.¹³⁴~~

For example, a French global financial services institution and a U.S.-based investment management firm retained a third-party sales agent to win business in Libya. The financial institutions repeatedly engaged the third-party sales agent to win business with Libyan state-owned financial institutions, ultimately paying the sales agent over \$90 million in commissions. In fact, the sales agent

used portions of the commission payments to bribe high-level Libyan government officials in order to secure the placement of approximately \$3.66 billion in assets with the financial institutions. As a consequence, the French global financial services institution and the U.S. investment management firm paid a combined approximately \$600 million in penalties; the French financial institution entered

into a deferred prosecution agreement with DOJ, and a wholly owned subsidiary pleaded guilty; while the U.S. financial institution entered into a non-prosecution agreement with DOJ, and disgorged \$34.5 million as part of its resolution with SEC.¹³⁶

In another case, between 1996 and 2012, a publicly traded energy company in the Netherlands engaged in the regular practice of retaining third-party sales agents to pay bribes to foreign officials in at least five countries: Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. Over the course of the conspiracy, the company paid at least \$180 million in “commission” payments to its agents, earning profits of at least \$2.8 billion. The company and

~~In another case, the its U.S. subsidiary of a Swiss freight forwarding company was charged with paying bribes on behalf of its customers in several countries.¹³⁵ Although the U.S. subsidiary was not an issuer under the FCPA, it was an “agent” of several U.S. issuers and was thus charged directly with admitted to violating the FCPA. Charges against the freight forwarding company and seven of its customers resulted in over \$236.5 million in sanctions.~~

as did its former CEO and a sales and marketing executive.¹³⁶⁷

Because Congress anticipated the use of ~~third-party~~third-party agents in bribery schemes—for example, to avoid actual knowledge of a bribe—it defined the term “knowing” in a way that prevents individuals and businesses from avoiding liability by putting “any person” between themselves and the foreign officials.¹³⁷⁸ Under the FCPA, a person’s state of mind ~~mind~~ is “knowing” with respect to conduct, a circumstance, or a result if the person:

- is aware that [he] is engaging in such conduct, that such circumstance exists, or that such ~~that such circumstance exists, or that such~~ result is substantially certain to occur; or
 - has a firm belief that such circumstance exists or that such result is substantially certain to occur.¹³⁸⁹

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Thus, a person has the requisite knowledge when he is aware of a high probability of the existence of such circumstance ~~aware of a high probability of the existence of such circum-~~ stance, unless the person actually believes that such ~~circum-~~ circumstance ~~stance~~ does not exist.¹³⁹⁴⁰ As Congress made clear, it meant to impose liability not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge:

[T]he so-called “head-in-the-sand” problem—vari-ously variously described in the pertinent authorities as “conscious disregard,” “willful blindness” or “deliberate ignorance”—should be covered so that management officials could not take refuge from the Act’s prohibitions by their unwarranted obliviousness to any action (or inaction), language or other “signaling

device” that should reasonably alert them of the “high probability” of an FCPA violation.¹⁴⁰¹

Common red flags associated with third parties include:

- excessive commissions to third-party agents or consultants;
- unreasonably large discounts to third-party distributors;
- third-party “consulting agreements” that ~~include~~ include only vaguely described services;
- the third-party consultant is in a different ~~line of~~ line of business than that for which it has been engaged;
 - the third party is related to or closely associated with the foreign official;
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- the third party became part of the transaction at the express request or insistence of the foreign official;
- the third party is merely a shell company incorporated in an offshore jurisdiction; and
- the third party requests payment to offshore bank accounts.

Businesses may reduce the FCPA risks associated with third-party agents by implementing an effective compliance program, which includes due diligence of any prospective ~~foreign~~ agents.

United States v. Kozeny, et al.

In December 2011, the U.S. Court of Appeals for the Second Circuit upheld a conscious avoidance instruction given during the 2009 trial of a businessman who was convicted of conspiring to violate the FCPA’s anti-bribery provisions by agreeing to make payments to Azeri officials in a scheme to encourage the privatization of the Republic of Azerbaijan’s ~~Republic’s~~ state oil company. The court of appeals found that the instruction did not lack a factual predicate, citing evidence and testimony at trial demonstrating that the defendant knew corruption was pervasive in Azerbaijan; that he was aware of his business partner’s reputation for misconduct; that he had created two U.S. companies in order to shield himself and other investors from potential liability for payments made in violation of the FCPA; and that the defendant expressed concerns during a conference call about whether his business partner and company were bribing officials.

The court of appeals also rejected the defendant’s contention that the conscious avoidance charge had improperly permitted the jury to convict him based on negligence, explaining that ample evidence in the record showed that the defendant had “serious concerns” about the legality of his partner’s business practices “and worked to avoid learning exactly what [he] was doing,” and noting that the district court had specifically instructed the jury not to convict based on negligence.

What Affirmative Defenses ~~Are~~ Are Available?

The FCPA’s anti-bribery provisions contain two affirmative defenses: (1) that the payment was lawful under the written laws of the foreign country (the “local law” defense), and (2) that the money was spent as part of demonstrating a product or performing a contractual obligation (the “reasonable and bona fide business expenditure” defense). Because these are affirmative defenses, the defendant bears the burden of

proving them.

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The Local Law Defense

For the local law defense to apply, a defendant must establish that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”¹⁴¹² The defendant must establish that the payment was lawful under the foreign country’s written laws and regulations at the time of the offense. In creating the local law defense in 1988, Congress sought “to make clear that the absence of written laws in a foreign official’s country would not by itself be sufficient to satisfy this defense.”¹⁴²³ Thus, the fact that bribes may not be prosecuted under local law is insufficient to establish the defense. In practice, the local law defense arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments. Nevertheless, if a defendant can establish that conduct that otherwise falls within the scope of the FCPA’s anti-bribery provisions was lawful under written, local law, he or she would have a defense to prosecution.

In *United States v. Kozeny*, the defendant unsuccessfully sought to assert the local law defense regarding the law of Azerbaijan. The parties disputed the contents and applicability of Azeri law, and each presented expert reports and testimony on behalf of their conflicting interpretations. The court ruled that the defendant could not invoke the FCPA’s affirmative defense because Azeri law did not actually legalize the bribe payment. The court concluded that an exception under Azeri law relieving [of criminal liability](#) bribe payors who voluntarily

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disclose bribe payments to the authorities ~~of criminal liability~~ did not make the bribes legal.¹⁴³⁴

In *United States v. Ng Lap Seng*, the district court rejected the defendant’s request to instruct the jury with respect to the local law affirmative defense.¹⁴⁵ In that case, the defendant was convicted of conspiracy, violating the FCPA, bribery, and money laundering, in connection with a scheme to bribe two ambassadors to the United Nations. In arguing in favor of a jury instruction for the local law affirmative defense, the defendant maintained that a finding by the jury that the payments at issue were not unlawful under the written laws and regulations of Antigua and the Dominican Republic would require acquittal on the FCPA-related counts. The court denied the defendant’s request for the affirmative defense instruction, finding that the proposed instruction was “inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA.”¹⁴⁶ The court further explained that the defendant’s request was not directly supported by the majority of sources that had addressed the issue and, if applied, “would lead to impractical results.”¹⁴⁷

Reasonable and Bona Fide Expenditures

The FCPA allows companies to provide reasonable and bona fide travel and lodging expenses to a foreign official, and it is an affirmative defense where expenses are directly related to the promotion, demonstration, or explanation of a company’s products or services, or are related to a company’s execution or performance of a contract with a foreign government or agency.¹⁴⁴⁸ Trips that are primarily for personal entertainment

purposes, however, are not bona fide business expenses and may violate the FCPA's anti-bribery provisions.¹⁴⁵⁹ Moreover, when expenditures, bona fide or not, are mischaracterized in a company's books and records, or where unauthorized or improper expenditures occur due to a failure to implement adequate internal controls, they may also violate the FCPA's accounting provisions. Purposeful ~~mischaracterization~~

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mischaracterization of expenditures may also, of course, indicate a corrupt intent.

DOJ and SEC have consistently recognized that businesses, both foreign and domestic, are permitted to pay for reasonable expenses associated with the promotion of their products and services or the execution of existing contracts. In addition, DOJ has frequently provided guidance about legitimate promotional and contract-related expenses—addressing travel and lodging expenses in particular—through several opinion procedure releases. Under the circumstances presented in those releases,¹⁴⁶⁵⁰ DOJ opined that the following types of expenditures on behalf of foreign officials did not warrant FCPA enforcement action:

- travel and expenses to visit company facilities or operations;
- travel and expenses for training; and
- product demonstration or promotional activities, including travel and expenses for meetings.

Whether any particular payment is a bona fide expenditure necessarily requires a fact-specific analysis. But the following non-exhaustive list of safeguards, compiled from several releases, may be helpful to businesses in evaluating whether a ~~whether a~~ particular expenditure is appropriate or may risk violating the FCPA:

- Do not select the particular officials who will participate in the party's proposed trip or program¹⁴⁷⁵¹ or else select them based on pre-determined, merit-based criteria.¹⁴⁸⁵²
- Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.¹⁴⁹⁵³
- Do not advance funds or pay for reimbursements in cash.¹⁵⁰⁴
 - Ensure that any stipends are reasonable approximations of costs likely to be incurred¹⁵¹⁵ and/or that expenses are limited to those that are necessary and reasonable.¹⁵²⁶
- Ensure the expenditures are transparent, both within the company and to the foreign government.¹⁵³⁷
- Do not condition payment of expenses on any action by the foreign official.¹⁵⁴⁸
- Obtain written confirmation that payment of the expenses is not contrary to local law.¹⁵⁵⁹
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.¹⁵⁶⁰
- Ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in the company's books and records.¹⁵⁷⁶¹

In sum, while certain expenditures are more likely to raise red flags, they will not

give rise to prosecution if they are: (1) reasonable, (2) bona fide, and (3) directly related to (4) the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.¹⁵⁸⁶²

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What Are Facilitating or Expediting Payments?

Payments?

The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action.¹⁵⁹⁶³ The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts.¹⁶⁰⁴ Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party.¹⁶¹⁵ Nor does it include acts that are within an official's discretion or that would constitute misuse of an official's office.¹⁶²⁶ Thus, paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment.

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Examples of

"Routine Governmental Action"

An action ~~which~~that is ordinarily and commonly performed by a foreign official in—:

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

Whether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of corrupt intent to influence a non-routine governmental action. But, like the FCPA's anti-bribery provisions more generally, the facilitating payments exception focuses on the purpose of the payment rather than its value. For instance, an Oklahoma-based corporation violated the FCPA when its subsidiary paid Argentine customs officials approximately \$166,000 to secure customs clearance for equipment and materials that lacked required certifications or could not be imported under local law and to pay a lower-than-applicable duty rate. The company's Venezuelan subsidiary had also paid Venezuelan customs officials approximately \$7,000 to permit the importation and exportation of equipment and materials not in compliance with local regulations and to avoid a full inspection of the imported goods.¹⁶³⁷ In another case, three subsidiaries of a global supplier of oil drilling products and services were criminally charged with authorizing an agent to make at least 378 corrupt payments (totaling approximately \$2.1 million) to Nigerian Customs Service officials for preferential treatment during the customs process, including the

reduction or elimination of customs duties.¹⁶⁴⁸

Labeling a bribe as a “facilitating payment” in a company’s books and records does not make it one. A Swiss offshore drilling company, for example, recorded payments to its customs agent in the subsidiary’s “facilitating payment” account, even though company personnel believed the payments were, in fact, bribes. The company was charged with violating both the FCPA’s anti-bribery and accounting provisions.¹⁶⁵⁹

Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD’s Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments, which the United States has done regularly.¹⁶⁶⁷⁰ In addition, other countries’ foreign bribery laws, such as the United Kingdom’s, may not contain an exception for facilitating payments.¹⁶⁷¹ Individuals and companies should therefore be aware that although true facilitating payments are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may violate the FCPA if they are not properly recorded in an issuer’s books and records.¹⁷²

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are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may still violate the FCPA if they are not properly recorded in an issuer’s books and records. ¹⁶⁸	chapter 2 The FCPA: Anti-Bribery Provisions
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Hypothetical: Facilitating Payments

Company A is a large multi-national mining company with operations in Foreign Country, where it recently identified a significant new ore deposit. It has ready buyers for the new ore but has limited capacity to get it to market. In order to increase the size and speed of its ore export, Company A will need to build a new road from its facility to the port that can accommodate larger trucks. Company A retains an agent in Foreign Country to assist it in obtaining the required permits, including an environmental permit, to build the road. The agent informs Company A’s vice president for international operations that he plans to make a one-time small cash payment to a clerk in the relevant government office to ensure that the clerk files and stamps the permit applications expeditiously, as the agent has experienced delays of three months when he has not made this “grease” payment. The clerk has no discretion about whether to file and stamp the permit applications once the requisite filing fee has been paid. The vice president authorizes the payment.

A few months later, the agent tells the vice president that he has run into a problem obtaining a necessary environmental permit. It turns out that the planned road construction would adversely impact an environmentally sensitive and protected local wetland. While the problem could be overcome by rerouting the road, such rerouting would cost Company A \$1 million more and would slow down construction by six months. It would also increase the transit time for the ore and reduce the number of monthly shipments. The agent tells the vice president that he is good friends with the director of Foreign Country’s Department of Natural Resources and that it would only take a modest cash payment to the director and the “problem would go away.” The vice president authorizes the payment, and the agent makes it. After receiving the payment, the director issues the permit, and Company A constructs its new road through the wetlands.

Was the payment to the clerk a violation of the FCPA?

No. Under these circumstances, the payment to the clerk would qualify as a facilitating payment, since it is a one-time, small payment to obtain a routine, non-discretionary governmental service that Company A is entitled to receive (i.e., the stamping and filing of the permit application). However, while the payment may qualify as an exception to the FCPA's anti-bribery provisions, it may violate other laws, both in Foreign Country and elsewhere. In addition, if the payment is not accurately recorded, it could violate the FCPA's books and records provision.

Was the payment to the director a violation of the FCPA?

Yes. The payment to the director of the Department of Natural Resources was in clear violation of the FCPA, since it was designed to corruptly influence a foreign official into improperly approving a permit. The issuance of the environmental permit was a discretionary act, and indeed, Company A should not have received it. Company A, its vice president, and the local agent may all be prosecuted for authorizing and paying the bribe.

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Does the FCPA Apply to Cases of Extortion or Duress?

Situations involving extortion or duress will not give rise to FCPA liability because a payment made in response to true extortionate demands under imminent threat of physical harm cannot be said to have been made with corrupt intent or for the purpose of obtaining or retaining business.¹⁶⁹⁷³ In enacting the FCPA, Congress recognized that ~~real-world~~real- world situations might arise in which a business is compelled to pay an official in order to avoid threats to health and safety. As Congress explained, "a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt purpose."¹⁷⁰⁴

Mere economic coercion, however, does not amount to extortion. As Congress noted when it enacted the FCPA: "The defense that the payment

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was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe."¹⁷⁴⁵ The fact that the payment was "first proposed by the recipient ... does not alter the corrupt purpose on the part of the person paying the bribe."¹⁷²⁶

This distinction between extortion and economic coercion was recognized by the court in *United States v. Kozeny*. There, the court concluded that although an individual who makes a payment under duress (i.e., upon threat of physical harm) will not be criminally liable under the FCPA,¹⁷³⁷ a bribe payor who claims payment was demanded as a price for gaining market entry or obtaining a contract "cannot argue that he lacked the intent to bribe the official because he made the 'conscious decision' to pay the official."¹⁷⁴⁸ While the bribe payor in this situation "could have turned his back and walked away," in the oil rig example, "he could not."¹⁷⁵⁹

Businesses operating in high-risk ~~countries~~environments may face real threats of violence or harm to their employees, and payments made in response to imminent threats to health or safety do not violate the FCPA.¹⁷⁶⁸⁰ If such a situation arises, and to ensure the safety of its employees, companies should immediately contact the appropriate U.S. embassy for assistance.

Principles of Corporate Liability for Anti-Bribery Violations

General principles of corporate liability apply to the FCPA. Thus, a company is

liable when its directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company.¹⁷⁷⁸¹ Similarly, just as with any other statute, DOJ and SEC look to principles of ~~parent-subsidary~~parent- subsidiary and successor liability in evaluating corporate liability. As described more fully below, unlike with most other statutes, DOJ has instituted an FCPA Corporate Enforcement Policy that applies to corporate resolutions in the FCPA context.

Parent-Subsidiary Liability

There are two ways in which a parent company may be liable for bribes paid by its subsidiary.

First, a parent may have participated sufficiently in the activity to be directly liable for the conduct— as, for example, when it directed its subsidiary’s misconduct or otherwise directly participated in the bribe scheme.

Second, a parent may be liable for its subsidiary’s conduct under traditional agency principles. The fundamental characteristic of agency is control.¹⁷⁸² Accordingly, DOJ and SEC evaluate the parent’s control—including the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction— when evaluating whether a subsidiary is an agent of the parent. Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent and subsidiary actually interact.

If an agency relationship exists and the subsidiary is acting within the scope of authority conferred by the parent, a subsidiary’s actions and knowledge are imputed to its parent.¹⁷⁹⁸³ Moreover, under traditional principles of respondeat superior, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company.¹⁸⁰⁴ Thus, if an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary’s employees. For example, SEC brought an administrative action against a parent for bribes paid by the president of its indirect, wholly owned

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subsidiary. In that matter, the subsidiary’s president reported directly to the CEO of the parent issuer, and the issuer routinely identified

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the president as a member of its senior management in its annual filing with SEC and in annual reports. Additionally, the parent’s legal department approved the retention of the third-party agent through whom the bribes were arranged despite a lack of documented due diligence and an agency agreement that violated corporate policy; also, an officialialer of the parent approved one of the payments to the third-party agent.¹⁸¹⁵ Under these circumstances, the parent company had sufficient knowledge and control of its subsidiary’s actions to be liable under the FCPA.

Successor Liability

Companies acquire a host of liabilities when they merge with or acquire another company, including those arising out of contracts, torts, regulations, and statutes. As a general legal matter, when a company merges with or acquires another company, the successor company assumes the predecessor company’s liabilities.¹⁸²⁶ Successor liability is an integral component of corporate law and, among other things, prevents companies from avoiding liability by reorganizing.¹⁸³⁷ At the same time, DOJ and SEC recognize the potential benefits of corporate mergers and acquisitions, particularly when

the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Successor liability applies to all kinds of civil and criminal liabilities,¹⁸⁴⁸ and FCPA violations are no exception. Whether successor liability applies to a particular corporate transaction depends on the facts and the applicable state, federal, and foreign law. Successor liability does not, however, create liability where none existed before. For example, if an issuer were to acquire a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company would not retroactively create FCPA liability for the acquiring issuer.

DOJ and SEC encourage companies to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition for a variety of reasons.

First, due diligence helps an acquiring company to accurately value the target company. Contracts obtained through bribes may be legally unenforceable, business obtained illegally may be lost when bribe payments are stopped, there may be liability for prior illegal conduct, and the prior corrupt acts may harm the acquiring company's reputation and future business prospects. Identifying these issues before an acquisition allows companies to better

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evaluate any potential post-acquisition liability and thus properly assess the target's value.¹⁸⁵⁹ Second, due diligence reduces the risk that the acquired company will continue to pay bribes. Proper pre-acquisition due diligence can identify business and regional risks and can also lay the foundation for a swift and successful post-acquisition integration into the acquiring company's corporate control and compliance environment. Third, the consequences of potential violations uncovered through due diligence can be handled by the parties in an orderly and efficient manner through negotiation of the costs and responsibilities for the investigation and remediation. Finally, comprehensive due diligence demonstrates a genuine commitment to uncovering and preventing FCPA violations.

DOJ and SEC also recognize that, in certain instances, robust pre-acquisition due diligence may not be possible. In such instances, DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts.

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In a significant number of instances, DOJ and SEC have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context.¹⁸⁶⁹⁰ And DOJ and SEC have ~~only~~ taken action against successor companies only in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition. In one case, a U.S.-based issuer was charged with books and records and internal controls violations for continuing a kickback scheme originated by its predecessor.¹⁸⁷⁹¹ Another recent case involved a merger between two ~~tobacco leaf merchants~~ oil and gas companies, where prior to the merger ~~each~~ both predecessor companies committed FCPA violations ~~through its foreign~~

~~subsidiaries, involving multiple countries~~ over the course of many years. ~~At each company, the bribes were directed by the parent company's senior management. The two issuers then~~ The two companies, one of which was an issuer and the other a former issuer operating through a U.S.-based subsidiary, merged to form a new publicly traded company. Under these circumstances—the merger of two ~~public~~ companies that had each engaged in bribery—both the new entity and the foreign subsidiaries were liable under the FCPA. The new parent entered into a deferred prosecution agreement with DOJ and settled a civil action with SEC, while the company's U.S.-based subsidiary pleaded guilty.¹⁹²

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More often, DOJ and SEC have pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition. In one such case, a U.S.-based multinational conglomerate acquired the power business of a French power and transportation company, which had paid bribes to obtain contracts prior to the acquisition. In that case the matter was resolved with a guilty plea for the French power and transportation company, and deferred prosecution agreements for two of the newly acquired subsidiaries; no successor liability was sought against the acquiring entity.¹⁹³

Practical Tips to Reduce FCPA Risk in Mergers and Acquisitions

Companies pursuing mergers or acquisitions can take certain steps to identify and potentially reduce FCPA risks:

- M&A Opinion Procedure Release Requests:

One option is to seek an opinion from DOJ in anticipation of a potential acquisition, such as occurred with Opinion Release 08-02. That case involved special circumstances, namely, severely limited pre-acquisition due diligence available to the potential acquiring company, and, because it was an opinion release (i.e., providing certain assurances by DOJ concerning prospective conduct), it necessarily imposed demanding standards and prescriptive timeframes in return for specific assurances from DOJ, which SEC, as a matter of discretion, also honors. Thus, obtaining an opinion from DOJ can be a good way to address specific due diligence challenges, but, because of the nature of such an opinion, it will likely contain more stringent requirements than may be necessary in all circumstances.

- M&A Risk-Based FCPA Due Diligence and Disclosure:

As a practical matter, most acquisitions will typically not require the type of prospective assurances contained in an opinion from DOJ. DOJ and SEC encourage companies engaging in mergers and acquisitions to: (1) conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions; ~~(~~

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(2) ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities; (3) train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures; (4) conduct an FCPA-specific audit of all newly acquired or merged

businesses as quickly as practicable; and (5) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities. DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions. ~~bribery—both the new entity and the foreign subsidiaries were liable under the FCPA. The new parent entered into a non-prosecution agreement with DOJ and settled a civil action with SEC, while the company’s subsidiaries, which also merged, pleaded guilty.~~¹⁸⁸

~~More often, DOJ and SEC have pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government’s investigation of the predecessor company preceded the acquisition. In one such case, an Ohio-based health care company’s due diligence of an acquisition target uncovered FCPA violations by the target’s subsidiary, and, before the merger was completed, the subsidiary’s violations were disclosed to DOJ and SEC. The subsidiary pleaded guilty and paid a \$2 million criminal fine,¹⁸⁹ the acquisition target settled with SEC and paid a \$500,000 civil penalty,¹⁹⁰ and no successor liability was sought against the acquiring entity. In another case, a Pennsylvania-based issuer that supplied heating and air conditioning products and services was subject to an ongoing investigation by DOJ and SEC at the time that it was acquired; DOJ and SEC resolved enforcement actions only against the predecessor company, which had by that time become a wholly owned subsidiary of the successor company.¹⁹¹~~¹⁹⁴

~~DOJ and SEC have also brought actions only against a predecessor company where its FCPA violations are discovered after acquisition. For~~^{In another} example, when a Florida-based U.S. company discovered in post-acquisition due diligence that the telecommunications company (a domestic concern) it had acquired had engaged in foreign bribery, the successor company disclosed the FCPA violations to DOJ. It then conducted an internal investigation, cooperated fully with DOJ, and took appropriate remedial action—including terminating senior management at the acquired

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company. No enforcement action was taken against the successor, but the predecessor company pleaded guilty to one count of violating the FCPA and agreed to pay a \$2 million fine.¹⁹²⁵ Later, four executives from the predecessor company were convicted of FCPA violations, three of whom received terms of imprisonment.¹⁹³⁶

On occasion, when an enforcement action has been taken against a predecessor company, the successor seeks assurances that it will not be subject to a future enforcement action. In one such case, a Dutch predecessor resolved FCPA charges with DOJ through a deferred prosecution agreement.¹⁹⁴⁷ While both the predecessor and successor signed the agreement, which included a commitment to ongoing cooperation and an improved compliance program, only the predecessor company was charged; in signing the agreement, the successor company gained the certainty of conditional release from criminal liability, even though it was not being pursued for FCPA violations.¹⁹⁵⁸ In another case, after a Connecticut-based company uncovered FCPA violations by a California company it sought to acquire, both companies voluntarily disclosed the conduct to DOJ and SEC.¹⁹⁶⁹ The predecessor company resolved its criminal liability

through a non-prosecution agreement with DOJ that included an \$800,000 monetary penalty and also settled with SEC, paying a total of \$1.1 million in disgorgement, pre-judgment interest, and civil penalties. The successor company proceeded with the acquisition and separately entered into a non-prosecution agreement with DOJ in which it agreed, among other things, to ensure full performance of the predecessor company's non-prosecution agreement. This agreement provided certainty to the successor concerning its FCPA liability. ~~197~~200

Importantly, a successor company's voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program

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may also decrease the likelihood of an enforcement action regarding an acquired company's post-acquisition conduct when pre-acquisition due diligence is not possible. ~~201~~198
In fact, under the DOJ FCPA Corporate Enforcement Policy, in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

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Hypothetical: Successor Liability Where Acquired Company Was Not Previously Subject to the FCPA

Company A is a Delaware corporation with its principal offices in the United States and whose shares are listed on a national U.S. exchange. Company A is considering acquiring Foreign Company, which is not an issuer or a domestic concern. Foreign Company takes no actions within the United States that would make it subject to territorial jurisdiction. Company A's proposed acquisition would make Foreign Company a subsidiary of Company A.

Scenario 1:

Prior to acquiring Foreign Company, Company A engages in extensive due diligence of Foreign Company, including: (1) having its legal, accounting, and compliance departments review Foreign Company's sales and financial data, its customer contracts, and its third-party and distributor agreements; (2) performing a risk-based analysis of Foreign Company's customer base; (3) performing an audit of selected transactions engaged in by Foreign Company; and (4) engaging in discussions with Foreign Company's general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other corruption-related issues that have surfaced at Foreign Company over the past ten years. This due diligence aims to determine whether Foreign Company has appropriate anti-corruption and compliance policies in place, whether Foreign Company's employees have been adequately trained regarding those policies, how Foreign Company ensures that those policies are followed, and what remedial actions are taken if the policies are violated.

During the course of its due diligence, Company A learns that Foreign Company has made several potentially improper payments in the form of an inflated commission to a third-party agent in connection with a government contract with Foreign Country. Immediately after the acquisition, Company A discloses the conduct to DOJ and SEC, suspends and terminates those employees and the third-party agent responsible for the payments, and makes certain that the illegal payments have stopped. It also quickly integrates Foreign Company into Company A's own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Foreign Company's third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate

FCPA and anti-corruption representations and warranties and audit rights.
Based on these facts, could DOJ or SEC prosecute Company A?

No. Although DOJ and SEC have jurisdiction over Company A because it is an issuer, neither could pursue Company A for conduct that occurred prior to its acquisition of Foreign Company. As Foreign Company was neither an issuer nor a domestic concern and was not subject to U.S. territorial jurisdiction, DOJ and SEC have no jurisdiction over its pre-acquisition misconduct. The acquisition of a company does not create jurisdiction where none existed before.

Importantly, Company A's extensive pre-acquisition due diligence allowed it to identify and halt the corruption. As there was no continuing misconduct post-acquisition, the FCPA was not violated.

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Scenario 2:

Company A performs only minimal and pro forma pre-acquisition due diligence. It does not conduct a risk-based analysis, and its review of Foreign Company's data, contracts, and third-party and distributor agreements is cursory. Company A acquires Foreign Company and makes it a wholly owned subsidiary. Although Company A circulates its compliance policies to all new personnel after the acquisition, it does not translate the compliance policies into the local language or train its new personnel or third-party agents on anti-corruption issues.

A few months after the acquisition, an employee in Company A's international sales office (Sales Employee) learns from a legacy Foreign Company employee that for years the government contract that generated most of Foreign Company's revenues depended on inflated commissions to a third-party agent "to make the right person happy at Foreign Government Agency." Sales Employee is told that unless the payments continue the business will likely be lost, which would mean that Company A's new acquisition would quickly become a financial failure. The payments continue for two

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years after the acquisition. After another employee of Company A reports the long-running bribe scheme to a director at Foreign Government Agency, Company A stops the payments and DOJ and SEC investigate.

Based on these facts, would DOJ or SEC charge Company A?

Yes. DOJ and SEC have prosecuted companies like Company A in similar circumstances. Any charges would not, however, be premised upon successor liability, but rather on Company A's post-acquisition bribe payments, which themselves created criminal and civil liability for Company A.

Scenario 3:

Under local law, Company A's ability to conduct pre-acquisition due diligence on Foreign Company is limited. In the due diligence it does conduct, Company A determines that Foreign Company is doing business in high-risk countries and in high-risk industries but finds no red flags specific to Foreign Company's operations. Post-acquisition,

Company A conducts extensive due diligence and determines that Foreign Company had paid bribes to officials with Foreign Government Agency. Company A takes prompt action to remediate the problem, including following the measures set forth in Opinion Procedure Release No. 08-02. Among other actions, it voluntarily discloses the misconduct to DOJ and SEC, ensures all bribes are immediately stopped, takes remedial action against all parties involved in the corruption, and quickly ~~incorporates~~ integrates Foreign Company into a robust compliance program and Company A's other internal controls.

Based on these facts, would DOJ or SEC prosecute Company A?

DOJ and SEC have declined to prosecute companies like Company A in similar circumstances. Companies can follow the measures set forth in Opinion Procedure Release No. 08-02, or seek their own opinions, where adequate pre-acquisition due diligence is not possible.

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Hypothetical: Successor Liability Where Acquired Company Was Already Subject to the FCPA

Both Company A and Company B are Delaware corporations with their principal offices in the United States. Both companies' shares ~~are~~ listed on a national U.S. exchange.

Scenario 1:

Company A is considering acquiring several of Company B's business lines. Prior to the acquisition, Company A engages in extensive due diligence, including: (1) having its legal, accounting, and compliance departments review Company B's sales and financial data, its customer contracts, and its third-party and distributor agreements; (2) performing a risk-based analysis of Company B's customer base; (3) performing an audit of selected transactions engaged in by Company B; and (4) engaging in discussions with Company B's general counsel, vice president of sales, and head of internal audit regarding all corruption risks, compliance efforts, and any other major corruption-related issues that have surfaced at Company B over the past ten years. This due diligence aims to determine whether Company B has appropriate anti-corruption and compliance policies in place, whether Company B's employees have been adequately trained regarding those policies, how Company B ensures that those policies are followed, and what remedial actions are taken if the policies are violated.

During the course of its due diligence, Company A learns that Company B has made several potentially improper payments in connection with a government contract with Foreign Country. As a condition of the acquisition, Company A requires Company B to disclose the misconduct to the government. Company A makes certain that the illegal payments

~~(cont'd)~~

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have stopped and quickly integrates Company B's business lines into Company A's own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Company B's third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights.

Based on these facts, would DOJ or SEC prosecute?

DOJ and SEC have declined to prosecute companies like Company A in similar circumstances. DOJ and SEC encourage companies like Company A to conduct extensive FCPA due diligence. By uncovering the corruption, Company A put itself in a favorable position, and, because the corrupt payments have stopped, Company A has no continuing liability. Whether DOJ and SEC might charge Company B depends on facts and circumstances beyond the scope of this hypothetical. DOJ would consider its Principles of Federal Prosecution of Business Organizations and SEC would consider the factors contained in the Seaboard Report, both of which are discussed in Chapter 5. In general, the more egregious and long-standing the corruption, the more likely it is that DOJ and SEC would prosecute Company B. In certain limited circumstances, DOJ and SEC have in the past declined to bring charges against acquired companies, recognizing that acquiring companies may bear much of the reputational damage and costs associated with such charges.

Scenario 2:

Company A plans to acquire Company B. Although, as in Scenario 1, Company A conducts extensive due diligence, it does not uncover the bribery until after the acquisition. Company A then makes certain that the illegal payments stop and voluntarily discloses the misconduct to DOJ and SEC. It quickly integrates Company B into Company A's own robust internal controls, including its anti-corruption and compliance policies, which it communicates to its new employees through required online and in-person training in the local language. Company A also requires Company B's third-party distributors and other agents to sign anti-corruption certifications, complete training, and sign new contracts that incorporate FCPA and anti-corruption representations and warranties and audit rights.

[cont'd](#)

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Based on these facts, would DOJ or SEC prosecute?

Absent unusual circumstances not contemplated by this hypothetical, DOJ and SEC are unlikely to prosecute Company A for the pre-acquisition misconduct of Company B, provided that Company B still exists in a form that would allow it to be prosecuted separately (e.g., Company B is a subsidiary of Company A). DOJ and SEC understand that no due diligence is perfect and that society benefits when companies with strong compliance programs acquire and improve companies with weak ones. At the same time, however, neither the liability for corruption—nor the harms caused by it—are eliminated when one company acquires another. Whether DOJ and SEC will pursue a case against Company B (or, in unusual circumstances, Company A) will depend on consideration of all the factors in the Principles of Federal Prosecution of Business Organizations and the Seaboard Report, respectively.

Scenario 3:

Company A merges with Company B, which is in the same line of business and interacts with the same Foreign Government customers, and forms Company C. Due diligence before the merger reveals that both Company A and Company B have been engaging in similar bribery. In both cases, the bribery was extensive and known by high-level management within the companies.

Based on these facts, would DOJ or SEC prosecute?

Yes. DOJ and SEC have prosecuted companies like Company C on the basis of successor liability. Company C is a combination of two companies that both violated the

FCPA, and their merger does not eliminate their liability. In addition, since Company C is an ongoing concern, DOJ and SEC may impose a monitorship to ensure that the bribery has ceased and a compliance program is developed to prevent future misconduct.

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~~Additional Principles of Criminal~~

Additional Principles of Criminal Liability for Anti-Bribery Violations: Aiding and Abetting and Conspiracy

~~Aiding and Abetting and Conspiracy~~

Under federal law, individuals or companies that aid or abet a crime, including an FCPA violation, are as guilty as if they had directly committed the offense themselves. The aiding and abetting statute provides that whoever “commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission,” or “willfully causes an act to be done which if directly performed by him or another would be an offense against the United States,” is punishable as a principal.¹⁹⁹²⁰² Aiding and abetting is not an independent crime, and the government must prove that an underlying FCPA violation was committed.²⁰⁰³

Under normal principles of conspiracy liability, individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA—i.e., for agreeing to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation. For instance, a foreign, non-issuer company could be convicted of conspiring with a domestic concern to violate the FCPA. Under certain circumstances, it could also be held liable for the domestic concern’s substantive FCPA violations under *Pinkerton v. United States*, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined.²⁰¹⁴

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A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States.²⁰²⁵ For example, if a foreign company or individual conspires to violate the FCPA with someone who commits an overt act within the United States, the United States can prosecute the foreign company or individual for the conspiracy. The same principle applies to aiding and abetting violations. For instance, even though they took no action in the United States, Japanese and European companies were charged with conspiring with and aiding and abetting a domestic concern’s FCPA violations.²⁰³⁶

However, in *United States v. Hoskins*, the Second Circuit addressed the question of whether individuals not directly covered by the FCPA anti-bribery provisions could nevertheless be guilty of conspiring to violate, or aiding and abetting the violation of, the FCPA anti-bribery provisions, and concluded they could not.²⁰⁷ Therefore, at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an FCPA anti-bribery violation only if that individual’s conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA’s anti-bribery provisions.

At least one district court from another circuit has rejected the reasoning in the *Hoskins* decision, and concluded that the defendants could be criminally liable for

[conspiracy to violate the FCPA anti-bribery provisions, and aiding and abetting a violation, even though they do not “belong to the class of individuals capable of committing a substantive FCPA violation.”](#)²⁰⁸

Additional Principles of Civil Liability for Anti-Bribery Violations: Aiding and Abetting and Causing

Both companies and individuals can be held civilly liable for aiding and abetting FCPA anti-bribery violations if they knowingly or recklessly provide substantial assistance to a violator.²⁰⁴ Similarly, in the administrative proceeding context, companies and individuals may be held liable for causing FCPA violations.²¹⁰ This liability extends to the subsidiaries and agents of U.S. issuers.

In one case, the U.S. subsidiary of a Swiss freight forwarding company was held civilly liable for paying bribes on behalf of its customers in several countries.²⁰⁶ Although the U.S. subsidiary was not an issuer for purposes of the FCPA, it was an “agent” of several U.S. issuers. By paying bribes on behalf of its issuers’ customers, the subsidiary both directly violated [the FCPA](#) and aided and abetted the issuers’ FCPA violations.

What Is the Applicable Statute of Limitations?

Statute of Limitations in Criminal Cases

The FCPA’s anti-bribery and accounting provisions do not specify a statute of limitations for criminal actions. Accordingly, the general [statutes of limitations periods apply. For substantive violations of the FCPA anti-bribery provisions, the](#) five-year limitations period set forth in 18 U.S.C. § 3282 applies ~~to substantive criminal~~.²¹² For violations of the ~~Act~~ [FCPA accounting provisions, which are defined as “securities fraud offense\[s\]” under 18 U.S.C. § 3301, there is a limitations period of six years.](#)²⁰⁷
¹³
³⁶

In cases involving FCPA conspiracies, the government may be able to reach conduct occurring before the ~~five-year~~ [general](#) limitations period applicable to conspiracies

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under 18 U.S.C. § 371. For conspiracy offenses, the government generally need prove only that one act in furtherance of the conspiracy occurred during the limitations period, thus enabling the government to prosecute bribes paid or accounting violations occurring more than five ~~or six~~ years, [respectively](#), prior to the filing of formal charges.²⁰⁸
¹⁴

There are at least two ways in which the applicable limitations period is commonly extended. First, companies or individuals cooperating with DOJ may enter into a tolling agreement that voluntarily extends the limitations period. [Companies and individuals may choose to do this so that they may have additional time to do their own investigation of the conduct, as well as to give them an opportunity to meet with the government to discuss the case and attempt to reach a negotiated resolution.](#) Second, under 18 U.S.C. § 3292, the government may seek a court order suspending the statute of limitations ~~posed~~ [period](#) in a criminal case for up to three years in order to obtain evidence from foreign countries. Generally, the suspension period begins when the official request is made by the U.S. government to the foreign authority and ends on the [earlier of the](#) date on which the foreign authority takes final action on the request, ~~or~~ [three years.](#)²⁰⁹
¹⁵

Statute of Limitations in Civil Actions

In civil cases brought by SEC, the statute of limitations is set by 28 U.S.C. § 2462, which provides for a five-year limitation on any “suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture.” The five-year period begins to run “when the claim first accrued.” The five-year limitations period applies to SEC actions seeking civil penalties, but it does not prevent SEC from seeking equitable remedies, such as an injunction ~~or the disgorgement of ill-gotten gains~~, for conduct pre-dating the five-year period. In [Kokesh v. SEC, the Supreme Court ruled that, because the disgorgement remedy constitutes a “penalty,” it is therefore subject to the five-year statute of limitations in 28 U.S.C. § 2462.216](#)

[In](#) cases against individuals who are not residents of the United States, the statute is tolled for any period when the defendants are not “found within the United States in order that proper service may be made thereon.”²¹⁰⁷ Furthermore, companies or individuals ~~cooperating with SEC~~ may enter into tolling agreements that voluntarily extend the limitations period.

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Accounting Provisions

THE FCPA: ACCOUNTING PROVISIONS

In addition to the anti-bribery provisions, the FCPA contains accounting provisions applicable to public companies. The FCPA’s accounting provisions operate in tandem with the anti-bribery provisions²¹¹⁸ and prohibit off-the-books accounting. Company management and investors rely on a company’s financial statements and internal accounting controls to ensure transparency in the financial health of the business, the risks undertaken, and the transactions between the company and its customers and business partners. The accounting provisions are designed to “strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute

the foundations of our system of corporate disclosure.”²¹²⁹

The accounting provisions consist of two primary components. First, under the “books and records” provision, issuers must make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect an issuer’s transactions and dispositions of an ~~issu-er’s~~ issuer’s assets.²¹³²⁰ Second, under the “internal controls” provision, issuers must devise and maintain a system of internal accounting controls sufficient to assure management’s control, authority, and responsibility over the firm’s assets.²²¹⁴ These components, and other aspects of the accounting provisions, are discussed in greater detail below.

Although the accounting provisions were originally enacted as part of the FCPA, they do not apply only to bribery-related violations. Rather, the accounting provisions ~~ensure~~ require that all public companies account for all of their assets and liabilities accurately and in reasonable detail, and they form the backbone for most accounting fraud and issuer disclosure cases brought by DOJ and SEC.²¹⁵²²

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In the past, “corporate bribery has been concealed by the falsification of corporate books and records” and the accounting provisions “remove[] this avenue of ~~avenue of coverup~~”

coverup.” Senate Report No. 95-114, at 3 (1977)

What Is Covered by the Accounting Provisions?

Books and Records Provision

Bribes, both foreign and domestic, are often mischaracterized in companies’ books and records. Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)), commonly called the “books and records” provision, requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”²¹⁶²³ The “in reasonable detail” qualification was adopted by Congress “in light of the concern that such a standard, if unqualified, might connote a degree of exactitude and precision which is unrealistic.”²¹⁷²⁴ The addition of this phrase was intended to make clear “that the issuer’s records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes.”²¹⁸²⁵

The term “reasonable detail” is defined in the statute as the level of detail that would “satisfy prudent officials in the conduct of their own affairs.”²¹⁹²⁶ Thus, as Congress noted when it adopted this definition, “[t]he concept of reasonableness of necessity contemplates the weighing of a number of relevant factors, including the costs of compliance.”²²⁰⁷

Although the standard is one of reasonable detail, it is never appropriate to mischaracterize transactions in a company’s books and records.²²¹⁸ Bribes are often concealed under the guise of legitimate payments, such as commissions or consulting fees.

In instances where all the elements of a violation of the anti-bribery provisions are not met—where, for example, there was no use of interstate commerce—companies nonetheless may be liable if the improper payments are inaccurately recorded. Consistent with the FCPA’s approach to prohibiting payments of any value that are made with a corrupt purpose, there is no materiality threshold under the books and records provision. In combination with the internal controls provision, the requirement that issuers maintain

books and records that accurately and fairly reflect the corporation's transactions "assure[s], among other things, that the assets of the issuer are used for proper corporate purpose[s]."2229 As with the anti-bribery provisions, DOJ's and SEC's enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systematic pattern of bribery, and both DOJ and SEC look to the nature and seriousness of the conduct in determining whether to pursue an enforcement action.

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Bribes Have Been Mischaracterized As:

- Commissions or Royalties
- Consulting Fees
- Sales and Marketing Expenses
- Scientific Incentives or Studies
- Travel and Entertainment Expenses
- Rebates or Discounts
- After Sales Service Fees
- Miscellaneous Expenses
- Petty Cash Withdrawals
- Free Goods
- Intercompany Accounts
- Supplier / Vendor Payments
- Write-offs
- "Customs Intervention" Payments

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~~An effective compliance program is a critical component of an issuer's internal controls. Fundamentally, the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. A company's compliance program should be tailored to these differences. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.~~

~~A 2008 case against a German manufacturer of industrial and consumer products illustrates a systemic internal controls problem involving bribery that was unprecedented in scale and geographic reach. From 2001 to 2007, the company created elaborate payment schemes—including slush~~

Internal Accounting Controls Provision

The payment of bribes often occurs in companies that

have weak internal accounting control environments. Internal controls over financial reporting are the processes used by ~~compa-companies~~ nies to provide reasonable assurances regarding the reliabil-ity ity of financial reporting and the preparation of financial statements. They include various components, such as: a control

environment that covers the tone set by the ~~organi-~~organization ~~zation~~ regarding integrity and ethics; risk assessments; ~~con-~~control ~~rel-~~ activities that cover policies and procedures designed to ensure that management directives are carried out (e.g., approvals, authorizations, reconciliations, and segregation of duties); information and communication; and monitor-ing. Section 13(b)(2)(B) of the Exchange Act (15 U.S.C. § 78m(b)(2)(B)), commonly called the “internal controls” provision, requires issuers to: devise and maintain a system of internal accounting

controls sufficient to provide reasonable assurances that—

- (i) transactions are executed in accordance with man-agement’s general or specific authorization;
- (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- (iii) access to assets is permitted only in accordance with management’s general or specific authorization; and
- (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences

....²²³⁰

Like the “reasonable detail” requirement in the books and records provision, the Act defines “reasonable assurances” as “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.”²²⁴³¹

The Act does not specify a particular set of controls that companies are required to implement. Rather, the internal accounting controls provision gives companies the flexibility to develop and maintain a system of controls that is appropriate to their particular needs and circumstances.

Although a company’s internal accounting controls are not synonymous with a company’s compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer’s internal accounting controls. Fundamentally, the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business, such as: the nature of its products or services; how the products or services get to market; the nature of its work

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force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. Just as a company’s internal accounting controls are tailored to its operations, its compliance program needs to be tailored to the risks specific to its operations. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different compliance programs than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal accounting controls than a manufacturer.

Companies with ineffective internal

controls often face risks of embezzlement and self-dealing by employees, commercial bribery, export control problems, and violations of other U.S. and local laws.

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A 2008 case against a German manufacturer of industrial and consumer products illustrates a systemic internal controls problem involving bribery that was unprecedented

[in scale and geographic reach.](#)

~~funds.~~ From 2001 to 2007, the company created elaborate payment schemes—[including slush funds, off](#) ~~off~~-the-books accounts, and systematic payments to business consultants and other intermediaries—to facilitate bribery. Payments were made in ways that obscured their purpose and the ultimate recipients of the money. In some cases, employees obtained large amounts of cash from cash desks and then transported the cash in suitcases across international borders. Authorizations for some payments were placed on sticky notes and later removed to avoid any permanent record. The company made payments totaling approximately \$1.36 billion through various mechanisms, including \$805.5 million as bribes and \$554.5 million for unknown purposes.²³²⁵ The company was charged with internal controls and books and records violations, along with anti-bribery violations, and paid over \$1.6 billion to resolve the case with authorities in the United States and Germany.²²⁶³³

The types of internal control failures identified in the above example exist in many other cases where companies were charged with internal controls violations.²²⁷³⁴ A 2010 case against a multi-national automobile manufacturer involved bribery that occurred over a long period of time in multiple countries.²²⁸³⁵ In that case, the company used dozens of ledger accounts, known internally as “internal third party accounts,” to maintain credit balances for the benefit of government officials.²²⁹³⁶ The accounts were funded through several bogus pricing mechanisms, such as “price surcharges,” “price inclusions,” or excessive commissions.²³⁰⁷ The company also used artificial discounts or rebates on sales contracts to generate the money to pay the bribes.²³¹⁸ The bribes also were made through phony sales intermediaries and corrupt business partners, as well as through the use of cash desks.²³²⁹ Sales executives would obtain cash from the company in amounts as high as hundreds of thousands of dollars, enabling the company to obscure the purpose and recipients of the money paid to government officials.²³³⁴⁰ In addition to bribery charges, the company was charged with internal controls and books and records violations.

Good internal [accounting](#) controls can prevent not only FCPA violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees. DOJ and SEC have repeatedly brought FCPA cases that also involved other types of misconduct, such as financial fraud,²³⁴¹

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commercial bribery,²³⁵⁴² export controls violations,²⁴³⁶ and embezzlement or self-dealing by company employees.²³⁷⁴⁴

Potential Reporting and Anti-Fraud Violations

Issuers have reporting obligations under Section 13(a) of the Exchange Act, which requires issuers to file an annual report that contains comprehensive information about the issuer. Failure to properly disclose material information about the issuer’s business, including material revenue, expenses, profits, assets, or liabilities related to bribery of foreign government officials, may give rise to anti-fraud and reporting violations under Sections 10(b) and 13(a) of the Exchange Act.

For example, a California-based technology company was charged with reporting violations, in addition to violations of the FCPA’s anti-bribery and accounting provisions, when its bribery scheme led to material misstatements in its SEC filings.²³⁸⁴⁵ The company was awarded contracts procured through bribery of Chinese officials that generated material revenue and profits. The revenue and profits helped the company offset losses incurred to develop new products expected to become the company’s future

source of revenue growth. The company improperly recorded the bribe payments as sales commission expenses in its books and records.

Companies engaged in bribery may also be ~~engaged~~involved in activity that violates the anti-fraud and reporting provisions. For example, an oil and gas pipeline company and its employees ~~engaged in~~perpetrated a long-running scheme to use the company's petty cash accounts in Nigeria to make a variety of corrupt payments to Nigerian tax and court officials using false invoices.²³⁹⁴⁶ The company and its employees also engaged in a fraudulent scheme to minimize the company's tax obligations in Bolivia by using false invoices to claim false offsets to its value-added tax obligations. The scheme resulted in material overstatements of the company's net income in the company's financial statements, which violated the Exchange Act's anti-fraud and reporting provisions. Both schemes also violated the books and records and internal controls provisions.

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What Are Management's Other Obligations?

Sarbanes-Oxley Act of 2002

In 2002, in response to a series of accounting scandals involving U.S. companies, Congress enacted the Sarbanes-Oxley Act (Sarbanes-Oxley or SOX),²⁴⁰⁷ which strengthened the accounting requirements for issuers. All issuers must comply with Sarbanes-Oxley's requirements, several of which have FCPA implications.

SOX Section 302 (15 U.S.C. § 7241)—Responsibility of Corporate Officers for the Accuracy and Validity of Corporate Financial Reports

Section 302 of Sarbanes-Oxley requires that a com-pany's "principal officers" (typically the Chief Executive Officer (CEO) and Chief Financial Officer (CFO)) take responsibility for and certify the integrity of their ~~compa-ny's~~company's financial reports on a quarterly basis. Under Exchange Act Rule 13a-14, which is commonly called the "SOX certification" rule, each periodic report filed by an issuer must include a certification signed by the issuer's principal executive officer and principal financial officer ~~that~~stating, among other things, ~~states~~ that: (i) based on the officer's knowledge, the report contains no material misstatements or omissions; (ii) based on the officer's knowledge, the relevant financial statements are accurate in all material respects; (iii) internal controls are properly designed; and

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(iv) the certifying officers have disclosed to the issuer's audit committee and auditors all significant internal control deficiencies.

SOX Section 404 (15 U.S.C. § 7262)—Reporting on the State of a Company's Internal Controls over Financial Reporting

Sarbanes-Oxley also strengthened a company's required disclosures concerning the state of its internal controls over financial reporting. Under Section 404, issuers are required to present in their annual reports management's conclusion regarding the effectiveness of the company's internal controls over financial reporting. This statement must also assess the effectiveness of such internal controls and procedures. In addition, the company's independent

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auditor must attest to and report on its assessment of the effectiveness of the company's internal controls over financial reporting.

As directed by Section 404, SEC has adopted rules requiring issuers and their independent auditors to report to the public on the effectiveness of the ~~company's~~ company's internal controls over financial reporting.²⁴¹⁸ These internal controls include those related to illegal acts and fraud—including acts of bribery—that could result in a material misstatement of the company's financial ~~statements~~ statements.²⁴²⁹ In 2007, SEC issued guidance on controls over financial reporting.²⁴³⁵⁰ SOX Section 802 (18 U.S.C. §§ 1519 and 1520)—

Criminal Penalties for Altering Documents

Section 802 of Sarbanes-Oxley prohibits altering, destroying, mutilating, concealing, or falsifying records, documents, or tangible objects with the intent to obstruct, impede, or influence a potential or actual federal investigation. This section also prohibits any accountant from knowingly and willfully violating the requirement that all audit or review papers be maintained for a period of five years.

Who Is Covered by the Accounting Provisions?

~~Provisions?~~

Civil Liability for Issuers, Subsidiaries, and Affiliates

The FCPA's accounting provisions apply to every issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file annual or other periodic reports pursuant to Section 15(d) of the Exchange Act.²⁴⁴⁵¹ These provisions apply to any issuer whose securities trade on a national securities exchange in the United States, including foreign issuers with exchange-traded American Depositary Receipts.²⁴⁵² They also apply

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to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission, such as annual and quarterly reports. Unlike the FCPA's anti-bribery provisions, the accounting provisions do not apply to private companies.²⁴⁶⁵³

Although the FCPA's accounting ~~requirements~~ provisions are directed at "issuers," an issuer's books and records include those of its consolidated subsidiaries and affiliates. An ~~issuer's~~ issuer's responsibility thus extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions. For instance, DOJ and SEC brought enforcement actions against a California company for violating the FCPA's accounting provisions when two Chinese joint ventures in which it was a partner paid more than \$400,000 in bribes over a four-year period to obtain business in China.²⁵⁴⁷ Sales personnel in China made the illicit payments by obtaining cash advances from accounting personnel, who recorded the payments on the books as "business fees" or "travel and entertainment" expenses. Although the payments were made exclusively in China by Chinese employees of the joint venture, the California company failed to have adequate internal

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controls and failed to act on red flags indicating that its affiliates were engaged in bribery. The California company paid \$1.15 million in civil disgorgement and a criminal monetary penalty of \$1.7 million.

Companies may not be able to exercise the same level of control over a minority-owned subsidiary or affiliate as they do over a majority or wholly owned entity. Therefore, if a parent company owns 50% or less of a subsidiary or affiliate, the parent is only required to use good faith efforts to cause the minority-owned subsidiary or affiliate to devise and maintain a system of internal accounting controls consistent with the

issuer's own obligations under the FCPA.²⁴⁸⁵⁵ In evaluating an issuer's good faith efforts, all the circumstances—including “the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located”—are taken into account.²⁴⁹⁵⁶

Civil Liability for Individuals and Other Entities

Companies (including subsidiaries of issuers) and individuals may also face civil liability for aiding and abetting or causing an issuer's violation of the accounting provisions.²⁵⁰⁷ For example, in April 2010, SEC charged four individuals—a Country Manager, a Senior Vice President of Sales, a Regional Financial Director, and an International Controller of a U.S. issuer—for their roles in schemes to bribe Kyrgyz and Thai government officials to purchase tobacco from their employer. The complaint alleged that, among other things, the individuals aided and abetted the issuer company's violations of the books and records and internal controls provisions by “knowingly provid[ing] substantial assistance to” the parent company.²⁵¹⁸ All four executives settled the charges against them, consenting to the entry of final judgments permanently enjoining them from violating the accounting and anti-bribery provisions, with two executives paying civil penalties.²⁵²⁹ As in other areas of federal securities law, corporate officers also can be held liable as control persons.²⁵³⁶⁰

Similarly, in October 2011, SEC ~~brought an administrative action~~instituted a proceeding against a U.S. water valve manufacturer and a former employee of the company's Chinese subsidiary for violations of the FCPA's accounting provisions.²⁵⁴⁶¹ The Chinese subsidiary had made improper payments to employees of certain design institutes to create design specifications that favored the company's valve products. The payments were disguised as sales commissions in the subsidiary's books and records, thereby causing the U.S. issuer's books and records to be inaccurate. The general manager of the subsidiary, who approved the payments and knew or should have known that they were improperly recorded, was ordered to cease-and-desist from committing or causing violations of the accounting provisions, among other charges.²⁵⁵⁶²

Additionally, individuals and entities can be held directly civilly liable for falsifying an issuer's books and records or for circumventing internal controls. Exchange Act Rule 13b2-1 provides: “No person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to [the books and records provision] of the Securities Exchange Act.”²⁵⁶³ And Section 13(b)(5) of

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The FCPA: Accounting Provisions

the Exchange Act (15 U.S.C. § 78m(b)(5)) provides that “[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account”²⁵⁷⁶⁴ The Exchange Act defines “person” to include a “natural person, company, government, or political subdivision, agency, or instrumentality of a government.”²⁶⁵⁸

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An issuer's officers and directors may also be held civilly liable for making false statements to a company's auditor. Exchange Act Rule 13b2-2 prohibits officers and directors from making (or causing to be made) materially false or misleading statements, including an omission of material facts, to an accountant. This liability arises in connection with any audit, review, or examination of a company's financial statements or in connection with the filing of any document with SEC.²⁵⁹⁶⁶

Finally, the principal executive and principal financial officer, or persons performing similar functions, can be held liable for violating Exchange Act Rule 13a-14 by signing false personal certifications required by SOX. Thus, for example, in January 2011, SEC charged the former CEO of a U.S. issuer for his role in schemes to bribe Iraqi government officials in connection with the United Nations Oil-For-Food Programme and to bribe Iraqi and Indonesian officials to purchase the company's fuel additives. There, the company used false invoices and sham consulting contracts to support large bribes that were passed on to foreign officials through an agent, and the bribes were mischaracterized as legitimate commissions and travel fees in the company's books and records. The officer directed and authorized the bribe payments and their false recording in the books and records. He also signed annual and quarterly SOX certifications in which he falsely represented that the company's financial statements were fairly presented and the company's internal controls sufficiently designed, as well as annual representations to the company's external auditors where he falsely stated that he complied with the company's code of ethics and was unaware of any violations of the code of ethics by anyone else. The officer was charged with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications.²⁶⁰7 He consented to the entry of an injunction and paid disgorgement and a civil penalty.²⁶¹8 He also later pleaded guilty in the United Kingdom to conspiring to corrupt Iraqi and Indonesian officials.²⁶²9

Criminal Liability for Accounting Violations

Criminal liability can be imposed on companies and individuals for knowingly and willfully failing to comply with the FCPA's books and records or internal controls provisions.²⁶³70 ~~As with the FCPA's anti-bribery provisions, individuals are only subject to the FCPA's criminal penalties for violations of the accounting provisions if they acted "willfully."~~²⁶⁴

~~For example, a French company was criminally charged with failure to implement internal controls and failure to keep accurate books and records, among other violations.²⁶⁵ As part of its deferred prosecution agreement, the company admitted to numerous internal control failures, including failure to implement sufficient anti-bribery compliance policies, maintain a sufficient system for the selection and approval of consultants, and conduct appropriate audits of payments to purported "business consultants."²⁶⁶ Likewise, a German company pleaded guilty to internal controls and books and records violations where, from 2001 through 2007, it made payments totaling approximately \$1.36 billion through various mechanisms, including \$805.5 million as bribes and \$554.5 million for unknown purposes.²⁶⁷~~

For example, a U.S.-based hedge fund was criminally charged with violating the books and records and the internal accounting controls provisions of the FCPA, among other things. As part of its deferred prosecution agreement, the company admitted to falsifying its books and records by falsifying records related to the retention and nature of services of, and payments to, an intermediary it used in Libya in order to conceal the true nature of the payments. Also, the hedge fund admitted that it failed to implement a system of internal controls relating to due diligence for the retention of third-party intermediaries, pre-clearance and approval of agreements with third parties and agents, notification to clients and prospective clients of arrangements with third parties having an impact on the client arrangements, documentation and proof of services provided by the third parties, auditing assets and operations in areas that posed a high risk of corruption,

ensuring appropriate justification for the use of and payment to nominee entities, and oversight of payment processes to ensure that payments were made pursuant to appropriate controls.²⁷¹ Similarly, a U.S.-based electronics company entered into a deferred prosecution agreement to resolve charges that it

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knowingly and willfully caused its Japanese-parent issuer to falsify its books and records concerning the improper retention of consultants and concealment of payments to third-party sales agents. As part of its agreement, the company admitted that it retained certain so-called consultants, who did little or no actual consulting work, through a third-party service provider and paid for those services out of a budget over which a senior executive had complete control and discretion, without meaningful oversight by anyone at the company or the parent. By mischaracterizing these payments as “consultant payments” on its general ledger, the company caused its issuer-parent to incorrectly designate those payments as “selling and general administrative expenses” on its books, records, and accounts. In addition, the company admitted that its senior executives provided false or incomplete representations about the effectiveness of the company’s internal controls to the parent on their Sarbanes-Oxley certifications.²⁷²

Individuals can be held criminally liable for accounting violations. For example, a former managing director of a U.S. bank’s real estate business in China pleaded guilty to conspiring to evade internal accounting controls in order to transfer a multi-million dollar ownership interest in a Shanghai building to himself and a Chinese public official with whom

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he had a personal friendship. The former managing director repeatedly made false representations to his employer about the transaction and the ownership interests involved.²⁶⁸⁷³

Conspiracy and Aiding and Abetting Liability

~~As with the FCPA’s anti-bribery provisions,~~ Companies (including subsidiaries of issuers) and individuals may face criminal liability for conspiring to commit or for aiding and abetting violations of the accounting provisions.

For example, the subsidiary of a Houston-based company pleaded guilty both to conspiring to commit and to aiding and abetting the company’s books ~~and~~ and records ~~and~~ and ~~anti-bribery violations.~~ anti-bribery violations.²⁶⁹⁷⁴ The subsidiary paid bribes of over \$4 million and falsely characterized the payments as “commissions,” “fees,” or “legal services,” consequently causing the company’s books and records to be inaccurate. Although the subsidiary was not an issuer and therefore could not be charged directly with an accounting violation, it was criminally liable for its involvement in the parent company’s accounting violation.

Similarly, a U.S. subsidiary of a Swiss freight forwarding company that was not an issuer was charged with conspiring to commit and with aiding and abetting the books and records violations of its customers, who were issuers and therefore subject to the FCPA’s accounting provisions.²⁷⁰⁵ The U.S. subsidiary substantially assisted the issuer-customers in violating the FCPA’s books and records provision by masking the true nature of the bribe payments in the invoices it submitted to the issuer-customers.²⁷¹⁶ The subsidiary thus faced criminal liability for its involvement in the issuer-customers’ FCPA violations even though it was not itself subject to the FCPA’s accounting provisions.

Unlike the FCPA anti-bribery provisions, the accounting provisions apply to “any person,” and thus are not subject to the reasoning in the Second Circuit’s decision in United States v. Hoskins limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions.²⁷⁷

Auditor Obligations

All public companies in the United States must file annual financial statements that have been prepared in conformity with U.S. Generally Accepted

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Accounting Principles (U.S. GAAP). These accounting principles are among the most comprehensive in the world. U.S. GAAP requires an accounting of all assets, liabilities, revenue, and expenses as well as extensive disclosures concerning the company’s operations and financial condition. A company’s financial statements should be complete and fairly represent the company’s financial condition.²⁷²⁸ Thus, under U.S. GAAP, any payments to foreign government officials must be properly accounted for in a company’s books, records, and financial statements.

U.S. laws, including SEC Rules, require issuers to undergo an annual external audit of their financial statements and to make those audited financial statements available to the public by filing them with SEC. SEC Rules and the rules and standards issued by the Public Company Accounting Oversight Board (PCAOB) under SEC oversight, require external auditors to be independent of the companies that they audit. Independent auditors must comply with the rules and standards set forth by the PCAOB when they perform an audit of a public company. ~~These~~The audit standards govern, for example, the auditor’s responsibility concerning material errors, irregularities, or illegal acts by a client and its officers, directors, and employees. Additionally, the auditor has a responsibility to obtain an understanding of an entity’s internal controls over financial reporting as part of its audit and must communicate all significant deficiencies and material weaknesses identified during the audit to management and the audit committee.²⁷³⁹

Under Section 10A of the Exchange Act, independent auditors who discover an illegal act, such as the payment of bribes to domestic or foreign government officials, have certain obligations in connection with their audits of public companies.²⁷⁴⁸⁰ Generally, Section 10A requires auditors who become aware of illegal acts to report such acts to appropriate levels within the company and, if the company fails to take appropriate action, to notify SEC.



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Other Related U.S. Laws

OTHER RELATED U.S. LAWS

Businesses and individuals should be aware that conduct that violates the FCPA's anti-bribery or accounting provisions may also violate other statutes or regulations. Moreover, payments to foreign government officials and intermediaries may violate these laws even if all of the elements of an FCPA violation are not present.

Travel Act

The Travel Act, 18 U.S.C. § 1952, prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity.²⁷⁵⁸¹ "Unlawful activity" includes violations of not only the FCPA, but also state commercial bribery laws. Thus, bribery between private commercial enterprises may, in some circumstances, be covered by the Travel Act. Said differently, if a company pays kickbacks to an employee of a private company who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act.

DOJ has previously charged both individual and corporate defendants in FCPA cases with violations of the Travel Act.²⁷⁶⁸² For instance, an individual investor was convicted of conspiracy to violate the FCPA and the Travel Act in 2009 where the relevant "unlawful activity" under the Travel Act was an FCPA violation involving a bribery scheme in Azerbaijan.²⁷⁷⁸³ Also in 2009, a California company that engaged in

both bribery of foreign officials in violation of the FCPA and commercial bribery in violation of California state law pleaded guilty to conspiracy to violate the FCPA and the Travel Act, among other charges.²⁷⁸⁴

Money Laundering

Many FCPA cases also involve violations of anti-money laundering statutes.²⁷⁹⁸⁵ For example, two Florida executives of a Miami-based telecommunications company were convicted of

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FCPA and money laundering conduct where they conducted financial transactions involving the proceeds of specified unlawful activities—violations of the FCPA, the criminal bribery laws of Haiti, and wire fraud—in order to conceal and disguise these proceeds.

Notably, although foreign officials cannot be prosecuted for FCPA [violations,286 they can be prosecuted for money laundering violations where the specified unlawful activity is a violation of the FCPA.287](#)

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~~violations,280 three former Haitian officials involved in the same scheme were convicted of money laundering.281~~

Mail and Wire Fraud

The mail and wire fraud statutes may also apply. In 2006, for example, a wholly owned foreign subsidiary of a U.S. issuer pleaded guilty to both FCPA and wire fraud counts where the scheme included overbilling the subsidiary's customers—both government and private—and using part of the overcharged money to pay kickbacks to the customers' employees. The wire fraud charges alleged that the subsidiary had funds wired from its parent's Oregon bank account to off-the-books bank accounts in South Korea that were controlled by the subsidiary. The funds, amounting to almost \$2 million, were then paid to managers of state-owned and private steel production companies in China and South Korea as illegal commission payments and kickbacks that were disguised as refunds, commissions, and other seemingly legitimate expenses.²⁸²⁸

Certification and Reporting Violations

Certain other licensing, certification, and reporting requirements imposed by the U.S. government can also be implicated in the foreign bribery context. For example, as a condition of its facilitation of direct loans and loan guarantees to a foreign purchaser of U.S. goods and services, the Export-Import Bank of the United States requires the U.S. supplier to make certifications concerning commissions, fees, or other payments paid in connection with the financial assistance and that it has not and will not violate the FCPA.²⁸³⁹ A false certification may give rise to criminal liability for false statements.²⁸⁴⁹⁰

Similarly, manufacturers, exporters, and brokers of certain defense articles and services are subject to registration, licensing, and reporting requirements under the Arms Export Control Act (AECA), 22 U.S.C. § 2751, et seq., and its implementing regulations, the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120, et seq. For example, under AECA and ITAR, all manufacturers and exporters of defense articles and services must register with the Directorate of Defense Trade Controls. The sale of defense articles and services valued at \$500,000 or more triggers disclosure requirements concerning fees and commissions, including bribes, in an aggregate amount of \$100,000 or more.²⁸⁵⁹¹ Violations of AECA and ITAR can result in civil and criminal penalties.²⁸⁶⁹²

Tax Violations

Individuals and companies who violate the FCPA may also violate U.S. tax law, which explicitly prohibits tax deductions for bribes, such as false sales “commissions” deductions intended to conceal corrupt payments.²⁸⁷⁹³ Internal Revenue ~~Service~~ ~~Criminal~~ Service – Criminal Investigation has been involved in a number of FCPA investigations involving tax violations, as well as other financial crimes like money laundering.

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~~Other Related U.S. Laws~~

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eChapter 5

Guiding Principles of Enforcement

GUIDING PRINCIPLES OF
ENFORCEMENT

What Does DOJ Consider When Deciding Whether to Open an Investigation or Bring Charges?

Whether and how DOJ will commence, decline, or otherwise resolve an FCPA matter is guided by the Principles of Federal Prosecution in the case of individuals, and the Principles of Federal Prosecution of Business Organizations and FCPA Corporate Enforcement Policy in the case of companies.

DOJ Principles of Federal Prosecution

The Principles of Federal Prosecution, set forth in Chapter 9-27.000 of the ~~U.S.~~ ~~Attorney's~~ Justice Manual,²⁸⁸⁹⁴ provide guidance for DOJ prosecutors regarding initiating or declining prosecution, selecting charges, and plea-bargaining. The Principles of Federal Prosecution provide that prosecutors should recommend or commence federal prosecution if the putative defendant's conduct constitutes a federal offense and the admissible evidence will probably be sufficient to obtain and sustain a conviction unless: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists. In assessing the existence of a substantial federal interest, the prosecutor is advised to “weigh all relevant considerations,” including the nature and seriousness of the offense; the deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation or prosecution of others; and the probable sentence or other consequences if the person is convicted. The Principles of Federal Prosecution also set out the considerations to be weighed when deciding whether to enter into a plea agreement with an individual defendant, including the nature and seriousness of the offense and the person's willingness to cooperate, as well as the desirability of prompt and certain disposition of the case and the expense of trial and appeal.²⁸⁹⁵

DOJ Principles of Federal Prosecution of Business Organizations

The Principles of Federal Prosecution of Business Organizations, set forth in Chapter

9-28.000 of the ~~U.S. Attorney's~~

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Justice Manual, 2906 provide guidance regarding the resolution of cases involving corporate wrongdoing. The Principles of Federal Prosecution of Business Organizations recognize that resolution of corporate criminal cases by means other than

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~~than~~ indictment, including non-prosecution and deferred prosecution agreements, may be appropriate in certain circumstances. Nine Ten factors are considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements:

- the nature and seriousness of the offense, ~~including the risk of harm to the public;~~ including the risk of harm to the public;
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;
- the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's ~~timely and voluntary disclosure of wrongdoing and its~~ willingness to cooperate ~~in the~~ with the government's investigation ~~of its,~~ including as to potential wrongdoing by the corporation's agents;
- the ~~existence~~ adequacy and effectiveness of the corporation's ~~pre-existing~~ compliance program at the time of the offense, as well as at the time of a charging or resolution decision;
- the corporation's timely and voluntary disclosure of wrongdoing;
- the corporation's remedial actions, including any efforts to implement an adequate and effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, or to pay restitution, ~~and cooperate with the relevant government agencies;~~
- collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;
- the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; ~~and~~
- ~~the adequacy of remedies such as civil or regulatory enforcement actions.~~

As these factors illustrate, in many investigations it will be appropriate for a prosecutor to consider a ~~corporation's~~ corporation's pre-indictment conduct, including voluntary disclosure, cooperation, and remediation, in determining whether to seek an indictment. In assessing a corporation's cooperation, prosecutors are prohibited from requesting attorney-client privileged materials with two exceptions—when a corporation or its employee asserts an advice-of-counsel defense and when the attorney-client communications were in furtherance of a crime or fraud. Otherwise, an organization's

cooperation may only be assessed on the basis of whether it disclosed the relevant facts underlying an investigation—and not on the basis of whether it has waived its attorney-client privilege or work product protection.²⁹⁴

DOJ FCPA Corporate Enforcement Policy

The FCPA Corporate Enforcement Policy (CEP), contained in the Justice Manual, provides that, where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances.²⁹⁸ CEP declinations are public and available on the Fraud Section’s website at <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>. Aggravating circumstances that may warrant a criminal resolution instead of a declination include, but are not limited to: involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.²⁹⁹ Even where aggravating circumstances exist, DOJ may still

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decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme.³⁰⁰

If a criminal resolution is appropriate, where a company that voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, DOJ will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (Guidelines) fine range, except in the case of a criminal recidivist; and generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.³⁰¹

The CEP also recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the CEP, there will be a presumption of a declination in accordance with and subject to the other requirements of the CEP. In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

Where a company does not voluntarily self-disclose the misconduct, but nevertheless fully cooperates, and timely and appropriately remediates, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the Guidelines fine range.³⁰²

To be eligible for the benefits of the CEP, including a declination, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.³⁰³

The CEP also provides definitions of the terms “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation.” By outlining in the Justice Manual how DOJ defines these terms and the benefits that will accrue to a company that engages in such behavior, companies can make an informed decision as to whether they believe such behavior is in their best interest. Of course, if a company chooses not to engage in such behavior, and DOJ learns of the misconduct and establishes sufficient

proof for prosecution, the company should not expect to receive any benefits outlined in the CEP or to otherwise receive leniency.³⁰⁴

The CEP applies only to DOJ, and does not bind or apply to SEC. 305 The CEP and the declinations that have been announced pursuant to it are posted on DOJ's website.³⁰⁶
Three such cases are as follows:

CEP Declination Example 1

In 2018, DOJ declined prosecution of a privately held company based in the United Kingdom that manufactures and sells equipment used to detect earthquakes and other seismic events. The company had voluntarily self-disclosed to DOJ that it had made numerous payments amounting to nearly \$1 million to the director of a Korean government-funded research center. Following the disclosure of these payments, DOJ indicted the director and in July 2017 tried and convicted him in the Central District of California of one count of money laundering in violation of 18 U.S.C. § 1957. The director was subsequently sentenced to 14 months in prison in October 2017.

The company received a declination under

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the CEP because it voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated pursuant to the CEP. In addition, the company was the subject of a parallel investigation by the United Kingdom's Serious Fraud Office (SFO) for legal violations relating to the same conduct and committed to accepting responsibility with the SFO (the company subsequently entered into a deferred prosecution with the SFO and agreed to pay approximately £2.07M of gross profits arising from the payments to the director).

CEP Declination Example 2

In 2018, DOJ declined prosecution of an insurance company incorporated and headquartered in Barbados. DOJ's investigation found that the company, through its employees and agents, paid approximately \$36,000 in bribes to a Barbadian government official in exchange for insurance contracts resulting in approximately \$686,827 in total premiums for the contracts and approximately \$93,940 in net profits. Specifically, in or around August 2015 and April 2016, high-level employees of the company took part in a scheme to pay approximately \$36,000 in bribes to the Minister of Industry in Barbados, and to launder the bribe payments into the United States.

Despite the high-level involvement of corporate officers in the misconduct, DOJ declined prosecution based on a number of factors, including but not limited to: (1) the company's timely, voluntary self-disclosure of the conduct; (2) the company's thorough and comprehensive investigation; (3) the company's cooperation (including its provision of all known relevant facts about the misconduct) and its agreement to continue to cooperate in DOJ's ongoing investigations and/or prosecutions; (4) the company's agreement to disgorge to DOJ all profits it made from the illegal conduct, which equaled \$93,940; (5) the steps the company had taken to enhance its compliance program and its internal accounting controls; (6) the company's remediation, including but not limited to terminating all of the executives and employees who were involved in the misconduct; and (7) the fact that DOJ had been able to identify and charge the culpable individuals.

CEP Declination Example 3

In 2019, DOJ declined prosecution of a publicly traded technology services company. DOJ's investigation found that the company, through its employees, authorized its agents to pay an approximately \$2 million bribe to one or more government officials in India in exchange for securing and obtaining a statutorily required planning permit in

connection with the development of an office park, as well as other improper payments in connection with other projects in India. Despite the fact that certain members of senior management participated in and directed the criminal conduct at issue, DOJ declined prosecution of the company based on an assessment of the factors set forth in the CEP and the Principles of Federal Prosecution of Business Organizations, including but not limited to: (1) the company's voluntary self-disclosure within two weeks of the Board learning of the criminal conduct; (2) the company's thorough and comprehensive investigation; (3) the company's full and proactive cooperation in the matter (including its provision of all known relevant facts about the misconduct) and its agreement to continue to cooperate in DOJ's ongoing investigations and any prosecutions that might result; (4) the nature and seriousness of the offense; (5) the company's lack of prior criminal history; (6) the existence and effectiveness of the company's pre-existing compliance program, as well as steps that it had taken to enhance its

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compliance program and internal accounting controls; (7) the company's full remediation, including but not limited to terminating the employment of, and disciplining, employees and contractors involved in misconduct; (8) the adequacy of remedies such as civil or regulatory enforcement actions, including the company's resolution with SEC and agreement to pay a civil penalty of \$6 million and disgorgement; (9) the company's agreement to disgorge the full amount of its cost savings from the bribery; and (10) the fact that, as a result of the company's timely voluntary disclosure, DOJ was able to conduct an independent investigation and identify individuals with culpability for the corporation's malfeasance.

What Does SEC Staff Consider When

Deciding Whether to Open an Investigation or Bring/Recommend Charges?

SEC's Enforcement Manual, published by SEC's Enforcement Division and available on SEC's website, 292307 sets forth information about how SEC conducts investigations, as well as the guiding principles that SEC staff considers when determining whether to open or close an investigation and whether civil charges are merited. There are various ways that potential FCPA violations come to the attention of SEC staff, including: tips from informants or whistleblowers; information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives. Investigations can be formal, such as where SEC has issued a formal order of investigation that authorizes its staff to issue investigative subpoenas for testimony and documents, or informal, such as where the staff proceeds with the investigation without the use of investigative subpoenas.

In determining whether to open an investigation and, if so, whether an enforcement action is warranted, SEC staff considers a number of factors, including: the statutes or rules potentially violated; the egregiousness of the potential violation; the potential magnitude of the violation; whether the potentially harmed group is particularly vulnerable or at risk; whether the conduct is ongoing; whether the conduct can be investigated efficiently and within the statute of limitations period; and whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct. SEC staff also may

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consider whether the case involves a possibly widespread industry practice that should be addressed, whether the case involves a recidivist, and whether the matter gives SEC an opportunity to be visible in a community that might not otherwise be familiar with SEC or the protections afforded by the securities laws.

For more information about the Enforcement Division's procedures concerning investigations, enforcement actions, and cooperation with other regulators, see the Enforcement Manual at <http://www.sec.gov/divisions/enforce.shtml>. <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. Self-Reporting, Cooperation, and [Remedial Efforts](#)

Remedial Efforts

While the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.

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Criminal Cases

Under DOJ's Principles of Federal Prosecution of Business Organizations [and the CEP](#), federal ~~prosecutors consider a company's cooperation in determining how to resolve a corporate criminal case. Specifically,~~ prosecutors consider whether the company made a voluntary ~~an~~ [and](#) timely disclosure as well as the company's willingness to provide relevant information and evidence and identify relevant actors inside and outside the company, including senior executives.

In addition, prosecutors may consider a company's remedial actions, including efforts to improve an existing compliance program or appropriate disciplining of ~~wrongdoers~~ [wrongdoers](#).²⁹³⁰⁸ A company's remedial measures should be meaningful and illustrate its recognition of the seriousness of the misconduct, for example, by taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.²³⁰⁹⁴

The Principles of Federal Prosecution similarly provide that prosecutors may consider an individual's willingness to cooperate in deciding whether a prosecution should be undertaken and how it should be resolved. Although a willingness to cooperate will not, by itself, generally relieve a person of criminal liability, it may be given "serious consideration" in evaluating whether to enter into a plea agreement with a defendant, depending on the nature and value of the cooperation offered.²⁹⁵³¹⁰

The U.S. Sentencing Guidelines similarly take into account an individual defendant's cooperation and voluntary disclosure. Under § 5K1.1, a defendant's cooperation, if sufficiently substantial, may justify the government filing a motion for a reduced sentence. And under § 5K2.16, a defendant's voluntary disclosure of an offense prior to its discovery—if the offense was unlikely to have been discovered otherwise—may warrant a downward departure in certain circumstances.

Chapter 8 of the Sentencing Guidelines, which governs the sentencing of organizations, takes into account an organization's remediation as part of an "effective compliance and ethics program." One of the seven elements of such a program provides that after the detection of criminal conduct, "the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct, including making any necessary modifications to the organization's compliance

and ethics program.”²⁹⁶[311](#) Having an effective compliance and ethics program may lead to a three-point reduction in an organization’s culpability score under § 8C2.5, which affects the fine calculation under the Guidelines. Similarly, an organization’s self-reporting, cooperation, and acceptance of responsibility may lead to fine reductions under § 8C2.5(g) by decreasing the culpability score. Conversely, an organization will not qualify for the compliance program reduction when it unreasonably delayed reporting the offense.³¹²⁹⁷ Similar to § 5K1.1

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for individuals, organizations can qualify for departures pursuant to § 8C4.1 of the Guidelines for cooperating in the prosecution of others.

Civil Cases

SEC’s Framework for Evaluating Cooperation by Companies

SEC’s framework for evaluating cooperation by companies is set forth in its 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, which is commonly known as the Seaboard Report.²⁹⁸[313](#) The report, which explained the Commission’s decision not to take enforcement action against a public company

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for certain accounting violations caused by its subsidiary, details the many factors SEC considers in determining whether, and to what extent, it grants leniency to companies for cooperating in its investigations and for related good corporate citizenship. Specifically, the report identifies four broad measures of a company’s cooperation:

- self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top;
- self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations;
- remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected; and
- cooperation with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company’s remedial efforts.

Since every enforcement matter is different, this analytical framework sets forth general principles but does not limit SEC’s broad discretion to evaluate every case individually on its own unique facts and circumstances. Similar to SEC’s treatment of cooperating individuals, credit for cooperation by companies may range from taking no enforcement action to pursuing reduced sanctions in connection with enforcement actions.

SEC’s Framework for Evaluating Cooperation by Individuals

In 2010, SEC announced a new cooperation program for individuals.²⁹⁹[314](#) SEC staff has a wide range of tools to facilitate and reward cooperation by individuals, from taking no enforcement action to pursuing reduced sanctions in connection with

enforcement actions. Although the evaluation of cooperation depends on the specific circumstances, SEC generally evaluates four factors to determine whether, to what extent, and in what manner to credit cooperation by individuals:

- the assistance provided by the cooperating individual in SEC's investigation or related enforcement actions, including, among other things: the value and timeliness of the cooperation, including whether the individual was the first to report the misconduct to SEC or to offer his or her cooperation; whether the investigation was initiated based upon the information or other cooperation by the individual; the quality of the cooperation, including whether the individual was truthful and the cooperation was complete; the time and resources conserved as a result of the individual's cooperation; and the nature of the cooperation, such as the type of assistance provided;
- the importance of the matter in which the individual provided cooperation;
- the societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct, including the severity of the individual's misconduct, the culpability of the individual, and the efforts undertaken by the individual to remediate the harm; and
- the appropriateness of a cooperation credit in light of the profile of the cooperating individual.

Corporate Compliance Program

In a global marketplace, an effective compliance program ~~is a critical component of~~ reinforces a company's internal controls and is essential to detecting and preventing FCPA violations.³⁰⁰¹⁵ Effective compliance programs are tailored to the company's specific business and to the risks associated with that business. They are dynamic and evolve as the business and the markets change.

An effective compliance program promotes "an organizational culture that encourages ethical conduct and a commitment to compliance with the law."³⁰¹⁶ Such a program protects a company's

⁵⁶ reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures a company's assets.³⁰²¹⁷ A ~~well-constructed, thoughtfully implemented, and consistently enforced~~ company's compliance and ethics program can help prevent, detect, remediate, and report misconduct, including FCPA violations, where it is well-constructed, effectively implemented, appropriately resourced, and consistently enforced.

In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, DOJ and SEC also consider the adequacy and effectiveness of a company's compliance program at the time of the misconduct and at the time of the resolution when deciding what, if any, action to take. ~~The program~~ In criminal resolutions, the compliance program factors into three key areas of decision: (1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate and the length and nature of any reporting obligations).³¹⁸ For example, compliance program adequacy may influence whether or not charges should be resolved through a guilty plea, deferred prosecution agreement (DPA) or non-prosecution agreement (NPA), as well as the appropriate length of any DPA or NPA, or the term of corporate probation. ~~It will often affect the penalty amount and the need for a monitor or self-reporting.~~³⁰³¹⁹ As discussed above, SEC's Seaboard

Report focuses, among other things, on a company's self-policing prior to the discovery of the misconduct, including whether it had established effective compliance procedures.³²⁰⁴ Likewise, three of the ~~nineteen~~ factors set forth in DOJ's Principles of Federal Prosecution of Business Organizations relate, either directly or indirectly, to a compliance program's design ~~and~~, implementation, and effectiveness, including the pervasiveness of wrongdoing within the company, the ~~existence~~adequacy and effectiveness of the company's ~~pre-existing~~ compliance program, and the nature of the company's remedial actions.³⁰⁵²¹ DOJ also considers the U.S.

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Sentencing Guidelines' elements of an effective compliance program, as set forth in § 8B2.1 of the Guidelines.

These considerations reflect the recognition that a company's failure to prevent every single violation does not necessarily mean that a particular company's compliance program was not generally effective. DOJ and SEC understand that "no compliance program can ever prevent all criminal activity by a corporation's employees,"³⁰⁶²² and they do not hold companies to a standard of perfection. An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.³⁰⁷²³

DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:

- Is the company's compliance program well designed?
- Is it being applied in good faith? In other words, is the program adequately resourced and empowered to function effectively?
 - Does it work in practice?³⁰⁸²⁴

This guide contains information regarding some of the basic elements DOJ and SEC consider when evaluating compliance programs. Although

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the focus is on compliance with the FCPA, given the existence of anti-corruption laws in many other countries, businesses should consider designing programs focused on anti-corruption compliance more broadly.³⁰⁹²⁵

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Hallmarks of Effective Compliance

Programs

Individual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program. Thus, the discussion below is meant to provide insight into the aspects of compliance programs that DOJ and SEC assess, recognizing that companies may consider a variety of factors when making their own determination of what is appropriate for their specific business needs.³¹⁰²⁶ Indeed, small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations, a fact DOJ and SEC take into account when evaluating

companies' compliance programs.

Compliance programs that employ a “check-the-box” approach may be inefficient and, more importantly, ineffective. Because each compliance program should be tailored to an organization's specific needs, risks, and challenges, the information provided below should not be considered a substitute for a company's own assessment of the corporate compliance program most appropriate for that particular business organization. In the end, if designed carefully, implemented earnestly, and enforced fairly, a company's compliance program—no matter how large or small the organization—will allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately.

Commitment from Senior Management and a Clearly Articulated Policy Against Corruption

Within a business organization, compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company. Managers and employees take their cues from these corporate leaders. Thus, DOJ and SEC consider the commitment of corporate leaders to a “culture of compliance”³⁴²⁷ and look to see if this high-level commitment is also reinforced and implemented ~~by~~ by middle managers ~~and~~ and employees ~~at~~ at all levels of a business. A well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees to engage in misconduct to achieve business objectives, will be ineffective. DOJ and SEC have often encountered companies with compliance programs that are strong on paper but that nevertheless have significant FCPA violations because management has failed to effectively implement the program even in the face of obvious signs of corruption. This may be the result of aggressive sales staff preventing compliance personnel from doing their jobs effectively and of senior management, more concerned with securing a valuable business opportunity than enforcing a culture of compliance, siding with the sales team. The higher the financial stakes of the transaction, the greater the temptation for management to choose profit over compliance.

A strong ethical culture directly supports a strong compliance program. By adhering to ethical standards, senior managers will inspire middle managers to reinforce those standards. Compliant middle managers, in turn, will encourage employees to strive to attain those standards throughout the organizational structure.³⁴²⁸

In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus

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evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization.

Code of Conduct and Compliance Policies and Procedures

A company's code of conduct is often the foundation upon which an effective compliance program is built. As DOJ has repeatedly noted in its charging documents, the most effective codes are clear, concise, and accessible to all employees and to those conducting business on the com-pany's behalf. Indeed, it would be difficult to effectively implement a compliance program if it was not available in the local language so that employees in foreign subsidiaries can access and understand it. When assessing a compliance program, DOJ and SEC will review whether the company

has taken steps to make certain that the code of conduct remains current and effective and whether a company has periodically reviewed and updated its code.

Whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures will also be considered by DOJ and SEC. These types of policies and procedures will depend on the size and nature of the business and the risks associated with the business. Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks. ~~Among the~~^{The} risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments. For example, some companies with global operations have created web-based approval processes to review and approve routine gifts, travel, and entertainment involving foreign officials and private customers with clear monetary limits and annual limitations. Many of these systems have built-in flexibility so that senior management, or in-house legal counsel, can be apprised of and, in appropriate circumstances, approve unique requests. These types of systems can be a good way to conserve corporate resources while, if properly implemented, preventing and detecting potential FCPA violations.

Regardless of the specific policies and procedures implemented, these standards should apply to personnel at all levels of the company.

Oversight, Autonomy, and Resources

In appraising a compliance program, DOJ and SEC also consider whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization.³¹³²⁹ Those individuals must have appropriate authority within the organization,

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adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented effectively.³¹⁴³⁰ Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee).³¹⁵ Depending on the size and structure of an organization, it may be appropriate for day-to-day operational responsibility to be

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delegated to other specific individuals within a company.³¹⁶³² DOJ and SEC recognize that the reporting structure will depend on the size and complexity of an organization. Moreover, the amount of resources devoted to compliance will depend on the company's size, complexity, industry, geographical reach, and risks associated with the business. In assessing whether a company has reasonable internal controls, DOJ and SEC typically consider whether the company devoted adequate staffing and resources to the compliance program given the size, structure, and risk profile of the business.

Risk Assessment

Assessment of risk is fundamental to developing a strong compliance program, and

is another factor DOJ and SEC evaluate when assessing a company's compliance program.³⁴⁷³³ One-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective. A \$50 million contract with a government agency in a high-risk country warrants greater

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scrutiny than modest and routine gifts and entertainment. Similarly, performing identical due diligence on all third-party agents, irrespective of risk factors, is often counterproductive, diverting attention and resources away from those third parties that pose the most significant risks. DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, ~~risk-based~~risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area. Conversely, a company that fails to prevent an FCPA violation on an economically significant, high-risk transaction because it failed to perform a level of due diligence commensurate with the size and risk of the transaction is likely to receive reduced credit based on the quality and effectiveness of its compliance program.

As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits. The degree of appropriate due diligence is fact-specific and should vary based on industry, country, size, and nature of the transaction, and the method and amount of third-party compensation. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. When assessing a company's compliance program, DOJ and SEC take into account whether and to what degree a company analyzes and addresses the particular risks it faces.

Training and Continuing Advice

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where

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appropriate, agents and business partners.³⁴⁸³⁴ For example, many larger companies have implemented a mix of web-based and in-person training conducted at varying intervals. Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training, however, the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language. For example, companies may want to consider providing different types of training to their sales personnel and accounting personnel with hypotheticals or sample situations that are similar to the situations they might encounter. In addition to the existence and scope of a company's

training program, a company should develop appropriate measures, depending on the size and sophistication of the particular company, to provide guidance and advice on complying with the company's ethics and compliance program, including when such advice is needed urgently. Such measures will help ensure that the compliance program is understood and followed appropriately at all levels of the company.

Incentives and Disciplinary Measures

In addition to evaluating the design and implementation of a compliance program throughout an organization, enforcement of that program is fundamental to its effectiveness.³¹⁹³⁵ A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly, and whether they are commensurate with the violation. Many companies have found that publicizing disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences. DOJ and SEC recognize that positive incentives can also drive compliant behavior. ~~These~~The incentives can take many

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forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance ~~pro-~~program, and ~~gram, and~~ rewards for ethics and compliance leadership.³²⁰³⁶ Some organizations, for example, have made adherence to compliance a significant metric for ~~compliance a significant metric for~~ management's bonuses so that compliance becomes ~~an integral part of management's~~ an integral part of management's everyday concern. ~~Beyond financial incentives, some compa-~~ Beyond financial incentives, some companies have highlighted compliance within their organizations by recognizing compliance professionals and ~~internal audit~~ internal audit staff. Others have made working in ~~the company's compli-~~ the company's compliance organization a way to ~~ance organization a way to~~ advance an employee's career. SEC, for instance, has encouraged companies to embrace methods to incentivize ethical and lawful behavior:

[M]ake integrity, ethics and compliance part of the promotion, compensation and evaluation processes as well. For at the end of the day, the most effective way to communicate that "doing the right thing" is a priority, is to reward it. Conversely, if employees are led to believe that, when it comes to compensation and career advancement, all that counts is short-term profitability, and that cutting ethical corners is an acceptable way of getting there, they'll perform to that measure. To cite an example from a different walk of life: a college football coach can be told that the graduation rates of his players are what matters, but he'll know differently if the sole focus of his contract

extension talks or the decision to fire him is his win-loss record.³²¹³⁷

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No matter what the disciplinary scheme or potential

incentives a company decides to adopt, DOJ and SEC will consider whether they are fairly and consistently applied across the organization. No executive should be above ~~com-compliance~~ ~~pliancee~~, no employee below compliance, and no person within an organization deemed too valuable to be ~~disei-disciplined~~ ~~plined~~, if warranted. Rewarding good behavior and ~~sane-sanctioning~~ ~~tioning~~ bad behavior reinforces a culture of compliance and ethics throughout an organization.

Third-Party Due Diligence and Payments

DOJ's and SEC's FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business

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transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program.

Although the degree of appropriate due diligence may vary based on industry, country, size and nature of the transaction, and historical relationship with the ~~third-~~ ~~party~~ third party, some guiding principles always apply.

First, as part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials. The degree of scrutiny should increase as red flags surface.

Second, companies should have an understanding of the business rationale for including the third party in the transaction. Among other things, the company should understand the role of and need for the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country, as well as the timing of the third party's introduction to the business. Moreover, companies may want to confirm and document that the third party is actually performing the work for which it is being paid and that its compensation is commensurate with the work being provided.

Third, companies should undertake some form of ongoing monitoring of third-party relationships.³²²³⁸ Where appropriate, this may include updating due diligence periodically, exercising audit rights, providing periodic training, and requesting annual compliance certifications by the third party.

In addition to considering a company's due diligence on third parties, DOJ and SEC also assess whether the company has informed third parties of the company's

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~~Compliance Program Case Study~~

~~Recent DOJ and SEC actions relating to a financial institution's real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District's real estate arm. The government entity conducted the transactions through two special~~

purpose vehicles (“SPVs”), with the second SPV purchasing a 12% stake in a real estate project.

The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity’s payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity’s offices; searching media sources; and conducting background checks on the entity’s principals. The financial institution vetted the SPVs by obtaining a letter with designated bank account information from a Chinese official associated with the government entity (the “Chinese Official”); using an international law firm to request and review 50 documents from the SPVs’ Canadian attorney; interviewing the attorney; and interviewing the SPVs’ management.

Notwithstanding the financial institution’s robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution’s executive in charge of the project, and the SPV’s attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA’s internal control provisions and also settled with SEC.

compliance program and commitment to ethical and lawful business practices and, where appropriate, whether it has sought assurances from third parties, through certifications and otherwise, of reciprocal commitments. These can be meaningful ways to mitigate third-party risk.

Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis and without fear of retaliation.³²³ Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken. Companies will want to consider taking “lessons learned” from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and Review

Finally, a good compliance program should constantly evolve. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its

followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.

According to one survey, 64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs.³²⁴ An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines.³²⁵ Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.³²⁶

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks.³²⁷ Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business's profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target's value and negotiate for the costs of the bribery to be borne by the target. In addition,

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such actions demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government, cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.³²⁸ When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.³²⁹

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

~~For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions.³³⁰~~

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~~Other Guidance on Compliance and International Best Practices~~

~~In addition to this guide, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce’s International Trade Administration has published *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*,³³¹ and the Department of State has published *Fighting Global Corruption: Business Risk Management*.³³²~~

~~There is also an emerging international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.³³³ Most notably, the OECD’s 2009 *Anti-Bribery Recommendation and its Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance*,³³⁴ published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:~~

- ~~• Asia Pacific Economic Cooperation—Anti-Corruption Code of Conduct for Business;³³⁵~~
- ~~• International Chamber of Commerce—ICC Rules on Combating Corruption;³³⁶~~
- ~~• Transparency International—Business Principles for Countering Bribery;³³⁷~~
- ~~• United Nations Global Compact—The Ten Principles;³³⁸~~
- ~~• World Bank—Integrity Compliance Guidelines;³³⁹ and~~
- ~~• World Economic Forum—Partnering Against Corruption—Principles for Countering Bribery.³⁴⁰~~

Hypothetical: Third-Party Vetting

Part 1: Consultants

Company A, a U.S. issuer headquartered in Delaware, wants to start doing business in a country that poses high risks of corruption. Company A learns about a potential \$50 million contract with the country’s Ministry of Immigration. This is a very attractive opportunity to Company A, both for its profitability and to open the door to future projects with the government. At the suggestion of the company’s senior vice president of international sales (Sales Executive), Company A hires a local businessman who assures them that he has strong ties to political and government leaders in the country and can help them win the contract. Company A enters into a consulting contract with the local businessman (Consultant). The agreement requires Consultant to use his best efforts to help the company win the business and provides for Consultant to receive a significant monthly retainer as well as a success fee of 3% of the value of any contract the company wins.

What steps should Company A consider taking before hiring Consultant?

There are several factors here that might lead Company A to perform heightened

FCPA-related due diligence prior to retaining Consultant: (1) the market (high-risk country); (2) the size and significance of the deal to the company; (3) the company's first time use of this particular consultant; (4) the consultant's strong ties to political and government leaders; (5) the success fee structure of the contract; and (6) the ~~vaguely-defined~~vaguely defined services to be provided. In order to minimize the likelihood of incurring FCPA liability, Company A should carefully vet Consultant and his role in the transaction, including close scrutiny of the relationship between Consultant and any Ministry of Immigration officials or other government officials. Although there is nothing inherently illegal about contracting with a third party that has close connections to politicians and government officials to perform legitimate services on a transaction, this type of relationship can be susceptible to corruption. Among other things, Company A may consider conducting due diligence on Consultant, including background

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and reference checks; ensuring that the contract spells out exactly what services and deliverables (such as written status reports or other documentation) Consultant is providing; training Consultant on the FCPA and other anti-corruption laws; requiring Consultant to represent that he will abide by the FCPA and other anti-corruption laws; including audit rights in the contract (and exercising those rights); and ensuring that payments requested by Consultant have the proper supporting documentation before they are approved for payment.

Part 2: Distributors and Local Partners

Assume the following alternative facts:

~~Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A's products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project~~

to Company A, claims that the standard discount price to Distributor	creates insufficient margin for Distributor to cover
warehousing, distribution, installation, marketing, and training costs an	d requests an additional discount or rebate, or, in

the ~~Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A's products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project to Company A, claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or, in the~~ alternative, a contribution to its marketing efforts, either in the form ~~m~~ of a lump sum or as a percentage of the total contract. The requested discount/allowance is significantly larger than usual, although there is precedent at Company A for granting this level of discount in unique circumstances. Distributor further advises Company A that the Ministry's procurement officials responsible for awarding the contract have expressed a strong preference for including a particular local company (Local Partner) in the transaction as a subcontractor of Company A ~~to perform installation, training, and other services that would normally have been performed by Distributor or Company A. According to Distributor, the Ministry~~

~~has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.~~

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to perform installation, training, and other services that would normally have been performed by Distributor of Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.

What additional compliance considerations do these alternative facts raise?

As with Consultant in the first scenario above, Company A should carefully vet Distributor and Local Partner and their roles in the transaction in order to minimize the likelihood of incurring FCPA liability. While Company A has an established relationship with Distributor, the fact that Distributor has requested an additional discount warrants further inquiry into the economic justification for the change, particularly where, as here, the proposed transaction structure contemplates paying Local Partner to provide many of the same services that Distributor would otherwise provide. In many cases, it may be appropriate for distributors to receive larger discounts to account for unique circumstances in particular transactions. That said, a common mechanism to create additional margin for bribe payments is through excessive discounts or rebates to distributors. Accordingly, when a company has pre-existing relationships with distributors and other third parties, transaction-specific due diligence—including an analysis of payment terms to confirm that the payment is commensurate with the work being performed—can be critical even in circumstances where due diligence of the distributor or other third party raises no initial red flags.

Company A should carefully scrutinize the relationship among Local Partner, Distributor, and Ministry of Immigration officials. While there is nothing inherently illegal about contracting with a third party that is recommended by the end-user, or even hiring a government official to perform legitimate services on a transaction unrelated to his or her government job, these facts raise additional red flags that warrant significant scrutiny. Among other things, Company A would be well-advised to require Principal 1 to verify that he will have no role in the Ministry of Immigration's decision to award the contract to Company A, notify the Ministry of Immigration and his own ministry of his proposed involvement in the transaction, and certify that he will abide by the FCPA and other anti-corruption laws and that his involvement in the transaction is permitted under local law.

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Assume the following additional facts:

Under its company policy for a government transaction of this size, Company A requires both finance and compliance approval. The finance officer is concerned that the discounts to Distributor are significantly larger than what they have approved for similar work and will cut too deeply into Company A's profit margin. The finance officer is also skeptical about including Local Partner to perform some of the same services that Company A is paying Distributor to perform. Unsatisfied with Sales Executive's

explanation, she requests a meeting with Distributor and Principal 1. At the meeting, Distributor and Principal 1 offer vague and inconsistent justifications for the payments and fail to provide any supporting analysis, and Principal 1 seems to have no real expertise in the industry. During a coffee break, Distributor comments to Sales Executive that the finance officer is naïve about “how business is done in my country.” Following the meeting, Sales Executive dismisses the finance officer’s concerns, assuring her that the proposed transaction structure is reasonable and legitimate. Sales Executive also reminds the finance officer that “the deal is key to their growth in the industry.”

The compliance officer focuses his due diligence on vetting Distributor and Local Partner and hires a business investigative firm to conduct a background check. Distributor appears reputable, capable, and financially stable and is willing to take on real risk in the project, financial and otherwise. However, the compliance officer learns that Distributor has established an off-shore bank account for the transaction.

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The compliance officer further learns that Local Partner’s business was organized two years ago and appears financially stable but has no expertise in the industry and has established an off-shore shell company and bank account to conduct this transaction. The background check also reveals that Principal 1 is a former college roommate of a senior official of the Ministry of Immigration. The Sales Executive dismisses the compliance officer’s concerns, commenting that what Local Partner does with its payments “isn’t our problem.” Sales Executive also strongly objects to the compliance officer’s request to meet with Principal 1 to discuss the off-shore company and account, assuring him that it was done for legitimate tax purposes and complaining that if Company A continues to “harass” Local Partner and Distributor, they would partner with Company A’s chief competitor. The compliance officer and the finance officer discuss their concerns with each other but ultimately sign off on the deal even though their questions had not been answered. Their decision is motivated in large part by their conversation with Sales Executive, who told them that this was the region’s most important contract and that the detailed FCPA questionnaires and robust anti-corruption representations in the contracts placed the burden on Distributor and Local Partner to act ethically.

Company A goes forward with the Distributor and Local Partner agreements and wins the contract after six months. The finance officer approves Company A’s payments to Local Partner via the offshore account, even though Local Partner’s invoices did not contain supporting detail or documentation of any services provided. Company A recorded the payments as legitimate operational expenses on its books and records. Sales Executive received a large year-end bonus due to the award of the contract.

In fact, Local Partner and Distributor used part of the payments and discount margin, respectively, to funnel bribe payments to several Ministry of Immigration officials, including Principal 1’s former college roommate, in exchange for awarding the contract to Company A. Thousands of dollars are also wired to the personal offshore bank account of Sales Executive.

How would DOJ and SEC evaluate the potential FCPA liability of Company A and its employees?

This is not the case of a single “rogue employee” circumventing an otherwise robust compliance program. Although Company A’s finance and compliance officers had the correct instincts to scrutinize the structure and economics of the transaction and the role

of the third parties, their due diligence was incomplete. When the initial inquiry identified significant red flags, they approved the transaction despite knowing that their concerns were unanswered or the answers they received raised additional concerns and red flags. Relying on due diligence questionnaires and anti-corruption representations is insufficient, particularly when the risks are readily apparent. Nor can Company A or its employees shield themselves from liability because it was Distributor and Local Partner—rather than Company A directly—that made the payments.

The facts suggest that Sales Executive had actual knowledge of or was willfully blind to the consultant's payment of the bribes. He also personally profited from the scheme (both from the kickback and from the bonus he received from the company) and intentionally discouraged the finance and compliance officers from learning the full story. Sales Executive is therefore subject to liability under the anti-bribery, books and records, and internal controls provisions of the FCPA, and others may be as well. Company A may also be liable for violations of the anti-bribery, books and records, and internal controls provisions of the FCPA given the number and significance of red flags that established a high probability of bribery and the role of employees and agents acting on the company's behalf.

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Confidential Reporting and Internal Investigation

An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation.³³⁹ Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken. Companies will want to consider taking "lessons learned" from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.

Continuous Improvement: Periodic Testing and

chapter 5 Review

Guiding Principles of Enforcement

Finally, a good compliance program should constantly evolve. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and do not allow them to become stale.

An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines.³⁴⁰ Although

the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability.³⁴¹

Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks.³⁴² Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business’ profitability and reputation, as well as potential civil and criminal liability.

In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target’s value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company’s commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government,

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cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.³⁴³ When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.³⁴⁴

FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.

For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions.³⁴⁵

Investigation, Analysis, and Remediation of Misconduct

The truest measure of an effective compliance program is how it responds to misconduct. Accordingly, for a compliance program to be truly effective, it should have a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company’s response, including any disciplinary or remediation measures taken.

In addition to having a mechanism for responding to the specific incident of misconduct, the company's program should also integrate lessons learned from any misconduct into the company's policies, training, and controls. To do so, a company will need to analyze the root causes of the misconduct to timely and appropriately remediate those causes to prevent future compliance breaches.

Other Guidance on Compliance and International Best Practices

In addition to this guide, DOJ has published guidance concerning the Evaluation of Corporate Compliance Programs.³⁴⁶ The Evaluation of Corporate Compliance Programs is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate: (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations). The DOJ compliance guidance provides companies insight into the types of questions that prosecutors ask to evaluate and assess a company's compliance program.

In addition, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce's International Trade Administration

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has published Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies,³⁴⁷ and the Department of State has published Fighting Global Corruption: Business Risk Management.³⁴⁸

There is also a developing international consensus on compliance best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance.³⁴⁹ Most notably, the OECD's 2009 Anti-Bribery Recommendation and its Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance,³⁵⁰ published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:

- Asia-Pacific Economic Cooperation—Anti-Corruption Code of Conduct for Business³⁵¹
- International Chamber of Commerce— ICC Rules on Combating Corruption³⁵²
- Transparency International—Business Principles for Countering Bribery³⁵³
- United Nations Global Compact—The Ten Principles³⁵⁴
- World Bank—Integrity Compliance Guidelines³⁵⁵
- World Economic Forum—Partnering Against Corruption—Principles for Countering Bribery³⁵⁶

Compliance Program Case Study

DOJ and SEC actions relating to a financial institution's real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District's real estate

arm. The government entity conducted the transactions through two special purpose vehicles (“SPVs”), with the second SPV purchasing a 12% stake in a real estate project.

The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity’s payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity’s offices; searching media sources; and conducting background checks on the entity’s principals. The financial institution vetted the SPVs by obtaining a letter with designated bank account information from a Chinese official associated with the government entity (the “Chinese Official”); using an international law firm to request and review 50 documents from the SPVs’ Canadian attorney; interviewing the attorney; and interviewing the SPVs’ management.

Notwithstanding the financial institution’s robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution’s executive in charge of the project, and the SPV’s attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA’s internal control provisions and also settled with SEC.

Under the Alternative Fines Act, 18 U.S.C. § 3571(d), courts may impose significantly higher fines than those provided by the FCPA—up to twice the benefit that the defendant obtained by making the corrupt payment, as long as the facts supporting the increased fines are included in the indictment and either proved to the jury beyond a reasonable doubt or admitted in a guilty plea proceeding.³⁴⁵⁶¹ Fines imposed on individuals may not be paid by their employer or principal.³⁴⁶²

U.S. Sentencing Guidelines

When calculating penalties for violations of the FCPA, DOJ focuses its analysis on the U.S. Sentencing Guidelines (~~Guidelines~~)³⁴⁷⁶³ in all of its resolutions, including guilty pleas, DPAs, and NPAs. The Guidelines provide a very detailed and predictable structure for calculating penalties for all federal crimes, including violations of the FCPA. To determine the appropriate penalty, the “offense level” is first calculated by examining both the severity of the crime and facts specific to the crime, with appropriate reductions for cooperation and acceptance of responsibility, and, for business entities, additional factors such as voluntary disclosure, ~~cooperation~~, pre-existing compliance programs, and remediation.

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The Guidelines provide ~~for~~ different penalties for the different provisions of the FCPA. The initial offense level for violations of the anti-bribery provisions is determined under § 2C1.1, while violations of the accounting provisions are assessed under § 2B1.1. For individuals, the initial offense level is modified by factors set forth in Chapters 3, 4, and 5 of the Guidelines³⁶⁴⁸ to identify a final offense level. This final offense level, combined with other factors, is used

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to determine whether the Guidelines would recommend that incarceration is appropriate, the length of any term of incarceration, and the appropriate amount of any fine. For corporations, the offense level is modified by factors particular to organizations as described in Chapter 8 to determine the applicable organizational penalty.

For example, violations of the anti-bribery provisions are calculated pursuant to § 2C1.1. The offense level is determined by first identifying the base offense level;³⁴⁹⁶⁵ adding additional levels based on specific offense characteristics, including whether the offense involved more than one bribe, the value of the bribe or the benefit that was conferred, and the level of the public official;³⁵⁰⁶⁶ adjusting the offense level based on the defendant’s role in the offense;³⁵¹⁶⁷ and using the total offense level as well as the defendant’s criminal history category to determine the advisory guideline range.³⁵²⁶⁸ For violations of the accounting provisions assessed under § 2B1.1, the procedure is generally the same, except that the specific offense characteristics differ. For instance, for violations of the FCPA’s accounting provisions, the offense level may be increased if a substantial part of the scheme occurred outside the United States or if the defendant was an officer or director of a publicly traded company at the time of the offense.³⁵³⁶⁹

For companies, the offense level is calculated pursuant to §§ 2C1.1 or 2B1.1 in the same way as for an individual—by starting with the base offense level and increasing it as warranted by any applicable specific offense characteristics. The organizational guidelines found in Chapter 8, however, provide the structure for determining the final advisory guideline fine range for organizations. The base fine consists of the greater of the amount corresponding to the total offense level, calculated pursuant to the Guidelines, or the pecuniary gain or loss from the offense.³⁵⁴⁷⁰ This base fine is then multiplied by a culpability score that can either reduce the fine to as little as five percent of the base

fine or increase the recommended fine to up to four times the amount of the base fine.³⁵⁵⁷¹ As described in § 8C2.5, this culpability score is calculated by taking into account numerous factors such as the size of the organization committing the criminal acts; the involvement in or tolerance of criminal activity by high-level personnel within the organization; and prior misconduct or obstructive behavior. The culpability score is reduced if the organization had an effective pre-existing compliance program to prevent violations and if the organization voluntarily disclosed the offense, cooperated in the investigation, and accepted responsibility for the criminal conduct.³⁵⁶⁷²

Civil Penalties

Although only DOJ has the authority to pursue criminal actions, both DOJ and SEC have civil enforcement authority under the FCPA. DOJ may pursue civil actions for anti-bribery violations by domestic concerns (and their officers, directors, employees, agents, or stockholders) and foreign nationals and companies for violations while in the United States, while SEC may pursue civil actions against issuers and their officers, directors, [70](#) employees, agents, or stockholders for violations of the anti-bribery and the accounting provisions.³⁵⁷³

For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to \$~~216,410~~⁰⁰ per violation.³⁵⁸⁷⁴ Individuals, including officers, directors, stockholders, and agents of companies, are similarly subject to a civil penalty of up to \$~~216,410~~⁰⁰ per violation,³⁷⁵⁹ which may not be paid by their employer or principal.³⁷⁶⁰

For violations of the accounting provisions [in district court actions](#), SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the [egregiousness](#) [nature](#) of the violation [and](#) [potential risk to investors](#), ranging from \$~~7,500~~^{9,639} to \$~~150,000~~^{192,768} for an individual and \$~~75,000~~^{96,384} to \$~~725,000~~^{963,837} for a company.³⁶¹⁷⁷ SEC may obtain civil penalties both in actions filed in federal court and in administrative proceedings.³⁶²⁷⁸

[Forfeiture and Disgorgement](#)

[In addition to criminal and civil penalties, companies may also be required to forfeit the proceeds of their crimes, or disgorge the profits generated from the crimes. While the purpose of a penalty or fine is to punish and deter misconduct, the purpose of forfeiture and disgorgement is primarily to return the perpetrator to the same position as before the crime, ensuring that the perpetrator does not profit from the misconduct. However, in Kokesh v. SEC, the Supreme Court ruled that the civil disgorgement remedy is subject to the same five-year statute of limitations as a penalty under 28 U.S.C. § 2462. Following Kokesh, in SEC v. Liu, the court again addressed the disgorgement remedy stating, “\[e\]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity,” and holding that disgorgement is permissible equitable relief when it does not exceed a wrongdoer’s net profits and is awarded for victims.](#)³⁷⁹

[Coordinated Resolutions and Avoiding “Piling On”](#)

[In resolving cases against companies, DOJ and SEC strive to avoid imposing duplicative penalties, forfeiture, and disgorgement for the same conduct. DOJ and SEC attempt to similarly credit fines, penalties, forfeiture, and disgorgement of foreign authorities resolving with the same company for the same conduct. In a case involving a publicly-traded Brazilian petrochemical company, DOJ, SEC, Brazilian authorities, and](#)

Swiss authorities credited one another in imposing fines and disgorgement.³⁸⁰

DOJ has coordinated resolutions with foreign authorities in more than 10 cases, and SEC has coordinated resolutions with foreign authorities in at least five.³⁸¹ DOJ has memorialized this practice of coordinating resolutions to avoid “piling on” in the Justice Manual, which instructs prosecutors to “endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/ or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”³⁸² In determining whether and how much to credit another authority, prosecutors are to consider, among other factors, “the egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and its cooperation with the Department, separate from any such disclosures and cooperation with other relevant enforcement authorities.”³⁸³

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Collateral Consequences

In addition to the criminal and civil penalties described above, individuals and companies who violate the FCPA may face significant collateral consequences, including suspension

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or debarment from contracting with the federal government, cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges.

Debarment

Under federal guidelines governing procurement, an individual or company that violates the FCPA or other criminal statutes may be barred from doing business with the federal government. The Federal Acquisition Regulations (FAR) provide for the potential suspension or debarment of companies that contract with the government upon conviction of or civil judgment for bribery, falsification or destruction of records, the making of false statements, or “[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor.”³⁶³⁸⁴ These measures are not intended to be punitive and may be imposed only if “in the public’s interest for the Government’s protection.”³⁶⁴⁸⁵

Under the FAR, a decision to debar or suspend is discretionary. The decision is not made by DOJ prosecutors or SEC staff, but instead by independent debarment authorities within each agency, such as the Department of Defense or the General Services Administration, which analyze a number of factors to determine whether a company should be suspended, debarred, or otherwise determined to be ineligible for government contracting. Such factors include whether the contractor has effective internal control systems in place, self-reported the misconduct in a timely manner, and has taken remedial measures.³⁸⁶⁵ If a cause for debarment exists, the contractor has the burden of demonstrating to the satisfaction of the debarring official that it is presently responsible and that debarment is not necessary.³⁶⁶⁸⁷ Each federal department and agency determines the eligibility of contractors with whom it deals. However, if one department or agency debars or suspends a contractor, the debarment or suspension applies to the entire executive branch of the federal government, unless a department or agency shows compelling reasons not to debar or suspend the contractor.³⁶⁷⁸⁸

Although guilty pleas, DPAs, and NPAs do not result in automatic debarment from U.S. government contracting,

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committing a federal crime and the factual admissions underlying a resolution are factors that the independent debarment authorities may consider. Moreover, indictment alone can lead to suspension of the right to do business with the government.³⁶⁸⁹ The ~~U.S. Attorney's~~Justice Manual also provides that when a company engages in fraud against the government, a prosecutor may not negotiate away an ~~agen-ey's~~agency's right to debar or delist the company as part of the plea bargaining process.³⁶⁹⁰ In making debarment determinations, contracting agencies, including at the state and local level, may consult with DOJ in advance of awarding a contract. Depending on the circumstances, DOJ may provide information to contracting authorities in the context of the corporate settlement about the facts and circumstances underlying the criminal conduct and remediation measures undertaken by the company, if any. This information sharing is not advocacy, and the ultimate debarment decisions are squarely within the purview of the independent

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debarment authorities. In some situations, the contracting agency may impose its own oversight requirements in order for a company that has admitted to violations of federal law to be awarded federal contracts, such as the Corporate Integrity Agreements often required by the Department of Health and Human Services.

Cross-Debarment by Multilateral Development Banks

Multilateral Development Banks (MDBs), like the World Bank, also have the ability to debar companies and individuals for corrupt practices.³⁷⁰⁹¹ Each MDB has its own process for evaluating alleged corruption in connection with MDB-funded projects. When appropriate, DOJ and SEC work with MDBs to share evidence and refer cases. On April 9, 2010, the African Development Bank Group, the Asian Development Bank, the European Bank for

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Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group entered into an agreement under which entities debarred by one MDB will be sanctioned for the same misconduct by other signatory MDBs.³⁷⁴⁹² This cross-debarment agreement means that if a company is debarred by one MDB, it is debarred by all.³⁷²⁹³

Loss of Export Privileges

Companies and individuals who violate the FCPA may face consequences under other regulatory regimes, such as the Arms Export Control Act (AECA), 22 U.S.C. § 2751, et seq., and its implementing regulations, the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120, et seq. AECA and ITAR together provide for the suspension, revocation, amendment, or denial of an arms export license if an applicant has been indicted or convicted for violating the FCPA.³⁷³⁹⁴ They also set forth certain factors for the Department of State's Directorate of Defense Trade Controls (DDTC)³⁷⁴⁹⁵ to consider when determining whether to grant, deny, or return without action license applications for certain types of defense materials. One of those factors is whether there is reasonable cause to believe that an applicant for a license has violated (or conspired to violate) the FCPA; if so, the Department of State "may disapprove the

application.”³⁷⁵⁹⁶ In addition, it is the policy of the Department of State not to consider applications for licenses involving any persons who have been convicted of violating the AECA or convicted of conspiracy to violate the AECA.³⁹⁷⁶ In an action related to the criminal resolution of a U.K. military products manufacturer, the DDTC imposed a “policy of denial” for export licenses on three of the company’s subsidiaries that were involved in violations of AECA and ITAR.³⁷⁷⁹⁸

When Is a Compliance Monitor or Independent Consultant Appropriate?

One of the primary goals of both criminal prosecutions and civil enforcement actions against companies that violate the FCPA is ensuring that such conduct does not occur again. As a consequence, enhanced compliance and reporting requirements may be part of criminal and civil resolutions of FCPA matters. The amount of enhanced compliance and kind of reporting required varies according to the facts and circumstances of individual cases.

In criminal cases, a company’s sentence, or a DPA or NPA with a company, may require the appointment of an independent corporate monitor. Whether a monitor is appropriate depends on the specific facts and circumstances of the case. In 2008, DOJ issued internal guidance regarding the selection and use of corporate monitors in DPAs and NPAs with companies.³⁹⁹ Additional guidance has since been issued.³⁷⁸⁴⁰⁰ A monitor is an independent third

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party who assesses and monitors a company’s adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company’s misconduct. Appointment of a monitor is not appropriate in all circumstances, and a monitor should never be imposed for punitive purposes, but it may be appropriate, for example, where a company does not already have an effective internal compliance program or needs to establish necessary internal controls. ~~In addition, companies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.~~ DOJ’s guidance provides that, in determining whether to impose a monitor as part of a corporate resolution, prosecutors should assess (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation.⁴⁰¹ In evaluating the potential benefits of a monitor, prosecutors consider, among other factors: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.⁴⁰² “Where a corporation’s compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary.”⁴⁰³

In civil cases, a company may similarly be required to retain an independent compliance consultant or monitor to provide an independent, third-party review of the company’s internal controls. The consultant recommends improvements, to the extent

necessary, which the company must adopt. When both DOJ and SEC require a company to retain a monitor, the two agencies have been able to coordinate their requirements so that the company can retain one monitor to fulfill both sets of requirements.

The most successful monitoring relationships are those in which the company embraces the monitor or consultant. If the company takes the recommendations and suggestions seriously and uses the monitoring period as a time to find and fix any outstanding compliance issues, the company can emerge from the monitorship with a stronger, long-lasting compliance program.

Factors DOJ and SEC Consider

When Determining Whether a Compliance

Monitor Is Appropriate Include:

- • Nature and Seriousness of the offense
 - • Duration of the misconduct
 - • Pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines
 - Nature and size • The risk profile of the company, including its nature, size, geographical reach, and business model
 - • Quality of the company's compliance program at the time of the misconduct
 - • Subsequent remediation efforts and quality of the company's compliance program at the time of resolution
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- Whether the company's current compliance program has been fully implemented and tested

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eChapter 7 Resolutions

RESOLUTIONS

What Are the Different Types of Resolutions with DOJ?

Criminal Complaints, Informations, and Indictments

Charges against individuals and companies are brought in three different ways under the Federal Rules of Criminal Procedure: criminal complaints, criminal informations, and

indictments.

DOJ may agree to resolve criminal FCPA matters against companies either through a declination or, in appropriate cases, a negotiated resolution resulting in a plea agreement, deferred prosecution agreement, or non-prosecution agreement. For individuals, a negotiated resolution will generally take the form of a plea agreement, which may include language regarding cooperation, or a non-prosecution cooperation agreement. When negotiated resolutions cannot be reached with companies or individuals, the matter may proceed to trial.

Plea Agreements

Plea agreements—whether with companies or individuals—are governed by Rule 11 of the Federal Rules of Criminal Procedure. The defendant generally admits to the facts supporting the charges, admits guilt, and is convicted of the charged crimes when the plea agreement is presented to and accepted by a court.

The plea agreement may jointly recommend a sentence or fine, jointly recommend an analysis under the U.S. Sentencing Guidelines, or leave such items open for argument at the time of sentencing.

Deferred Prosecution Agreements

Under a deferred prosecution agreement, or a DPA as it is commonly known, DOJ files a charging document with the court,³⁷⁹⁴⁰⁴ but it simultaneously requests that the prosecution be deferred, that is, postponed for the purpose of allowing the company to demonstrate its good conduct. DPAs generally require a defendant to agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor. DPAs describe the company's conduct, cooperation, and remediation, if any, and provide a calculation of the penalty pursuant

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to the U.S. Sentencing Guidelines. In addition to being publicly filed, DOJ places all of its DPAs on its website. If the company successfully completes [its obligations during](#) the term of the agreement (typically ~~two or~~ three years), DOJ will then move to dismiss the filed charges. A company's successful completion of a DPA is not treated as a criminal conviction. [Other countries, such as the United Kingdom and France, have also instituted DPA-like frameworks to resolve corporate matters whereby a company can avoid prosecution if it adheres to conditions imposed upon it for a set period of time.](#)

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Non-Prosecution Agreements

Under a non-prosecution agreement, or an NPA as it is commonly known, DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties. In circumstances where an NPA is with a company for FCPA-related offenses, it is made available to the public through DOJ's website. The requirements of an NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty. If the company complies with the agreement throughout its term, DOJ does not file criminal charges. If an individual complies with the terms of his or her NPA, namely, truthful and complete cooperation and continued law-abiding conduct, DOJ will not pursue criminal charges.

Declinations

As discussed above, DOJ's decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the Principles of Federal Prosecution, in the case of individuals, and the Principles of Federal Prosecution of Business Organizations [and the CEP](#), in the case of companies. As described, in the case of individuals, the Principles of Federal Prosecution advise prosecutors to weigh all relevant considerations, including:

- federal law enforcement priorities;
- the nature and seriousness of the offense;
- the deterrent effect of prosecution;
- the person's culpability in connection with the offense;
- the person's history of criminal activity;
- the person's willingness to cooperate in the investigation or prosecution of others; and
- the probable sentence or other consequences if the person is convicted.[38405](#)

The Principles of Federal Prosecution provide additional commentary about each of these factors. For instance, they explain that prosecutors should take into account federal law enforcement priorities because federal law enforcement and judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. The deterrent effect of prosecution should also be kept in mind because some offenses, "although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community."[38406](#)

As discussed above, the Principles of Federal Prosecution of Business Organizations require prosecutors to consider ~~nineteen~~ factors when determining whether to prosecute a corporate entity for an FCPA violation, including the nature and seriousness of the offense; the pervasiveness of wrongdoing within the company; the company's history of similar conduct; the existence and effectiveness of the company's pre-existing compliance program; [whether the company voluntarily self-disclosed the misconduct; the extent of the company's cooperation with the](#)

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[government's investigation; the company's remediation; the collateral consequences that would flow from the resolution; the adequacy of prosecutions against individuals;](#) and the adequacy of remedies, such as civil or regulatory enforcement actions.

Pursuant to these guidelines, DOJ has declined to prosecute both individuals and corporate entities in numerous cases based on the particular facts and circumstances presented in those matters, taking into account the available evidence.[382407](#) To protect the privacy rights and other interests of the uncharged and other potentially interested parties, DOJ has a long-standing policy not to provide, without the party's consent, non-public information on matters it has declined to prosecute. To put DOJ's declinations in context, however, ~~in the past two years alone,~~ DOJ has [recently](#) declined several dozen cases against companies where potential FCPA violations were alleged.

[In addition to the Principles of Federal Prosecution of Business Organizations, as discussed above, DOJ has implemented the CEP to provide additional incentives and benefits to companies that voluntarily self-disclose misconduct, fully cooperate, and fully remediate, including a presumption of a declination \(with the disgorgement of ill-gotten profits\), absent aggravating circumstances. A declination pursuant to the CEP is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/ or restitution. If a case would have been declined in the absence of such](#)

circumstances, it is not considered as a declination pursuant to the CEP. Declinations awarded under the CEP are made public on the DOJ/FCPA website.

~~As mentioned above, there are rare occasions in which, in conjunction with the public filing of charges against an individual, it is appropriate to disclose that a company is not also being prosecuted. That was done in a recent case where a former employee was charged but the former corporate employer was not.~~³⁸³

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What Are the Different Types of Resolutions with SEC?

Civil Injunctive Actions and Remedies

In a civil injunctive action, SEC seeks a court order ~~compelling~~enjoining the defendant ~~to obey the law in the future. Violating such an order can result in civil or criminal contempt proceedings~~from future violations of the laws charged in the action. Civil contempt sanctions, brought by SEC, are remedial rather than punitive in nature and serve one of two purposes: to compensate the party injured as a result of the violation of the injunction or force compliance with the terms of the injunction.

Where a defendant has profited from a violation of law, SEC can obtain the equitable relief of disgorgement of ill-gotten gains and pre-judgment interest and can also obtain civil money penalties pursuant to Sections 21(d)(3) and 32(c) of the Exchange Act. SEC may also seek ancillary relief (such as an accounting from a defendant). Pursuant to Section 21(d)(5), SEC also may seek, and any federal court may grant, any other equitable relief that may be appropriate or necessary for the benefit of investors, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.

Civil Administrative Actions and Remedies

SEC has the ability to institute various types of administrative proceedings against a person or an entity that it believes has violated the law. This type of enforcement action is brought by SEC's Enforcement Division and is litigated before an SEC administrative law judge (ALJ). The ALJ's decision is subject to appeal directly to the Securities and Exchange Commission itself, and the Commission's decision is in turn subject to review by a U.S. Court of Appeals.

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Administrative proceedings provide for a variety of relief. For regulated persons and entities, such as broker-dealers and investment advisers and persons associated with them, sanctions include censure, limitation on activities, suspension of up to twelve months, and bar from association or revocation of registration. For professionals such as attorneys and accountants, SEC can order in Rule 102(e)

~~)chapter 7 Resolutions~~

proceedings that the professional be censured, suspended, or barred from appearing ~~or practicing before SEC~~^{3.4048} SEC staff can seek an order from an administrative law judge requiring the respondent to cease and desist from any current or future violations of the securities laws. In addition, SEC can obtain disgorgement, pre-judgment interest, and civil money penalties in administrative proceedings under Section 21B of the Exchange Act, and also can ~~obtain other equitable relief~~in order other relief to effect compliance with the federal securities laws, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.

Deferred Prosecution Agreements

A deferred prosecution agreement is a written agreement between SEC and a potential cooperating individual or company in which SEC agrees to forego an

enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in SEC's investigation and related enforcement actions; (2) enter into a ~~long-term~~[longterm](#) tolling agreement; (3) comply with express prohibitions and/or undertakings during a period of deferred prosecution; and (4) under certain circumstances, agree either to admit or not to contest underlying facts that SEC could assert to establish a violation of the federal securities laws. If the agreement is violated during the period of deferred prosecution, SEC staff may recommend an enforcement action to the Commission against the individual or company for the original misconduct as well as any additional misconduct. Furthermore, if the Commission authorizes the enforcement action, SEC staff may use any factual admissions made by the cooperating individual or company in support of a motion for summary judgment, while maintaining the ability to bring an enforcement action for any additional misconduct at a later date.

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In May of 2011, SEC entered into its first deferred prosecution agreement against a company for violating the FCPA.[385409](#) In that case, a global manufacturer of steel pipe products violated the FCPA by bribing Uzbekistan government officials during a bidding process to supply pipelines for transporting oil and natural gas. The company made almost \$5 million in profits when it was subsequently awarded several contracts by the Uzbekistan government. The company discovered the misconduct during a worldwide review of its operations and brought it to the ~~govern-ment's~~[government's](#) attention. In addition to self-reporting, the company conducted a thorough internal investigation; provided complete, real-time cooperation with SEC and DOJ staff; and undertook extensive remediation, including enhanced anti-corruption procedures and training. Under the terms of the DPA, the company paid \$5.4 million in disgorgement and prejudgment interest. The company also paid a \$3.5 million monetary penalty to resolve a criminal investigation by DOJ through an NPA.[386410](#)

For further information about deferred prosecution agreements, see SEC's Enforcement Manual.[387411](#)

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Non-Prosecution Agreements

A non-prosecution agreement is a written agreement between SEC and a potential cooperating individual or company, entered into in limited and appropriate circumstances, that provides that SEC will not pursue an enforcement action against the individual or company if the individual or company agrees to, among other things: (1) cooperate truthfully and fully in SEC's investigation and related enforcement actions; and (2) comply, under certain circumstances, with express undertakings. If the agreement is violated, SEC staff retains its ability to recommend an enforcement action to the Commission against the individual or company.

For further information about non-prosecution agreements, see SEC's Enforcement Manual.[388412](#)

Termination Letters and Declinations

As discussed above, SEC's decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in SEC's Enforcement Manual. The same factors that apply to SEC staff's ~~s~~'s determination of whether to recommend an enforcement action against an individual or entity apply to the decision to close an investigation without recommending enforcement action.[41389](#) Generally, SEC staff considers, among other things:

- the seriousness of the conduct and potential violations;
- the resources available to SEC staff to pursue the investigation;
- the sufficiency and strength of the evidence;
- the extent of potential investor harm if an action is not commenced; and
- the age of the conduct underlying the potential violations.

SEC has declined to take enforcement action against both individuals and companies based on the facts and circumstances present in those matters, where, for example, the conduct was not egregious, the company fully cooperated, and the ~~company identified and remediated the~~

~~misconduct~~

company identified and remediated the misconduct quickly. SEC Enforcement Division policy is to notify individuals and entities at the earliest opportunity when the staff has determined not to recommend an enforcement action against them to the Commission. This notification takes the form of a termination letter.

In order to protect the privacy rights and other interests of the uncharged and other potentially interested parties, SEC does not provide non-public ~~information on matters it has declined to~~

~~prosecute.~~

information related to closed investigations unless required by law.

What Are Some Examples of Past Declinations by DOJ and SEC?

~~Neither DOJ~~ As discussed above, under the CEP, DOJ has announced declinations of companies that voluntarily self-disclosed, fully cooperated and timely and appropriately remediated. Other than those pursuant to the CEP, neither DOJ nor SEC typically publicizes declinations but, to provide some insight into the process, the following are ~~recent,~~ anonymized examples of matters DOJ and SEC have declined to pursue:

~~Termination Letters and Declinations~~

~~As discussed above, SEC's decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in SEC's~~

Example 1: Public Company Declination

DOJ and SEC declined to take enforcement action against a public U.S. company.

Factors taken into consideration included:

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- The company discovered that its employees had received competitor bid information from a third-

party with connections to the foreign government.

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- The company began an internal investigation, withdrew its contract bid, terminated the employees involved, severed ties to the third-party agent, and voluntarily disclosed the conduct to DOJ's Antitrust Division, which also declined prosecution.
- During the internal investigation, the company uncovered various FCPA red flags,

including prior concerns about the third-party agent, all of which the company voluntarily disclosed to DOJ and SEC.

- The company immediately took substantial steps to improve its compliance program.

Example 2: Public Company Declination

DOJ and SEC declined to take enforcement action against a public U.S. company.

Factors taken into consideration included:

- With knowledge of employees of the company's subsidiary, a retained construction company paid relatively small bribes, which were wrongly approved by the company's local law firm, to foreign building code inspectors.
- When the company's compliance department learned of the bribes, it immediately ended the conduct, terminated its relationship with the construction company and law firm, and terminated or disciplined the employees involved.
- The company completed a thorough internal investigation and voluntarily disclosed to DOJ and SEC.
- The company reorganized its compliance department, appointed a new compliance officer dedicated to anti-corruption, improved the training and compliance program, and undertook a review of all of the company's international third-party relationships.

Example 3: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held industrial services company for

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bribes paid by a small foreign subsidiary. Factors taken into consideration included:

- The company self-reported the conduct to DOJ and SEC.
- The total amount of the improper payments was relatively small, and the activity appeared to be an isolated incident by a single employee at the subsidiary.
- The profits potentially obtained from the improper payments were very small.
- The payments were detected by the company's existing internal controls. The company's audit committee conducted a thorough independent internal investigation. The results of the investigation ~~tion tion~~ were provided to the government.
- The company cooperated fully with investigations by DOJ and SEC.
- The company implemented significant remedial actions and enhanced its internal control structure.

Example 4: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held oil-and-gas services company for small bribes paid by a foreign subsidiary's customs agent.

Factors taken into consideration included:

The company's internal controls timely detected a potential bribe before a payment was made.

- When company management learned of the potential bribe, management immediately reported the issue to the company's General Counsel and Audit Committee and prevented the payment from occurring.

[cont'd](#)

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- Within weeks of learning of the attempted bribe, the company provided in-person FCPA training to employees of the subsidiary and undertook

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an extensive internal investigation to determine whether any of the company’s subsidiaries in the same region had engaged in misconduct.

- The company self-reported the misconduct and the results of its internal investigation to DOJ and SEC.
- The company cooperated fully with investigations by DOJ and SEC.
- In addition to the immediate training at the relevant subsidiary, the company provided comprehensive FCPA training to all of its employees and conducted an extensive review of its anti-corruption compliance program.
- The company enhanced its internal controls and record-keeping policies and procedures, including requiring periodic internal audits of customs payments. As part of its remediation, the company directed that local lawyers rather than customs agents be used to handle its permits, with instructions that “no matter what, we don’t pay bribes”—a policy that resulted in a longer and costlier permit procedure.

Example 5: Public Company Declination

DOJ and SEC declined to take enforcement action against a U.S. publicly held consumer products company in connection with its acquisition of a foreign company. Factors taken into consideration included:

- The company identified the potential improper payments to local government officials as part of its pre-acquisition due diligence.
- The company promptly developed a comprehensive plan to investigate, correct, and remediate any FCPA issues after acquisition.
- The company promptly self-reported the issues prior to acquisition and provided the results of its ~~investi-~~
investigation ~~gation~~ to the government on a real-time basis.
- The acquiring company’s existing internal controls and compliance program were robust.
- After the acquisition closed, the company implemented a comprehensive remedial plan, ensured

that all improper payments stopped, provided extensive FCPA training to employees of the new subsidiary, and promptly incorporated the new subsidiary into the company’s existing internal controls and compliance environment.

Example 6: Private Company Declination

In 2011, DOJ declined to take prosecutorial action against a privately held U.S. company and its foreign subsidiary. Factors taken into consideration included:

- The company voluntarily disclosed bribes paid to social security officials in a foreign country. The total amount of the bribes was small.
- ~~The total amount of the bribes was small.~~
- When discovered, the corrupt practices were immediately terminated.
- The conduct was thoroughly investigated, and the results of the investigation were promptly provided to DOJ.
- All individuals involved were either terminated or disciplined. The company also terminated its relationship with its foreign law firm.
- The company instituted improved training and compliance programs commensurate with its size and risk exposure.

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Chapter 8

Whistleblower Provisions and Protections

WHISTLEBLOWER PROVISIONS

AND PROTECTIONS

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal. Through their knowledge of the circumstances and individuals involved, whistleblowers can help SEC and DOJ identify potential violations much earlier than might otherwise have been possible, thus allowing SEC and DOJ to minimize the harm to investors, better preserve the integrity of the U.S. capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 both contain provisions affecting whistleblowers who report FCPA violations. Sarbanes-Oxley prohibits issuers from retaliating against whistleblowers and provides that employees who are retaliated against for reporting possible securities law violations may file a complaint with the Department of Labor, for which they would be eligible to receive reinstatement, back pay, and other compensation.³⁹⁰⁴¹⁴ Sarbanes-Oxley also prohibits retaliation against employee whistleblowers under the obstruction of justice statute.³⁹⁴¹⁵

In 2010, the Dodd-Frank Act added Section 21F to the Exchange Act, addressing whistleblower incentives and protections. Section 21F authorizes SEC to provide monetary awards to eligible individuals who voluntarily come forward with high quality, original information that leads to an SEC enforcement action in which over \$1,000,000 in sanctions is ordered.³⁹² ~~The awards range is between~~⁴¹⁶ The Commission issues awards in an aggregate amount equal to not less than 10% percent, and not more than 30% percent, of the monetary sanctions recovered by the government that have been collected in the actions. The Dodd-Frank Act also prohibits employers from retaliating against whistleblowers and creates a private right of action for employees who are retaliated against.³⁹³⁴¹⁷

Furthermore, businesses should be aware that retaliation against a whistleblower may also violate state, local, and foreign laws that provide protection of whistleblowers.

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On August 12, 2011, the final rules for SEC's Whistleblower Program became effective. These rules set forth the requirements for a whistleblowers to be eligible for an awards ~~consideration, the~~ factors that SEC will use to determine the amount of the award, the categories of individuals who are excluded from award consideration, and the categories of individuals who are subject to limitations in award considerations.³⁹⁴¹⁸ The final rules strengthen incentives for employees to report the suspected violations internally through internal compliance programs when appropriate, although ~~it does~~they do not require an employee to do so in order to qualify for an award.³⁴¹⁹⁵

Individuals with information about a possible violation of the federal securities laws, including FCPA violations, should submit that information to SEC either online through SEC's Tips, Complaints, and Referrals (TCR) Intakesystem and Resolution Systemcomplaint form (available at <https://dene-blee.www.sec.gov/TCRExternal/disclaimer.xhtml>^{tc}) or by mailing or faxing a completed Form TCR to the Commission's Office of the Whistleblower.

Whistleblowers can submit information anonymously. To be considered under SEC's whistleblower program as eligible for ~~an~~ reward, however, the information must be submitted on an anonymous whistleblower's behalf by an attorney.³⁹⁶⁴²⁰ Whether or not a whistleblower reports anonymously, SEC is committed to protecting the identity of a whistleblower to the fullest extent possible under the statute.³⁹⁷⁴²¹ SEC's Office of the Whistleblower administers SEC's Whistleblower Program and answers questions from the public regarding the program. Additional information regarding SEC's Whistleblower Program, including answers to frequently asked questions, is available online at <http://www.sec.gov/whistleblower>.

SEC Office of the Whistleblower

100 F Street NE, Mail Stop 5971

Washington, DC 20549

Facsimile: (703) 813-9322

Online Report Form:

<http://www.sec.gov/whistleblower>

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~~Whistleblower Provisions and Protections~~

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~~Chapter 9~~

DOJ Opinion Procedure

DOJ OPINION PROCEDURE

DOJ's opinion procedure ~~is~~remains a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by DOJ under the FCPA.³⁹⁸⁴²² Generally speaking, under the opinion procedure process, parties submit information to DOJ, after which DOJ issues an opinion about whether the proposed conduct falls within its enforcement policy. All of DOJ's prior opinions are available online.⁴²³⁹⁹ Parties interested in obtaining such an opinion should follow these steps:⁴⁰⁰²⁴

First, those seeking an opinion should evaluate whether their question relates to

actual, prospective conduct.⁴⁰¹²⁵ The opinion procedure cannot be used to obtain opinions on purely historical conduct or on hypothetical questions. DOJ will not consider a request unless that portion of the transaction for which an opinion is sought involves only prospective conduct, although the transaction as a whole may have components that already have occurred. An executed contract is not a prerequisite and, in most—if not all—instances, an opinion request should be made before the requestor commits to proceed with a transaction.⁴⁰²⁶ Those seeking requests should be aware that FCPA opinions relate only to the FCPA’s anti-bribery provisions.⁴⁰³²⁷

Second, before making the request, the company or individual should check that they are either an issuer or a domestic concern, as only those categories of parties can receive an opinion.⁴⁰⁴²⁸ If the transaction involves more than one issuer or domestic concern, consider making a request for an opinion jointly, as opinions ~~only~~ apply only to the parties that request them.⁴⁰⁵²⁹

Third, those seeking an opinion must put their request in writing. The request must be specific and accompanied by all relevant and material information bearing on the conduct and

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circumstances for which an opinion is requested. Material information includes background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any. Those seeking opinions are under an affirmative obligation to make full and true disclosures.⁴³⁰⁶ Materials disclosed to DOJ will not be made public without the consent of the party submitting them.⁴⁰⁷³¹

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Fourth, the request must be signed. For corporate requestors, the signatory should be an appropriate senior officer with operational responsibility for the conduct that is the subject of the request and who has been designated by the corporation’s chief executive officer. In appropriate cases, DOJ also may require the chief executive officer to sign the request. Those signing the request must certify that it contains a true, correct, and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.⁴⁰⁸³²

Fifth, an original and five copies of the request should be addressed to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Opinion Group.⁴⁰⁹³³ The mailing address is P.O. Box 28188 Central Station, Washington, D.C. 20038. DOJ also asks that you send an electronic courtesy copy to FCPA.Fraud@usdoj.gov.

DOJ will evaluate the request for an FCPA opinion.⁴¹⁰³⁴ A party may withdraw a request for an opinion at any time prior to the release of an opinion.⁴¹¹³⁵ If the request is complete and all the relevant information has been submitted, DOJ will respond to the request by issuing an opinion within 30 days.⁴¹²³⁶ If the request is incomplete, DOJ will identify for the requestor what additional information or documents are required for DOJ to review the request. Such information must be provided to DOJ promptly. Once the additional information has been received, DOJ will issue an opinion within 30 days of receipt of that additional information.⁴¹³⁷ DOJ’s FCPA opinions state whether, for purposes of DOJ’s present enforcement policy, the prospective conduct would violate either the issuer or domestic concern anti-bribery provisions of the FCPA.⁴¹⁴³⁸ DOJ also may take other positions in the opinion as it considers appropriate.⁴¹⁵³⁹ To the extent that the opinion concludes that the proposed conduct would not violate the FCPA, a rebuttable presumption is created that the

requestor's conduct that was the basis of the opinion is in compliance with the FCPA.⁴¹⁶⁴⁰ In order to provide non-binding guidance to the business community, DOJ makes versions of its opinions publicly available on its website.⁴⁴¹⁷

If, after receiving an opinion, a party is concerned about prospective conduct that is beyond the scope of conduct specified in a previous request, the party may submit an additional request for an opinion using the procedures outlined above.⁴¹⁸⁴²

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~~DOJ Opinion Procedure~~

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~~eChapter 10 Conclusion~~

~~CONCLUSION~~

The FCPA was designed to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes. Following Congress' leadership in enacting the FCPA ⁴³⁵ years ago, and through determined international diplomatic and law enforcement efforts in the time since, laws like the FCPA prohibiting foreign bribery have been enacted by most of the United States' major trading partners.

This guide is designed to provide practical advice about, and useful insights into, our enforcement considerations. For businesses desiring to compete fairly in foreign markets, it is our goal to maximize those businesses' ability to comply with the FCPA in the most effective and efficient way suitable to their business and the markets in which they operate. Through our ongoing efforts with the U.S. and international business and legal communities and non-governmental organizations, DOJ and SEC can continue effectively to protect the integrity of our markets and reduce corruption around the world.

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~~APPENDIX~~

~~The Foreign Corrupt~~

~~Practices Act~~

~~THE FOREIGN CORRUPT~~

~~PRACTICES ACT:~~

~~15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78m, 78ff~~

~~15 U.S.C. § 78dd-1 [Prohibited foreign trade practices by issuers](#) [Section 30A of the Securities Exchange Act of 1934] ~~Prohibited foreign trade practices by issuers~~~~

~~(a) Prohibition~~

~~It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this~~

title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

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(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

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(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) ~~of this section~~ shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) ~~of this section~~

that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

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

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state

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whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is

in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

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(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive Order pursuant to section 1 of the ~~International Organizations Immunities Act~~ (28 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

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

(i) such person is aware that such person is engaging in such conduct, that such

circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

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

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(3)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities

from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the ~~decision-making~~ decision making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 1101 of ~~the Immigration and Nationality Act (title 8 U.S.C. § 1101)~~) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

* * *

15 U.S.C. § 78dd-2 Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder

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thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; ~~or~~

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

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(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

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

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

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(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries

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on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce,

the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of ~~F~~title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

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(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of ~~F~~title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

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(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under

paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, ~~by~~^{be} made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

~~(f) Opinions of Attorney General~~

~~(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney—~~

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

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(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than \$2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term “domestic concern” means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that has been designated by Executive order pursuant to ~~Section 4 of the International Organizations Immunities Act (288 of title 22 U.S.C. § 288)~~; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

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(3)(A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

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

(4)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the

intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs

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~~influence any act or decision of such government or instrumentality,~~

~~in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or~~

~~(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—~~

~~(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or~~

~~(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.~~

~~(b) Exception for routine governmental action~~

~~Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.~~

(1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a “United States person” means a national of the United States (as defined in section 1101 of ~~the Immigration and Nationality Act (title 8 U.S.C. § 1101)~~) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

* * *

15 U.S.C. § 78dd-3 Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 [Section 30A of the Exchange Act] of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of

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an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of— candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or ~~(e) Affirmative defenses~~ influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party

official, or

It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

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

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(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General

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that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than \$2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to

a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than \$100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term “person,” when referring to an offender, means any natural person other than a national of the United States (as defined in [section 1101 of title 8 U.S.C. § 1101](#)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term “public international organization” means—

(i) an organization that has been designated by Executive Order pursuant to [Section 1 of the International Organizations Immunities Act \(28 U.S.C. § 288\)](#); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

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(3)(A) A person’s state of mind is “knowing” with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

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

(4)(A) The term “routine governmental action” means only an action which is ordinarily and commonly performed by a foreign official in—

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(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across

country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) ~~the~~The term “routine governmental action” does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) ~~the~~The term “interstate commerce” means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

* * *

15 U.S.C. § 78m Periodical and other reports [Section 13 of the Securities Exchange Act of 1934]

~~Periodical and other reports~~

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

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Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. In any registration statement, periodic report, or other reports to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period presented in connection with its first registration statement that became effective under this chapter or the Securities Act of 1933 [15 U.S.C. §§ 77a, et seq.] and, with respect

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to any such statement or reports, an emerging growth company may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to

companies that are not issuers.

(b) Form of report; books, records, and internal accounting; directives

(1) ~~the~~The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but in the case of the reports of any person whose methods of accounting are prescribed under the provisions of any law of the United States, or any rule or regulation thereunder, the rules and regulations of the Commission with respect to reports shall not be inconsistent with the requirements imposed by such law or rule or regulation in respect of the same subject matter (except that such rules and regulations of the Commission may be inconsistent with such requirements to the extent that the Commission determines that the public interest or the protection of investors so requires).

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

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(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

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

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with ~~manage-~~
~~ment's~~management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

(3)(A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House

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of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 781 of this title or an issuer which is required to file reports pursuant to section 780(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

[\[Reminder of the statute omitted\]](#)

* * *

15 U.S.C. § 78ff Penalties [Section 32 of the Securities Exchange Act of 1934]

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title [Section 30A of the Exchange Act]), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 780 of this title or any rule or regulation thereunder shall

forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such

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failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than \$2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act]

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of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be fined not more than \$100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 [Section 30A of the Exchange Act] of this title shall be subject to a civil penalty of not more than \$10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

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APPENDIX Endnotes

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1 ~~S.~~ H. REP. REP. No. 95-~~H640~~, at 4-5 (1977) [hereinafter SH. REP. REP. No. 95-~~H640~~], available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-sites/default/files/criminal-fraud/legacy/2010/04/11/houseprt-95-H640.pdf>.

2 ~~Id.;~~ H.R. REP S. Rep. No. 95-~~61140~~, at 4-5 (1977) [hereinafter HS. RRep. REP. ~~NO~~ No. 95-61140], available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-senaterpt-95-61140.pdf>. ~~The House Report made clear Congress's concerns:~~

3 Id.; H.R. Rep. No. 95-640, at 4-5. The House Report made clear Congress' concerns: "The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business." Id.

³⁴ See, e.g., U.S. ~~AGENCY FOR INT'L DEV~~[Agency for Int'l Dev.](#), USAID ~~ANTICORRUPTION STRATEGY~~[Anticorruption Strategy](#) 5-6 (2005), available at <https://transitionwww.usaid.gov/policy/ads/200/sites/default/files/documents/1868/200mbo.pdf>. The growing recognition that corruption poses a severe threat to domestic and international security has galvanized efforts to combat it in the United States and abroad. See, e.g., Int'l Anti-Corruption and Good Governance Act of 2000, Pub. L. No. 106-309, § 202, 114 Stat. 1090 (codified as amended at 22 U.S.C. §§ 2151-2152 (2000)) (noting that “[w]idespread corruption endangers the stability and security of societies, undermines democracy, and jeopardizes the social, political, and economic development of a society. . . . [and that] [c]orruption facilitates criminal activities, such as money laundering, hinders economic development, inflates the costs of doing business, and undermines the legitimacy of the government and public trust”).

⁴⁵ See Maryse Tremblay & Camille Karbassi, Corruption and Human Trafficking 4 (Transparency Int'l, Working Paper No. 3, 2011), available at http://issuu.com/transparenyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011; U.S. ~~AGENCY FOR INT'L DEV.~~, ~~FOREIGN AID IN THE NATIONAL INTEREST~~https://issuu.com/transparenyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011?mode=window&backgroundColor=%23222222; U.S. Agency for Int'l Dev., ~~Foreign Aid in the National Interest~~ 40 (2002), available at http://pdf.usaid.gov/pdf_docs/PDABW900.pdf (“No problem does more to alienate citizens from their political leaders and institutions, and to undermine political stability and economic development, than endemic corruption among the government, political party leaders, judges, and bureaucrats. The more endemic the corruption is, the more likely it is to be accompanied by other serious deficiencies in the rule of law: smuggling, drug trafficking, criminal violence, human rights abuses, and personalization of power.”).

⁵⁶ President George W. Bush observed in 2006 that “the culture of corruption has undercut development and good governance and . . . impedes our efforts to promote freedom and democracy, end poverty, and combat international crime and terrorism.” President’s Statement on Kleptocracy, 2 ~~PUB~~[Pub. PAPERS](#)[Papers](#) 1504 (Aug. 10, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/08/20060810.html>. The administrations of former President George W. Bush and ~~former~~[former](#) President Barack Obama both recognized the threats posed to security and stability by corruption. For instance, in issuing a proclamation restricting the entry of certain corrupt foreign public officials, former President George W. Bush recognized “the serious negative effects that corruption of public institutions has on the United States’ efforts to promote security and to strengthen democratic institutions and free market systems. . . .” Proclamation No. 7750, 69 Fed. Reg. 2287 (Jan. 14, 2004). Similarly, ~~former~~[former](#) President Barack Obama’s National Security Strategy paper, released in May 2010, expressed the administration’s efforts and commitment to promote the recognition that “pervasive corruption is a violation of basic human rights and a severe impediment to development and global security.” ~~THE~~[THE WHITE HOUSE](#)[The White](#)

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~~House~~, ~~NATIONAL SECURITY STRATEGY~~[National Security Strategy](#) 38 (2010), available at https://www.whitehouseobamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁶⁷ See, e.g., ~~INT’L CHAMBER OF COMMERCE, ET AL., CLEAN BUSINESS IS GOOD BUSINESS: THE BUSINESS CASE AGAINST CORRUPTION~~[Int’l Chamber of Commerce, et al., Clean Business Is Good Business: The Business Case Against Corruption](http://www.unglobalcompact.org/docs/news_events/2F8.14/2Fclean_business_is_good_business.pdf) (2008), available at http://www.unglobalcompact.org/docs/news_events/2F8.14/2Fclean_business_is_good_business.pdf; World Health Org., ~~Fact Sheet No. 335, Medicines: Corruption and Pharmaceuticals (Dec. Reinforcing the Focus on Anti-corruption, Transparency and Accountability in National Health Policies, Strategies and Plans (2001)9)~~, available at <https://wwwapps.who.int/mediacentre/factsheets/fs335/en/>; Daniel Kaufmann, ~~Corruption: The Facts~~, FOREIGN POL’Y, Summer 1997, at 119-20; Paolo Mauro, ~~Corruption and Growth~~, 110 Q. J. Econ. 681, 683, 705 (1995) (finding that “corruption lowers private investment . . . [and] reduc[es] economic growth . . .”); THE WORLD BANK, ~~THE DATA REVOLUTION: MEASURING GOVERNANCE AND CORRUPTION~~, (Apr. 8, 2004), available at <http://go.worldbank.org/87JUY8GJH0.iris/bitstream/handle/10665/326229/9789241515689-eng.pdf?ua=1>.

⁷⁸ See, e.g., The Corruption Eruption, ~~ECONOMIST~~[Economist](http://www.economist.com/node/16005114) (Apr. 29, 2010), available at <http://www.economist.com/node/16005114> (“The hidden costs of corruption are almost always much higher than companies imagine. Corruption inevitably begets ever more corruption: bribe-takers keep returning to the trough and bribe-givers open themselves up to blackmail.”); Daniel Kaufmann and Shang-Jin Wei, Does “Grease Money” Speed Up the Wheels of Commerce? 2 (Nat’l Bureau of Econ. Research, Working Paper No. 7093, 1999), available at <http://www.nber.org/papers/w7093.pdf> (“Contrary to the ‘efficient grease’ theory, we find

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that firms that pay more bribes are also likely to spend more, not less, management time with bureaucrats negotiating regulations, and face higher, not lower, cost of capital.”).

⁸⁹ For example, in a number of recent enforcement actions, the same employees who were directing or controlling the bribe payments were also enriching themselves at the expense of the company. See, e.g., [Criminal Information, United States v. Cyrus Allen Ahsani, et al., No. 19-cr-147 \(S.D. Tex. Mar. 4, 2019\), ECF No. 1 \[hereinafter United States v. Ahsani\]](https://www.justice.gov/criminal-fraud/case/file/1266861/download) (paying kickbacks to executives who were involved in bribe payments), available at <https://www.justice.gov/criminal-fraud/case/file/1266861/download>; [Criminal Information, United States v. Colin Steven, No. 17-cr-788 \(S.D.N.Y. Dec. 21, 2017\), ECF No. 2 \[hereinafter United States v. Steven\]](https://www.justice.gov/criminal-fraud/file/1021856/download) (receiving kickbacks related to certain corrupt payments made by Embraer, S.A.), available at <https://www.justice.gov/criminal-fraud/file/1021856/download>; [Criminal Information, United States v. Robert Zubiate, No. 17-cr-591 \(S.D. Tex. Oct. 6, 2017\), ECF No. 1 \[hereinafter United States v. Zubiate\]](https://www.justice.gov/criminal-fraud/file/1017281/download) (receiving kickbacks related to certain corrupt payments made by SBM Offshore, N.V. in Brazil), available at <https://www.justice.gov/criminal-fraud/file/1017281/download>; Complaint, SEC v. Peterson, No. 12-cv-2033 (E.D.N.Y. 2012), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf>; Criminal Information, United States v. Peterson, No. 12-cr-224 (E.D.N.Y. 2012), ECF No. 7 [hereinafter United States v. Peterson], available at <https://www.justice.gov/criminal-fraud/fepa/cases/petersongsites/default/files/criminal-fraud/legacy/2012/04/26/petersong-information.pdf>; Plea Agreement, United States v. Stanley, No. 08-cr-597 (S.D. Tex. 2008), ECF No. 9 [hereinafter United States v.

Stanley], available at <https://www.justice.gov/criminal/fraud/fepa/cases/stanleyasites/default/files/criminal-fraud/legacy/2012/03/19/09-03-08stanley-plea-agree.pdf>; Plea Agreement, United States v. Sapsizian, No. 06-cr-20797 (S.D. Fla. 2007), ECF No. 42 [hereinafter United States v. Sapsizian], available at <https://www.justice.gov/criminal/fraud/fepa/cases/sapsizianesites/default/files/criminal-fraud/legacy/2011/02/16/06-06-07sapsizian-plea.pdf>.

910 See, e.g., [Criminal Information, United States v. Société Générale S.A., No. 18-cr-253 \(E.D.N.Y. May 18, 2018\)](https://www.justice.gov/criminal-fraud/file/1072456/download), ECF No. 4 [hereinafter United States v. Société Générale], available at <https://www.justice.gov/criminal-fraud/file/1072456/download>; Complaint, SEC v. Tyco Int'l Ltd., 06-cv-2942 (S.D.N.Y. 2006), ECF No. 1 [hereinafter SEC v. Tyco Int'l], available at

<http://www.sec.gov/litigation/complaints/2006/comp19657.pdf>; Complaint, SEC v. Willbros Group, Inc., No. 08-cv-1494 (S.D. Tex. 2008), ECF No. 1 [hereinafter SEC v. Willbros], available at <http://www.sec.gov/litigation/complaints/2008/comp20571.pdf>.

101 See [United States v. Ahsani, supra note 9 \(engaging in bid-rigging\)](#); Plea Agreement, United States v. Bridgestone Corp., No. 11-cr-651 (S.D. Tex. 2011), ECF No. 21, available at <https://www.justice.gov/criminal/fraud/fepa/cases/bridgestonesites/default/files/criminal-fraud/legacy/2011/10/18/10-05-11bridgestone-plea.pdf>.

112 See S. [REPREP](#). No. 95-114, at 6; H.R. [REPREP](#). No. 95-640, at 4; see also A. Carl Kotchian, The Payoff: Lockheed's 70-Day Mission to Tokyo, [SATURDAY](#) [Saturday](#) [REv.](#), Jul. 9, 1977, at 7.

123 U.S. ~~SEC. AND EXCHANGE COMM., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES~~ [Sec. and Exchange Comm., Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices](#) 2-3 (1976).

134 See H.R. [REPREP](#). No. 95-640, at 4-5; S. [REPREP](#). No. 95-114, at 3-4.

145 H.R. [REPREP](#). No. 95-640, at 4-5; S. [REPREP](#). No. 95-114, at 4. The Senate Report observed, for instance, that “[m]anagements which resort to corporate bribery and the falsification of records to enhance their business reveal a lack of confidence about themselves,” while citing the Secretary of the Treasury’s testimony that “[p]aying bribes—apart from being morally repugnant and illegal in most countries—is simply not necessary for the successful conduct of business here or overseas.” Id.

156 See S. [REPREP](#). No. 100-85, at 46 (1987) (recounting FCPA’s historical background and explaining that “a strong antibribery statute could help U.S. corporations resist corrupt demands . . .”) [hereinafter S. [REPREP](#). No. 100-85].

167 S. [REPREP](#). No. 95-114, at 7.

178 Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415-25 (1988); see also H.R. [REPREP](#). No. 100-576, at 916-24 (1988) (discussing FCPA amendments, including changes to standard of liability for acts of third parties) [hereinafter H.R. [REPREP](#). No. 100-576].

189 See Omnibus Trade and Competitiveness Act of 1988, § 5003(d). The amended statute included the following directive:

“It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this

section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.” Id.; see also S. [REPREP](#). No. 105-277, at 2 (1998) (describing efforts by Executive Branch to encourage U.S. trading partners to enact legislation similar to FCPA following 1988 amendments) [hereinafter S. [REPREP](#). No. 105-277].

[1920](#) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1.1, Dec.

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18, 1997, 37 I.L.M. 1 [hereinafter Anti-Bribery Convention]. The Anti-Bribery Convention requires member countries to make it a criminal offense “for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.” The Convention and its commentaries also call on all parties (a) to ensure that aiding and abetting and authorization of an act of bribery are criminal offenses, (b) to assert territorial jurisdiction “broadly so that an extensive physical connection to the bribery act is not required,” and (c) to assert nationality jurisdiction consistent with the general principles and conditions of each party’s legal system. Id. at art. 1.2, cmts. 25, 26.

[201](#) See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); see also S. [REPREP](#). No. 105-277, at 2-3 (describing amendments to “the FCPA to conform it to the requirements of and to implement the OECD Convention”).

[212](#) There is no private right of action under the FCPA. See, e.g., *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028-29 (6th Cir. 1990); *McLean v. Int’l Harvester Co.*, 817 F.2d 1214, 1219 (5th Cir. 1987).

[223](#) U.S. ~~DEPT. OF JUSTICE, U.S. ATTORNEYS’ MANUAL~~ [Dept. of Justice, Justice Manual](#) § 9-47.110 (2008) [hereinafter [USAMJM](#)], available at https://www.justice.gov/usao/eousa/foia_reading_room/usam/jm/justice-manual.

[234](#) Go to https://www.trade.gov/virtual-services-and-https://2016.export.gov/worldwide_us/index.asp for more information.

[25](#) See [International Trade Administration, Country Commercial Guides](#), available at: <https://www.trade.gov/ccg-landing-page>.

~~[246](#) Additional information about publicly available market research and due diligence assistance is available online. See Int’l Trade Admin., Market Research and Due Diligence, available at http://export.gov/salesandmarketing/eg_main_018204.asp. The International Company Profile reports include a listing of the potential partner’s key officers and senior management; banking relationships and other financial information about the company; and market information, including sales and profit figures and potential liabilities. They are not, however, intended to substitute for a company’s own due diligence, and the Commercial Service does not offer ICP in countries where Dun & Bradstreet or other private sector vendors are already performing this service. See [Int’l International Trade Administration, International Company Profile](#), available at https://exportwww.trade.gov/salesandmarketing/eg_main_018198.asp-international-company-profile-0.~~

~~[25](#) The Commercial Services’ domestic and foreign offices can also be found at <http://export.gov/usoffices/index.asp> and http://export.gov/worldwide_us/index.asp.~~

~~27~~ See [International Trade Administration, The U.S. Commercial Service – Virtual Services](https://www.trade.gov/virtual-services), available at <https://www.trade.gov/virtual-services>.

~~268 This form can be located at~~ See https://tcc.export.gov/Report_a_Barrier/index.asp.

~~27 See IN'L TRADE ADMIN., "DOING BUSINESS IN" GUIDES, available at~~ http://export.gov/about/eg_main_016806.asp.

~~28 The BUSINESS ETHICS MANUAL is available at~~ http://www.ita.doc.gov/goodgovernance/business_ethics/manual.asp.

29 Information about the Advocacy Center [services](https://www.trade.gov/advocacy/advocacy-center-services) can be found at <https://www.trade.gov/advocacy/advocacy-center-services>.

30 Reports on U.S. compliance with these treaties can be found at <http://www.justice.gov/criminal/fraud/fcpa/intlagree/>.

31 See Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 ~~WEEKLY COMP. PRES~~ [Weekly Comp. Pres.](#) Doc. 2290, 2291 (Nov. 10, 1998) (“U.S. companies have had to compete on an uneven playing field The OECD Convention . . . is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions.”).

~~32 Colombia is also a member of the Working Group and is expected to accede to the Anti-Bribery Convention.~~

~~332~~ OECD, Country Monitoring of the OECD Anti-Bribery Convention, available at http://www.oecd.org/document/12/0,3746,en_2649_34859_35692940_1_1_1_1,00.html.

~~343~~ OECD, Phase 3 Country Monitoring of the OECD Anti-Bribery Convention, available at http://www.oecd.org/document/31/0,3746,en_2649_34859_44684959_1_1_1_1,00.html.

~~354~~ OECD, Country Reports on the Implementation of the OECD Anti-Bribery Convention, available at http://www.oecd.org/document/24/0,3746746,en_2649_34859_1933144_1_1_1_1,00.html.

~~365~~ The OECD Phase 1, 2, and 3 reports on the United States, as well as the U.S. responses to questionnaires, are available at <http://www.justice.gov/criminal/fraud/fcpa/intlagree>.

~~376~~ See OECD Working Group on Bribery, United States: Phase 3, Report on the Application of the Convention on Combating Bribery of Foreign

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~~APPENDIX Endnotes~~

Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions, Oct. 2010, at 61-62 (recommending that the United States “[c]onsolidate and summarise publicly available information on the application of the FCPA in relevant sources”), available at <https://www.oecd.org/dataoecd/10/49/46213841/unitedstates/UnitedStatesphase3reportEN.pdf>.

~~387~~ United Nations Convention Against Corruption, Oct. 31, 2003, S. ~~TREATY~~ [Treaty](#) Doc. No. 109-6, 2349 U.N.T.S. 41, available at https://www.unodc.org/documents/treaties/UNCAC/Publications/brussels/UN_Convention/08-50026_E_Against_Corruption.pdf [hereinafter UNCAC].

~~398~~ For more information about the UNCAC review mechanism, see Mechanism for the Review of Implementation of the United Nations Convention Against Corruption,

United Nations Office on Drugs and Crime, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism_for_the_Review_of_Implementation_-_Basic_Documents_-_E.pdf.

[4039](#) For information about the status of UNCAC, see United Nations Office on Drugs and Crime, UNCAC Signature and Ratification Status as of ~~12 July~~ [6 February 2012](#), available at <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>.

[410](#) Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/treaties/b-58.html>. For additional information about the status of the IACAC, see Organization of American States, Signatories and Ratifications, available at <http://www.oas.org/juridico/english/Sigs/b-58.html>.

[103](#)

[421](#) Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, 38 I.L.M. 505, available at <http://conventions.coe.int/Treaty/en/Treaties/html/173.html>.

[432](#) For additional information about GRECO, see Council of Europe, Group of States Against Corruption, available at http://www.coe.int/t/dghl/monitoring/greco/default_EN.asp. The United States has not yet ratified the GRECO convention.

[443](#) The text of the FCPA statute is set forth in the appendix. See also Jury Instructions at [52-64, United States v. Mark Lambert, No. 18-cr-012 \(D. Md. Nov. 14, 2019\), ECF No. 152 \[hereinafter United States v. Lambert\] \(FCPA jury instructions\); Jury Instructions at 1259-66, United States v. Lawrence Hoskins, No. 12-cr-238 \(D. Conn. Nov. 6, 2019\), ECF No. 601 \[hereinafter United States v. Hoskins\] \(same\); Jury Instructions at 33-37, United States v. Joseph Baptiste, No. 17-cr-10305 \(D. Mass. June 19, 2019\), ECF No. 195 \[hereinafter United States v. Baptiste\] \(same\); Jury Instructions at 1081-89, United States v. Chi Ping Patrick Ho, No. 17-cr-779 \(S.D.N.Y. Dec. 4, 2018\), ECF No. 214 \[hereinafter United States v. Ho\] \(same\); Jury Instructions at 4249-62, United States v. Ng Lap Seng, No. 15-cr-706 \(S.D.N.Y. July 26, 2017\), ECF No. 609 \[hereinafter United States v. Ng\] \(same\); Jury Instructions at 21-27, United States v. Esquenazi, No. 09-cr-21010 \(S.D. Fla. Aug. 5, 2011\), ECF No. 520 \[hereinafter United States v. Esquenazi\] \(**FCPA jury instructions same**\); Jury Instructions at 14-25, United States v. Kay, No. 01-cr-914 \(S.D. Tex. Oct. 6, 2004\), ECF No. 142 \(same\), *aff'd*, 513 F.3d 432, 446-52 \(5th Cir. 2007\), *reh'g denied*, 513 F.3d 461 \(5th Cir. 2008\) \[hereinafter United States v. Kay\]; Jury Instructions at 76-87, United States v. Jefferson, No. 07-cr-209 \(E.D. Va. July 30, 2009\), ECF No. 684 \[hereinafter United States v. Jefferson\] \(same\); Jury Instructions at 8-10, United States v. Green, No. 08-cr-59 \(C.D. Cal. Sept. 11, 2009\), ECF No. 288 \[hereinafter United States v. Green\] \(same\); Jury Instructions at 23-29, United States v. Bourke, No. 05-cr-518 \(S.D.N.Y. July 2009\) \[hereinafter United States v. Bourke\] \(same, not docketed\); Jury Instructions at 2-8, United States v. Mead, No. 98-cr-240 \(D.N.J. Oct. 1998\) \[hereinafter United States v. Mead\] \(same\).](#)

[454](#) The provisions of the FCPA applying to issuers are part of the Securities Exchange Act of 1934 [hereinafter Exchange Act]. The anti-bribery provisions can be found at Section 30A of the Exchange Act, 15 U.S.C. § 78dd-1.

[465](#) 15 U.S.C. § 78l.

[476](#) 15 U.S.C. § 78o(d).

487 SEC enforcement actions have involved a number of foreign issuers. See, e.g., Complaint, SEC v. Magyar Telekom Plc., et al., No. 11-cv-9646 (S.D.N.Y. Dec. 29, 2011), ECF No. 1 (German and Hungarian companies), available at <http://www.sec.gov/litigation/complaints/2011/comp22213-co.pdf>; Complaint, SEC v. Alcatel-Lucent, S.A., No. 10-cv-24620 (S.D. Fla. Dec. 27, 2010), ECF No.1 [hereinafter SEC v. Alcatel-Lucent] (French company), available at <http://www.sec.gov/litigation/complaints/2010/comp21795.pdf>; Complaint, SEC v. ABB, Ltd., No. 10-cv-1648 (D.D.C. Sept. 29, 2010), ECF No. 1 [hereinafter SEC v. ABB] (Swiss company), available at <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-175.pdf>; ~~Complaint, complaints/2010/comp-pr2010-175.pdf;~~ [Complaint, complaints/2010/comp-pr2010-175.pdf](#); [Complaint, SEC v. Daimler AG, No. 10-cv-473 \(D.D.C. Apr. 1, 2010\), ECF No. 1 \[hereinafter SEC v. Daimler AG\] \(German company\), available at <http://sec.gov/litigation/complaints/2010/comp-pr2010-51.pdf>; Complaint, SEC v. Siemens Aktiengesellschaft, No. 08-cv-2167 \(D.D.C. Dec. 12, 2008\), ECF No. 1 \[hereinafter SEC v. Siemens AG\] \(German company\), available at <http://www.sec.gov/litigation/complaints/2008/comp20829.pdf>. Certain DOJ enforcement actions have likewise involved foreign issuers. See, e.g., Criminal Information, United States v. ~~Magyar Telekom, Ple. Telefonaktiebolaget LM Ericsson~~, No. 11-cr-597884 \(S.D. Va. Dec. 29, 2011\), ECF No. 13 \[hereinafter \[United States v. Ericsson\]\(#\)\], available at <https://justice.gov/criminal-fraud/file/1226526/download>; ~~Non-Pros. Agreement, In re Petr leo Brasileiro S.A. \(Sept. 26, 2018\), available at <https://www.justice.gov/criminal/fraud/fepa/cases/magyar-telekom/2011-12-29-information-magyar-telekom.pdf>; Non-Pros. Agreement, In re Deutsche Telekom AG \(Dec. 29, 2011\), available at <http://www.justice.gov/criminal/fraud/fepa/cases/deutsche-telekom/2011-12-29-deutsche-telekom-mpa.pdf>~~\[criminal-fraud/file/1097256/download\]\(https://justice.gov/criminal-fraud/file/1097256/download\); Criminal Information, United States v. ~~Alcatel-Lucent, S.A. Teva LLC~~, No. 10-cr-209067 \(S.D. Fla. Dec. 27, 2010\), ECF No. 1 \[hereinafter \[United States v. Alcatel-Lucent, S.A.\]\(#\)\], available at <https://www.justice.gov/criminal/fraud/fepa/cases/alcatel-et-al/12-27-10alcatel-et-al-info.pdf>\[criminal-fraud/file/920421/download\]\(https://justice.gov/criminal-fraud/file/920421/download\); Criminal Information, United States v. ~~DaimlerBraskem S. AG.~~, No. 10-cr-63709 \(D.D.C. Mar. 21, 2010\), ECF No. 1 \[hereinafter \[United States v. Daimler AG\]\(#\)\], available at <https://www.justice.gov/criminal/fraud/fepa/cases/daimler/03-22-10daimlerag-info.pdf>; Criminal Information, United States v. Siemens Aktiengesellschaft, No. 08-cr-367 \(D.D.C. Dec. 12, 2008\), ECF No. 1 \[hereinafter \[United States v. Siemens AG\]\(#\)\], available at <http://www.justice.gov/criminal-fraud/fepa/cases/siemens/12-12-08siemensakt-info.pdf>\[criminal-fraud/file/920086/download\]\(https://justice.gov/criminal-fraud/file/920086/download\).](#)

498 See <http://www.sec.gov/divisions/corpfin/internatl/companies.shtml>.

5049 See, e.g., ~~Complaint, SEC v. Turner, et al., No. 10-cv-1309 (D.D.C. Aug. 4, 2010), ECF No. 1 [hereinafter, SEC v. Turner] (charging a Lebanese/Canadian agent of a UK company listed on U.S. exchange with violating the FCPA for bribes of Iraqi officials), available at <http://www.sec.gov/litigation/complaints/2010/comp21615.pdf>;~~ [Indictment Criminal Information, United States v. Naaman Ericsson, supra note 47 \(charging issuer company with violating FCPA for paying bribes to foreign officials in Djibouti, China, Vietnam, Indonesia, and Kuwait\); Criminal Information, United States v. Tim Leissner, No. 018-cr-24639 \(D.D.C.N.Y. Aug. 7, 2018\), ECF No. 3 \[hereinafter](#)

~~United States v. Naaman~~ (same 16 (charging an employee and agent of U.S. publicly traded company with violating FCPA for bribery of official in Malaysia), available at <https://www.justice.gov/criminal/fraud/fepa/cases/naamano/08-07-08naaman-indict.pdf>; Complaint, SEC v. Elkin, et al., No. 10-cv-661 (D.D.C. Apr. 28, 2010), ECF No. 1 [hereinafter SEC v. Elkin] (charging an criminal-fraud/file/1231346/download; United States v. Steven, supra note 9 (charging a UK employee of U.S. publicly traded company with violating FCPA for bribery of officials in Kyrgyzstan), available at <http://www.sec.gov/litigation/complaints/2010/comp21509.pdf>; Criminal Information, United States v. Elkin, No. 10-cr-15 (W.D. Va. Aug. 3, 2010), ECF No. 8 [hereinafter United States v. Elkin] (same), available at <http://www.justice.gov/criminal/fraud/fepa/cases/elkin/08-03-10elkin-information.pdf>; Indictment, United States v. Tesler, et al., No. 09-cr-98 (S.D. Tex. Feb. 17, 2009), ECF No. 1 [hereinafter United States v. Tesler] (charging a British agent of U.S. publicly traded company with violating the FCPA for bribery of Nigerian officials), available at <http://www.justice.gov/criminal/fraud/fepa/cases/tesler/tesler-indict.pdf>; Superseding Indictment, United States v. Sapsizian, et al., supra note 8, ECF 32 (charging a French employee of French company traded on a U.S. exchange with violating the FCPA). Saudi Arabia).

540 15 U.S.C. § 78dd-2.

521 15 U.S.C. § 78dd-2(h)(1).

532 15 U.S.C. § 78dd-2(a). See, e.g., Superseding Indictment, United States v. Nexus Technologies, et al., No. 08-cr-522 (E.D. Pa. Oct. 28, 2009), ECF No. 106 [hereinafter United States v. Nexus Technologies] (private U.S. company and corporate executives Lambert, supra note 43, ECF No. 1 (employee of domestic concern charged with violating FCPA for bribes paid in Vietnam to a Russian government official), available at <https://www.justice.gov/criminal/fraud/fepa/cases/nguyenn/09-04-08nguyen-indict.pdf>; Indictment criminal-fraud/ file/1044676/download; Criminal Information, United States v. Esquenazi, supra note 44, (private U.S. company and corporate executives charged with FCPA violations for bribes paid in Haiti James Finley, No. 17-cr-160 (S.D. Ohio July 21, 2017), ECF No. 3 (executive of foreign parent company charged as an agent of a domestic concern in directing bribes to Kazakh official on behalf of U.S.-based subsidiary), available at <https://www.justice.gov/criminal/fraud/fepa/cases/esquenazij/12-08-09esquenazi-indict.pdf>; criminal-fraud/file/1009596/download; Superseding Indictment, United States v. Dmitriy Harder, No. 15-cr-001 (E.D.N.Y. Dec. 15, 2015), ECF No. 62 [hereinafter United States v. Harder] (owner of U.S. corporation charged for bribes paid to an official at the European Bank for Reconstruction and Development), available at <https://www.justice.gov/criminal-fraud/file/843621/download>.

543 15 U.S.C. § 78dd-3(a). As discussed above, foreign companies that have securities registered in the United States or that are required to file periodic reports with ~~the~~ SEC, including certain foreign companies with American Depositary Receipts, are covered by the FCPA's anti-bribery provisions governing "issuers" under 15 U.S.C. § 78dd-1.

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554 See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998); 15 U.S.C. § 78dd-3(a); see also U.S. ~~DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL~~ Dept. of Justice, Criminal Resource

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[Manual](#) § 9-1018 (Nov. 2000) (the Department “interprets [Section 78dd-3(a)] as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company’s or national’s agent.”). This interpretation is consistent with U.S. treaty obligations. See S. [REPR](#)ep. No. 105-2177 (1998) (expressing Congress’ intention that the 1998 amendments to the FCPA “conform it to the requirements of and to implement the OECD Convention-”); Anti-Bribery Convention at art. 4.1, *supra* note [1920](#) (“Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.”).

[565-15 U.S.C. § 78dd-3\(a\)](#); *s*See, e.g., Criminal Information, United States v. [Alcatel-Lucent France, Airbus SE, A., et al.](#), No. [120-cr-20906021](#) (S.D. Fla. Dec. 27, 2012), ECF No. 1 ([Netherlands-headquartered company with main offices in France convicted of FCPA violations for paying bribes to Chinese officials in order to obtain contracts to sell aircraft](#)) [hereinafter United States v. [Alcatel-Lucent France](#)] (~~subsidiary of French publicly traded company convicted of conspiracy to violate FCPA~~) [Airbus](#)], available at <https://www.justice.gov/eriminal/fraud/fepa/cases/alcatel-lucent-sa-et-al/12-27-10alcatel-et-al-info.pdf>; Criminal Information [criminal-fraud/file/1242046/download; Superseding Indictment](#), United States v. [DaimlerChrysler Automotive Russia SAO](#), No. [10-cr-64](#) (D.D.C. Mar. 22, 2010), ECF No. 1 (~~subsidiary of German publicly traded company convicted of violating FCPA~~) *Ng, supra* note 43, ECF No. 322 ([Chinese businessman convicted of paying bribes to former United Nations \(U.N.\) Ambassador from the Dominican Republic and former Permanent Representative of Antigua and Barbuda to the U.N. in exchange for corrupt assistance in obtaining formal U.N. support for defendant’s conference center in Macau](#)), available at <https://www.justice.gov/eriminal/fraud/fepa/cases/daimler/03-22-10daimlerrussia-info.pdf>

[criminal-fraud/file/913286/download](#); Criminal Information, United States v. [Siemens S.A. \(Argentina\) Samuel Mebiame](#), No. [0816-cr-36827](#) (D.E.D. C.N.Y. Dec. 12, 2008), ECF No. 19 (~~subsidiary of German publicly traded~~ [Gabonese consultant who worked on behalf of a British Virgin Islands company and a joint venture between a U.S. company and a Turks and Caicos company convicted of violating FCPA violations for paying bribes to officials in Niger, Chad, and Guinea](#)), available at <https://www.justice.gov/eriminal/fraud/fepa/cases/siemens/12-12-08siemensargen-info.pdf>

[criminal-fraud/file/943121/download.](#)

[576](#) See 15 U.S.C. §§ 78dd-2(h)(5) (defining “interstate commerce”), 78dd-3(f)(5) (same); see also 15 U.S.C. § 78c(a)(17).

[587](#) 15 U.S.C. §§ 78dd-2(h)(5), 78dd-3(f)(5).

[598](#) See 15 U.S.C. § 78dd-3.

[60 Criminal Information](#) [59](#) See, e.g., [Superseding Indictment](#), United States v. [Nervis JGC Corp. Villalobos-Cardenas, et al.](#), No. [117-cr-260514](#) (S.D. Tex. Apr. 24, 2011), ECF No. 1 [hereinafter [United States v. JGC Corp.](#)], ([establishing jurisdiction under 15 U.S.C. § 78dd-3 based on meetings in the U.S.](#)), available at <https://www.justice.gov/eriminal/fraud/fepa/cases/jgc-corp/04-6-11jgc-corp-info.pdf>

[criminal-fraud/file/1267066/download](#); Criminal Information, United States v. [Snamprogetti Netherlands B.V. Steven Hunter](#), No. [108-cr-46015](#) (S.D. Tex. Jul. Sept. 17, 2010), ECF No. 1 [hereinafter [United States v. Snamprogetti](#)], (same), available at <https://www.justice.gov/eriminal/fraud/fepa/cases/snamprogetti/07-07-10snamprogetti-info.pdf> [criminal-fraud/ file/1266876/download](#); United States v. [Ramiro Andres Luque](#)

[Flores, No. 17-cr-537 \(E.D.N.Y. Oct. 6, 2017\) \(same\); see also United States v. Société Générale, supra note 10 \(establishing corporate jurisdiction under 15 U.S.C. § 78dd-3 based on, among other things, meetings in the U.S.\).](#)

[640](#) See 15 U.S.C. §§ 78dd-1(g) (“irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization”), 78dd-2(i)(1) (“irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization”).

[621](#) S. [REPREP](#). No. 105-277 at 2 (“[T]he OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad.”).

[632](#) Id. at 2-3.

[643](#) 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

[654](#) See H.R. [REPREP](#). No. 95-831, at 12 (referring to “business purpose” test).

[665](#) See, e.g., Complaint, SEC v. [Siemens AG, supra note Telefonaktiebolaget LM Ericsson, No. 19-cv-11214 \(S.D.N.Y. Dec. 6, 2019\), ECF No. 1 \[hereinafter SEC v. Ericsson\]](#), available at <https://www.sec.gov/litigation/complaints/2019/comp-pr2019-2548.pdf>; Criminal Information, United States v. [Siemens AGERicsson](#), supra note [487](#); [SEC v. Ericsson](#), <https://www.sec.gov/news/press-release/2019-254>.

[676](#) In amending the FCPA in 1988, Congress made clear that the business purpose element, and specifically the “retaining business” prong, was meant to be interpreted broadly:

“The Conferees wish to make clear that the reference to corrupt payments for “retaining business” in present law is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment. The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.” H.R. [REPREP](#). No. 100-576, at 1951-52 (internal citations omitted).

[687](#) See, e.g., [Complaint, SEC v. Panalpina, Inc., No. 10-cv-4334 \(S.D. Tex. Nov. 4, 2010\), ECF No. 1 \[hereinafter SEC v. Panalpina, Inc.\]](#), available at <http://www.sec.gov/litigation/complaints/2010/comp21727.pdf>; Criminal Information, United States v. Panalpina, Inc., No. 10-cr-765 (S.D. Tex. Nov. 4, 2010), ECF No. 1 [hereinafter United States v. Panalpina, Inc.] [Non-Pros. Agreement, In re: Wal-Mart, Inc. \(June 20, 2019\) \(holding company liable for internal controls failures resulting in corrupt payments related to obtaining permits and licenses\)](#), available at <https://www.justice.gov/criminal/fraud/fepa/cases/panalpina-inc/11-04-10panalpina-info.pdf>; Criminal Information, United States v. Panalpina World Transport (Holding) Ltd., No. 10-cr-769 (S.D. Tex. Nov. 4, 2010), ECF No. 1, [criminal-fraud/page/file/1177596/download; Non-Pros. Agreement, In re: Archer Daniels Midland Company \(Dec. 20, 2013\) \(favorable tax treatment\)](#), available at <https://www.justice.gov/criminal/fraud/fepa/cases/panalpina-world/11-04-10panalpina->

~~world-info.pdf; see also Press Release, U.S. Sec. and Exchange Comm., SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010) (“The SEC alleges that the companies bribed customs officials in more than 10 countries in exchange for such perks as avoiding applicable customs duties on imported goods, expediting the importation of goods and equipment, extending drilling contracts, and lowering tax assessments.”), available at <http://www.sec.gov/news/press/2010/2010-214.htm>; Press Release, U.S. Dept. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010) (logistics provider and its subsidiary engaged in scheme to pay thousands of bribes totaling at least \$27 million to numerous foreign officials on behalf of customers in oil and gas industry “to circumvent local rules and regulations relating to the import of goods and materials into numerous foreign jurisdictions”), available at <http://www.justice.gov/opa/pr/2010/November/10-erm-1251.html>; <http://www.justice.gov/opa/pr/2013/04/23/Ralph-Lauren.-NPA-Executed.pdf>; <http://www.justice.gov/opa/pr/2014/01/03/adm-mpa.pdf>; Non-Pros. Agreement, *In re Ralph Lauren Corporation* (Apr. 22, 2013) (customs clearance), available at <https://www.justice.gov/opa/pr/2013/04/23/Ralph-Lauren.-NPA-Executed.pdf>.~~

698 *United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004).

7069 *Id.* at 749. Indeed, the *Kay* court found that Congress’ explicit exclusion of facilitation payments from the scope of the FCPA was evidence that “Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtaining or retaining business for some person.” *Id.* at 749-50 (emphasis added).

710 *Id.* at 750.

721 *Id.* at 749-55.

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732 *Id.* at 756 (“It still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would ‘assist in obtaining or retaining business.’”).

743 The FCPA does not explicitly define “corruptly,” but in drafting the statute Congress adopted the meaning ascribed to the same term in the domestic bribery statute, 18 U.S.C. § 201(b). See H.R. [REP](#)Rep. No. 95-640, at 7.

754 The House Report states in full:

“The word “‘corruptly’” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function. The word “‘corruptly’” connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word “‘corruptly’” indicates an intent or desire wrongfully to influence the recipient. It does not require that the act [be] fully consummated or succeed in producing the desired outcome.” *Id.* The Senate Report provides a nearly identical explanation of the meaning of the term: “‘The word “‘corruptly’” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain

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preferential legislation or a favorable regulation. The word ““corruptly”” connotes an evil motive or purpose, an intent to wrongfully influence the recipient.” S. Rep. No. 95-114, at 10.

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

776 See, e.g., Complaint, SEC v. Monsanto Co., No. 05-cv-14 (D.D.C. Jan. 6, 2005) (among other things, the company paid a \$50,000 bribe to influence an Indonesian official to repeal an unfavorable law, which was not repealed despite the bribe), available at <http://www.sec.gov/litigation/complaints/comp19023.pdf>; Criminal Information, United States v. Monsanto Co., No. 05-cr-8 (D.D.C. Jan. 6, 2005), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/monsanto-co/01-06-05monsanto-info.pdf>.

787 Jury instructions in FCPA cases have defined “corruptly” consistent with the definition found in the legislative history. See, e.g., Jury Instructions at 56, [United States v. Lambert, supra note 43](#); Jury Instructions at 34, [United States v. Baptiste, supra note 43](#); Jury Instructions at 1261, [United States v. Hoskins, supra note 43](#); Jury Instructions at 1084-85, [United States v. Ho, supra note 43](#); Jury Instructions at 4242, [United States v. Ng, supra note 43](#); Jury Instructions at 22-23, [United States v. Esquenazi, supra note 443](#); Jury Instructions at 10, [United States v. Green, supra note 443](#); Jury Instructions at 35, [United States v. Jefferson, supra note 443](#); Jury Instructions at 25, [United States v. Bourke, supra note 443](#); Jury Instructions at 17, [United States v. Kay, supra note 443](#); Jury Instructions at 5, [United States v. Mead, supra note 443](#).

78 See [Indictment, United States v. Joo Hyun Bahn, et al., No. 16-cr-831 \(S.D.N.Y. Dec. 15, 2016\), ECF No. 1, available at https://www.justice.gov/criminal-fraud/case/file/942226/download; see also, In the Matter of JooHyun Bahn, available at https://www.sec.gov/news/press-release/2018-181.](#)

79 See Complaint, SEC v. Innospec, Inc., No. 10-cv-448 (D.D.C. Mar. 18, 2010), ECF No. 1 [hereinafter SEC v. Innospec], available at <http://www.sec.gov/litigation/complaints/2010/comp21454.pdf>; Criminal Information at 8, [United States v. Innospec Inc., No. 10-cr-61 \(D.D.C. Mar. 17, 2010\), ECF No. 1 \[hereinafter United States v. Innospec\], available at https://www.justice.gov/criminal/fraud/fcpa/cases/innospec-inesites/default/files/criminal-fraud/legacy/2011/02/16/03-17-10innospec-info.pdf.](#)

~~80 See Complaint, SEC v. Innospec, supra note 79; Criminal Information, United States v. Innospec, supra note 79.~~

810 See 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A).

821 Compare 15 U.S.C. § 78ff(c)(1)(A) (corporate criminal liability under issuer provision) with § 78ff(c)(2)(A) (individual criminal liability under issuer provision); compare 15 U.S.C. § 78dd-2(g)(1)(A) (corporate criminal liability under domestic concern provision) with § 78dd-2(g)(2)(A) (individual criminal liability under issuer provision); compare 15 U.S.C. § 78dd-3(e)(1)(A) (corporate criminal liability ~~for~~under territorial provision) with § 78dd-3(e)(2)(A) (individual criminal liability ~~for~~under territorial provision). However, companies still must act corruptly. See Section 30A(a), 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), 78dd-3(a).

832 [United States v. Kay, 513 F.3d 432, 448 \(5th Cir. 2007\)](#); see also Jury Instructions at 56-57, [United States v. Lambert, supra note 43](#); Jury Instructions at 34-35, [United](#)

[States v. Baptiste, supra note 43](#); [Jury Instructions at 1261, United States v. Hoskins, supra note 43](#); [Jury Instructions at 1084-85, United States v. Ho, supra note 43](#); [Jury Instructions at 4242, United States v. Ng, supra note 43](#); [Jury Instructions at 38, United States v. Esquenazi, supra note 443](#); [Jury Instructions at 10, United States v. Green, supra note 443](#); [Jury Instructions at 35, United States v. Jefferson, supra note 443](#); [Jury Instructions at 25, United States v. Bourke, supra note 443](#); [Jury Instructions at 5, United States v. Mead, supra note 443](#).

[843](#) Bryan v. United States, 524 U.S. 184, 191-92 (1998) (construing “willfully” in the context of 18 U.S.C. § 924(a)(1) (A)) (quoting Ratzlaf v. United States, 510 U.S. 135, 137 (1994)); see also Kay, 513 F.3d at 446-51 (discussing Bryan and term “willfully” under the FCPA).

[854](#) Kay, 513 F.3d at 447-48; Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber, 327 F.3d 173, 181 (2d Cir. 2003).

[865](#) The phrase “anything of value” is not defined in the FCPA, but the identical phrase under the domestic bribery statute has been broadly construed to include both tangible and intangible benefits. See, e.g., United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (rejecting defendant’s objection to instruction defining sex as a “thing of value,” which “unambiguously covers intangible considerations”); United States v. Gorman, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (holding that loans and promises of future employment are “things of value”); United States v. Williams, 705 F.2d 603, 622-23 (2d Cir. 1983) (approving jury instruction that stock could be a “thing of value” if defendant believed it had value, even though the shares had no commercial value, and noting that “[t]he phrase ‘anything of value’ in bribery and related statutes has consistently been given a broad meaning”).

[876](#) Section 30A(a), 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), 78dd-3(a) (emphasis added).

[887](#) Like the FCPA, the domestic bribery statute, 18 U.S.C. § 201, prohibits giving, offering, or promising “anything of value.” Numerous domestic bribery cases under Section 201

[106](#)

have involved “small” dollar bribes. See, e.g., United States v. Franco, 632 F.3d 880, 882-84 (5th Cir. 2011) (affirming bribery convictions of inmate for paying correctional officer \$325 to obtain cell phone, food, and marijuana, and noting that 18 U.S.C. § 201 does not contain minimum monetary threshold); United States v. Williams, 216 F.3d 1099, 1103 (D.C. Cir. 2000) (affirming bribery conviction for \$70 bribe to vehicle inspector); United States v. Traitz, 871 F.2d 368, 396 (3rd Cir. 1989) (affirming bribery conviction for \$100 bribe paid to official of Occupational Health and Safety Administration); United States v. Hsieh Hui Mei Chen, 754 F.2d 817, 822 (9th Cir. 1985) (affirming bribery convictions including \$100 bribe to immigration official); United States v. Bishton, 463 F.2d 887, 889 (D.C. Cir. 1972) (affirming bribery conviction for \$100 bribe to division chief of District of Columbia Sewer Operations Division).

~~[898](#) Complaint, SEC v. Daimler AG, supra note 48~~; [See](#) Criminal Information, United States v. ~~Daimler AG, supra note 48~~. [Odebrecht](#)

[S.A., No. 16-CR-643 \(E.D.N.Y. Dec. 21, 2016\), ECF No. 8, available at <https://www.justice.gov/criminal-fraud/file/920096/download>.](#)

[890](#) Complaint, SEC v. Halliburton Company and KBR, Inc., No. 09-cv-399 (S.D. Tex. Feb. 11, 2009), ECF No 1 [hereinafter SEC v. Halliburton and

KBR], available at <http://www.sec.gov/litigation/complaints/2009/comp20897.pdf>;

Criminal Information, United States v. Kellogg Brown & Root LLC, No. 09-cr-71, ECF No. 1 (S.D. Tex. Feb. 6, 2009) [hereinafter United States v. KBR], available at <https://www.justice.gov/criminal/fraud/fepa/cases/kelloggsites/default/files/criminal-fraud/legacy/2011/02/16/02-06-09kbr-info.pdf>.

~~910~~ Complaint, SEC v. Halliburton and KBR, supra note ~~890~~;
Criminal Information, United States v. KBR, supra note ~~890~~.

~~921~~ See, e.g., Complaint, SEC v. RAE Sys. Inc., No. 10-cv-2093 (D.D.C. Dec. 10, 2010), ECF No. 1 [hereinafter SEC v. RAE Sys., Inc.] (fur coat, among other extravagant gifts), available at <http://www.sec.gov/litigation/complaints/2010/comp21770.pdf>; Non-Pros. Agreement, In re RAE Sys. Inc. (Dec. 10, 2010) [hereinafter In re RAE Sys. Inc.] (same), available at <https://www.justice.gov/criminal/fraud/fepa/cases/rae-systemssites/default/files/criminal-fraud/legacy/2011/02/16/12-10-10rae-systems.pdf>; Complaint, SEC v. Daimler AG, supra note ~~487~~ (armored Mercedes Benz worth €300,000); Criminal Information, United States v. Daimler AG, supra note ~~487~~ (same).

~~92~~ See Criminal Information, United States v. SBM Offshore, N.V., No. 17-cr-686 (S.D. Tex. Nov. 21, 2017), ECF No. 1 [hereinafter United States v. SBM], available at <https://www.justice.gov/criminal-fraud/file/1017351/download>.

93 See Complaint, SEC v. ABB Ltd, No. 04-cv-1141 (D.D.C. July 6, 2004), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/comp18775.pdf>; Criminal Information, United States v. ABB Vetco Gray Inc., et al., No. 04-cr-279 (S.D. Tex. June 22, 2004), ECF No. 1 [hereinafter United States v. ABB Vetco Gray], available at <https://www.justice.gov/criminal/fraud/fepa/cases/abbsites/default/files/criminal-fraud/legacy/2014/11/07/06-22-04abbvetco-info.pdf>.

~~94~~ ~~Complaint, SEC v. UTStarcom, Inc., No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), ECF No. 1 [hereinafter SEC v. UTStarcom], available at <http://www.sec.gov/litigation/complaints/2009/comp21357.pdf>; Non-Pros. Agreement, In re UTStarcom Inc. (Dec. 31, 2009) [hereinafter In re UTStarcom], available at <http://www.justice.gov/criminal/fraud/fepa/cases/utstareom-inc/12-31-09utstareom-agree.pdf>.~~

~~954~~ ~~Complaint, SEC Criminal Information, United States v. UTStarcomEricsson, supra note 94; Non-Pros. Agreement, In re UTStarcom, supra note 94.~~

~~96~~ ~~Complaint, SEC v. UTStarcom, supra note 94; Non-Pros. Agreement, In re UTStarcom, supra note 94.~~
~~note 47.~~

~~975~~ Complaint, SEC v. Lucent Technologies Inc., No. 07-cv-2301 (D.D.C. Dec. 21, 2007), ECF No.1 [hereinafter SEC v. Lucent], available at <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf>; Non-Pros. Agreement, In re Lucent Technologies (Nov. 14, 2007) [hereinafter In re Lucent], available at <https://www.justice.gov/criminal/fraud/fepa/cases/lucent-techsites/default/files/criminal-fraud/legacy/2011/02/16/11-14-07lucent-agree.pdf>.

~~986~~ Complaint, SEC v. Lucent, supra note ~~975~~; Non-Pros. Agreement, In re Lucent, supra note ~~975~~.

~~997~~ The company consented to the entry of a final judgment permanently enjoining it

from future violations of the books and records and internal

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controls provisions and paid a civil penalty of \$1,500,000. Complaint, ~~No. 1~~ [hereinafter SEC v. York Int'l Corp.], available at <http://www.sec.gov/litigation/complaints/2007/comp20319.pdf>; ~~SEC v. Lucent~~, supra note 975. Additionally, the company entered into a

~~gov/litigation/complaints/2007/comp20319.pdf; Criminal Information, non-prosecution agreement with DOJ and paid a \$1,000,000 monetary United States v. York Int'l Corp., No. 07-cr-253 (D.D.C. Oct. 1, 2007), penalty. Non-Pros. Agreement, In re Lucent~~, supra note 975. ~~ECF No. 1 [hereinafter United States v. York Int'l Corp.], available at~~

~~10098~~ United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991).

~~http://www.justice.gov/criminal/fraud/fcpa/cases/york/10-01-07york-10199~~ Judgment, United States v. Liebo, No. 89-cr-76 (D. Minn. Jan. 31, ~~info.pdf; Complaint, SEC v. Textron Inc., No. 07-cv-1505 (D.D.C. Aug.~~

1992), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/23,2007>); ~~ECF No. 1 [hereinafter SEC v. Textron], available at http://liebor/1992-01-31-liebor-judgment.pdf. www.sec.gov/litigation/complaints/2007/comp20251.pdf; Non-Pros. 100 Non-Pros. Agreement, In re Credit Suisse (May 30, 2018), available at https://www.justice.gov/criminal-fraud/file/1079596/download; In the Matter of Credit Suisse Group AG, available at https://www.sec.gov/news/press-release/2018-128.~~

~~1021~~ Complaint, SEC v. Schering-Plough Corp., No. 04-cv-945 (D.D.C. ~~Agreement, In re Textron Inc. (Aug. 23, 2007), available at http://www.~~

June 9, 2004), ECF No. 1, available at <http://www.sec.gov/litigation/justice.gov/criminal/fraud/fcpa/cases/textron-inc/08-21-07textron-complaints/comp18740.pdf>; Admin. Proc. Order, ~~In the Matter~~ ~~complaints/comp18740.pdf; Admin. Proceeding Order, In the Matter~~ ~~agree.pdf. DOJ has issued opinion procedure releases concerning~~ of Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, ~~payments (that were, in essence, donations) to government agencies or~~ ~~2004) (finding that company violated FCPA accounting provisions and 2004) (finding that company violated FCPA accounting provisions and~~ ~~departments. See U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 09-01~~

imposing \$500,000 civil monetary penalty), available at <http://www.sec.gov/litigation/admin/34-49838.htm>. ~~(Aug. 3, 2009) (involving donation of 100 medical devices to foreign~~

~~gov/litigation/admin/34-49838.htm. government), available at http://www.justice.gov/criminal/fraud/~~

~~103~~ FCPA opinion procedure releases can be found at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf>; U.S. DEPT. OF JUSTICE, FCPA OP. ~~justice.gov/criminal/fraud/fcpa/. In the case of the company seeking to~~ ~~RELEASE 06-01 (Oct. 16, 2006) (involving contribution of \$25,000 to~~

~~102~~ FCPA opinion procedure releases can be found at <https://www.justice.gov/criminal-fraud/opinion-procedure-releases>. In the case of the ~~company seeking to~~ contribute the \$1.42 million grant to a local MFI, DOJ noted that it had ~~regional customs department to pay incentive rewards to improve local~~ undertaken each of these due diligence steps and controls, in addition to ~~enforcement of anti-counterfeiting laws), available at http://www.~~ ~~others, that would minimize the likelihood that anything of value would be given to any officials of the Eurasian country.~~

U.S. Dept. of Justice

~~others, that would minimize the likelihood that anything of value would
gov/criminal/fraud/fcpa/opinion/2006/0601.pdf.~~

~~be given to any officials of the Eurasian country. U.S. DEPT. OF JUSTICE, 116~~

~~The United States has some state-owned entities, like the Tennessee~~

~~FCPA Op. RELEASE Release 10-02 (July 16, 2010), available at http://www. Valley~~

~~Authority, that are instrumentalities of the government. McCarthyjustice.gov/~~

~~criminal/fraud/fcpa/opinion/2010/1002.pdf. v. Middle Tenn. Elec. Membership Corp.,~~

~~466 F.3d 399, 411 n.18~~

~~1043 U.S. DEPT. OF JUSTICE of Justice, FCPA Op. RELEASE Release 95-01~~

~~(Jan. 11, (6th Cir. 2006) (“[T]here is no question that TVA is an agency and~~

~~1995), available at http://www.justice.gov/criminal/fraud/fcpa/ instrumentality of the~~

~~United States.”) (internal quotes omitted).opinion/1995/9501.pdf. 117 During the period~~

~~surrounding the FCPA’s adoption, state-owned~~

~~104 Id.~~

~~105 Id. entities held virtual monopolies and operated under state-controlled~~

~~106 Id. price-setting in many national industries around the world. See generally~~

~~107 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 97-02 (Nov. 5, WORLD~~

~~BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS~~

~~106 U.S. Dept. of Justice, FCPA Op. Release 97-02 (Nov. 5, 1997), available at~~

~~http://www.justice.gov/criminal/fraud/fcpa/ AND POLITICS OF GOVERNMENT~~

~~OWNERSHIP, WORLD BANK~~

~~opinion/1997/9702.pdf; U.S. Dept. of Justice, FCPA Op. Release opinion/1997/9702.pdf;~~

~~U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE POLICY RESEARCH Report at 78~~

~~(1995); SUNITA KIKERI AND~~

~~06-01 (Oct. 16, 2006), available at https://www.justice.gov/criminal/ AISHETU~~

~~KOLO, STATE ENTERPRISES, THE WORLD BANK~~

~~GROUP sites/default/files/criminal-fraud/ legacy/2010/04/11/0601.pdf.~~

~~fraud/fcpa/opinion/2006/0601.pdf. (Feb. 2006), available at~~

~~http://rru.worldbank.org/documents/~~

~~107~~

~~1087 U.S. DEPT. OF JUSTICE of Justice, FCPA Op. RELEASE Release 06-01~~

~~(Oct. 16, 2006): publicpolicyjournal/, supra note 31046 Kikeri_Kolo.pdf.~~

~~108 Id.~~

~~109 Id.~~

~~109 Id. 118 Id. at 1 (“[A]fter more than two decades of privatization, government~~

~~110 Id. ownership and control remains widespread in many regions—and in~~

~~1110 See Section 30A(a)(1)-(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a) many~~

~~parts of the world still dominates certain sectors.”).~~

~~(1)-(3); 15 U.S.C. §§ 78dd-2(a)(1)-(3), 78dd-3(a)(1)-(3). 119 To date, consistent with~~

~~the approach taken by DOJ and SEC, all~~

~~1121 Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1) district~~

~~courts that have considered this issue have concluded that this is~~

~~(A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). an issue of fact for a jury to~~

~~decide. See Order, United States v. Carson,~~

~~113 Under the FCPA, any person “acting in an official capacity for 2011 WL 5101701,~~

~~No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No.~~

~~or on behalf of” a foreign government, a department, agency, or 373 [hereinafter~~

~~United States v. Carson]; United States v. Aguilar, 783 instrumentality thereof, or a public international organization, is a F. Supp. 2d 1108 (C.D. Cal. 2011); Order, United States v. Esquenazi, 112 Under the FCPA, any person “acting in an official capacity for or on behalf of” a foreign government, a department, agency, or instrumentality thereof, or a public international organization, is a foreign official. Section 30A(f) (1)(A), 15 U.S.C. § 78dd-1(f)(1)(A); 15 ~~supra note 44, ECF No. 309; see also Order, United States v. O’Shea, No. U.S.C. §§ 78dd-2(h)(2) (A), 78dd-2(f)(2)(A). See also U.S. DEPT. OF 09-cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, United States Dept. of Justice, JUSTICE, FCPA OPOp. RELEASERelease No. 10-03, at 2 (Sept. 1, 2010), available v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 144. These at http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf district court decisions are consistent with the acceptance by district (listing safeguards to ensure that consultant was not acting on behalf of foreign government). (listing safeguards to ensure that consultant was not acting on behalf of courts around the country of over 35 guilty pleas by individuals who foreign government)- admitted to violating the FCPA by bribing officials of state-owned or~~~~

1143 But see Sections 30A(b) and f(3)(A) of the Exchange Act, 15 U.S.C. § ~~state-controlled entities. See Government’s Opposition to Defendants’ 78dd-1(b) & (f)(3); 15 U.S.C. §§ 78dd-2(b) & (h) (4), 78dd-3(b) & (f) Amended Motion to Dismiss Counts One Through Ten of the (4) (facilitating payments exception). Even though payments to a foreign government may not violate the anti-bribery provisions of the FCPA, such payments may violate other (4) (facilitating payments exception): Indictment at 18, United States v. Carson, supra note 119, ECF No. 332;~~

115 Even though payments to a foreign government may not violate the ~~Exhibit I, United States v. Carson, supra note 119, ECF No. 335 (list of anti-bribery provisions of the FCPA, such payments may violate other examples of enforcement actions based on foreign officials of state-owned U.S. laws, including wire fraud, money laundering, and the FCPA’s entities)- accounting provisions. This was the case in a series of matters brought by DOJ and SEC involving kickbacks to the Iraqi government through the accounting provisions. This was the case in a series of matters brought by 120 Jury Instructions, United States v. Esquenazi, supra note 44, ECF No. DOJ and SEC involving kickbacks to the Iraqi government through the 520; Order at 5 and Jury Instructions, United States v. Carson, supra note United Nations Oil-for-Food Programme. See, e.g., Complaint, SEC v. 119, ECF No. 373 and ECF No. 549; Aguilar, 783 F. Supp. 2d at 1115.~~

~~Innospec, supra note 79; Innospec, supra note 79; Criminal Information, United States v. Innospec, 121 Criminal Information, United States v. C.E. Millier Corp., et al., supra note 79; Complaint, SEC v. Novo Nordisk A/S, No. 09-cv-862 No. 82-cr-788 (C.D. Cal. Sept. 17, 1982), available at http://www.(D.D.C. May 11, 2009), ECF No. 1, available at http://www.sec.gov/ justice.gov/criminal/fraud/fcpa/cases/ce-millier/1982-09-17-ce-millier litigation/complaints/2009/ comp21033.pdf; Criminal Information, information.pdf. United States v. Novo Nordisk A/S, No. 09-cr-126 (D.D.C. May 11, 122 See Complaint, SEC v. Sam P. Wallace Co., Inc., et al., No. 81-cr-2009), ECF No. 1, available at http://www.justice.gov/criminal/ 1915 (D.D.C.~~

~~Aug. 31, 1982); Criminal Information, United States v. fraud/ fcpa/cases/nordiskn/05-11-09novo-info.pdf; Complaint, Sam P. Wallace Co., Inc SEC v. Ingersoll-Rand Company Ltd., No. 8307-cr-v-341955 (D.P.D.R.C. FebOct. 231, 19832007), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2007/comp20353.pdf>; Criminal Information, United States SEC-v. Ingersoll-Rand Company Ltd-Italiana SpA, No. 07-cv-1955294 (D.D.C. Oct. 31, 2007), ECF No. 1, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/sam-wallace-ingerand-italiana/10-31-07ingersollrand-info.pdf>; Complaint34, SEC v. York Int'l Corp., No. 07-cv-1750 (D.D.C. Oct. 1, 2007), ECF No. 1 [hereinafter SEC v. York Int'l Corp.], available at <https://www.sec.gov/litigation/company/1983-02-23-sam-wallace-company-information.pdf>; see also [complaints/2007/comp2035319.pdf](https://www.sec.gov/litigation/complaints/2007/comp2035319.pdf); Criminal Information, United States Criminal Information, United States v. GoodyearYork Int'l Corp., No. 89-07-cr-253 (D.D.C. Oct. 1, 2007), ECF No. 1 [hereinafter United States v. York Int'l Corp.], available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/10-01-07york-info.pdf>; Complaint, SEC v. Textron Inc., No. 07-cv-1505 (D.D.C. Aug. 23, 2007), ECF No. 1 [hereinafter SEC v. Textron], available at <https://www.sec.gov/litigation/complaints/2007/comp20251.pdf>; Non-Pros. Agreement, In re Textron Inc. (Aug. 22, 2007), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/08-21-07textron-agree.pdf>. DOJ has issued opinion procedure releases concerning payments (that were, in essence, donations) to government agencies or departments. See U.S. Dept. of Justice, FCPA Op. Release 09-01 (Aug. 3, 2009) (involving donation of 100 medical devices to foreign government), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf>; U.S. Dept. of Justice, FCPA Op. Release 06-01 (Oct. 16, 2006) (involving contribution of \$25,000 to regional customs department to pay incentive rewards to improve local enforcement of anti-counterfeiting laws), available at <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0601.pdf>.~~

~~v. Ingersoll-Rand Italiana SpA, No. 07-cr-294 (D.D.C. Oct. 31, 2007); er-156 (D.D.C. May 11, 1989) (Iraqi Trading Company identified as ECF No. 1, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/ingerand-italiana/10-31-07ingersollrand-info.pdf>; Complaint, at <http://www.justice.gov/criminal/fraud/fcpa/cases/goodyear/1989-114> Exhibit I, United States v. Carson, *infra* note 118, ECF No. 335 (list of examples of enforcement actions based on foreign officials of state-owned entities).~~

~~115 The United States has some state-owned entities, like the Tennessee Valley Authority, that are instrumentalities of the government. *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 411 n.18 (6th Cir. 2006) (“[T]here is no question that TVA is an agency and instrumentality of the United States.”) (internal quotes omitted).~~

~~116 During the period surrounding the FCPA’s adoption, state-owned entities held virtual monopolies and operated under state-controlled price-setting in many national industries around the world. See generally World Bank, *Bureaucrats in Business: The Economics* 1997), and *Politics of Government Ownership*, World Bank Policy Research Report at 78 (1995); Sunita Kikeri and Aishetu Kolo, *State Enterprises*, The World Bank Group (Feb. 2006), available at <http://documents.worldbank.org/curated/en/169041468768316446/pdf/353300PAPER0VP0304Kikeri1Kolo.pdf>.~~

~~117 *Id.* at 1 (“[A]fter more than two decades of privatization, government ownership and control remains widespread in many regions—and in many parts of the world still~~

dominates certain sectors.”).

118 To date, consistent with the approach taken by DOJ and SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide. See Order, United States v. Carson, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No. 373 [hereinafter United States v. Carson]; United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order, United States v. Esquenazi, supra note 43, ECF No. 309; see also Order, United States v. O’Shea, No. 09-cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, United States v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 144. These district court decisions are consistent with the acceptance by district courts around the country of over 35 guilty pleas by individuals who admitted to violating the FCPA by bribing officials of state-owned or state-controlled entities. See Government’s Opposition to Defendants’ Amended Motion to Dismiss Counts One Through Ten of the Indictment at 18, United States v. Carson, ECF No. 332.

119 United States v. Esquenazi, 752 F.3d 912, 920-33 (11th Cir. 2014).

120 Id. at 925.

121 Id.

122 Id. at 926.

123 See Jury Instructions at 60-61, United States v. Lambert, supra note 43; Jury Instructions at 1264, United States v. Hoskins, supra note 43; Order at 5 and Jury Instructions, United States v. Carson, supra note 118, ECF No. 373 and ECF No. 549; Aguilar, 783 F. Supp. 2d at 1115.

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124 Criminal Information, United States v. C.E. Miller Corp., et al., No. 82-cr-788 (C.D. Cal. Sept. 17, 1982), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/22/1982-09-17-ce-miller-information.pdf>.

125 See Complaint, SEC v. ~~York Int’l Corp~~ Sam P. Wallace Co., Inc., et al., No. ~~0781-cv-179150~~ (D.D.C. ~~Oct~~Aug. 31, 2007), ECF 1982); Criminal Information, United States v. Sam P. Wallace Co., Inc., No. 83-cr-34 (D.P.R. Feb. 23, 1983), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/sam-wallace-company/1983-02-23-sam-wallace-company-information.pdf>; see also Criminal Information, United States v. Goodyear Int’l Corp., No. 89-cr-156 (D.D.C. May 11, 1989) (Iraqi Trading Company identified as “instrumentality of the Government of the Republic of Iraq”), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/goodyear/1989-05-11-goodyear-information.pdf>.

~~109~~

1236 See Complaint, SEC v. ABB, supra note 487; Criminal Information at 3, United States v. ABB Inc., No. 10-cr-664 (S.D. Tex. Sept. 29, 2010), ECF No. 1 [hereinafter United States v. ABB], available at <https://www.justice.gov/criminal/fraud/fcpa/cases/abb/sites/default/files/criminal-fraud/legacy/2014/11/07/09-20-10abbinc-info.pdf>; Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); Ley Del Servicio Publico de Energia Electrica, as amended, art. 1-3, 10, Diario Oficial de la Federación [DO], 22 de Diciembre de 1975 (Mex.).

1247 See Esquenazi, 752 F.3d at 928-29, supra note 119; Indictment at 2, United States v. Esquenazi, supra note 443, ECF No. 3; Affidavit of Mr. Louis Gary Lissade at 1-9, id., ECF No. 417-2.

1258 Criminal Information at 30-31, United States v. Alcatel-Lucent France, ~~supra note 56, ECF No. 10~~, S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), ECF No. 1 [hereinafter United States v. Alcatel-Lucent France], available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/07/29/12-27-10alcatel-et-al-info.pdf>.

1269 Id.

12730 See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366 § 2, 112 Stat. 3302, 3303, 3305, 3308 (1998).

12831 Section 30A(F)(1)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1)(B); 15 U.S.C. §§ 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

132 See, e.g., Superseding Indictment, United States v. Ng, supra note 43 (charging violations of the FCPA for payment of bribes to ambassadors to the United Nations); Superseding Indictment, United States v. Harder, supra note 52 (charging FCPA violations for bribes paid to an official at the European Bank for Reconstruction and Development).

12933 Third parties and intermediaries themselves are also liable for FCPA violations. Section 30A(a) of the Exchange Act, 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), and 78dd-3(a).

1304 Section 30A(a)(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3).

1315 See, e.g., Complaint, SEC v. Johnson & Johnson, No. 11-cv-686 (D.D.C. Apr. 8, 2011) [hereinafter SEC v. Johnson & Johnson] (bribes paid through Greek and Romanian agents), available at <https://www.sec.gov/litigation/complaints/2011/comp21922.pdf>; Criminal Information, United States v. DePuy, Inc., No. 11-cr-99 (D.D.C. Apr. 8, 2011), ECF No. 1 [hereinafter United States v. DePuy] (bribes paid through Greek agents), available at <https://www.justice.gov/criminal/fraud/fepa/cases/depuy-sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-info.pdf>; Complaint, SEC v. ABB, supra note 487 (bribes paid through Mexican agents); Criminal Information, United States v. ABB, supra note 1236 (same); Criminal Information, United States v. Int'l Harvester Co., No. 82-cr-244 (S.D. Tex. Nov. 17, 1982) (bribes paid through Mexican agent), available at <https://www.justice.gov/criminal/fraud/fepa/cases/international-harvester-sites/default/files/criminal-fraud/legacy/2012/06/22/1982-11-17-international-harvester-information.pdf>.

136 See United States v. Société Générale; Information, United States v. SGA Société Générale Acceptance, N.V., No. 18-cr-274 (E.D.N.Y. May 30, 2018), ECF No. 4, available at <https://www.justice.gov/criminal-fraud/file/1072436/download>; Non-Pros. Agreement, In re Legg Mason (June 4, 2018), available at <https://www.justice.gov/criminal-fraud/file/1072461/download>; In the Matter of Legg Mason, Inc., <https://www.sec.gov/news/press-release/2018-168>.

1327 See ~~Criminal Information, United States v. Marubeni Corp., No. 12-cr-22 (S.D. Tex. Jan. 17, 2012), ECF No. 1 [hereinafter United States v. Marubeni], available at <http://www.justice.gov/criminal/fraud/fepa/cases/marubeni/2012-01-17-marubeni-information.pdf>~~ SBM, supra note 92; Criminal Information, United States v. JGC Corp., supra note 60, ECF No. 1; Criminal Information, United States v. Snamprogetti, supra note 60, ECF No. 1; Complaint, SEC v. ENI, S.p.A. and Snamprogetti Netherlands B.V. SBM Offshore USA, Inc., No. 107-cv-2414685 (S.D. Tex. July 7 Nov. 21, 2010), ECF No. 1, available at <https://www.seejustice.gov/litigation/complaints/2010/comp>

~~pr2010-119.pdf~~[criminal-fraud/file/1017336/download](https://www.justice.gov/criminal-fraud/file/1017336/download); Criminal Information, United States v. ~~Technip S.A.~~ [Anthony Mace](#), No. 107-cr-439618 (S.D. Tex. ~~June 28~~ [Oct. 19, 2010](#)), ECF No. 1 [hereinafter United States v. ~~Technip~~ [Mace](#)], available at <https://www.justice.gov/criminal-fraud/fepa/cases/technip-sa/06-28-10-technip-%20information.pdf>; ~~Complaint, SEC v. Technip, No. 10-cv-2289 (S.D. Tex. June 28, 2010), ECF No. 1 [hereinafter SEC v. Technip], available at <http://www.sec.gov/litigation/complaints/2010/comp-pr2010-110.pdf>; Indictment, United States v. Tesler, supra note 50; Complaint, SEC v. Halliburton and KBR, supra note 90; Criminal Information, United States v. KBR, supra note 90; Criminal Information, United States v. Stanley, No. 08-cr-597 (S.D. Tex. Sept. 3, 2008), ECF No. 1, available at <http://justice.gov/criminal-fraud/fepa/cases/stanleya/08-29-08stanley-info.pdf>.~~

~~[justice.gov/criminal-fraud/file/1017326/download](https://www.justice.gov/criminal-fraud/file/1017326/download); United~~

~~133 See Criminal Information, United States v. AGA Medical Corp., No. 08-cr-172, ECF No. 1 (D. Minn. June 3, 2008), available at <http://www.justice.gov/criminal-fraud/fepa/cases/agamedecorp/06-03-08aga-info.pdf>.~~

~~134 Complaint, SEC v. Innospec, supra note 79; Criminal Information, United States v. Innospec, supra note 79; Superseding Criminal Information, United States v. Naaman, supra note 50, ECF No. 15, available at <http://www.justice.gov/criminal-fraud/fepa/cases/naamano/06-24-10naaman-superseded-info.pdf>; Complaint, SEC v. Turner, supra note 50.~~

~~135 See sources cited [States v. Zubiante](#), supra note 689.~~

~~136 See sources cited supra note 68.~~

1378 Section 30A(a)(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3).

1389 See Section 30A(f)(2)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(A); 15 U.S.C. §§ 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

13940 See Section 30A(f)(2)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(B); 15 U.S.C. §§ 78dd-2(h)(3)(B), 78dd-3(f)(3)(B). The “knowing” standard was intended to cover “both prohibited actions that are taken with ‘actual knowledge’ of intended results as well as other actions that, while falling short of what the law terms ‘positive knowledge,’ nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.” H.R. [REPREP](#). No. 100-576, at 920; see also Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1423-24 (1988). [Cf. Plea Agreement, United States v. Mace, supra note 137, ECF No. 18, available at <https://www.justice.gov/criminal-fraud/file/1017331/download> \(former CEO admitting he was guilty of FCPA violation by “continuing to make payments that furthered \[a\] bribery scheme and deliberately avoiding learning that certain payments, including payments Defendant authorized and approved, were in fact bribes paid to foreign officials”\).](#)

1401 H.R. [REPREP](#). No. 100-576, at 920 (1988).

1412 Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

1423 H.R. [REPREP](#). No. 100-576, at 922. The conferees also noted that “[i]n interpreting what is ‘lawful under the written laws and regulations’ . . . the normal rules of legal construction would apply.” Id.

[109](#)

1434 See United States v. Kozeny, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008).

Likewise, the court found that a provision under Azeri law that relieved bribe payors of criminal liability if they were extorted did not make the bribe payments legal. Azeri extortion law precludes the prosecution of the payor of the bribes for the illegal payments, but it does not make the payments legal. *Id.* at 540-41.

[145](#) [See Trial Transcript 715-18, United States v. Ng, supra note 43.](#)

[146](#) [Id.](#)

[147](#) [Id.](#)

[1448](#) Section 30A(c)(2)(A), (B) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. §§ 78dd-2(c)(2), 78dd-3(c)(2).

[1459](#) For example, the Eighth Circuit Court of Appeals found that providing airline tickets to a government official in order to corruptly influence that official may form the basis for a violation of the FCPA's anti-bribery provisions. See *Liebo*, 923 F. 2d at 1311-12.

[14650](#) See generally, U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 11-01 (June 30, 2011) (travel, lodging, and meal expenses of two foreign officials for two-day trip to United States to learn about services of U.S. adoption service provider), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 08-03 (July 11, 2008) (stipends to reimburse minimal travel expenses of local, government-affiliated journalists attending press conference in foreign country), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2008/sites/default/files/criminal-fraud/legacy/2010/04/11/0803.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 07-02 (Sept. 11, 2007) (domestic travel, lodging, and meal expenses of six foreign officials for six-week educational program), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2007/sites/default/files/criminal-fraud/legacy/2010/04/11/0702.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 07-01 (July 24, 2007) (domestic travel, lodging, and meal expenses of six foreign officials for four-day educational and promotional tour of U.S. company's operations sites), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2007/sites/default/files/criminal-fraud/legacy/2010/04/11/0701.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 04-04 (Sept. 3, 2004) (travel, lodging, and modest per diem expenses of five foreign officials to participate in nine-day study tour of mutual insurance companies), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2004/sites/default/files/criminal-fraud/legacy/2010/04/11/0404.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 04-03 (June 14, 2004) (travel, lodging, meal, and insurance expenses for twelve foreign officials and one translator on ten-day trip to three U.S. cities to meet with U.S. public sector officials), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0403.pdf>; U.S. [DEPT.](#) [OF JUSTICE](#)[sites/default/files/criminal-fraud/legacy/2010/04/11/0403.pdf](#); U.S. [Dept.](#) [of Justice](#), FCPA [OPOp.](#) [RELEASE](#)[Release](#) 04-01 (Jan. 6, 2004) (seminar expenses, including receptions, meals, transportation and lodging costs, for one-and-a-half day comparative law seminar on labor and employment law in foreign country), available at <https://www.justice.gov/criminal/fraud/fcpa/opinion/2004/sites/default/files/criminal-fraud/legacy/2010/04/11/0401.pdf>; U.S. [DEPT](#)[Dept.](#) [OF JUSTICE](#)[of Justice](#), FCPA [OPOp.](#) [RELEASE](#)

[Release](#) [ENDIX](#) notes

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96-01 (Nov. 25, 1996) (travel, lodging, and meal expenses of regional ~~eventual act or decision or which do not involve any discretionary action,~~ government representatives to attend training courses in United ~~giving the examples of “a gratuity paid to a customs official to speed the~~ States), available at <http://www.justice.gov/criminal/fraud/fcpa/processing-of-a-customs-document>” or “payments made to secure ~~permits,~~opinion/1996/9601.pdf; U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~ [RELEASE](#) licenses, or the expeditious performance of similar duties of an ~~essentially~~[Op. Release](#) 92-01 (Feb. 1992) (training expenses so that foreign officials could ~~ministerial or clerical nature which must of necessity be performed in any~~ effectively perform duties related to execution and performance of ~~joint-~~ ~~event.”~~ H.R. ~~REP. No. 95-640, at 8.~~[joint-venture](#) ~~venture~~ agreement, including seminar fees, airfare, lodging, meals, and ~~161 Section 30A(f)(3)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(3)~~ ground transportation), available at <http://www.justice.gov/criminal/fraud/fcpa/review/1992/r9201.pdf>. ~~162 In a 2004 decision, the Fifth Circuit emphasized this precise point,~~ [14751](#) U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 11-01 (June 30, 2011); ~~commenting on the limited nature of the facilitating payments exception:~~

U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 07-02 (Sept. 11, 2007); ~~A brief review of the types of routine governmental~~ U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 07-01 (July 24, 2007); ~~actions enumerated by Congress shows how limited~~ U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 04-04 (Sept. 3, 2004); U.S. ~~Congress wanted to make the grease exceptions:~~ [Dept. of Justice](#)~~DEPT. OF JUSTICE~~, FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 04-03 (June 14, 2004); U.S. ~~Routine governmental action, for instance, includes~~ [Dept. of Justice](#), ~~DEPT. OF JUSTICE~~, FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 04-01 (Jan. 6, 2004). ~~“obtaining permits, licenses, or other official~~ [14852](#) U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 96-01 (Nov. 25, 1996). ~~documents to qualify a person to do business in~~ [14953](#) U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 11-01 (June 30, 2011); ~~a foreign country,” and “scheduling inspections~~ U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 07-02 (Sept. 11, 2007); ~~associated with contract performance or inspections~~ U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 07-01 (July 24, 2007); ~~related to transit of goods across country.”~~ U.S. ~~DEPT~~[Dept. OF JUSTICE](#)[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 04-04 (Sept. 3, 2004); U.S. ~~Therefore, routine governmental action does not~~ [Dept.](#)~~DEPT. OF JUSTICE~~[of Justice](#), FCPA ~~OP.~~[Op. RELEASE](#)[Release](#) 04-01 (Jan. 6, 2004). ~~include the issuance of every official document or~~

154	U.S.	Dept. of Justice,	Releas	04-
(Jan. 6,		FCPA Op.	e	01
2004).				
155	U.S.	Dept. of Justice,	Releas	08-
(July 11,		FCPA Op.	e	03
2008).				
156	U.S.	Dept. of Justice,	Releas	11-

~~150 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan. 6, 2004).~~ every inspection, but only (1) documentation that

~~151 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 08-03 (July 11, 2008).~~

~~qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-~~

~~(June 30, 2011); U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 92-01 (Feb. 1992).~~ discretionary, ministerial activities performed by

~~1537 U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 08-03 (July 11, 2008).~~ mid- or low-level foreign functionaries.

~~154 Id. United States v. Kay; 359 F.3d 738, 750-51 (5th Cir. 2004) (internal~~

~~158 Id.~~

~~1559 Id.; U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 04-03 (June 14,~~ footnote omitted) (emphasis in original).

~~2004); U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 04-01 (Jan. 6, 163 Non-Pros. Agreement, In re Helmerich & Payne, Inc. (July 29, 2009) 2004);~~

~~U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 07-01 (July 24,~~ [hereinafter In re Helmerich & Payne], available at <http://www.justice.gov/criminal/fraud/fepa/cases/helmerich-payne/06-29-09helmerich-2007>).

~~1560 U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 11-01 (June 30, 2011);~~ agree.pdf; Admin. ProceedingProc. Order, In the Matter of Helmerich &

~~U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-02 (Sept. 11, 2007); Payne, Inc., Exchange Act Release No. 60400 (July 30, 2009) [hereinafter U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-01 (July 24, 2007);~~ In the Matter of Helmerich & Payne], available at <http://www.sec.gov/litigation/admin/2009/34-60400.pdf>.

~~U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-04 (Sept. 3, 2004); U.S. litigation/admin/2009/34-60400.pdf.~~

~~DEPT. OF JUSTICE, FCPA OP. RELEASE 04-03 (June 14, 2004); U.S. 164 Criminal Information, Veteo Gray Controls Inc., et al., No. 07-~~

~~DEPT. OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan. 6, 2004).~~ er 4 No. (S.D. Tex. Jan. 5, 2007), ECF Nos. 1-2, available at <http://www.justice.gov/criminal/fraud/fepa/cases/veteo-controls/02-06-07veteo-gray-info.pdf>.

~~15761 U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 07-01 (July 24, 2007);~~ www.justice.gov/criminal/fraud/fepa/cases/veteo-controls/02-06-07veteo-gray-info.pdf.

~~U.S. DEPT. OF JUSTICE of Justice, FCPA OPOp. RELEASERelease 08-03 (July 11, 2008).~~ 07veteo-gray-info.pdf.

~~158 For example, DOJ has previously approved expenditures on behalf of 165 Complaint, SEC v. Noble Corp., No. 10-cv-4336 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at <http://www.sec.gov/litigation/>~~

~~162 For example, DOJ has previously approved expenditures on behalf of family members or for entertainment purposes under certain, limited~~ circumstances. See, e.g., U.S. DEPT. OF JUSTICE of Justice, FCPA REv. P. RELEASE

~~complaints/2010/comp21728.pdf; Non-Pros. Agreement, In re Noble Corp. (Nov. 4, company seeking to provide promotional tour for foreign official and wife,~~

~~Release 83-02 (July 26, 1983) (declining to take enforcement action against~~

~~(Nov. 4, company seeking to provide promotional tour for foreign official and wife,~~

~~Release 83-02 (July 26, 1983) (declining to take enforcement action against~~

~~(Nov. 4, company seeking to provide promotional tour for foreign official and wife,~~

where both had already planned a trip to the United States at their own expense and company proposed to pay only for all reasonable and necessary actual domestic expenses for the extension of their travel to allow the promotional tour, which would not exceed \$25,0400), available at <http://www.justice.gov/criminal/>

~~company seeking to provide promotional tour for foreign official and wife, where both had already planned a trip to the United States at their own expense and company proposed to pay only for all reasonable and necessary actual domestic expenses for the extension of their travel to~~ ~~fraud/fepa/cases/noble-corp/11-04-10noble-corp-mpa.pdf; see also sources cited supra note 68.~~

~~Group on Bribery, 2009 Recommendation of the Council for Combating Bribery of Foreign Public Officials in International Transactions, at § VI (recommending countries should~~ ~~allow the promotional tour, which would not exceed \$5,000), available at~~ ~~http://www.justice.gov/criminal/fraud/fcpa/review/1983/r8302.pdf.~~ ~~review their policies and approach to facilitation payments~~

110 15963 Unlike the local law and bona fide expenditures ~~defenses, the~~ ~~encourage companies to prohibit or discourage facilitation~~ ~~defenses, the~~ ~~payments “in view of the corrosive effect of small facilitation payments,~~ ~~and should~~

FCPA. Rather, payments of this kind fall outside the scope of the ~~economic development and the rule of law”~~ ~~particularly on sustainable~~ ~~the “facilitating payments”~~ ~~Working Group on Bribery, United States: Phase 3, at 24 (Oct. 15,~~ ~~exception was incorporated into the definition of “foreign official,” which~~ ~~2010), available at~~ ~~http://www.oecd.org/dataoecd/10/49/46213841.~~ ~~excluded from~~ ~~the statute’s purview officials whose duties were primarily~~ ~~pdf (commending United States for steps taken in line with 2009~~ ~~ministerial or clerical. See Foreign Corrupt Practices Act of 1977, Pub.~~ ~~recommendation to encourage companies to prohibit or discourage~~ ~~L. No. 95-213, § 104(d)(2), 91 Stat. 1494, 1498 (1977) (providing that~~ ~~facilitation payments):~~ ~~the term foreign official “does not include any employee of~~ ~~a foreign~~ ~~167 Facilitating payments are illegal under the U.K. Bribery Act 2010,~~ ~~government or any department, agency, or instrumentality thereof whose~~ ~~which came into force on July 1, 2011, and were also illegal under~~ ~~duties are essentially ministerial or clerical”). The original exception thus~~ ~~prior U.K. legislation. See Bribery Act 2010,~~ ~~e.23 (Eng.), available~~ ~~at~~ ~~http://www.legislation.gov.uk/ukpga/2010/23/contents; see also~~ ~~payment. In~~

practice, however, it proved difficult to determine whether ~~U.K. MINISTRY OF JUSTICE, The Bribery Act 2010: Guidance About~~ ~~a foreign official’s duties were~~ ~~“ministerial or clerical.” S. REP~~ ~~Rep. No. 100-~~ ~~Procedures Which Relevant Commercial Organisations Can Put into Place~~ ~~85, at 53. Responding to criticism that the~~ ~~statutory language “does not~~ ~~to Prevent Persons Associated with Them from Bribing (Section 9 of the~~ ~~clearly reflect Congressional intent and the boundaries of the prohibited~~ ~~Bribery Act 2010), at 18 (2011), available at~~ ~~http://www.justice.gov.uk/~~ ~~conduct,”~~ ~~Congress revised the FCPA to define the exception in terms of~~

~~guidance/does/bribery-act-2010-guidance.pdf.~~ ~~the purpose of the payment. H. REP~~ ~~Rep. No. 100-40, pt. 2, at 77. In doing so,~~ ~~168 See, e.g., Non-Pros. Agreement, In re Helmerich & Payne, supra note~~ ~~Congress reiterated that while its policy to exclude~~

facilitating payments ~~163~~; ~~Admin. Proceeding Order, In the Matter of Helmerich & Payne~~, reflected practical considerations of enforcement, “such payments should ~~supra note 163~~ not be condoned.” Id. The enacted language reflects this narrow purpose.

~~169~~

164 In exempting facilitating payments, Congress sought to distinguish them as “payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action,” giving the examples of “a gratuity paid to a customs official to speed the processing of a customs document” or “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.” H.R. Rep. No. 95-640, at 8.

165 Section 30A(f)(3)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(3)(B); 15 U.S.C. §§ 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

166 In a 2004 decision, the Fifth Circuit emphasized this precise point, commenting on the limited nature of the facilitating payments exception:

A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes “obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country,” and “scheduling inspections associated with contract performance or inspections related to transit of goods across country.” Therefore, routine governmental action does not include the issuance of every official document or every inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid-or low-level foreign functionaries.

United States v. Kay, 359 F.3d 738, 750-51 (5th Cir. 2004) (internal footnote omitted) (emphasis in original).

167 Non-Pros. Agreement, In re Helmerich & Payne, Inc. (July 29, 2009) [hereinafter In re Helmerich & Payne], available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/06-29-09helmerich-agree.pdf>. 168 Criminal Information, Vetco Gray Controls Inc., et al., No. 07-cr-4 No. (S.D. Tex. Jan. 5, 2007), ECF Nos. 1-2, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-info.pdf>.

169 Complaint, SEC v. Noble Corp., No. 10-cv-4336 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2010/comp21728.pdf>; Non-Pros. Agreement, In re Noble Corp. (Nov. 4, 2010), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10noble-corp-npa.pdf>; see also sources cited supra note 67.

170 Working Group on Bribery, 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, at § VI (recommending countries should periodically review their policies and approach to facilitation payments and should encourage companies to prohibit or discourage facilitation payments “in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law”); Working Group on Bribery, United States: Phase 3, at 24 (Oct. 15, 2010), available at <https://www.oecd.org/daf/anti-bribery/44176910.pdf> (commending United States for steps taken in line

[with 2009 recommendation to encourage companies to prohibit or discourage facilitation payments\).](#)

[171 Facilitating payments are illegal under the U.K. Bribery Act 2010, which came into force on July 1, 2011, and were also illegal under prior U.K. legislation. See Bribery Act 2010, c.23 \(Eng.\), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>; see also U.K. Ministry of Justice, The Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing \(Section 9 of the Bribery Act 2010\), at 18 \(2011\), available at <http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>.](#)

[172 See, e.g., Non-Pros. Agreement, In re Helmerich & Payne, supra note 167; Admin. Proc. Order, In the Matter of Helmerich & Payne, supra note 160.](#)

[173 In order to establish duress or coercion, a defendant must demonstrate ~~160 In exempting facilitating payments, Congress sought to distinguish~~ that the defendant was under unlawful, present, immediate, and ~~them as “payments which merely move a particular matter toward an~~ impending threat of death or serious bodily injury; that the defendant did](#)

~~111~~

~~ENDIX~~ notes

not negligently or recklessly create a situation where he would be forced to engage in criminal conduct (e.g., had been making payments as part of an ongoing bribery scheme); that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. See Eleventh Circuit Pattern Jury Instr., Special Instr. No. 16 (2020~~3~~); see also Fifth Circuit Pattern Jury Instr. No. 1.368 (2019~~9~~); Sixth Circuit Pattern Jury Instr. No. 6.05 (2010~~9~~); Seventh Circuit Pattern Jury Instr. No. 6.08 (19982012~~2~~); Ninth Circuit Pattern Jury Instr. No. 6.5 (2010); 1A Kevin F. O’Malley, Jay E. Grenig, Hon. William C. Lee, Federal Jury Practice and Instructions § 19.02 (6th ed. 2008 & Supp. 2012).

~~1704~~ S. [REPR](#)ep. No. 95-114, at 11.

~~1715~~ Id. at 10.

~~1726~~ Id. at 11.

~~1737~~ United States v. Kozeny, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008).

~~777~~

~~1748~~ [Kozeny, 582 F. Supp. 2d](#) [Id.](#) at 540 (citing S. [REPR](#)ep. No. 95-114, at 10-11).

~~1759~~ Id.

~~17680~~ These payments, however, must be accurately reflected in the company’s books and records so that the company and its management are aware of the payments and can assure that the payments were properly made under the circumstances. For example, in one instance, a Kazakh immigration prosecutor threatened to fine, jail, or deport employees of a U.S. company’s subsidiary. Believing the threats to be genuine, the employees in ~~Kazakhstan~~[Kazakhstan](#) sought guidance from senior management of the U.S. subsidiary and were authorized to make the payments. The employees then paid the government official a total of \$45,000 using personal funds. The subsidiary reimbursed the employees, but it falsely recorded the reimbursements as “salary advances” or “visa fines.” The parent company, which eventually discovered these payments, as well as other improperly booked cash payments made to a ~~Kazakhstani~~[Kazakh](#) consultant to obtain visas, was charged with civil violations of the accounting provisions. Admin.

[Proceeding Proc.](#) Order, In the Matter of NATCO Group Inc., Exchange Act Release No. 61325 (Jan. 11, 2010), available at <http://www.sec.gov/litigation/admin/2010/34-61325.pdf> (imposing cease-and-desist order and \$65,000 civil monetary penalty).

[17781](#) See Jury Instructions at 21, *United States v. Aguilar*, No. 10-cr-1031 (C.D. Cal. May 16, 2011), ECF No. 511.

[1782](#) See, e.g., *Pacific Can Co. v. Hewes*, 95 F.2d 42, 46 (9th Cir. 1938) (“Where one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for the acts of its agent within the scope of the agent’s authority.”); *United States v. NYNEX Corp.*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992) (holding that “[a] corporation can of course be held criminally liable for the acts of its agents,” including “the conduct of its subsidiaries.”).

[17983](#) *Pacific Can Co.*, 95 F.2d at 46; *NYNEX Corp.*, 788 F. Supp. at 18 n.3.

[1804](#) See, e.g., *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

[1815](#) Admin. [Proceeding Proc.](#) Order, In the Matter of United Industrial Corp., Exchange Act Release No. 60005 (May 29, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>; see also Lit. Release No. 21063, SEC v. [Wourzel](#) (May 29, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr21063.htm>.

[1826](#) See, e.g., Philip Urofksy, What You Don’t Know Can Hurt You: Successor Liability Resulting From Inadequate FCPA Due Diligence in M&A Transactions, 1763 *PLI/Corp. 631, 637* (2009) (“As a legal matter, when one corporation acquires another, it assumes any existing liabilities of that corporation, including liability for unlawful payments, regardless of whether it knows of them.”). Whether or not successor liability applies to a particular corporate transaction depends on the facts involved and state, federal, and, potentially, foreign law.

[1837](#) See, e.g., Carolyn Lindsey, More Than You Bargained for: Successor Liability Under the U.S. Foreign Corrupt Practices Act, 35 *Ohio N.U.L. Rev.* 959, 966 (2009) (“Allowing a company to escape its debts and liabilities by merging with another entity is considered to lead to an unjust result.”).

[188](#) ~~184~~ See, e.g., *Melrose Distillers, Inc. v. United States*, 359 U.S. 271, 274 (1959) (affirming criminal successor liability for antitrust violations); *United States v. Alamo Bank of Texas*, 880 F.2d 828, 830 (5th Cir. 1989) (affirming criminal successor liability for Bank Secrecy Act violations); *United States v. Polizzi*, 500 F.2d 856, 907 (9th Cir. 1974) (affirming criminal successor liability for conspiracy and Travel Act violations); *United States v. Shields Rubber Corp.*, 732 F. Supp. 569, 571-72 (W.D. Pa. 1989) (permitting criminal successor liability for customs violations); see also *United States v. Mobile Materials, Inc.*, 776 F.2d 1476, 1477 (10th Cir. 1985) (allowing criminal post-dissolution liability for antitrust, mail fraud, and false statement violations).

[1859](#) Complaint, SEC v. The Titan Corp., No. 05-cv-411 (D.D.C. Mar. 1, 2005) (discovery of FCPA violations during pre-acquisition due diligence protected potential acquiring company and led to termination of merger agreement), available at <https://www.sec.gov/litigation/complaints/comp19107.pdf>; Criminal Information, *United States v. Titan Corp.*, No. 05-cr-314 (S.D. Cal. Mar. 1, 2005) (same) [hereinafter *United States v. Titan Corp.*], available at <https://www.justice.gov/criminal/fraud/fcpa/cases/titan-corp/sites/default/files/criminal-fraud/legacy/2011/02/16/03-01-05titan-info.pdf>.

[18690](#) For a discussion of declinations, see Chapter 7.

[18791](#) See Complaint, SEC v. El Paso Corp., No. 07-cv-899 (S.D.N.Y. Feb. 7, 2007),

ECF No. 1 [hereinafter SEC v. El Paso Corp.] (charging company with books and records and internal controls charges for improper payments to Iraq under U.N. Oil-for-Food Programme), available at <https://www.sec.gov/litigation/complaints/2007/comp19991.pdf>.

~~18892 Complaint, SEC v. Alliance One Int'l, Inc. Criminal Information, United States v. TechnipFMC plc, No. 109-cv-1319278 (D.E.D. CN. Aug Y. 6 June 25, 20109), ECF No. 15 [hereinafter United States v. TechnipFMC], available at <https://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf>; Non-Pros. Agreement, In re Alliance One Int'l, Inc. (Aug. 6, 2010), available at <http://www.justice.gov/eriminal/fraud/fepa/cases/alliance-one/08-06-10alliance-one-mpa.pdf>; Criminal Information, criminal-fraud/file/1225056/download; United States v. Alliance One Int'l Technip Offshore USA G, Inc., No. 109-cr-1279 (W.E.D. Va N. Aug Y. 6 June 25, 20109), ECF No. 35, available at <https://www.justice.gov/eriminal/fraud/fepa/cases/alliance-one/08-06-10alliance-one-info.pdf>; Criminal Information, United States v. Alliance One Tobacco Osh, LLC, No. 10-cr-16 (W.D. Va. Aug. 6, 2010), ECF No. 3 criminal-fraud/file/1225066/download; Cease-and-Desist Order, In the Matter of TechnipFMC plc, Admin. Proc. 3-19493 (Sept. 23, 2019), available at <https://www.justicesec.gov/eriminal/fraud/fepa/cases/alliance-one/08-06-10alliance-one-tobaccoinfo/litigation/admin/2019/34-87055.pdf>.~~

1893 See ~~Criminal Information~~ Plea Agreement, United States v. ~~Syneor Taiwan~~ Alstom S.A., No. 14-cr-246 (D. Conn. Dec. 22, 2014), ECF No. 1 [hereinafter United States v. Alstom], available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-5-Plea-Agreement-for-SA.pdf>; ~~Deferred Pros. Agreement, United States v. Alstom Grid, Inc., No. 0214-cr-12447 (C.D. Cal Conn. Dec. 522, 200214), ECF No. 1, available at~~

~~<https://www.justice.gov/eriminal/fraud/fepa/cases/syneor-taiwan/12-05-02syneor-taiwan-info.pdf>; Plea [sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Grid.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Grid.pdf); ~~Deferred Pros. Agreement, United States v. Syneor Taiwan Alstom Power, Inc., No. 0214-cr-12448 (C.D. Cal Conn. Dec. 922, 200214), ECF No. 14, available at~~~~

~~<https://www.justice.gov/eriminal/fraud/fepa/cases/syneor-taiwan/12-03-02syneor-taiwan-plea-agree>[sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Power.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Power.pdf).
190 See Complaint, SEC v. Syneor Int'l Corp., No. 02-cv-2421 (D.D.C. Dec. 10, 2002), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/comp17887.htm>; SEC v. Syneor International Corp., SEC Lit. Rel. 17997, (Dec. 10, 2002), available at <http://www.sec.gov/litigation/litreleases/lr17887.htm>.~~

1914 See Complaint, SEC v. York Int'l Corp., supra note 1153; Criminal Information, United States v. York Int'l Corp., supra note 1153.

1925 See Criminal Information, United States v. Latin Node, Inc., No. 09-cr-20239 (S.D. Fla. Mar. 23, 2009), ECF No. 1, available at <https://www.justice.gov/eriminal/fraud/fepa/cases/litton-applied>[sites/default/files/criminal-fraud/legacy/2011/02/16/03-23-09latinnode-info.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/03-23-09latinnode-info.pdf); eLandia Int'l Inc., Annual Report (Form 10-K), at 20 (Apr. 2, 2009), available at <https://www.sec.gov/Archives/edgar/data/1352819/000119312509070961/d10k.htm>.

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1936 See Criminal Information, United States v. Salvoch, No. 10-cr-20893 (S.D. Fla. Dec. 17, 2010), ECF No. 3, available at <https://www.justice.gov/eriminal/fraud/fepa/cases/salvoch/12-17-10>[sites/default/files/criminal-fraud/legacy/2013/09/05/12-17-10sa_salvoch-info.pdf](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/09/05/12-17-10sa_salvoch-info.pdf); Criminal Information,

United States v. Vasquez, No. 10-cr-20894 (S.D. Fla. Dec. 17, 2010), ECF No. 3, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/vasquez-jp-criminal-fraud/legacy/2013/09/05/12-17-10vasquez-juan-info.pdf>; Indictment, United States v. Granados, et al., No. 10-cr-20881, (S.D. Fla. Dec. 14, 2010), ECF No. 3, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/10/18/12-21-10granados-indict.pdf>.

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~~crim~~inal/fraud/fcpa/cases/granados-jorge/12-21-10granados-indict.pdf. within five years next after such offense shall have been committed.”

1947 See Deferred Pros. Agreement, United States v. Snamprogetti, ~~supra~~ 208 See *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) *Netherlands B.V.*, No. 4:10-cr-00460 (S.D. Tex. July 7, 2010)

~~note 60~~, ECF No. 3 [~~hereinafter~~ *United States v. Snamprogetti*], available at <https://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-dpa.pdf>. ~~one overt act was committed within the statute of limitations~~; *Fiswick*

1958 Compare Criminal Information, United States v. Snamprogetti, ~~supra~~ *v. United States*, 329 U.S. 211, 216 (1946) (“The statute of limitations, No. 4:10-cr-00460 (S.D. Tex. July 7, 2010), ECF No. 1 ~~note 60~~, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf>, with Deferred Pros. Agreement, United States v. Snamprogetti, unless suspended, runs from the last overt act during the existence of ~~supra note~~

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~~supra note 60, ECF No. 3. the conspiracy. The overt acts averred and proved may thus mark the~~

1969 See Press Release, General Electric Co., General Electric Agrees to ~~duration, as well as the scope, of the conspiracy.~~”) (citation omitted); see *Acquire InVision* (Mar. 15, 2004), available at https://www.ge.com/files/generally-Julie-N.-Sarnoff,-Federal-Criminal-Conspiracy,-48-AM.-CRIM.-L.-usa/company/investor/downloads/sharpeye_press_release.pdf; Press ~~REv. 663, 676 (Spring 2011).~~

Release, U.S. Dept. of Justice, InVision ~~Tech. Technologies~~, Inc. Enters into Agreement ~~209-18 U.S.C. § 3292.~~ with the United States (Dec. 6, 2004), available at https://www.justice.gov/opa/pr/2004/December/04_crm_780.htm; Company News; G.E. ~~211 S. REP. No. 95-114, at 3 (noting that, in the past, “corporate bribery Gets InVision, a Maker of Bomb Detectors, N.Y. TIMES Times, Dec. 7, 2004, at has been concealed by the falsification of corporate books and records.” C4.~~

C4. that the accounting provisions “remove [] this avenue of coverup,” and 197200 Non-Pros. Agreement, In re InVision (Dec. 3, 2004), available at ~~that “[t]aken together, the accounting requirements and criminal [anti-~~ [04invisiointech-agree.pdf; Non-Pros. Agreement, In re General Elec. Co., ~~foreign government officials~~”\): \(Dec. 3, 2004\), available at <https://www.justice.gov/criminal/fraud/fcpa/212cases/invision-tech/12-03-04invisiointech-agree-ge.pdf>; *Complaint, SEC .-REP. No. 95-114, at 7.*](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03- bribery} prohibitions . . . should effectively deter corporate bribery of</p></div><div data-bbox=)

~~cases/invision-tech/12-03-04invisiontech-agree-ge.pdf; Complaint, SEC 213 Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).~~
v. GE InVision, Inc., f/k/a InVision Technologies, Inc., No. 05-cv-660; ~~214 Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).~~ (N.D. Cal. Feb. 14, 2005), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/comp19078.pdf>. ~~215 The accounting provisions contain a narrow exemption related to litigation/ complaints/comp19078.pdf. litigation/complaints/comp19078.pdf. national security and the protection of classified information. Under~~
~~20198~~ See U.S. ~~DEPT~~Dept. of Justice, FCPA ~~OP~~Op. ~~RELEASE~~Release 08-02 (June 13, ~~this “national security” provision, “no duty or liability [under Section 2008], available at https://www.justice.gov/criminal/ fraud/fcpa/ 13(b)(2) of the Exchange Act] shall be imposed upon any person acting in~~ ~~opinion/2008/0802.pdf; see also Press Release, U.S. Dept. of Justice, in cooperation with the head of any federal department or agency Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign~~ ~~responsible for such matters if such act in cooperation with such head of Bribery Investigation (Aug. 7, 2012) (“In the 18 months following its a acquisition of Wyeth, Pfizer Inc., in consultation with the department or agency was done upon the specific, written directive of~~ ~~, conducted a due diligence and investigative review of the Wyeth business acquisition of Wyeth, Pfizer Inc., in consultation with the department, the head of such department or agency pursuant to Presidential authority~~ ~~conducted a due diligence and investigative review of the Wyeth business to issue such directives.” Section 13(b)(3) of the Exchange Act, 15 U.S.C. operations and integrated Pfizer Inc.’s internal controls system into § 78m(b)(3). As Congress made clear, however, the exception is narrowly~~ ~~the former Wyeth business entities. The department considered these extensive efforts and SEC resolution in its determination not to pursue a criminal resolution for the pre-acquisition improper conduct of the former Wyeth business entities. The department considered these tailored and intended to prevent the disclosure of classified information.~~ ~~extensive efforts and the SEC resolution in its determination not to H.R. REP. 94-831, at 11, available at http://www.justice.gov/criminal/ pursue a criminal resolution for the pre-acquisition improper conduct of fraud/fcpa/history/1977/corruptrpt-94-831.pdf.~~ ~~Wyeth subsidiaries.”), available at https://www.justice.gov/opa/pr/2012/August/2162 Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § ~~crm-7980~~m(b)(2)(A).html. August/12-~~crm-980~~crm-980.html. 217 H.R. REP. No. 94-831, at 10-199202 18 U.S.C. § 2. 218 Id.~~
~~200 In enacting the FCPA in 1977, Congress explicitly noted that “[t]he 219 Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7).~~
~~203 In enacting the FCPA in 1977, Congress explicitly noted that “[t]he concepts of aiding and abetting and joint participation would apply to a 220 H.R. REP. No. 100-576, at 917 (1988), available at~~ ~~http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf. Congress~~ ~~always applied in both SEC civil actions and in implied private actions rejected the addition of proposed cost-benefit language to the definition~~ brought under the securities

laws generally.” H.R. ~~REP~~Rep. No. 95-640, at 8. ~~“in response to concerns that such a statutory provision might be abused~~

~~2014~~ Pinkerton held that a conspirator may be found guilty of a substantive ~~and weaken the accounting provisions at a time of increasing concern~~

offense committed by a co-conspirator in furtherance of the conspiracy ~~about audit failures and financial fraud and resultant recommendations~~ if the co-conspirator’s acts were reasonably foreseeable. See Pinkerton v. ~~by experts for stronger accounting practices and audit standards.”~~ Id. United States, 328 U.S. 640, 647-48 (1946). ~~221~~

~~See, e.g., Complaint, SEC v. Biomet, Inc., No. 12-cv-454 (D.D.C. Mar. 2012);~~

~~2025~~ See United States v. MacAllister, 160 F.3d 1304, 1307 (11th Cir. ~~26, 2012~~); ~~ECF No. 1 [hereinafter SEC v. Biomet], available at http://~~

~~1998~~); United States v. Winter, 509 F.2d 975, 982 (5th Cir. 1975).

~~www.sec.gov/litigation/complaints/2012/comp22306.pdf; Criminal Information, United States v. Marubeni, supra note 2036~~ ~~Information, United States v. Biomet, Inc Corp., No. 12-cr-8022 (D.S.D.C. Tex. Mar. Jan. 17 2012);~~

~~Criminal Information, United States v. JGC Corp., supra note 60; 26, 2012), ECF No. 1 [hereinafter United States v. Biomet Marubeni], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-information.pdf; Criminal Information, United States v. JGC Corp., supra note 60; Criminal Information, United States v. Snamprogetti, supra note 60~~

~~198~~; see ~~justice.gov/criminal/fraud/fepa/cases/biomet/2012-03-26-biomet-also Criminal Information, United States v. Technip, supra note 1392. information.pdf; Complaint, SEC v. Smith & Nephew Inc., No. 12-cv-~~

~~207~~ ~~United State v. Hoskins, 902 F.3d 69, 76-97 (2d Cir. 2018).~~

~~208~~ ~~United States v. Firtash, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019).~~

~~2049~~ Section 20(e) of the Exchange Act, “Prosecution of Persons Who ~~187 (D.D.C. Feb. 6, 2012), ECF No. 1, available at http://www.sec.gov/~~

~~Aid and Abet Violations,” explicitly provides that, for purposes of a litigation/complaints/2012/comp22252.pdf; Criminal Information, civil action seeking injunctive relief or a civil penalty, “any person that United States v. Smith & Nephew ple., No. 12-cr-30 (D.D.C. Feb. 6, 2012), ECF No. 1, available at~~

~~http://www.justice.gov/criminal/fraud/ in violation of a provision of this chapter, or of any rule or regulation fepa/cases/smith-nephew/2012-02-06-s-n-information.pdf; Complaint, issued under this chapter, shall be deemed to be in violation of such SEC v. Johnson & Johnson, supra note 131; Criminal Information, provision to the same extent as the person to whom such assistance is United States v. DePuy, supra note 131; Complaint, SEC v. Maxwell provided.”~~

Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e). ~~Technologies Inc., No. 11-cv-258 (D.D.C. Jan. 31, 2011), ECF No. 1~~

~~2105~~ Under Section 21C(a) of the Exchange Act, ~~the~~ SEC may impose a ~~[hereinafter SEC v. Maxwell Technologies], available at http://www.sec. cease-and-desist order through SEC’s administrative proceedings~~

~~through the SEC’s administrative proceedings~~

~~gov/litigation/complaints/2011/comp21832.pdf; Criminal Information, upon any person who is violating, has violated, or is about to violate any United States v. Maxwell Technologies Inc., No. 11-cr-329 (S.D. Cal. provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the~~

~~2105~~ Under Section 21C(a) of the Exchange Act, ~~the~~ SEC may impose a ~~[hereinafter SEC v. Maxwell Technologies], available at http://www.sec. cease-and-desist order through SEC’s administrative proceedings~~

~~through the SEC’s administrative proceedings~~

~~gov/litigation/complaints/2011/comp21832.pdf; Criminal Information, upon any person who is violating, has violated, or is about to violate any United States v. Maxwell Technologies Inc., No. 11-cr-329 (S.D. Cal. provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the~~

~~2105~~ Under Section 21C(a) of the Exchange Act, ~~the~~ SEC may impose a ~~[hereinafter SEC v. Maxwell Technologies], available at http://www.sec. cease-and-desist order through SEC’s administrative proceedings~~

~~through the SEC’s administrative proceedings~~

~~gov/litigation/complaints/2011/comp21832.pdf; Criminal Information, upon any person who is violating, has violated, or is about to violate any United States v. Maxwell Technologies Inc., No. 11-cr-329 (S.D. Cal. provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the~~

~~person knew or should have known would provision of the Exchange Act or any rule or regulation thereunder, and Jan. 31, 2011), ECF No. 1, available at <http://www.justice.gov/criminal/>~~

~~upon any other person that is, was, or would be a cause of the violation,~~

~~fraud/fepa/cases/maxwell/01-31-11maxwell-tech-info.pdf; Complaint, due to an act or omission the person knew or should have known would SEC v. Transocean, Inc., No. 10-cv-1891 (D.D.C. Nov. 4, 2010), ECF~~

~~contribute to such violation. Section 21C(a) of the Exchange Act, 15 No. 1, available at <http://www.sec.gov/litigation/complaints/2010/> U.S.C. § 78u-3(a).~~

~~comp21725.pdf; Criminal Information, United States v. Transocean, 20611 See Complaint, SEC v. Panalpina, Inc., supra note 68. Inc., No. 10-cv-7684334 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at <https://www.sec.gov/litigation/complaints/2010/comp21727.pdf>.~~

~~20712 18 U.S.C. § 3282(a) provides: “Except as otherwise expressly provided [http://www.justice.gov/criminal/fraud/fepa/cases/transocean-inc/11-](http://www.justice.gov/criminal/fraud/fepa/cases/transocean-inc/11-04-10transocean-info.pdf)~~

~~by law, no person shall be prosecuted, tried, or punished for any offense, 04-10transocean-info.pdf. not capital, unless the indictment is found or the information is instituted 222 S. REP. No. 95-114, at 7. within five years next after such offense shall have been committed.”~~

~~213 See 18 U.S.C. § 3301(a) (“[T]he term ‘securities fraud offense’ means a violation of, or a conspiracy or an attempt to violate . . . section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a))”); 18 U.S.C. § 3301(b) (“No person shall be prosecuted, tried, or punished for a securities fraud offense,~~

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~~unless the indictment is found or the information is instituted within 6 years after the commission of the offense.”).~~

~~214 See Grunewald v. United States, 353 U.S. 391, 396-97 (1957) (holding government must prove conspiracy still existed and at least one overt act was committed within the statute of limitations); Fiswick v. United States, 329 U.S. 211, 216 (1946) (“The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.”) (citation omitted); see generally Julie N. Sarnoff, Federal Criminal Conspiracy, 48 Am. Crim. L. Rev. 663, 676 (Spring 2011); see also United States v. SBM, supra note 92 (charging a single conspiracy to violate the FCPA spanning conduct from in or around 1996 until in or around 2012).~~

~~215 18 U.S.C. § 3292.~~

~~216 Kokesch v. SEC, 137 S. Ct. 1635 (2017).~~

~~217 28 U.S.C. § 2462.~~

~~218 S. Rep. No. 95-114, at 3 (noting that, in the past, “corporate bribery has been concealed by the falsification of corporate books and records,” that the accounting provisions “remove [] this avenue of coverup,” and that “[t]aken together, the accounting requirements and criminal [anti-bribery] prohibitions . . . should effectively deter corporate bribery of foreign government officials”).~~

~~219 S. Rep. No. 95-114, at 7.~~

~~220 Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).~~

~~2231 Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).~~

~~222 The accounting provisions contain a narrow exemption related to national security and the protection of classified information. Under this “national security” provision, “no~~

duty or liability [under Section 13(b)(2) of the Exchange Act] shall be imposed upon any person acting in cooperation with the head of any federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives.” Section 13(b)(3) of the Exchange Act, 15 U.S.C. § 78m(b)(3). As Congress made clear, however, the exception is narrowly tailored and intended to prevent the disclosure of classified information. H.R. Rep. 94-831, at 11 (1977), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/corruptprt-94-831.pdf>.

223 Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).

224 H.R. Rep. No. 94-831, at 10.

225 Id.

226 Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7).

227 H.R. Rep. No. 100-576, at 917 (1988), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/tradeact-100-418.pdf>. Congress rejected the addition of proposed cost-benefit language to the definition “in response to concerns that such a statutory provision might be abused and weaken the accounting provisions at a time of increasing concern about audit failures and financial fraud and resultant recommendations by experts for stronger accounting practices and audit standards.” Id.

228 See, e.g., Complaint, SEC v. Biomet, Inc., No. 12-cv-454 (D.D.C. Mar. 26, 2012), ECF No. 1 [hereinafter SEC v. Biomet], available at <https://www.sec.gov/litigation/complaints/2012/comp22306.pdf>; Criminal Information, United States v. Biomet, Inc., No. 12-cr-80 (D.D.C. Mar. 26, 2012) [hereinafter United States v. Biomet], available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/30/2012-03-26-biomet-information.pdf>; Complaint, SEC v. Smith & Nephew plc, No. 12-cv-187 (D.D.C. Feb. 6, 2012), ECF No. 1, available at <https://www.sec.gov/litigation/complaints/2012/comp22252.pdf>; Criminal Information, United States v. Smith & Nephew, Inc., No. 12-cr-30 (D.D.C. Feb. 6, 2012), ECF No. 1, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/02/08/2012-02-06-s-n-information.pdf>; Complaint, SEC v. Johnson & Johnson, supra note 135; Criminal Information, United States v. DePuy, supra note 135; Complaint, SEC v. Maxwell Techs. Inc., No. 11-cv-258 (D.D.C. Jan. 31, 2011), ECF No. 1 [hereinafter SEC v. Maxwell Technologies], available at <https://www.sec.gov/litigation/complaints/2011/comp21832.pdf>; Criminal Information, United States v. Maxwell Techs. Inc., No. 11-cr-329 (S.D. Cal. Jan. 31, 2011), ECF No. 1, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/01-31-11maxwell-tech-info.pdf>; Complaint, SEC v. Transocean, Inc., No. 10-cv-1891 (D.D.C. Nov. 4, 2010), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2010/comp21725.pdf>; Criminal Information, United States v. Transocean, Inc., No. 10-cr-768 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10transocean-info.pdf>.

229 S. Rep. No. 95-114, at 7.

230 Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).

22431 Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7).

2325 See Complaint, SEC v. Siemens AG, supra note 487; Criminal Information,

United States v. Siemens ~~AG, supra note~~ [Aktiengesellschaft, No. 08-cr-367 \(D.D.C. Dec. 12, 2008\)](#), ECF No. 1 [hereinafter [United States v. Siemens AG](#)], available at <https://www.justice.gov/archive/opa/pr/2008/December/408-crm-1105.html>.
[22633](#) Complaint, SEC v. Siemens AG, supra note [487](#); Criminal Information, United States v. Siemens AG, supra note [48232](#); Press Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), available at <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.
[22734](#) See, e.g., Complaint, SEC v. Biomet, supra note [2248](#) (bribes paid to government healthcare providers in which

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phony invoices were used to justify payments and bribes were falsely recorded as “consulting fees” or “commissions” in company’s books and records); Criminal Information, United States v. Biomet, supra note [2248](#) (same); SEC v. Alcatel-Lucent, supra note [487](#) (bribes paid to foreign officials to secure telecommunications contracts where company lacked proper internal controls and permitted books and records to falsified); United States v. Alcatel-Lucent, ~~S.A. France~~, supra note [4128](#) (same).
[22835](#) Complaint, SEC v. Daimler AG, supra note [487](#); Criminal Information, United States v. Daimler AG, supra note [487](#).

[22936](#) Id.

[2307](#) Id.

[2318](#) Id.

[2329](#) Id.

[23340](#) Id.

~~[234](#) See, e.g., Complaint, SEC v. Tyco Int’l, supra note 9; Complaint, SEC v. Willbros, No. 08-cv-1494 (S.D. Tex. May 14, 2008), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2008/comp20571.pdf>.~~

[241](#) See supra note [10](#).

~~[23542](#) See, e.g., Complaint, SEC v. Siemens AG, supra note [487](#); Complaint, SEC v. York Int’l Corp., supra note [115](#); Complaint, SEC v. Textron, supra note [115](#); Criminal Information, United States v. Control Components, Inc., No. 09-cr-162 (C.D. Cal. July 22, 2009), ECF No. 1 [hereinafter [United States v. Control Components](#)], available at <https://www.justice.gov/criminal/fraud/fepa/cases/control-components/default/files/criminal-fraud/legacy/2011/02/16/07-22-09cci-info.pdf>; Criminal Information, United States v. SSI Int’l Far East, Ltd., No. 06-cr-398, ECF No. 1 [hereinafter [United States v. SSI Int’l](#)] (D. Or. Oct. 10, 2006) [hereinafter [United States v. SSI Int’l](#)], available at <https://www.justice.gov/criminal/fraud/fepa/cases/ssi-intl/sites/default/files/criminal-fraud/legacy/2011/02/16/10-10-06ssi-information.pdf>.~~

[2436](#) See, e.g., Complaint, SEC v. El Paso Corp., supra note [187](#); Complaint, SEC v. Innospec, supra note [79](#); Complaint, SEC v. Chevron Corp., 07-cv-10299 (S.D.N.Y. Nov. 14, 2007), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2007/comp20363.pdf>.

~~[237](#) Plea Agreement, United States v. Stanley, supra note [8](#); Plea Agreement, United States v. Sapsizian, supra note [8](#).~~

[244](#) See supra note [9](#).

[23845](#) See Complaint, SEC v. Maxwell Technologies, supra note [2248](#).

[23946](#) See Complaint, SEC v. Willbros Group, supra note [910](#).

[2407](#) 15 U.S.C. § 7201, et seq.

2418 Exchange Act Rule 13a-15, 17 C.F.R. § 240.13a-15; Exchange Act Rule 15d-15, 17 C.F.R. § 240.15d-15; Item 308 of Regulation S-K, 17 C.F.R. § 229.308; Item 15, Form 20-F, available at <https://www.sec.gov/about/forms/form20-f.pdf>; General Instruction (B), Form 40-F (for foreign private issuers), available at <https://www.sec.gov/about/forms/form40-f.pdf>.

2429 See U.S. ~~SEC. AND EXCHANGE COMM., COMMISSION GUIDANCE REGARDING MANAGEMENT'S REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING UNDER SECTION 13(A) OR 15(D) OF THE SECURITIES EXCHANGE ACT OF~~ [Sec. and Exchange Comm'n, Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13\(a\) or 15\(d\) of the Securities Exchange Act of](#) 1934, Release No. 33-8810 (June 27, 2007), available at <https://www.sec.gov/rules/interp/2007/33-8810.pdf>.

24350 Id.

24451 Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494 (1977).

2452 See supra note 487; ~~SEC v.~~ [In the Matter of Technip FMC plc](#), supra note 1392, (French company); [United States v. Technip](#), supra note 1392, (same); see also Admin. ~~Proceeding~~ [Proc.](#) Order, In ~~re~~ [the Matter of](#) Diageo plc, Exchange Act Release No. 64978 (SEC July 27, 2011) (UK company), available at <https://www.sec.gov/litigation/admin/2011/34-64978.pdf>; Admin. ~~Proceeding~~ [Proc.](#) Order, In ~~re~~ [the Matter of](#) Statoil, ASA, Exchange Act Release No. 54599 (SEC May 29, 2009) (Norwegian company), available at <https://www.sec.gov/litigation/admin/2006/34-54599.pdf>; Criminal Information, [United States v. Statoil, ASA](#), No. 06-cr-960 (S.D.N.Y. Oct. 13, 2006) (same), available at <https://www.justice.gov/criminal/fraud/fcpa/cases/statoil-asa-ine/sites/default/files/criminal-fraud/legacy/2011/02/16/10-13-09statoil-information.pdf>.

24653 Although private companies are not covered by the books and records and internal controls provisions of the FCPA and do not fall within SEC's jurisdiction, such companies generally are required by federal and state tax laws and state corporation laws to maintain accurate books and records sufficient to properly calculate taxes owed. Further, most large private companies maintain their books and records to facilitate the preparation of financial statements in conformity with GAAP to comply with financial institutions' lending requirements.

2547 See SEC v. RAE Sys. Inc., supra note 921; In re RAE Sys. Inc., supra note 921.

24855 See Section 13(b)(6) of the Exchange Act, 15 U.S.C. § 78m(b)(6), which provides that where an issuer "holds 50 per centum or less of the voting power with respect to a domestic or foreign firm," the issuer must "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with [Section 13(b)(2)]."

24956 See 15 U.S.C. § 78m(b)(6). Congress added the language in sub-section 78m(b)(6) to the FCPA in 1988, recognizing that "it is unrealistic to expect a minority owner to exert a disproportionate degree of influence over the accounting practices of a subsidiary." H.R. ~~REP~~ [Rep.](#) No. 100-576, at 917. The Conference Report noted that, with respect to minority owners, "the amount of influence which an issuer may exercise necessarily varies from case to case. While the relative degree of ownership is obviously one factor, other factors may also be important in determining whether an issuer has demonstrated good-faith efforts to use its influence." Id.; see also S. ~~REP~~ [Rep.](#) No. 100-85, at 50.

2507 Section 20(e) of the Exchange Act, titled “Prosecution of Persons Who Aid and Abet Violations,” explicitly provides that for purposes of a civil action seeking injunctive relief or a civil penalty, “any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.” See Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e).

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2548 See Complaint at 11-12, SEC v. Elkin, ~~supra note No. 510, ECF 1, cv-661 (D.D.C. Apr. 28, 2010), ECF No. 1, available at <https://www.sec.gov/litigation/complaints/2010/comp21509.pdf>.~~

2529 ~~SEC v. Elkin, supra note 50~~ Id., ECF Nos. 6-9 (final judgments).

25360 See, e.g., Complaint, SEC v. Nature’s Sunshine ~~Products Prod., Inc., et al.~~, No. 09-cv-672 (D. Utah, July 31, 2009), ECF No. 2, available at https://www.sec.gov/litigation/litreleases/complaints/2009/lr_comp21162.htm.pdf.

25461 See Admin. ~~Proceeding Proc.~~ Order, In re Watts Water ~~Technologies Tech., Inc.~~ and Leesen Chang, Exchange Act Release No. 65555 (SEC Oct. 13, 2011), available at <https://www.sec.gov/litigation/admin/2011/34-65555.pdf>.

25562 Id. at 2, 4, 6-7.

2563 Exchange Act Rule 13b2-1, 17 C.F.R. § 240.13b2-1.

25764 15 U.S.C. § 78m(b)(5).

2658 Section 3(a)(9) of the Exchange Act, 15 U.S.C. § 78c(a)(9).

25966 Exchange Act Rule 13b2-2, 17 C.F.R. § 240.13b2-2.

2607 Complaint, SEC v. Jennings, No. 11-cv-1444 (D.D.C. Jan. 24, 2011), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/2011/comp21822.pdf>.

2618 ~~Complaint, id~~ Id., ECF Nos. 1, 3 (Complaint and Final Judgment, ~~id.~~, ECF No. 3).

2629 Serious Fraud Office, Innospec Ltd: Former CEO admits bribery to falsify product tests (July 30, 2012), available at <https://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-ceo-admits-bribery-to-falsify-product-tests.aspx>.2012/07/30/innospec-ltd-former-ceo-admits-bribery-falsify-product-tests/.

~~263 15 U.S.C. § 78m(b)(4)-(5). Congress adopted this language in 1988 in order to make clear that, consistent with enforcement policy at the time,~~

ENDIX notes

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~~criminal penalties would not be imposed “for inadvertent or insignificant~~ Nos. 182, 816, 824 (judgments against foreign official defendants).

~~errors in books and records, or inadvertent violations of accounting~~ 282 Criminal Information, United States v. SSI Int’l, supra note 235

~~controls.” See S. REP. No. 100-85, at 49; H.R. REP. No. 100-576, at~~ (alleging violations of 18 U.S.C. §§ 1343, 1346); Plea Agreement, United

916 (“The Conferees intend to codify current Securities and Exchange States v. SSI Int’l, supra note 235, (Oct. 10, 2006), available at [~~Commission \(SEC\) enforcement policy that penalties not be imposed for~~](http://www.justice.gov/</p></div><div data-bbox=)

~~www.justice.gov/criminal/fraud/fepa/cases/control-inc/07-24-09eci-insignificant-or-technical-infractions-or-inadvertent-conduct.”).~~ plea-agree.pdf.

26470 15 U.S.C. § 78ff(a). ~~283 See Ex-Im Bank, Form of Exporter’s Certificate, EBD-~~

M-56 (Jan.

265 See *United States v. Alcatel-Lucent, S.A.*, supra note 48; see also *United States v. Alcatel-Lucent France*, supra note 56. 284 See 18 U.S.C. § 1001.

26671 See *Deferred Prosecution Agreement*, *United States v. Alcatel-Lucent*, 285 22 C.F.R. §§ 130.2, 130.9.

Och-Ziff Capital Mgmt. Group LLC, No. 16-cr-516 (E.D.N.Y. Sept. 29, 2016), available at <https://www.justice.gov/file/900261/download>.

United States v. BAE Systems plc, BAE pleaded guilty criminal-fraud/ [eriminal/fraud/fepa/cases/alcatel-et-al/02-22-11alcatel-dpa.pdf](https://www.justice.gov/eriminal/fraud/fepa/cases/alcatel-et-al/02-22-11alcatel-dpa.pdf). to conspiring to defraud the United States by impairing and impeding its

2672 See *Plea Deferred Pros. Agreement*, *United States v. Siemens AG*, supra note 48, ECF

Panasonic Avionics Corp., No. 148-cr-118 (D.D.C. Apr. 30, 2018), available at <https://www.justice.gov/eriminal/fraud/fepa/cases/panasonic-avionics-corp-no-148-cr-118-d-d-c-apr-30-2018>, available at <https://www.justice.gov/eriminal/fraud/fepa/cases/panasonic-avionics-corp-no-148-cr-118-d-d-c-apr-30-2018> program, and to violating the AECA and ITAR. BAE paid a \$400 million fine and agreed to an independent corporate monitor to ensure

<https://www.justice.gov/eriminal/fraud/fepa/cases/panasonic-avionics-corp-no-148-cr-118-d-d-c-apr-30-2018> file/1058466/download.

26873 See Minute Entry of Guilty Plea, *United States v. Peterson*, supra note 98, ECF No. 13; see also Press Release, U.S. Dept. of Justice, Former Morgan

Criminal Information and Plea Agreement, United States v. BAE Sys. Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 23, 2012), available at <http://www.justice.gov/eriminal/fraud/fepa/cases/bae-system/02-01-justice.gov/opa/pr/2012/April/12-crm-534.html>. 10baesystems-info.pdf and <http://www.justice.gov/eriminal/fraud/fepa/cases/bae-system/03-01-10baesystems-plea-agree.pdf>. In an action based on the same underlying facts as the criminal guilty plea, BAE entered

<http://www.justice.gov/eriminal/fraud/fepa/cases/bae-system/03-01-10baesystems-plea-agree.pdf>. In an action based on the same underlying facts as the criminal guilty plea, BAE entered

26974 See *Criminal Information, United States v. Baker Hughes Svcs.* cases/bae-system/03-01-10baesystems-plea-agree.pdf. In an action based on the same underlying facts as the criminal guilty plea, BAE entered

Int'l, Inc., No. 07-cr-129 (S.D. Tex. Apr. 11, 2007), ECF No. 1, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-11-07bakerhughesintl-info.pdf>.

<https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-11-07bakerhughesintl-info.pdf>.

<http://www.justice.gov/eriminal/fraud/fepa/cases/baker-hughs/04-11-07bakerhughesintl-info.pdf>. a civil settlement with the Directorate of Defense Trade Controls for

07bakerhughesintl-info.pdf. violations of AECA and ITAR, including over 2500 ITAR violations

2705 See *Criminal Information, United States v. Panalpina, Inc.*, supra note 68. that included a failure to report the payment of fees or commissions

No. 10-cr-765 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at <http://www.justice.gov/eriminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-info.pdf>. 276 *Id.*

271 *Id.* associated with defense transactions and failure to maintain records at <http://www.justice.gov/eriminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-info.pdf>. 276 *Id.*

277 See 15 U.S.C. § 78ff(a).

2728 See FASB Statement of Financial Accounting Concepts No. 2, ¶¶ involving ITAR-controlled transactions. BAE paid \$79 million in [63-80](https://www.justice.gov/eriminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-info.pdf).

63-80. penalties, and the State Department imposed a “policy of denial” for
2739 PCAOB Auditing Standard No. 12 and PCAOB AU Section 325. export licenses
on three BAE subsidiaries involved in the wrongful
27480 See Section 10A of the Exchange Act, 15 U.S.C. § 78j-1. conduct. Consent
Agreement between BAE Sys. plc and Defense Trade
27581 18 U.S.C. § 1952. Controls at 17-20, Bureau of Political-Military Affairs,
U.S. Dept. of State
27682 See, e.g., United States v. ~~Nexus Technologies~~ Baptiste, supra note 543; Criminal
(May 16, Information, United States v. Ernesto Lujan, No. 13-cr-671 (S.D.N.Y.
Aug. 29, 2014), ECF No. 11, available at <https://www.pmdtc.state.gov/compliance/justice.gov/sites/default/files/criminal-fraud/legacy/2013/08/30/lujan-filed-information.pdf>; Criminal Information, United States v. Robert Richard King, et al., No. 01-cr-190
consent_agreements/pdf/BAES_CA.pdf; Proposed Charging Letter, In (W.D. Mo.
June 27, 2001), available at <http://www.justice.gov/criminal/fraud/fepa/cases/kingr-etal> <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/05-03-02king-robert-indict.pdf>; Superseding Export
Control Act and the International Traffic in Arms Regulations, Indictment, United States
v. Mead, supra note 443, ECF No. 22; Criminal Information, U.S. Dept. of State
(May 2011), available at http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/BAES_PCL.pdf. Mass. Aug. 18, 1998),
available at <http://www.justice.gov/criminal/287-26> U.S.C. § 162(c)(1); see also Plea
Agreement, United States v. Smith,
fraud/fepa/cases/saybolt/08-10-98saybolt-info.pdf. No. 07-cr-69 (C.D. Cal. Sept. 3,
2009), ECF No. 89, available at [http://available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/08-10-98saybolt-info.pdf](http://available_at_https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/08-10-98saybolt-info.pdf).
27783 See Second Superseding Indictment, United States v. Kozeny, No. 05-
www.justice.gov/criminal/fraud/fepa/cases/smith1/09-03-09smith1-plea-cr-518 (S.D.N.Y. May 26, 2009), ECF No. 203, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/05-26-09bourke2nd-185-nd-supersed-indict.pdf>;
Criminal Information, United States v. Titan Corp., supra note 288 See USAM § 9-27.000.
Judgment, United States v. Bourke, No. 05-cr-518 288 See USAM § 9-27.000.
(S.D.N.Y. Nov. 12, 2009), ECF No. 253, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/11-12-09bourke-judgment.pdf>. 289 See
USAM § 9-27.420 (setting forth considerations to be weighed when
determining whether it would be appropriate to enter into plea
2784 Plea Agreement, United States v. Control Components, supra note agreement).
242235, ECF No. 7, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-24-09cci-plea-agree.pdf>; see also Order, United States v.
Carson, supra note 1198, 290 See USAM § 9-28.000 et seq. ECF No. 440 (denying
motion to dismiss counts alleging Travel Act 291 See USAM § 9-28.710 (discussing
attorney-client and work product violations), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/carsons/2011-09-20-carson-minutes-denying-motion-to-dismiss.pdf>. 292 See
<http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.
pdf. 293 See USAM § 9-28.300.A; see also USAM § 9-28.700.B (explaining

27985 See, e.g., [United States v. Ahsani](#), supra note 9; Criminal Information, [United States v. Matthias Krull](#), No. 18-cr-20682 (S.D. Fla. Aug. 16, 2018), ECF No. 23, available at <https://www.justice.gov/criminal-fraud/file/1119951/download>; [United States v. Ng](#), supra note 43; Criminal Information, [United States v. Darwin Enrique Padron-Acosta](#), No. 16-cr-437 (S.D. Tex. Sept. 30, 2016), ECF No. 1, available at <https://www.justice.gov/criminal-fraud/file/1226941/download>; Criminal Information, [United States v. Esquenazi](#), supra note ~~benefits of cooperation for both government and corporation~~. 4344; Criminal Information, [United States v. Green](#), supra note 443; Criminal ~~294 See USAM § 9-28.900 (discussing restitution and remediation)~~. The Information, [United States v. General Elec. Co.](#), No. 92-cr-87 (S.D. Ohio ~~commentary further provides that prosecutors should consider and weigh~~ July 22, 1992), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/general-electric/1992-07-22-general-electric-information.pdf>. ~~corporation's efforts to reform, including its quick recognition of the~~

280 Foreign officials may “not be charged with violating the FCPA itself, ~~flaws in the program and its efforts to improve the program~~. Id.

286 [Foreign officials may “not be charged with violating the FCPA itself](#), since the [FCPA] does not criminalize the receipt of a bribe by a foreign ~~295 See USAM §§ 9-27.230, 9-27.420~~.

official.” [United States v. Blondek](#), 741 F. Supp. 116, 117 (N.D. Tex. ~~296 U.S. SENTENCING GUIDELINES § 8B2.1(b)(7) (2011)~~: 1990), [aff'd](#) [United States v. Castle](#), 925 F.2d 831 (5th Cir. 1991) (“We ~~297 Id. § 8C2.5(f)(2) (2011)~~: [hold that](#) [116](#)

~~hold that~~ foreign officials may not be prosecuted under 18 U.S.C. § ~~298 U.S. SEC. AND EXCHANGE Comm., REPORT OF INVESTIGATION~~ 371 for conspiring to violate the FCPA.”). Foreign officials, however, ~~PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT~~ can be charged with violating the FCPA when the foreign official acts ~~OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP~~ as an intermediary of a bribe payment. See, e.g., Information, [United](#)

~~OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, SEC~~ [States v. Basu](#), No. 02-cr-475 (D.D.C. Nov. 26, 2002) (World Bank ~~Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001)~~ [hereinafter employee charged with wire fraud and FCPA violations for facilitating ~~Seaboard Report~~] available at <http://www.sec.gov/litigation/investreport/34-44969.htm>: official), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/basu/11-26-02basu-info.pdf>; Information, [United](#)

[States v. Sengupta](#), No. ~~CONCERNING COOPERATION BY INDIVIDUALS IN ITS~~ 02-cr-40 (D.D.C. Jan. 30, 2002), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/01-30-02sengupta-info.pdf>.

287 See, e.g., [Judgments, United States v. Esquenazi](#), supra note 43, ECF Nos. 182, 816, 824 ([judgments against foreign official defendants](#)).

288 [Criminal Information, United States v. SSI Int'l](#), supra note 242 (alleging violations of 18 U.S.C. §§ 1343, 1346); [Plea Agreement, United States v. SSI Int'l](#), supra note 242, (Oct. 10, 2006), available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/10-10-06ssi-fareast-plea.pdf>.

289 See Ex-Im Bank, Form of Exporter’s Certificate, EIB 15-04 (May 2019), available at https://www.exim.gov/sites/default/files/forms/eib15-04_0.pdf.

290 See 18 U.S.C. § 1001.

291 22 C.F.R. §§ 130.2, 130.9.

292 For example, in United States v. BAE Systems plc, BAE pleaded guilty to conspiring to defraud the United States by impairing and impeding its lawful functions, to making false statements about its FCPA compliance program, and to violating the AECA and ITAR. BAE paid a \$400 million fine and agreed to an independent corporate monitor to ensure compliance with applicable anti-corruption and export control laws. Criminal Information and Plea Agreement, United States v. BAE Sys. plc, No. 10-cr-35 (D.D.C. Mar. 1, 2010), ECF Nos. 1, 8, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-01-10baesystems-info.pdf> and <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/03-01-10baesystems-plea-agree.pdf>. In an action based on the same underlying facts as the criminal guilty plea, BAE entered a civil settlement with the Directorate of Defense Trade Controls for violations of AECA and ITAR, including over 2500 ITAR violations that included a failure to report the payment of fees or commissions associated with defense transactions and failure to maintain records involving ITAR-controlled transactions. BAE paid \$79 million in penalties, and the State Department imposed a “policy of denial” for export licenses on three BAE subsidiaries involved in the wrongful conduct. Press Release, BAE Systems plc Enters Civil Settlement of Alleged Violations of the AECA and ITAR and Agrees to Civil Penalty of \$79 Million (May 17, 2011), available at <https://2009-2017.state.gov/r/pa/prs/ps/2011/05/163530.htm>.

293 26 U.S.C. § 162(c)(1); see also, e.g., Criminal Superseding Information, United States v. Julia Vivi Wang, No. 16-cr-495 (S.D.N.Y. Apr. 4, 2018), ECF No. 55, available at <https://www.justice.gov/criminal-fraud/file/1061041/download>; Criminal Information, United States v. Roberto Enrique Rincon-Fernandez, No. 15-cr-654 (S.D. Tex. June 15, 2016), ECF No. 61, available at <https://www.justice.gov/criminal-fraud/file/878951/download>; Plea Agreement, United States v. Leo Winston Smith, No. 07-cr-69 (C.D. Cal. Sept. 3, 2009), ECF No. 89, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/09-03-09smithl-plea-agree.pdf>; Criminal Information, United States v. Titan Corp., supra note 189.

294 See JM § 9-27.000.

295 See JM § 9-27.420 (setting forth considerations to be weighed when determining whether it would be appropriate to enter into plea agreement).

296 See JM § 9-28.000 et seq.

297 See JM § 9-28.710 (discussing attorney-client and work product protections).

298 FCPA Corporate Enforcement Policy, available at <https://www.justice.gov/criminal-fraud/file/838416/download>.

299 Id.

300 See, e.g., DOJ Declination Letter, Cognizant Technology Solutions Corporation (Feb. 13, 2019), available at <https://www.justice.gov/criminal-fraud/file/1132666/download>; DOJ Declination Letter, Insurance Corporation of Barbados Limited (Aug. 23, 2018), available at <https://www.justice.gov/criminal-fraud/page/file/1089626/download>; DOJ Declination Letter, Guralp Systems Limited (Aug. 20, 2018), available at <https://www.justice.gov/criminal-fraud/page/file/1088621/download>.

301 See FCPA Corporate Enforcement Policy, supra note 298.

302 Id.

303 Id.

304 See Plea Agreement, United States v. Alstom S.A., supra note 193; Criminal Information, United States v. Marubeni Corp., Press Release, U.S. Dept. of Justice, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine, available at <https://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine>.

305 See, e.g., DOJ Declination Letter, Dun & Bradstreet Corp. (Apr. 23, 2018), available at <https://www.justice.gov/criminal-fraud/file/1055401/download>; Cease-and-Desist Order, In the Matter of The Dun & Bradstreet Corp., Admin. Proc. 3-18446 (Apr. 23, 2018), available at <https://www.sec.gov/litigation/admin/2018/34-83088.pdf>; DOJ Declination Letter, Nortek Inc. (June 3, 2016), available at <https://www.justice.gov/criminal-fraud/file/865406/download>; Nortek Inc., SEC Non-Prosecution Agreement (June 7, 2016), available at <https://www.sec.gov/news/press/2016/2016-109-mpa-nortek.pdf>.

306 DOJ Declination Letters, available at <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>.

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307 See SEC Enforcement Manual, available at <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

308 See JM § 9-28.300.A; see also JM § 9-28.700.B (explaining benefits of cooperation for both government and corporation).

309 See JM § 9-28.1000 (discussing restitution and remediation). The commentary further provides that prosecutors should consider and weigh whether the corporation appropriately disciplined wrongdoers and a corporation's efforts to reform, including its quick recognition of the flaws in the program and its efforts to improve the program. Id.

310 See JM §§ 9-27.230, 9-27.420.

311 U.S. Sentencing Guidelines § 8B2.1(b)(7) (2018).

312 Id. § 8C2.5(f)(2) (2011).

313 U.S. Sec. and Exchange Comm., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) [hereinafter Seaboard Report] available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

~~criminal/fraud/fepa/cases/sengupta/01-30-02sengupta-info.pdf.~~ 314 U.S. Sec. and Exchange Comm., Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcements Actions, 17 C.F.R. § 202.12 (Jan. 10, 2010), available at <http://www.sec.gov/rules/policy/2010/34-61340.pdf>.

~~281~~ See, e.g., Judgments, United States v. Esquenazi, supra note 44, ECF [policy/2010/34-61340.pdf](http://www.sec.gov/rules/policy/2010/34-61340.pdf).

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30015 See U.S. ~~SENTENCING GUIDELINES~~ at [Sentencing Guidelines](#) § 8B2.1(a)(2).

3016 U.S. ~~SENTENCING GUIDELINES~~ [Sentencing Guidelines](#) § 8B2.1(b).

30217 See generally ~~DEBBIE TROKLUS, ET AL., COMPLIANCE 101: HOW TO BUILD AND MAINTAIN AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM, SOCIETY OF CORP. COMPLIANCE AND ETHICS~~ [Debbie Troklus, et al., Compliance 101: How to build and maintain an effective compliance and ethics program, Society of Corp. Compliance and Ethics](#) (2008) 3-9 [hereinafter

~~COMPLIANCE~~Compliance 101] (listing reasons to implement compliance program, including protecting company's reputation, creating trust between management and employees, preventing false statements to customers, creating efficiencies and streamlining processes, detecting employee and contractor fraud and abuse, ensuring high-quality products and services, and providing "early warning" system of inappropriate actions); ~~TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: SMALL AND MEDIUM ENTERPRISE~~Transparency Int'l, Business Principles for Countering Bribery: Small and Medium Enterprise (SME) ~~EDITION~~Edition 5 (2008) (citing benefits of anti-bribery program like protecting reputation, creating record of integrity enhances opportunities to acquire government business, protecting company assets otherwise squandered on bribes); ~~MARK PIETH, HARMONISING ANTI-CORRUPTION COMPLIANCE: THE OECD GOOD PRACTICE GUIDANCE~~Mark Pieth, Harmonising Anti-Corruption Compliance: The OECD Good Practice Guidance 45-46 (2011) [hereinafter ~~HARMONISING ANTICORRUPTION COMPLIANCE~~Harmonising Anti-Corruption Compliance] (citing need for compliance program to prevent and detect in-house risks, such as workplace security or conflicts of interest, and external risks, like anti-trust violations, embargo circumvention, environmental hazards, and money laundering).

318 U.S. Dep't. of Justice, Crim. Div., Evaluation of Corporate Compliance Programs, at 1 (June 2020) [hereinafter Evaluation of Corporate Compliance Programs], available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

~~303~~19 Debarment authorities, such as the Department of Defense or the General Services Administration, may also consider a company's compliance program when deciding whether to debar or suspend a contractor. Specifically, the relevant regulations provide that the debarment authority should consider "[w]hether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment," and "[w]hether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs." 48 C.F.R. § 9.406-1(a).

3204 Seaboard Report, supra note ~~298~~313; U.S. ~~SEC. AND EXCHANGE COMM., REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS~~Sec. and Exchange Comm., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC ~~Rel.~~Release No. 44969 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>.

~~305~~21-USAM JM § 9-28.300. When evaluating the pervasiveness of wrongdoing within the corporation, prosecutors are advised that while it may be appropriate to charge a corporation for minor misconduct where the wrongdoing was pervasive, "it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee." Id. § 9-28.500.A (emphasis added). Prosecutors should also consider a company's compliance program when examining any remedial actions taken, including efforts to implement an effective compliance program or to improve an existing one. As the commentary explains, "although the inadequacy of a corporate

compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case." Id. § 9-28.91000.B. Finally, the Principles of Federal Prosecution of Business Organizations provides that prosecutors should consider the existence and effectiveness of the corporation's pre-existing compliance program in determining how to treat a corporate target. Id. § 9-28.800.

30622 See [USAMJM](#) § 9-28.800.B; see also U.S. [SENTENCING GUIDELINES](#) [Sentencing Guidelines](#) § 8B2.1(a) (2014) ("The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.").

30723 See Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012) (declining to bring criminal case against corporate employer that "had constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials"), available at <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>; Press Release, U.S. Sec. and Exchange Comm., SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud, No. 2012-78 (Apr. 25, 2012) (indicating corporate employer was not

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charged in the matter and had "cooperated with the SEC's inquiry and conducted a thorough internal investigation to determine the scope of the improper payments and other misconduct involved"), available at <http://www.sec.gov/news/press/2012/2012-78.htm>.

30824 See [USAMJM](#) § 9-28.800.B.

30925 See, e.g., [INT'L CHAMBER OF COMMERCE, ICC RULES ON COMBATING CORRUPTION](#) [Int'l Chamber of Commerce, ICC Rules on Combating Corruption](#) (2011) [hereinafter [ICC RULES ON COMBATING CORRUPTION](#) [Rules on Combating Corruption](#)], available at <https://www.wcdn>.

iccwbo.org/uploadedFiles/ICC/policy/business_in_society/Statements/ICC_Rules_on_Combating_Corruption_2011edition.pdf; [TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY](#)

[\(2dcontent/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf; Transparency Int'l, Business Principles for Countering Bribery \(3rd ed. 2009\)13](#)

[hereinafter [BUSINESS PRINCIPLES FOR COUNTERING BRIBERY](#) [Business Principles for Countering Bribery](#)], available at https://www.transparency.org/global_priorities/private_sector

[issue.com/transparencyinternational/docs/business_principles/](http://www.transparency.org/global_priorities/private_sector/issue.com/transparencyinternational/docs/business_principles/); [UNITED KINGDOM MINISTRY OF JUSTICE, THE BRIBERY ACT OF 2010, GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING](#) [_web_final](#); [United Kingdom Ministry of Justice, The Bribery Act of 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing](#) (2010), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>; [WORLD BANK GROUP, INTEGRITY COMPLIANCE GUIDELINES](#) [\(World Bank Group, Integrity Compliance Guidelines \(2014\)7](#) [hereinafter [INTEGRITY COMPLIANCE GUIDELINES](#) [Integrity](#)

[Integrity](#) [Guidelines \(2014\)7](#) [hereinafter [INTEGRITY COMPLIANCE GUIDELINES](#) [Integrity](#)

[Compliance Guidelines](#)], available at https://siteresources.worldbank.org/INTDOH/Resources/Integrity_Compliance_Guidelines.pdf; ~~ASIA-PACIFIC ECONOMIC COOPERATION, APEC ANTI-CORRUPTION CODE OF CONDUCT FOR BUSINESS~~ wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf; Asia-Pacific Economic Cooperation, [APEC Anti-corruption Code of Conduct for Business](#) (2007) [hereinafter ~~APEC ANTI-CORRUPTION CODE~~ [Anti-corruption Code](#)], available at http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/ACT/07_act_codebrochure.aspx; ~~INT'L CHAMBER OF COMMERCE, TRANSPARENCY INT'L, UNITED NATIONS GLOBAL COMPACT, and WORLD ECONOMIC FORUM, RESISTING EXTORTION AND SOLICITATION IN INTERNATIONAL TRANSACTIONS: A COMPANY TOOL FOR EMPLOYEE TRAINING~~ (2011), available at http://www3.weforum.org/docs/WEF_PACI_RESIST_Report_2011.pdf; ~~INT'L CHAMBER OF COMMERCE, ET AL., CLEAN BUSINESS IS GOOD BUSINESS~~, available at http://www3.weforum.org/docs/WEF_PACI_BusinessCaseFightingCorruption_2011.pdf; ~~WORLD ECONOMIC FORUM, PARTNERING AGAINST CORRUPTION—PRINCIPLES FOR COUNTERING BRIBERY~~ (2009) [hereinafter ~~PARTNERING AGAINST CORRUPTION~~ [Int'l Chamber of Commerce, et al., Resisting Extortion and Solicitation in International Transactions: A Company Tool for Employee Training](#) (2011), available at <https://iccwbo.org/content/uploads/sites/3/2016/11/RESIST-English.pdf>; [Int'l Chamber of Commerce, et al., Clean Business Is Good Business: The Business Case against Corruption](#) (2008), available at <https://www.unglobalcompact.org/library/158>; [World Economic Forum, Partnering Against Corruption Initiative: Global Principles for Countering Corruption](#) (May 2016) [hereinafter [Partnering Against Corruption](#)], available at http://www3.weforum.org/docs/WEF_PACI_Global_Principles_2009.pdf; ~~WORKING GROUP ON BRIBERY, OECD, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE 2010~~, for [Countering Corruption.pdf](#); [Working Group on Bribery, OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance](#) (Feb. 2010) [hereinafter ~~OECD GOOD PRACTICE GUIDANCE~~ [Good Practice Guidance](#)], available at <http://www.oecd.org/dataoecd/5/51/daf/anti-bribery/44884389.pdf>; U.N. ~~GLOBAL COMPACT, THE TEN PRINCIPLES~~ [Global Compact, The Ten Principles of the UN Global Compact](#) [hereinafter ~~THE TEN PRINCIPLES~~ [The Ten Principles](#)], available at <https://www.unglobalcompact.org/aboutTheGC/TheTenPrinciples/index.html>. [what-is-gc/mission/principles](#).

34026 This is also reflected in the Sentencing Guidelines, which recognizes that no single, formulaic set of requirements should be imposed, but instead focuses on a number of factors like “applicable industry practice or the standards called for by any applicable governmental regulation,” the size of the organization, and whether the organization has engaged in similar misconduct in the past. See U.S. ~~SENTENCING GUIDELINES~~ [Sentencing Guidelines](#) § 8B2.1 & app. note 2 (2014~~8~~).

34427 This was underscored by then-SEC Commissioner Cynthia Glassman in 2003 in a speech on the SEC’s implementation of the Sarbanes-Oxley Act: “[T]he ultimate effectiveness of the new corporate governance rules will be determined by the ‘tone at the top.’ Adopting a code of ethics means little if the company’s chief executive officer or its

directors make clear, by conduct or otherwise, that the code's provisions do not apply to them. . . . Corporate officers and directors hold the ultimate power

~~ENDIX notes~~

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and responsibility for restoring public trust by conducting themselves ~~available at~~ <http://justice.gov/criminal/fraud/fepa/opinion/2008/0802>. in a manner that is worthy of the trust that is placed in them." Cynthia ~~pdf~~. Glassman, SEC Implementation of Sarbanes-Oxley: The New Corporate ~~330 Complaint, SEC v. Rae Sys., Inc., supra note 92; Non-Pros. Agreement~~, Governance, Remarks at National Economists Club (~~April~~[Apr.](#) 7, 2003), ~~In re Rae Sys. Inc., supra note 92~~. available at

<http://www.sec.gov/news/speech/spch040703cag.htm>. ~~331 U.S. DEPT. OF~~

~~COMMERCE, BUSINESS ETHICS: A MANUAL FOR~~

~~3428~~ Indeed, research has found that "[e]thical culture is the single biggest

~~MANAGING A RESPONSIBLE BUSINESS ENTERPRISE IN EMERGING~~
~~factor determining the amount of~~

~~factor determining the amount of~~ misconduct that will take place in a ~~MARKET~~

~~ECONOMIES (2004)~~, available at <http://www.ita.doc.gov/business/> ~~business."~~ ~~Ethics~~

~~business."~~ ~~ETHICS RESOURCE CENTER, 2009 NATIONAL BUSINESS~~

~~goodgovernance/adobe/bem_manual.pdf.~~

~~ETHICS SURVEY: ETHICS IN THE RECESSION (2009)~~, at 41. Metrics ~~332 U.S.~~

~~DEPT. OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS~~

of ethical culture include ethical leadership (tone at the top), supervisor ~~RISK~~

~~MANAGEMENT (2d ed. 2001)~~, available at [http://www.oge.doc.](http://www.oge.doc.gov/pdfs/Fighting_Global_Corruption.pdf)

~~reinforcement of ethical behavior (middle management reinforcement),~~

~~gov/pdfs/Fighting_Global_Corruption.pdf.~~

and peer commitment (supporting one another in doing the right ~~333 See~~

~~HARMONISING ANTI-CORRUPTION COMPLIANCE~~, supra note

thing). ~~ETHICS RESOURCE CENTER, 2011 NATIONAL BUSINESS~~ ~~302~~, at 46

("Anti-corruption compliance is becoming more and more

~~ETHICS SURVEY: WORKPLACE ETHICS IN TRANSITION (2012)~~ at 19.

~~harmonised worldwide.").~~

Strong ethical cultures and strong ethics and compliance programs are ~~334 OECD~~

~~GOOD PRACTICE GUIDANCE~~, supra note 309.

related, as data show that a well implemented program helps lead to a ~~335 APEC~~

~~ANTI-CORRUPTION CODE~~, supra note 309.

strong ethical culture. Id. at 34. "Understanding the nature of any gap ~~336 ICC~~

~~RULES ON COMBATING CORRUPTION~~, supra note 309.

between the desired culture and the actual culture is a critical first step in ~~337~~

~~BUSINESS PRINCIPLES FOR COUNTERING BRIBERY~~, supra note 309.

determining the nature of any ethics based risks inside the organization." ~~338 THE TEN~~

~~PRINCIPLES~~, supra note 309.

David Gebler, The Role of Culture at 1.7, in ~~SOCIETY OF CORPORATE~~ ~~339~~

~~INTEGRITY COMPLIANCE GUIDELINES~~, supra note 309.

~~COMPLIANCE AND ETHICS, THE COMPLETE COMPLIANCE AND~~ ~~340~~

~~PARTNERING AGAINST CORRUPTION~~, supra note 309.

~~ETHICS MANUAL (2011)~~. To create an ethical culture, attention must be ~~341 15 U.S.C.~~

~~§§ 78dd 2(g)(1)(A), 78dd 3(e)(1)(A), 78ff(e)(1)(A).~~

paid to norms at all levels of an organization, including the "tone at the ~~342 15 U.S.C.~~

~~§§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(e)(2)(A); 18~~

Resource Center, 2009 National Business Ethics Survey: Ethics in the Recession (2009), at 41. Metrics of ethical culture include ethical leadership (tone at the top), supervisor reinforcement of ethical behavior (middle management reinforcement), and peer commitment (supporting one another in doing the right thing). Ethics Resource Center, 2013 National Business Ethics Survey: Workplace Ethics in Transition (2014) at 19. Strong ethical cultures and strong ethics and compliance programs are related, as data show that a well-implemented program helps lead to a strong ethical culture. Id. at 17. “Understanding the nature of any gap between the desired culture and the actual culture is a critical first step in determining the nature of any ethics-based risks inside the organization.” David Gebler, The Role of Culture at 1.7, in Society of Corporate Compliance and Ethics, The Complete Compliance and Manual (2011). To create an ethical culture, attention must be paid to norms at all levels of an organization, including the “tone at the top,” “mood in the middle,” and “buzz at the bottom.” Id. 1.9-1.10.

~~U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA specific~~

~~31329 See, e.g., U.S. SENTENCING GUIDELINES Sentencing Guidelines § 8B2.1(b)(2)(B)-(C) (20148). fine provisions).~~

330 Id.

331 Id.

332 Id.

333 See, e.g., Ethics and Compliance Officer Association Foundation, The Ethics and Compliance Handbook: A Practical Guide From Leading Organizations (2008) at 13-26 [hereinafter The Ethics and Compliance Handbook].

334 See, e.g., U.S. Sentencing Guidelines § 8B2.1(b)(4) (2018).

335 See U.S. Sentencing Guidelines § 8B2.1(b)(6) (2018) (“The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.”).

336 See, e.g., Joseph E. Murphy, Society of Corp. Compliance and Ethics, Using Incentives in Your Compliance and Ethics Program (2011) at 4; The Ethics and Compliance Handbook, supra note 333, at 111-23.

337 Stephen M. Cutler, Director, Division of Enforcement, SEC, Tone at the Top: Getting It Right, Second Annual General Counsel Roundtable (Dec. 3, 2004), available at <http://www.sec.gov/news/speech/spch120304smc.htm>.

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338 See, e.g., ICC Rules on Combating Corruption, supra note 325, at 7.

339 See, e.g., U.S. Sentencing Guidelines § 8B2.1(b)(5)(C) (2018); Compliance 101, supra note 317, at 30-33.

340 See U.S. Sentencing Guidelines § 8B2.1(b)(5)(B) (2018) (“The organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization’s compliance and ethics program.”).

341 See, e.g., Compliance 101, supra note 317, at 6061; The Ethics and Compliance Handbook, supra note 333, at 155-60; Business Principles for Countering Bribery, supra note 325, at 14.

342 See, e.g., Michael M. Mannix and David S. Black., Compliance Issues in M&A: Performing Diligence on the Target’s Ethics and Compliance Program at 5.71-5.81, in

[Society of Corporate Compliance and Ethics, The Complete Compliance and Ethics Manual \(2011\).](#)

[343 Complaint, SEC v. Syncor International Corp., No. 02-cv-2421 \(D.D.C. Dec. 10, 2002\), ECF No. 1, available at <http://www.sec.gov/litigation/complaints/comp17887.htm>; Criminal Information, United States v. Syncor Taiwan, Inc., No. 02-cr-1244 \(C.D. Cal. Dec. 5, 2002\), ECF No. 1, available at <https://www.justice.gov/criminal-fraud/case/united-states-v-syncor-taiwan-inc-court-docket-number-02-cr-1244-svw>.](#)

[344 U.S. Dept. of Justice, FCPA Op. Release 08-02 \(June 13, 2008\), available at <http://justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.](#)

[345 Complaint, SEC v. Rae Sys., Inc., supra note 91; Non-Pros. Agreement, In re Rae Sys. Inc., supra note 91.](#)

[346 See Evaluation of Corporate Compliance Programs, supra note 318.](#)

[347 U.S. Dept. of Commerce, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies \(2004\), available at \[https://legacy.trade.gov/goodgovernance/adobe/bem_manual.pdf\]\(https://legacy.trade.gov/goodgovernance/adobe/bem_manual.pdf\).](#)

[348 U.S. Dept. of State, Fighting Global Corruption: Business Risk Management \(2d ed. 2001\), available at <http://wgfacml.asa.gov/en/anticorruption/USA/EU%20fighting%20against%20corruption.usa%202001-2003.pdf>.](#)

[349 See Harmonising Anti-Corruption Compliance, supra note 317, at 46 \(“Anti-corruption compliance is becoming more and more harmonised worldwide.”\).](#)

[350 OECD Good Practice Guidance, supra note 325.](#)

[351 APEC Anti-corruption Code, supra note 325.](#)

[352 ICC Rules on Combating Corruption, supra note 325.](#)

[353 Business Principles for Countering Bribery, supra note 325.](#)

[354 The Ten Principles, supra note 325.](#)

[355 Integrity Compliance Guidelines, supra note 325.](#)

[356 Partnering Against Corruption, supra note 325.](#)

357	15	§§	78dd-2(g)(1)(A).	78dd-3(e)(1)(A).
	U.S.C.			
	78ff(c)(1)(A).			
358	15	§§	78dd-2(g)(2)(A).	78dd-3(e)(2)(A).
	U.S.C.			

[78ff\(c\)\(2\)\(A\); 18 U.S.C. § 3571\(b\)\(3\), \(e\) \(fine provision that supersedes FCPA-specific fine provisions\).](#)

~~[31459 Id.](#)~~ [343](#) 15 U.S.C. § 78ff(a).

~~[315 Id.](#)~~ [344](#) 15 U.S.C. § 78ff(a).

[360 Id.](#)

~~[3616 Id.](#)~~ [345](#) 18 U.S.C. § 3571(d); see Southern Union v. United States, 132 S. Ct.

~~[317 See, e.g., ETHICS AND COMPLIANCE OFFICER ASSOCIATION](#)~~ 2344, 2350-51 & n.4 (2012).

~~[FOUNDATION, THE ETHICS AND COMPLIANCE HANDBOOK: A PRACTICAL GUIDE FROM LEADING ORGANIZATIONS \(2008\) at 1363-26](#)~~ [3462](#) 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

~~[The U.S. Sentencing Guidelines are promulgated by the U.S. Sentencing Commission; \[hereinafter THE ETHICS AND COMPLIANCE HANDBOOK\].](#)~~ [347](#)

~~[Sentencing Commission:](#)~~ [318 See U.S. SENTENCING GUIDELINES § 8B2.1\(b\)\(4\) \(2011\). The United States](#)

Sentencing Commission

319 See U.S. SENTENCING GUIDELINES § 8B2.1(b)(6) (2011) (“The (“Commission”) is an independent agency in the organization’s compliance and ethics program shall be promoted The United States Sentencing Commission (“Commission”) is an independent agency in the judicial branch composed of seven voting and two ~~and enforced consistently throughout the organization through (A)~~ non-voting ex-officio members. Its principal purpose ~~is to establish sentencing policies and practices for appropriate incentives to perform in accordance with the compliance and~~ is to establish sentencing policies and practices for ethics program; and (B) appropriate disciplinary measures for engaging the federal criminal justice system that will assure their criminal conduct and for failing to take reasonable steps to prevent or ~~ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes. The guidelines and policy statements promulgated by the Commission detect criminal~~ conduct.”): prescribing the appropriate sentences for offenders

320 See, e.g., JOSEPH E. MURPHY, SOCIETY OF CORP. COMPLIANCE AND ~~convicted of federal crimes. The Guidelines and~~ ETHICS, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS policy statements promulgated by the Commission ~~PROGRAM (2011) at 1; THE ETHICS AND COMPLIANCE HANDBOOK,~~ are issued pursuant to Section 994(a) of Title 28, United States Code, supra note 317, at 111-23. United States Code.

321 Stephen M. Cutler, Director, Division of Enforcement, SEC, Tone at U.S. SENTENCING GUIDELINES U.S. Sentencing Guidelines § 1A1.1 (20148). the Top: Getting It Right, Second Annual General Counsel Roundtable 3648 Id. at ch. 3-5. (Dec. 365, 2004), available at <http://www.sec.gov/news/speech/spech120304sme.htm>. 366 350-Id. § 2C1.1(b). 32267 See, e.g., ICC RULES ON COMBATING CORRUPTION, supra note 309, 351-Id. § 3B1.1. at 368: 352-Id. at ch. 4, § 5A. 32369 See, e.g., U.S. SENTENCING GUIDELINES § 8B2.1(b)(5)(C); 353-Id. § 2B1.1(b)(10)(B), 2B1.1(b)(18)(A). COMPLIANCE 101, supra note 3702, at 30-33. 354-Id. § 8C2.4 (a). 32471 Corporate Board Member/FTI Consulting 2009 Legal Study, Buckle 355 Id. § 8C2.5. Up. Boards and General Counsel May Face a Bumpy Ride in 2009, at 5372 356-Id. § 8C2.5(f), 8C2.5(g). (“Interestingly, while 67% of general counsel say their company is subject 357373 DOJ has exercised this civil authority in limited circumstances in to compliance under the FCPA, 64% of those say there is room for the last thirty years. See, e.g., United States & SEC v. KPMG Siddharta ~~improvement in their FCPA training and compliance programs.”):~~ Siddharta & Harsono, et al., No. 01-cv-3105 (S.D. Tex. 2001) (entry 325 See U.S. SENTENCING GUIDELINES § 8B2.1(b)(5)(B) (“The of injunction barring company from future FCPA violations based on ~~organization shall take reasonable steps . . . to evaluate periodically the~~ allegations that company paid bribes to Indonesian tax official in order ~~effectiveness of the organization’s compliance and~~

~~ethics program.”):~~ to reduce the company’s tax assessment); United States v. Metcalf & ~~326 See, e.g., COMPLIANCE 101, supra note 302, at 60–61; THE ETHICS~~ Eddy, Inc., No. 99-cv-12566 (D. Mass. 1999) (entry of injunction barring ~~AND COMPLIANCE HANDBOOK, supra note 317, at 155–60; BUSINESS~~ company from future FCPA violations and requiring maintenance of ~~PRINCIPLES FOR COUNTERING BRIBERY, supra note 309, at 14.~~ compliance program based on allegations that it paid excessive marketing ~~327 See, e.g., Michael M. Mannix and David S. Black., Compliance Issues and promotional expenses such as airfare, travel expenses, and per~~ ~~in M&A: Performing Diligence on the Target’s Ethics and Compliance~~ diem to an Egyptian official and his family); United States v. American ~~Program at 5.71–5.81, in SOCIETY OF CORPORATE COMPLIANCE~~ Totalisator Co. Inc., No. 93-cv-161 (D. Md. 1993) (entry of injunction ~~AND ETHICS, THE COMPLETE COMPLIANCE AND ETHICS MANUAL~~ barring company from future FCPA violations

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based on allegations that ~~(2011).~~ it paid money to its Greek agent with knowledge that all or some of ~~328 Complaint, SEC v. Syneor International Corp., supra note 190;~~ the money paid would be offered, given, or promised to Greek foreign ~~Criminal Information, United States v. Syneor Taiwan, Inc., supra note~~ officials in connection with sale of company’s system and spare parts); ~~189.~~ United States v. Eagle Bus Manufacturing, Inc., No. 91-cv-171 (S.D. Tex. ~~329 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 08-02 (June 13, 2008);~~ 1991) (entry of injunction barring company from future FCPA violations

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~~ENDIX notes~~

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based on allegations that employees of the company participated in bribery scheme to pay foreign officials of Saskatchewan’s state-owned transportation company \$50,000 CAD in connection with sale of buses); United States v. Carver, et al., No. 79-cv-1768 (S.D. Fla. 1979) (entry of injunction barring company from future FCPA violations based on allegations that Carver and Holley, officers and shareholders of Holcar Oil Corp., paid \$1.5 million to Qatar foreign official to secure an oil drilling concession agreement); United States v. Kenny, et al., No. 79-cv-2038 (D.D.C. 1979) (in conjunction with criminal proceeding, entry of injunction barring company from future FCPA violations for providing illegal financial assistance to political party to secure renewal of stamp distribution agreement).

~~35874~~ 15 U.S.C. §§ 78dd-2(g)(1)(B), 78dd-3(e)(1)(B), 78ff(c)(1)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

~~3759~~ 15 U.S.C. §§ 78dd-2(g)(2)(B), 78dd-3(e)(2)(B), 78ff(c)(2)(B); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

~~3760~~ 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

~~36177~~ Section 21(B)(b) of the Exchange Act, 15 U.S.C. § 78u(d)(3); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation); ~~available at <https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm>.~~

~~36278~~ See Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 §§ 202, 301, 401, and 402 (codified in scattered sections of Title 15 of the United States Code).

~~363-48 C.F.R. §§ 9.406-2, 9.407-2.~~

36479-48 C.F.R. § 591 U.S. (9.42020(b)).

~~365 See 48 C.F.R. §§ 9.406-1, 9.407-1(b)(2). Section 9.406-1 sets forth the following non-exhaustive list of factors:~~

380 [Press Release, United States v. Braskem S.A., No. 16-cr-644 \(E.D.N.Y. Dec. 21, 2016\)](https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve), available at <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

381 See, e.g., [Press Release, United States v. Airbus \(DOJ coordinating with France and United Kingdom\)](https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case), available at <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>; [Press Release, United States v. TechnipFMC \(DOJ coordinating with Brazil\)](https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsi-dary-agree-pay-over-296-million-global-penalties-resolve), available at <https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsi-dary-agree-pay-over-296-million-global-penalties-resolve>; [Press Release, United States v. Société Générale \(DOJ coordinating with France\)](https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan), available at <https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan>; [Press Release, United States v. Keppel Offshore & Marine Ltd., No 17-cr-697 \(E.D.N.Y. Dec. 22, 2017\) \(DOJ coordinating with Brazil and Singapore\)](https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsi-dary-agree-pay-422-million-global-penalties), available at <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsi-dary-agree-pay-422-million-global-penalties>; [Press Release, United States v. SBM Offshore \(S.D. Tex. Nov. 29, 2017\) \(DOJ coordinating with the Netherlands and Brazil\)](https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsi-dary-resolve-foreign-corrupt-practices-act-case), available at <https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsi-dary-resolve-foreign-corrupt-practices-act-case>; [Press Release, United States v. Telia Company AB, No. 17-cr-581 \(S.D.N.Y. Sept. 21, 2017\) \(DOJ and SEC coordinating with the Netherlands\)](https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsi-dary-enter-global-foreign-bribery-resolution-more-965), available at <https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsi-dary-enter-global-foreign-bribery-resolution-more-965>; [Press Release, United States v. Rolls-Royce plc, No. 16-cr-247 \(S.D. Ohio Jan. 17, 2017\) \(DOJ coordinating with United Kingdom and Brazil\)](https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act), available at <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>; [Press Release, United States v. Odebrecht S.A., No. 16-cr-643 \(E.D.N.Y. Dec. 21, 2016\) \(DOJ coordinating with Brazil and Switzerland\)](https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve), available at <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>; [Press Release, United States v. Braskem S.A., No. 16-cr-644 \(E.D.N.Y. Dec. 21, 2016\) \(DOJ and SEC coordinating with Brazil and Switzerland\)](https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve), available at <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>; [Press Release, United States v. VimpelCom Ltd., No. 16-cr-137 \(S.D.N.Y. Feb. 18, 2016\) \(DOJ and SEC coordinating with the Netherlands\)](https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million), available at <https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million>; [Press Release, United States v. Siemens AG, supra note 232 \(DOJ and SEC coordinating with Germany\)](https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html), available at <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

382 See Rod J. Rosenstein, Deputy Attorney General, U.S. Department of Justice, Letter to Heads of Department Components on Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), available at <https://www.justice.gov/opa/speech/file/1061186/download>.

383	Id. at 1.		
384	48 C.F.R. §§ 9.406-2, 9.407-2.		
385	48 C.F.R. § 9.402(b).		

<u>386</u>	<u>See 48 C.F.R. §§</u> <u>9.406-1,</u>	<u>9.407-</u> <u>1(b)(2).</u>	<u>Section</u> <u>n</u>
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9.406-1 sets forth the following non-exhaustive list of factors: (1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

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(6) Whether the contractor has taken appropriate disciplinary action against the individuals

responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

~~366~~87 48 C.F.R. § 9.406-1(a).

~~367~~88 Exec. Order No. 12,549, 51 Fed. Reg. 6,370 (Feb. 18, 1986); Exec. Order No. 12,689, 54 Fed. Reg. 34131 (Aug. 18, 1989).

~~368~~9 48 C.F.R. § 9.407-2(b).

390 JM § 9-28.1500.B.

~~3691 USAM § 9 28.1300 (2008). 370 See, e.g., AFRICAN DEVELOPMENT BANK GROUP, INTEGRITY AND ANTI-CORRUPTION PROGRESS REPORT~~ See,

e.g., African Development Bank Group, Integrity and Anti-Corruption Progress Report 2009-2010 7, 14 (“As the premier financial development institution in Africa, the AfDB is determined to root out misconduct, fraud and corruption within its own ranks as well as in the implementation of the projects it finances. In order to do so, the Bank created an anti-corruption and fraud investigation division in November 2005 as its sole investigative body. The unit became operational in June 2006 and commenced investigations in January 2007. . . . Investigations conducted by the IACD [Integrity and Anti-Corruption Department] are not criminal proceedings; they are administrative in nature. Sanctions range from personnel disciplinary actions, such as separation, to loan cancellation and debarment for contractors, which can be temporary or permanent.”),

available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Integrity%20and%20Anti-Corruption.pdf>; ~~The World Bank Group, Procurement Sanctions Committee~~ (“~~Report Concerning the Debarment Process of the World Bank~~”, available at <https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/ThornburghReport.pdf>). The World Bank’s debarment process was first formulated in July, 1996, and the Sanctions Committee was established in November 1998 to review allegations and recommend sanctions to the President. Written procedures were issued in August 2001 and are posted on the Bank’s website, along with the sanction actions.”), ~~available and are posted~~ at <https://webwww.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:5000-2288—pagePK:84271—piPK:84287—theSitePK:84266,00.html.en/about/unit/sanctions-system/sanctions-board>.

~~37192~~ See African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group and World Bank Group, Agreement for Mutual Enforcement of Debarment Decisions (Apr. 9, 2010), available at <https://siteresources.worldbank.org/NEWS/Resources/AgreementForMutualEnforcementofDebarmentDecisions.pdf> www.adb.org/documents/agreement-mutual-enforcement-debarment-decisions.

~~37293~~ Id.; see also The World Bank Group, ~~Cross-Debarment Accord~~ [Multilateral Development Banks Step Up Their Fight Against Corruption with Joint Sanction Accord](http://www.worldbank.org/pressroom/2010/04/09/multilateral-development-banks-step-up-fight-against-corruption-joint-sanction-accord) (Apr. 9, 2010) (““With today’s cross-debarment agreement among development banks, a clear message on anticorruption is being delivered: Steal and cheat from one, get punished by all,” said World Bank Group President Robert B. Zoellick.”), available at <https://webwww.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:2535805—pagePK:64257043—piPK:437376—theSitePK:4607,00.html.en/news/press-release/2010/04/09/multilateral-development-banks-step-up-fight-against-corruption-joint-sanction-accord>.

~~37394~~ 22 C.F.R. §§ 126.7(a)(3)-(4), 120.27(a)(6).

~~37495~~ Authority under the AECA is delegated to the DDTC. See 22 C.F.R. § 120.1(a).

~~37596~~ 22 U.S.C. § 2778(g)(1)(A)(vi), (g)(3)(B).

~~3976~~ 22 C.F.R. § 127.7(c).

~~37798~~ See supra note ~~28692~~.

~~37899~~ See Gary G. Grindler, Acting Dep. Att’y Gen., U.S. Dept. of Justice, Mem. to the Heads of Department Components and United States Attorneys on Additional Guidance on the Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution (May 25, 2010), available at <http://www.justice.gov/dag/dag-memo-guidance-monitors.pdf>; Lanny A. Breuer, Assist. Att’y Gen., Dep’t of Justice, Mem. to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters (June 24, 2009), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp-appx-3.pdf>; see also Craig S. Morford, Acting Dep. Att’y Gen., U.S. Dept. of Justice, Mem. to the Heads of Department Components and United States Attorneys on Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), available at <https://www.justice.gov/dag/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf>.

~~400~~ See Brian A. Benczkowski, Assistant Att’y General, U.S. Department of Justice, [Memo to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters](http://www.justice.gov/pressroom/2018/10/11/memo-to-all-criminal-division-personnel-on-selection-of-monitors-in-criminal-division-matters) (Oct. 11, 2018), available at <https://www.justice.gov/pressroom/2018/10/11/memo-to-all-criminal-division-personnel-on-selection-of-monitors-in-criminal-division-matters>.

[opa/speech/file/1100531/download.](#)

[401](#) [Id.](#) at 2.

[402](#) [Id.](#)

[403](#) [Id.](#)

~~379~~[404](#) Historically, DOJ had, on occasion, agreed to DPAs with companies that were not filed with the court. That is no longer the practice of DOJ.

~~384~~[405](#) [USAM JM](#) § 9-27.230.

[406](#) [Id.](#)

~~381~~ [USAM § 9-27.230.B.](#)

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~~382~~[407](#) DOJ has ~~recently~~ declined matters where some or all of the following ~~internally and still be treated as if he or she had reported to the SEC~~ circumstances were present: (1) a corporation voluntarily and fully ~~at the earlier reporting date, thus preserving their “place in line” for~~ disclosed the potential misconduct; (2) corporate principles voluntarily ~~a possible whistleblower award from the SEC; and~~ (3) ~~provide that a~~ engaged in interviews with DOJ and provided truthful and complete ~~whistleblower’s voluntary participation in an entity’s internal compliance~~ information about their conduct; (3) a parent company conducted ~~and reporting systems is a factor that can increase the amount of an~~ extensive pre-acquisition due diligence of potentially liable ~~subsidiaries award, and that a whistleblower’s interference with internal compliance~~

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[subsidiaries](#) and engaged in significant remediation efforts post-acquisition; (4) a ~~and reporting system is a factor that can decrease the amount of an award.~~ company provided information about its extensive compliance policies, ~~See Exchange Act Rule 21F, 17 C.F.R. § 240.21F.~~ procedures, and internal controls; (5) a company agreed to a civil ~~396~~ [resolution with the Securities and Exchange Commission while also demonstrating that criminal declination was appropriate; \(6\) only a single employee was involved in the improper payments; and \(7\) the improper payments involved minimal funds compared to overall business revenues.](#)

[408](#) [SEC Rules of Practice, 17 C.F.R. § 201.102\(e\).](#)

[409](#) [Deferred Pros. Agreement, In the Matter of Tenaris, S.A. \(May 17, 2011\), available at http://www.sec.gov/news/press/2011/2011-112-dpa.pdf; see also Press Release, U.S. Sec. and Exchange Comm., Tenaris to Pay \\$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement \(May 17, 2011\), available at http://www.sec.gov/news/press/2011/2011-112.htm.](#)

[410](#) [See Non-Pros. Agreement, In re Tenaris, S.A. \(May 17, 2011\), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/08/2011-03-14-tenaris.pdf.](#)

[411](#) [See U.S. Sec. and Exchange Comm., Enforcement Manual § 6.2.3. \(Mar. 9, 2012\), available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.](#)

[412](#) [See id. § 6.2.4.](#)

[413](#) [See id. § 2.6.](#)

[414](#) [18 U.S.C. § 1514A\(c\).](#)

[415](#) [18 U.S.C. § 1513\(e\).](#)

[416](#) [15 U.S.C. § 78u-6\(a\)\(3\).](#) The new provision defines “original information” to [mean information that:](#)

[\(A\) is derived from the independent knowledge or analysis of a whistleblower; \(B\) is not](#)

known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative or investigation, or from the news media, unless the whistleblower is a source of the information.

417 15 U.S.C. § 78u-6; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010).

418 For detailed information about the program, including eligibility requirements and certain limitations that apply, see Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at <https://www.sec.gov/files/dodd-frank-sec-922.pdf>, and the final rules on eligibility, Exchange Act Rule 21F-8, 17 C.F.R. § 240.21F-8, available at <https://www.sec.gov/about/offices/owb/reg-21f.pdf>.

419 For example, the rules: (1) make a whistleblower eligible for an award if the whistleblower reports original information internally, and the company informs SEC about the violations; (2) give whistleblowers 120 days to report information to SEC after first reporting internally and still be treated as if he or she had reported to SEC at the earlier reporting date, thus preserving their “place in line” for a possible whistleblower award from SEC; and (3) provide that a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower’s interference with internal compliance and reporting system is a factor that can decrease the amount of an award. See Exchange Act Rule 21F, 17 C.F.R. § 240.21F.

420 See Exchange Act Rule 21F-7(b), 17 C.F.R. § 240.21F-7(b).

~~resolution with the Securities and Exchange Commission while also~~ [397421](#)

For example, SEC staff will not disclose a whistleblower’s identity in ~~demonstrating that criminal declination was appropriate; (6) only a single~~ response to requests under the Freedom of Information Act. However, ~~employee was involved in the improper payments; and (7) the improper~~ there are limits on SEC’s ability to shield a whistleblower’s identity, ~~payments involved minimal funds compared to overall business revenues.~~ and in certain circumstances SEC must disclose it to outside entities.

For example, in an administrative or court proceeding, SEC may be required to produce documents or other information that would ~~383 See Criminal Information, United States v. Peterson, supra note 8;~~ For example, in an administrative or court proceeding, SEC may be

~~Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing~~ required to produce documents or other information that would

~~Director Pleads Guilty for Role in Evading Internal Controls Required~~ reveal the whistleblower’s identity. In addition, as part of ongoing ~~by FCPA (Apr. 25, 2012), available at <http://www.justice.gov/opa/>~~ SEC investigatory responsibilities, SEC staff may use information

provided by a whistleblower during the course of the investigation. In ~~pr/2012/April/12-erm-534.html (“After considering all the available~~ provided by a whistleblower during the course of the investigation. In

~~facts and circumstances, including that Morgan Stanley constructed and~~ appropriate circumstances, SEC may also provide information, subject

to confidentiality requirements, to other governmental or regulatory ~~maintained a system of internal controls, which provided reasonable~~ to confidentiality requirements, to other governmental or regulatory

~~assurances that its employees were not bribing government officials, the~~ entities. See

Exchange Act Rule 21F-7(a), 17 C.F.R. 240.21F-7(a).

~~Department of Justice declined to bring any enforcement action against SEC does not have an opinion procedure release process, Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's~~ 398 Although it has declared 422

Although SEC does not have an opinion procedure release process, it has declared its decision to follow the guidance announced through DOJ's FCPA Opinion Release Procedure. U.S. Sec. and Exchange

~~investigation."); see also Press Release, U.S. Sec. and Exchange Comm., SEC Release No. 34-17099 (Aug. 29, 1980), available at [http://www.](http://www.sec.gov/news/digest/1980/dig082980.pdf)~~ Comm., SEC

~~SEC Charges Former Morgan Stanley Executive with FCPA Violations~~

~~www.sec.gov/news/digest/1980/dig082980.pdf. SEC Release No. 34-17099 stated that, to encourage issuers to take advantage of the DOJ's~~ 17099 stated

~~[sec.gov/news/press/2012/2012-78.htm](http://www.sec.gov/news/press/2012/2012-78.htm) ("Morgan Stanley, which is not FCPA Review~~

~~Procedure, as a matter of prosecutorial discretion, SEC charged in the matter, cooperated with the SEC's inquiry and conducted~~ No. 34-17099

~~stated that, to encourage issuers to take advantage of DOJ's FCPA Review Procedure, as a matter of prosecutorial discretion, SEC would "not take enforcement action alleging~~ stated that, to encourage issuers to take advantage of DOJ's FCPA Review Procedure, as

~~violations of Section 30A in any case where an issuer has sought and obtained an FCPA Review Procedure letter~~ No. 34-17099

~~from the Department, prior to May 31, 1981, stating that the a thorough internal investigation to determine the scope of the improper in any case where an issuer has~~ FCPA Review

~~sought and obtained an FCPA Review payments and other misconduct involved."); letter from the Department, prior to May 31, 1981, stating that the~~ No. 34-17099

~~384 SEC Rules of Practice, 17 C.F.R. § 201.102(e). Department will not take enforcement action under Section 30A with 385 Deferred Pros. Agreement, In the Matter~~ 384 SEC Rules of Practice, 17 C.F.R. § 201.102(e). Department will not take

~~of Tenaris, S.A. (May 17, respect to the transaction involved." Id. The release further noted that it~~ of Tenaris, S.A. (May 17, respect to the transaction involved." Id. The release further

~~would revisit this policy once DOJ had evaluated the results of the 2011), available at <http://www.sec.gov/news/press/2011/2011-112-dpa>. would revisit this policy once the~~ would revisit this policy once DOJ had evaluated the results of the 2011), available at

~~DOJ had evaluated the results of the pdf; see also Press Release, U.S. Sec. and Exchange Comm., Tenaris to Pay FCPA~~ DOJ had evaluated the results of the pdf; see also Press Release, U.S. Sec. and Exchange Comm., Tenaris to Pay

~~Review Procedure after its first year of operation. A second release stated that SEC would continue to adhere to the policy announced in Release No. 34-~~ Review Procedure after its first year of operation. A second release

~~17099. U.S. Sec. and Exchange Comm., SEC Release \$5.4 Million in SEC's First Ever Deferred Prosecution Agreement (May stated that the SEC would continue to~~ 17099. U.S. Sec. and Exchange Comm., SEC Release \$5.4 Million in SEC's First Ever

~~adhere to the policy announced 17, 2011), available at <http://www.sec.gov/news/press/2011/2011-112>. in Release No.~~ adhere to the policy announced 17, 2011), available at <http://www.sec.gov/news/press/2011/2011-112>. in Release No.

~~34-17099. U.S. Sec. and Exchange Comm., SEC Release htm. No. 34-18255 (Nov. 13, 1981), available at [http://](http://www.sec.gov/news/digest/1981/dig111381.pdf)~~ 34-17099. U.S. Sec. and Exchange Comm., SEC Release htm. No. 34-18255 (Nov. 13, 1981), available at [http://](http://www.sec.gov/news/digest/1981/dig111381.pdf)

~~www.sec.gov/news/digest/1981/dig111381.pdf. 386 See Non Pros. Agreement, In re Tenaris, S.A. (May 17, 2011), available~~ [digest/1981/dig111381.pdf](http://www.sec.gov/news/digest/1981/dig111381.pdf). 386 See Non Pros. Agreement, In re Tenaris, S.A. (May 17, 2011), available

~~at [http://www.justice.gov/criminal/fraud/fepa/cases/tenaris-sa/2011-](http://www.justice.gov/criminal/fraud/fepa/cases/tenaris-sa/2011-399423) 399423~~ at [http://www.justice.gov/criminal/fraud/fepa/cases/tenaris-sa/2011-](http://www.justice.gov/criminal/fraud/fepa/cases/tenaris-sa/2011-399423) 399423

Both DOJ's opinion procedure releases (from 1993 to present) and

03-14-tenaris.pdf. review procedure releases (from 1980-1992) are available at <http://www.justice.gov/criminal/fraud/fcpa/opinion>.

~~387 See U.S. SEC. AND EXCHANGE COMM., ENFORCEMENT MANUAL § 6.2.3. (March 9, 2012), available at <http://www.sec.gov/divisions/>~~ 400424

The full regulations relating to DOJ's opinion procedure are available ~~enforce/enforcementmanual.pdf.~~ at <http://www.justice.gov/criminal/fraud/fcpa/docs/frgnrpt.pdf>.

~~388 See id. § 6.2.4.~~ 425 401-28 C.F.R. § 80.1.

~~389 See id. § 4.2.6.~~ 402-28 C.F.R. § 80.3.

~~390 18 U.S.C. § 1514A(e).~~ 427 403-28 C.F.R. § 80.12 (“Neither the submission of a request for an

~~391 18 U.S.C. § 1513(e).~~ FCPA Opinion, its pendency, nor the issuance of an FCPA Opinion, ~~392 15 U.S.C. § 78u-6(a)(3).~~ The new provision defines “original information” to mean ~~information that:~~ accounting requirements of 15 U.S.C. 78m(b)(2) and (3).”).

123

~~(A) is derived from the independent knowledge~~ 428 404-28 C.F.R. § 80.4.

~~or analysis of a whistleblower; (B) is not known~~ 429 405-28 C.F.R. § 80.5.

~~to the Commission from any other source, unless~~ 430 406-28 C.F.R. § 80.6.

~~the whistleblower is the original source of the~~ 431 407-28 C.F.R. § 80.14(a). This non-disclosure policy applies regardless of

~~information; and (C) is not exclusively derived from~~ whether DOJ responds to the request or the party withdraws the request before receiving a response.

~~an allegation made in a judicial or administrative~~ before receiving a response. Id.

~~hearing, in a governmental report, hearing, audit,~~ 432 408-28 C.F.R. § 80.6.

~~or investigation, or from the news media, unless the~~ 433 409-28 C.F.R. § 80.2.

~~whistleblower is a source of the information.~~ 434 410-In connection with any request for an FCPA opinion, DOJ may

~~393 15 U.S.C. § 78u-6; see also Dodd-Frank Wall Street Reform and~~ conduct whatever independent investigation it believes appropriate. 28 ~~Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376,~~ C.F.R. § 80.7.

~~1841-49~~ 35 (2010). 411-28 C.F.R. § 80.15. Once a request is withdrawn, it has no effect.

~~394 For detailed information about the program, including eligibility~~ However, DOJ reserves the right to retain a copy of any FCPA ~~requirements and certain limitations that apply, see Section 922 of the~~ opinion request, documents, and information submitted during the ~~Dodd-Frank Wall Street Reform and Consumer Protection Act, available~~ opinion release procedure for any governmental purpose, subject to the ~~at~~ <http://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf>, restrictions on disclosures in 28 C.F.R. § 80.14.

~~and the final rules on eligibility, Exchange Act Rule 21F-8, 17 C.F.R. §~~ 41236 28 C.F.R. § 80.8.

~~240.21F-8.~~ 437 413-28 C.F.R. § 80.7. “Such additional information, if furnished orally,

~~395 For example, the rules: (1) make a whistleblower eligible for an award~~ must be confirmed in writing promptly. The same person who signed ~~if the whistleblower~~

~~reports original information internally, and the~~ the initial request must sign the written, supplemental information and ~~company informs the SEC about the violations; (2)~~

~~give whistleblowers~~ must again certify it to be a true, correct and complete disclosure

of the requested information.” Id.

~~120 days to report information to the SEC after first reporting requested information.” Id.~~

119

438 28 C.F.R. § 80.9 (“No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA opinion letter signed by the Attorney General or his designee.”).

439 28 C.F.R. § 80.8. FCPA opinions do not bind or obligate any agency other than DOJ. They also do not affect the requesting party’s obligations to any other agency or under any statutory or regulatory provision other than those specifically cited in the particular FCPA opinion. 28 C.F.R. § 80.11. If the conduct for which an FCPA opinion is requested is subject to approval by any other agency, such FCPA opinion may not be taken to indicate DOJ’s views on any legal or factual issues before that other agency. 28 C.F.R. § 80.13.

440 28 C.F.R. § 80.10. DOJ can rebut this presumption by a preponderance of the evidence. A court determining whether the presumption has been rebutted weighs all relevant factors, including whether the submitted information was accurate and complete and the activity was within the scope of conduct specified in the request. Id. As of September 2012, DOJ has never pursued an enforcement action against a party for conduct that formed the basis of an FCPA opinion stating that the prospective conduct would violate DOJ’s present enforcement policy.

441 As a general matter, DOJ normally anonymizes much of the information in its publicly released opinions and includes the general nature and circumstances of the proposed conduct. DOJ does not release the identity of any foreign sales agents or other types of identifying information. 28 C.F.R. § 80.14(b). However, DOJ may release the identity of the requesting party, the foreign country in which the proposed conduct is to take place, and any actions DOJ took in response to the FCPA opinion request. Id. If a party believes that an opinion contains proprietary information, it may request that DOJ remove or anonymize those portions of the opinion before it is publicly released. 28 C.F.R. § 80.14(c).

442 28 C.F.R. § 80.16.

~~414 28 C.F.R. § 80.9 (“No oral clearance, release or other statement~~

~~NDIX notes~~

purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA opinion letter signed by the Attorney General or his designee.”).

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418 28 C.F.R. § 80.16.



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1400 New York Avenue, N.W.
Washington, DC 20005
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FCPA Unit
Enforcement Division
U.S. Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549
<http://www.sec.gov/spotlight/fcpa.shtml>

Summary report:	
Litera® Change-Pro for Word 10.4.0.0 Document comparison done on 7/7/2020 3:13:55 PM	
Style name: Default Style	
Intelligent Table Comparison: Active	
Original filename: FCPA Resource guide (003).pdf	
Modified filename: FCPA Resource Guide 2.pdf	
Changes:	
<u>Add</u>	2764
Delete	2789
Move From	0
<u>Move To</u>	0
<u>Table Insert</u>	4
Table Delete	4
<u>Table moves to</u>	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	13
Embedded Excel	0
Format changes	0
Total Changes:	5574

Detailed Change Report

Intelligent Table Comparison: Active			
Operation	No.	Page	Text
Add	1	2	Second Edition¶
Add	2	2	This guidance reflects the views of the Division of Enforcement, but it is not a statement by the Commission and the Commission has neither approved nor disapproved its content.
Add	3	2	https://
Delete	4	2	criminal/fraud/fcpa and
Add	5	2	criminal-fraud/fcpa-resource-guide and https://
Delete	6	2	.shtml
Add	7	2	/fcpa-resource-guide.pdf
Add	8	2	SECOND EDITION¶
Add	9	2	the Second Edition of
Delete	10	2	Foreign Corrupt Practices Act (FCPA) is a critically important statute for combating corruption around the globe. Corruption has corrosive effects on democratic institutions, undermining public accountability and diverting public resources from important priorities such as health, education, and infrastructure. When business is won or lost based on how much a company is willing to pay in bribes rather than on the quality of its products and services, law-abiding companies are placed at a competitive disadvantage—and consumers lose. For these and other reasons, enforcing the FCPA is a continuing priority at
Add	11	2	Guide was originally published by
Delete	12	2	.¶
Add	13	2	in November 2012
Delete	14	2	The Guide is the product of extensive efforts by experts at DOJ and SEC, and has benefited from valuable input from the Departments of Commerce and State. It endeavors to provide helpful information to enterprises of all shapes and sizes— from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world. The Guide addresses a wide variety of topics, including who and what is covered by the FCPA’s anti-bribery and accounting provisions; the definition of a “foreign official”; what constitute proper and improper gifts, travel and entertainment expenses; the nature of facilitating payments; how successor liability applies in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context. On these and other topics, the Guide takes a multi-faceted approach, setting forth in detail
Add	15	3	to provide companies, practitioners, and the public with detailed information about

Add	16	3	of the Foreign Corrupt Practices Act (FCPA)
Add	17	3	Then and now, the Guide represents one of the most thorough compilations of information about any criminal statute, and remains relevant to this day.
Delete	18	3	The Guide is an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities. We are proud of the many lawyers and staff who worked on this project, and hope that it will be a useful reference for companies, individuals, and others interested in our enforcement of the Act.¶
Add	19	3	Although many aspects of the Guide continue to hold true today, the last eight years have also brought new cases, new law, and new policies. The Second Edition of the Guide reflects these updates, including new case law on the definition of the term “foreign official” under the FCPA, the jurisdictional reach of the FCPA, and the FCPA’s foreign written laws affirmative defense. It addresses certain legal standards, including the mens rea requirement and statute of limitations for criminal violations of the accounting provisions. It reflects updated data, statistics, and case examples. And it summarizes new policies applicable to the FCPA that have been announced in the DOJ’s and SEC’s continuing efforts to provide increased transparency, including the DOJ’s FCPA Corporate Enforcement Policy, Selection of Monitors in Criminal Division Matters, Coordination of Corporate Resolution Penalties (or Anti-Piling On Policy), and the Criminal Division’s Evaluation of Corporate Compliance Programs
Add	20	3	Foreign bribery is a scourge that must be eradicated. It undermines the rule of law, empowers authoritarian rulers, distorts free and fair markets, disadvantages honest and ethical companies, and threatens national security and sustainable development. This updated Guide is meant not only to summarize the product of the dedicated and hardworking individuals who combat foreign bribery as part of their work for the U.S. government, but also to help companies, practitioners, and the public— many of whom find themselves on the front lines of this fight—prevent corruption in the first instance. We hope that the Guide will continue to be an invaluable resource in those efforts.¶
Delete	21	3	Lanny
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Delete	23	3	Breuer→Robert S. Khuzami
Add	24	3	Benczkowski→Stephanie Avakian & Steven Peikin
Add	25	3	Co-Directors
Add	26	3	s
Delete	27	3	of Enforcement
Add	28	3	Criminal Division→Division of Enforcement¶

Delete	29	3	Criminal Division
Add	30	3	Department of Justice
Delete	31	3	Department of Justice
Add	32	3	July 2020¶
Add	33	4	Graphic
Delete	34	4	November 14, 2012
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Delete	37	5 2
Delete	38	5	Historical Background 3¶
Delete	39	5	National Landscape: Interagency Efforts 4 Department of Justice 4 Securities and Exchange Commission 4 Law Enforcement Partners 5 Departments of Commerce and State 5¶
Delete	40	5	International Landscape: Global Anti-Corruption Efforts7 OECD Working Group on Bribery and the Anti-Bribery Convention 7 U .N . Convention Against Corruption 8 Other Anti-Corruption Conventions 8¶
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Add	42	5	Historical Background¶
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Add	44	5	→10¶
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Add	56	5	9¶
Add	57	5	13¶
Add	58	5	13¶
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Add	98	6	International Landscape: Global Anti-Corruption Efforts¶
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Delete	128	7	Chapter 3: THE FCPA: ACCOUNTING PROVISIONS 38¶
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Add	145	8	Criminal Cases→55¶
Add	146	8	Civil Cases→55¶
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Add	168	9	Civil Penalties¶
Add	169	9	Forfeiture and Disgorgement¶
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Add	174	9	Collateral Consequences¶
Add	175	9	Debarment¶
Add	176	9	Cross-Debarment by Multilateral Development Banks¶
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Add	199	10	70¶
Add	200	10	71¶
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Add	217	10	→76¶
Add	218	11	→86¶
Add	219	11	→87¶
Add	220	11	→101¶
Add	221	11	77¶
Add	222	11	77¶
Add	223	11	77¶
Add	224	11	78¶
Add	225	12	Graphic
Add	226	12	¶
Add	227	13	The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American Public. But¶
Add	228	13	not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American¶
Add	229	13	companies casts a shadow on all U.S. companies.1¶
Add	230	13	- United States House of Representatives, 1977¶
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Delete	263	14	0
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Add	287	15	8
Delete	288	15	8

Add	289	15	9
Delete	290	15	19
Add	291	15	20
Delete	292	15	3¶
Delete	293	15	DOJ Contact Information¶
Delete	294	15	Deputy Chief (FCPA Unit)»
Delete	295	15	Fraud Section, Criminal Division»
Delete	296	15	Bond Building»
Delete	297	15	1400 New York Ave, N .W .»
Delete	298	15	Washington, DC 20005¶
Delete	299	15	Telephone: (202) 514-7023»
Delete	300	15	Facsimile: (202) 514-7021»
Delete	301	15	Email: FCPA .Fraud@usdoj .gov¶
Delete	302	15	0
Add	303	15	1
Delete	304	15	¶
Delete	305	15	1
Add	306	15	2
Delete	307	15	chapter 1 Introduction
Add	308	15	Department of Justice
Add	309	15	DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers,
Delete	310	15	2
Add	311	15	3
Delete	312	15	FCPA matters are handled primarily by the
Add	313	15	The
Delete	314	15	,
Add	315	15	handles all FCPA matters for DOJ, and
Delete	316	15	working
Add	317	15	works
Add	318	16	¶
Add	319	16	3¶
Delete	320	16	above
Add	321	16	below
Delete	322	16	Department of Justice
Add	323	16	DOJ Contact Information
Delete	324	16	DOJ has criminal FCPA enforcement authority over “issuers” (i.e., public companies) and their officers,¶
Add	325	16	Deputy Chief (FCPA Unit)¶
Add	326	16	Fraud Section, Criminal Division Bond Building¶
Add	327	16	1400 New York Ave, N.W.»
Add	328	16	Washington, DC 20005¶
Add	329	16	Telephone: (202) 514-2000¶
Add	330	16	Facsimile: (202) 514-7021¶

Add	331	16	Email: FCPA.Fraud@usdoj.gov¶
Delete	332	16	¶
Delete	333	16	4¶
Delete	334	16	SEC Contact Information¶
Delete	335	16	FCPA Unit Chief»
Delete	336	16	Division of Enforcement»
Delete	337	16	U .S . Securities and Exchange Commission»
Delete	338	16	100 F Street, N . E .»
Delete	339	16	Washington, DC 20549¶
Delete	340	16	Online: Tips, Complaints, and¶
Delete	341	16	Referrals website¶
Delete	342	16	http://www .sec .gov/complaint/tipscomplaint .shtml¶
Delete	343	16	Office of Investor Education and Advocacy:»
Delete	344	16	(800) SEC-0330¶
Add	345	16	¶
Delete	346	17	,
Add	347	17	and
Add	348	17	s
Delete	349	17	complaint/tip-scomplaint.shtml
Add	350	17	tcr
Delete	351	17	¶
Add	352	17	SEC Contact Information¶
Add	353	17	FCPA Unit Chief, Division of»
Add	354	17	Enforcement, U.S. Securities»
Add	355	17	and Exchange Commission»
Add	356	17	100 F Street, N.E.¶
Add	357	17	Washington, DC 20549¶
Add	358	17	Online Tips, Complaints, and Referrals¶
Add	359	17	website: https://www.sec.gov/tcr¶
Add	360	17	Office of Investor Education and¶
Add	361	17	Advocacy: (800) SEC-0330¶
Add	362	17	4¶
Delete	363	17	a
Add	364	17	s
Delete	365	17	(located in the Washington Field Office) that is
Add	366	17	that are
Delete	367	17	and
Add	368	17	Investigations,
Delete	369	17	Service-Criminal
Add	370	17	Service – Criminal
Add	371	17	s
Add	372	17	, and the Postal Inspection Service
Add	373	17	Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, and the

Delete	374	17	, which has helped lead a number of FCPA investigations
Add	375	17	and Financial Crimes Enforcement Network
Delete	376	17	Commerce and State
Add	377	17	agencies
Delete	378	18	¶
Delete	379	18	5¶
Delete	380	18	chapter 1¶
Delete	381	18	Introduction¶
Delete	382	18	3
Add	383	18	4
Delete	384	18	Among other things, these
Add	385	18	The Commercial Service maintains a website with online resources to help companies perform due diligence on markets and partners, at: https://www.trade.gov/perform-due-diligence . For example, Country Commercial Guides provide market conditions, opportunities, regulations, and business customs for more than 70 major markets, prepared by ITA trade professionals at U.S. embassies worldwide.25 Commercial Service
Add	386	18	also
Delete	387	18	due diligence
Add	388	18	background checks
Delete	389	18	business’
Add	390	18	company’s
Delete	391	18	4
Add	392	18	6
Delete	393	18	Businesses
Add	394	18	U.S. companies
Add	395	18	s
Delete	396	18	export
Add	397	18	www.trade
Delete	398	18	eac/,
Add	399	18	let-our-experts-help-0
Delete	400	18	5
Add	401	18	7
Add	402	18	s
Delete	403	18	www
Add	404	18	ogc
Delete	405	18	os/ogc/transparency-and-anti-bribery-initiatives,
Add	406	18	collection/office-chief-counsel-international-commerce
Delete	407	18	recent articles and speeches, links to translations of the FCPA, a catalogue of
Delete	408	18	,
Add	409	18	Office of
Add	410	18	Agreements Negotiations and

Delete	411	18	Center
Add	412	18	also
Add	413	18	s
Add	414	18	/ index.asp
Add	415	18	a link to
Delete	416	18	26 The Department of Commerce also provides information to companies through a number of U.S. and international publications designed to assist firms in complying with anti-corruption laws. For example, the Department of Commerce has included a new anti-corruption section in its Country Commercial Guides, prepared by market experts at U.S. embassies worldwide, that contains information on market conditions for more than 100 countries, including information on the FCPA for exporters. ²⁷ The Department of Commerce has also published a guide, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies, which contains information about corporate compliance programs for businesses involved in international trade. ²⁸
Add	417	18	5¶
Add	418	18	More information on resolving trade barriers can be found at: https://www.trade.gov/resolve-foreign-trade-barrier . ^{28¶}
Delete	419	19	-tor
Add	420	19	¶
Add	421	19	s
Delete	422	19	e/ eb/cba
Add	423	19	bureaus-offices/under-secretary-for-economic-growth-energy-and-the-environment/ bureau-of-economic-and-business-affairs/office-of-commercial-and-business-affairs
Delete	424	19	09
Add	425	19	19
Add	426	19	12
Delete	427	19	billion
Add	428	19	million
Delete	429	19	6¶
Delete	430	19	-corruption
Add	431	19	s
Delete	432	19	j/inl/c/crime/corr/index.htm
Add	433	19	combating-corruption-and-promoting-good-governance/
Add	434	19	-corruption
Add	435	19	s
Delete	436	19	-ing-accountability-transparency
Delete	437	19	Finally, the Department of State’s brochure “Fighting Global Corruption: Business Risk Management,” available at http://www.ogc.doc.gov/pdfs/ Fighting_Global_Corruption.pdf , provides guidance about corporate compliance programs as well

			as international anticorruption initiatives.
Delete	438	19	In recent years,
Delete	439	19	there
Add	440	19	There
Add	441	19	¶
Add	442	20	6¶
Add	443	20	As a result of the recognition by other countries of the need to combat corruption, as well as the significant efforts by organizations such as the
Delete	444	20	and the Anti–
Add	445	20	, a number of countries have implemented foreign bribery laws and significantly increased their enforcement efforts. For example, in December 2016, France enacted its Sapin II law, which significantly strengthened its existing foreign bribery legislation and enforcement regime.
Add	446	20	OECD Working Group on
Add	447	20	and the Anti-Bribery
Delete	448	20	-tions
Delete	449	20	November 1
Add	450	20	June 30
Delete	451	20	12
Add	452	20	0
Delete	453	20	39
Add	454	20	44
Delete	455	20	: 34 OECD member countries (including the United States) and five non-OECD member countries (Argentina, Brazil, Bulgaria, the Russian Federation, and South Africa)
Delete	456	20	32
Delete	457	20	3
Add	458	20	2
Delete	459	20	three
Add	460	20	four
Add	461	20	s
Delete	462	20	is a
Add	463	20	are
Add	464	20	s
Add	465	20	and the next is the Phase 4 review
Delete	466	20	s
Delete	467	20	Phase 2
Add	468	20	prior
Delete	469	20	4
Add	470	20	3
Delete	471	20	5
Add	472	20	4

Delete	473	20	The United States was one of the first countries to undergo all three phases of review.
Add	474	20	for all of the phases of reviews for the United States
Delete	475	20	6
Add	476	20	5
Delete	477	20	¶
Delete	478	20	7¶
Delete	479	20	chapter 1 Introduction¶
Delete	480	20	The IACAC requires parties (of which the United States is one) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) monitors parties' compliance with the IACAC. As of November 1, 2012, 31 countries were parties to MESICIC.¶
Delete	481	20	The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries' compliance with the Council of Europe's anticorruption standards, including the Council of Europe's Criminal Law Convention on Corruption. ⁴² These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of November 1, 2012, GRECO member states, which need not be members of the Council of Europe, include more than 45 European countries and the United States. ⁴³ ¶
Delete	482	21	The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ's website.¶
Delete	483	21	-
Delete	484	21	This
Add	485	21	Initial publication of this
Delete	486	21	is
Add	487	21	was
Delete	488	21	7
Add	489	21	6
Add	490	21	¶
Add	491	21	7¶
Delete	492	21	8
Add	493	21	7
Delete	494	21	9
Add	495	21	8
Delete	496	21	November 1
Add	497	21	June 30
Delete	498	21	12
Add	499	21	0
Delete	500	21	63
Add	501	21	87

Delete	502	21	40
Add	503	21	39
Delete	504	21	1
Add	505	21	0
Add	506	21	The IACAC requires parties (of which the United States is one) to criminalize both foreign and domestic bribery. A body known as the Mechanism for Follow-Up on the Implementation of the Inter-American Convention Against Corruption (MESICIC) monitors parties' compliance with the IACAC. As of June 30, 2020, 33 countries were parties to MESICIC.¶
Add	507	21	The Council of Europe established the Group of States Against Corruption (GRECO) in 1999 to monitor countries' compliance with the Council of Europe's anti-corruption standards, including the Council of Europe's Criminal Law Convention on Corruption. ⁴¹ These standards include prohibitions on the solicitation and receipt of bribes, as well as foreign bribery. As of June 30, 2020, GRECO member states, which need not be members of the Council of Europe, include 49 European countries and the United States. ⁴² ¶
Add	508	21	The United States has been reviewed under both MESICIC and GRECO, and the reports generated by those reviews are available on DOJ's website.¶
Add	509	22	Graphic
Add	510	22	¶
Delete	511	22	chapter 2¶
Add	512	22	Chapter 2
Delete	513	22	Anti-Bribery Provisions
Add	514	22	Anti-Bribery Provisions¶
Add	515	22	¶
Add	516	22	;
Delete	517	22	-suer's
Delete	518	22	4
Add	519	22	3
Add	520	22	¶
Delete	521	22	hareholders
Add	522	22	tockholders
Add	523	22	acting on behalf of an issuer
Delete	524	22	hareholders
Add	525	22	tockholders
Add	526	22	acting on behalf of a domestic concern
Delete	527	22	¶
Delete	528	22	10¶
Delete	529	23	How Can I Tell If My Company Is an "Issuer"?¶
Delete	530	23	□ → It is listed on a national securities exchange in the United States (either stock or American Depository Receipts); or¶

Delete	531	23	☐→The company’s stock trades in the over-the-counter market in the United States and the company is required to file SEC reports.¶
Delete	532	23	☐→To see if your company files SEC reports, go to SEC’s website at http://www.sec.gov/edgar/searchedgar/webusers.htm .¶
Delete	533	23	5
Add	534	23	4
Delete	535	23	6
Add	536	23	5
Delete	537	23	7
Add	538	23	6
Add	539	23	¶
Add	540	23	9¶
Delete	541	23	8
Add	542	23	7
Delete	543	23	1
Add	544	23	5
Delete	545	23	65
Add	546	23	23
Delete	547	23	9
Add	548	23	8
Delete	549	23	, and any co-conspirators,
Delete	550	23	50
Add	551	23	49
Add	552	23	How Can I Tell If My»
Add	553	23	Company Is an “Issuer”?¶
Add	554	23	•→It is listed on a national securities exchange»
Add	555	23	in the United States (either stock or American»
Add	556	23	Depository Receipts); or¶
Add	557	23	•→Its stock trades in the over-the-counter»
Add	558	23	market in the United States and the company is»
Add	559	23	required to file SEC reports.¶
Add	560	23	•→To see if your company files SEC reports, go to»
Add	561	23	SEC’s website at http://www.sec.gov/edgar/ »
Add	562	23	searchedgar/webusers.htm .¶
Delete	563	23	1
Add	564	23	0
Add	565	23	, other than an issuer,
Delete	566	23	2
Add	567	23	1
Delete	568	23	3
Add	569	23	2
Delete	570	23	4

Add	571	23	3
Delete	572	23	5
Add	573	23	4
Delete	574	23	prohibitions
Add	575	23	provisions
Delete	576	23	6
Add	577	23	5
Delete	578	24	Anti-¶
Add	579	24	Anti-Bribery
Delete	580	24	Bribery
Delete	581	24	7
Add	582	24	6
Delete	583	24	8
Add	584	24	7
Delete	585	24	1
Add	586	24	0
Delete	587	24	chapter 2¶
Delete	588	24	The FCPA:¶
Delete	589	24	Anti-Bribery Provisions¶
Delete	590	24	9
Add	591	24	8
Delete	592	24	, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.60
Add	593	24	.59
Delete	594	24	1
Add	595	24	0
Delete	596	24	2
Add	597	24	1
Delete	598	24	3
Add	599	24	2
Delete	600	24	—The Business
Delete	601	24	Purpose Test¶
Delete	602	24	intended to induce or influence
Add	603	24	, offers, or promises made for the purpose of: (i) influencing any act or decision of a foreign official in his official capacity, (ii) inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official, (iii) securing any improper advantage; or (iv) inducing
Delete	604	24	or her position “
Add	605	24	influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or

			instrumentality. In addition, the payment, offer, or promise must be made
Delete	606	24	...
Add	607	24	“
Delete	608	24	4
Add	609	24	3
Delete	610	25	5
Add	611	25	4
Delete	612	25	6
Add	613	25	5
Delete	614	25	the
Add	615	25	connection with
Add	616	25	ing
Delete	617	25	of
Add	618	25	to gain a business advantage. ⁶⁶ For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, can all satisfy the business purpose test. ⁶⁷
Delete	619	25	both
Delete	620	25	” and a “domestic concern
Delete	621	25	Moreover, even if EuroCo and Intermediary had never taken any actions in the territory of the United States, they can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges under Pinkerton liability, namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy.
Delete	622	25	2
Add	623	25	1
Delete	624	25	□
Add	625	25	•
Delete	626	25	□
Add	627	25	•
Delete	628	25	□
Add	629	25	•
Delete	630	25	□
Add	631	25	•
Delete	632	25	□
Add	633	25	•
Delete	634	25	□
Add	635	25	•
Delete	636	25	□
Add	637	25	•
Delete	638	25	□

Add	639	25	•
Delete	640	25	to gain a business advantage. ⁶⁷ For example, bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test. ⁶⁸ ¶
Delete	641	26	9
Add	642	26	8
Add	643	26	¶
Delete	644	26	-ments
Delete	645	26	70
Add	646	26	69
Delete	647	26	1
Add	648	26	0
Add	649	26	¶
Delete	650	26	2
Add	651	26	1
Delete	652	26	□
Add	653	26	•
Delete	654	26	□
Add	655	26	•
Delete	656	26	□
Add	657	26	•
Delete	658	26	□
Add	659	26	•
Delete	660	26	□
Add	661	26	•
Add	662	26	¶
Delete	663	26	3
Add	664	26	2
Delete	665	26	while
Add	666	26	although
Delete	667	26	¶
Delete	668	26	busi-
Add	669	26	business
Delete	670	26	ness
Delete	671	26	3
Add	672	26	2
Delete	673	26	authori-
Delete	674	27	zation
Add	675	27	authorization
Delete	676	27	government offi-
Delete	677	27	cial
Add	678	27	government official

Delete	679	27	4
Add	680	27	3
Delete	681	27	Congress noted when
Add	682	27	Congress noted when
Delete	683	27	“corruptly” means an intent
Add	684	27	“corruptly” means an intent or desire to wrongfully¶
Delete	685	27	or desire to wrongfully
Delete	686	27	5
Add	687	27	4
Delete	688	27	¶
Delete	689	27	¶
Add	690	27	of value (or authorizing the payment, offer, or promise).75 By focusing
Delete	691	27	of value (or authorizing the payment or offer).76 By focus—¶
Delete	692	27	ing
Delete	693	27	7
Add	694	27	6
Delete	695	27	8
Add	696	27	7
Add	697	27	New York-based commercial real estate broker promised a middleman that he would pay a \$2.5 million dollar bribe—and in fact paid \$500,000 to the middleman as an upfront payment—to a government official at the sovereign wealth fund of a Middle Eastern country in order to induce the sovereign wealth fund to buy an \$800 million dollar office building complex owned by the broker’s client. However, unbeknownst to the real estate broker, the middleman did not have any relationship with the foreign official, and simply kept the \$500,000 payment. Even though there was no foreign official actually receiving the bribe, the defendant was convicted of violating the FCPA.78
Delete	698	27	specialty chemical company promised Iraqi government¶
Delete	699	27	officials approximately \$850,000 in bribes for an upcoming¶
Delete	700	27	contract. Although the company did not, in the end, make¶
Delete	701	27	the payment (the scheme was thwarted by the U.S. govern—¶
Delete	702	27	ment’s investigation), the company still violated the FCPA¶
Delete	703	27	and was held accountable.79¶
Delete	704	27	¶
Delete	705	27	80
Add	706	27	79
Delete	707	27	chapter 2¶
Delete	708	27	The FCPA:¶
Delete	709	27	Anti-Bribery Provisions¶
Delete	710	27	1
Add	711	27	0
Delete	712	27	2

Add	713	27	1
Delete	714	27	3
Add	715	27	2
Delete	716	28	4
Add	717	28	3
Add	718	28	¶
Add	719	28	13¶
Delete	720	28	5
Add	721	28	4
Delete	722	28	6
Add	723	28	5
Delete	724	28	,
Delete	725	28	7
Add	726	28	6
Delete	727	28	¶
Delete	728	28	14¶
Delete	729	28	8
Add	730	28	7
Add	731	28	Brazilian company that was a stockholder of a
Delete	732	28	headquartered in Germany disbursed
Add	733	28	developed and operated a secret financial structure that operated to make and account for
Delete	734	28	from a corporate “cash desk” and used offshore bank accounts to bribe government officials to win contracts.
Add	735	28	to foreign officials. Among other methods the company used, it would transfer funds to Brazilian moneychangers (doleiros) who would withdraw the amounts in cash and deliver them to the officials.
Delete	736	28	9
Add	737	28	8
Add	738	28	89
Delete	739	28	0
Delete	740	29	1
Add	741	29	0
Delete	742	29	¶
Add	743	29	14¶
Delete	744	29	2
Add	745	29	1
Delete	746	29	one
Add	747	29	a recent case, a publicly traded energy company in the Netherlands resolved with DOJ over bribes it paid that included extravagant gifts such as paying for foreign officials to travel to sporting events and providing them with “spending money,” paying for school tuition for the children of foreign officials, and shipping luxury vehicles to foreign officials.92¶

Add	748	29	In another
Delete	749	29	California-based
Add	750	29	Sweden-based
Add	751	29	“issuer”
Delete	752	29	94 Between 2002 and
Add	753	29	Beginning in the 1990s and continuing until at least
Delete	754	29	07
Add	755	29	13
Delete	756	29	spent nearly \$7 million on approximately 225 trips for its customers in order to obtain systems contracts in China, including for employees of Chinese
Add	757	29	paid millions of dollars to various third parties, a portion of which was used to pay for gifts, travel, and entertainment, including overseas trips, for Chinese government officials in order to win business with
Add	758	29	telecommunications
Delete	759	29	to travel to popular tourist destinations in the United States. ⁹⁵
Add	760	29	.
Add	761	29	a portion of
Delete	762	29	conduct
Add	763	29	participate in
Delete	764	29	¶
Delete	765	29	15¶
Delete	766	29	Examples of Improper»
Delete	767	29	Travel and Entertainment¶
Delete	768	29	□→a \$12,000 birthday trip for a government decision-maker from Mexico that included visits to wineries and dinners¶
Delete	769	29	□→\$10,000 spent on dinners, drinks, and entertainment for a government official¶
Delete	770	29	□→a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in “pocket money” for each official¶
Delete	771	29	□→a trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle¶
Delete	772	30	Approximately \$670,000 of the \$7 million was falsely recorded as “training” expenses.
Add	773	30	Such trips included, among others, a luxury cruise through the Caribbean and trips to Las Vegas and London. The company also mischaracterized payments for these trips in its internal books and records.
Delete	774	30	6
Add	775	30	4
Delete	776	30	7
Add	777	30	5

Delete	778	30	8
Add	779	30	6
Add	780	30	,
Delete	781	30	to
Add	782	30	at
Delete	783	30	¶
Delete	784	30	chapter 2¶
Delete	785	30	The FCPA: Anti-Bribery Provisions¶
Delete	786	30	9
Add	787	30	7
Add	788	30	15¶
Delete	789	30	like
Add	790	30	such as
Delete	791	30	100
Add	792	30	98
Delete	793	30	101
Add	794	30	99 In another example, a Hong Kong subsidiary of a Switzerland-based bank engaged in a systematic scheme to hire, promote, and retain the children of Chinese officials in order to win business with those officials.100 The company ultimately disgorged approximately \$30 million and paid a \$47 million criminal fine for its FCPA violations.
Add	795	30	Examples of Improper Travel¶
Add	796	30	and Entertainment¶
Add	797	30	•→a \$12,000 birthday trip for a government»
Add	798	30	decision maker from Mexico that included»
Add	799	30	visits to wineries and dinners¶
Add	800	30	•→\$10,000 spent on dinners, drinks, and¶
Add	801	30	entertainment for a government official¶
Add	802	30	•→a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in “pocket money” for each official¶
Add	803	30	•→a trip to Paris for a government official and his wife that consisted primarily of touring¶
Add	804	30	activities via a chauffeur-driven vehicle¶
Delete	805	31	an
Add	806	31	¶
Delete	807	31	16¶
Add	808	31	also were not in compliance with the company’s internal policies, which provided that charitable donations generally should be made to healthcare institutions and relate to the practice of medicine.101
Add	809	31	16¶
Add	810	32	¶
Add	811	32	¶

Add	812	32	es
Delete	813	32	¶
Delete	814	32	(cont'd)¶
Delete	815	32	es¶
Delete	816	32	17¶
Delete	817	32	chapter 2¶
Delete	818	32	The FCPA:¶
Delete	819	32	Anti-Bribery Provisions¶
Add	820	32	(cont'd)¶
Add	821	32	17¶
Delete	822	33	18¶
Delete	823	33	also were not in compliance with the company's internal policies, which provided that charitable donations generally should be made to healthcare institutions and relate to the practice of medicine.102¶
Add	824	33	18¶
Delete	825	33	3
Add	826	33	2
Delete	827	33	4
Add	828	33	3
Add	829	33	¶
Delete	830	34	were
Add	831	34	was
Delete	832	34	5
Add	833	34	4
Delete	834	34	6
Add	835	34	5
Delete	836	34	7
Add	837	34	6
Delete	838	34	8
Add	839	34	7
Delete	840	34	»
Delete	841	34	9
Add	842	34	8
Delete	843	34	-going
Delete	844	34	of the
Add	845	34	of the
Delete	846	34	110
Add	847	34	9
Add	848	34	¶
Add	849	34	¶
Add	850	34	¶
Add	851	34	¶
Add	852	34	¶

Delete	853	34	»
Delete	854	34	»
Add	855	34	¶
Add	856	34	¶
Add	857	34	¶
Delete	858	34	1
Add	859	34	0
Delete	860	34	¶
Delete	861	34	¶
Delete	862	34	19¶
Delete	863	34	2
Add	864	34	1
Delete	865	34	¶
Delete	866	34	¶
Add	867	34	of a foreign government and to those acting on the foreign
Delete	868	34	of a foreign government and to those acting on the for-¶
Delete	869	34	eign
Delete	870	34	3
Add	871	34	2
Delete	872	34	cor-
Add	873	34	corrupt
Delete	874	34	rupt
Delete	875	34	4
Add	876	34	3
Delete	877	34	¶
Delete	878	34	5
Add	879	34	4
Delete	880	34	contem-
Add	881	34	contemplating
Delete	882	34	plating
Delete	883	35	cor-
Add	884	35	corrupt
Delete	885	35	rupt
Add	886	35	19¶
Delete	887	35	¶
Delete	888	35	¶
Delete	889	35	-
Add	890	35	ity
Delete	891	35	ity
Delete	892	35	6
Add	893	35	5
Delete	894	35	7
Add	895	35	6
Delete	896	35	bank-

Add	897	35	banking
Delete	898	35	ing
Delete	899	35	-
Add	900	35	tion
Delete	901	35	¶
Add	902	35	.117 By including officers or employees of agencies and
Delete	903	35	tion.118 By including officers or employees of agencies and¶
Delete	904	35	¶
Delete	905	35	-
Add	906	35	lar
Delete	907	35	lar
Add	908	35	control, status, and function.118 The Eleventh Circuit addressed the definition of “instrumentality” in United States v. Esquenazi, a case involving the state-owned and controlled telecommunications company of Haiti.119 The Eleventh Circuit concluded that an “instrumentality” under the FCPA is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”120 Although the court noted that this test is a fact-bound inquiry, it provided the following non-exhaustive list of factors to determine whether the government “controls” an entity:
Delete	909	35	control, status, and function.119 A number of courts have¶
Delete	910	35	approved final jury instructions providing a non-exclusive¶
Delete	911	35	chapter 2¶
Delete	912	35	The FCPA: Anti-Bribery Provisions¶
Delete	913	35	list of factors to be considered:¶
Delete	914	35	•→the foreign state’s extent of ownership of the entity;¶
Delete	915	35	state’s degree of control over the entity
Add	916	35	government’s formal designation
Delete	917	35	(including whether key officers and directors of»
Add	918	35	of that entity;¶
Add	919	35	•→whether
Delete	920	35	entity are, or are appointed by,
Add	921	35	has a
Delete	922	35	officials);¶
Delete	923	35	•→the foreign state’s characterization of
Add	924	35	majority interest in
Delete	925	35	and its employees
Delete	926	35	circumstances surrounding
Add	927	35	government’s ability to hire and fire
Delete	928	35	creation
Add	929	35	principals
Delete	930	35	purpose of
Add	931	35	extent to which

Delete	932	35	activities;
Add	933	35	profits, if any, go directly into the governmental fiscal accounts, and, by the same token, the extent to which the government funds the entity if it fails to break even; and
Delete	934	36	•→the entity's obligations and privileges under the foreign state's law;¶
Add	935	36	•→the length of time these indicia»
Add	936	36	have existed.121¶
Add	937	36	To determine whether the entity performs a¶
Add	938	36	function that the government treats as its own, the¶
Add	939	36	Eleventh Circuit listed the following non-exhaustive¶
Add	940	36	factors:¶
Delete	941	36	the exclusive or controlling power vested in
Add	942	36	whether
Delete	943	36	to administer its designated functions
Add	944	36	has a monopoly over the function it exists to carry out
Delete	945	36	•→the level of financial support by the foreign»
Delete	946	36	state (including subsidies, special tax treatment,»
Delete	947	36	government-mandated fees, and loans);¶
Delete	948	36	the
Add	949	36	whether the government subsidizes the costs associated with the
Delete	950	36	's
Delete	951	36	sion
Add	952	36	ding
Delete	953	36	on
Add	954	36	g
Delete	955	36	of
Delete	956	36	to the jurisdiction's residents
Delete	957	36	governmental end or purpose sought
Add	958	36	entity provides services to the
Delete	959	36	to be achieved is expressed in the policies of the»
Add	960	36	public at large in the
Delete	961	36	government
Add	962	36	country
Delete	963	36	the general perception that
Add	964	36	whether the public and the government of that foreign country generally perceive
Delete	965	36	is
Add	966	36	to be
Delete	967	36	official or
Add	968	36	a
Delete	969	36	s
Delete	970	36	0
Add	971	36	2

Add	972	36	In addition, a number of courts in other¶
Add	973	36	circuits have approved final jury instructions¶
Add	974	36	providing a similar non-exclusive list of factors to be¶
Add	975	36	considered.123¶
Add	976	36	¶
Add	977	36	¶
Add	978	36	¶
Add	979	36	¶
Add	980	36	¶
Add	981	36	¶
Add	982	36	¶
Add	983	36	¶
Add	984	36	¶
Add	985	36	¶
Add	986	36	¶
Delete	987	36	¶
Delete	988	36	20¶
Delete	989	36	1
Add	990	36	4
Add	991	36	¶
Add	992	36	¶
Add	993	36	20¶
Delete	994	36	2
Add	995	36	5
Delete	996	37	3
Add	997	37	6
Delete	998	37	another recent case
Add	999	37	the case involving Haiti's state-owned and controlled telecommunications company
Add	1000	37	the telecommunications company's
Delete	1001	37	of Haiti's state-owned and controlled telecommunications company
Delete	1002	37	and its director was appointed by Haiti's president.
Add	1003	37	Haiti granted the company a monopoly over telecommunications service and gave it various tax advantages, the company's Director General was chosen by the Haitian President with the consent of the Haitian Prime Minister and the ministers of public works and economic finance, and the Haitian President appointed all of the telecommunications company's board members.
Delete	1004	37	4
Add	1005	37	7
Delete	1006	37	is
Add	1007	37	are
Delete	1008	37	the

Add	1009	37	a
Delete	1010	37	5
Add	1011	37	8
Delete	1012	37	6
Add	1013	37	9
Delete	1014	37	nevertheless
Delete	1015	37	27
Add	1016	37	30
Delete	1017	37	Order
Add	1018	37	order
Delete	1019	37	28
Add	1020	37	31
Add	1021	37	United Nations, the
Add	1022	37	¶
Add	1023	37	21¶
Delete	1024	37	Printing
Add	1025	37	Publishing
Add	1026	37	s
Delete	1027	37	gpo
Add	1028	37	govinfo
Delete	1029	37	fdsys/.
Add	1030	37	content/pkg/USCODE-2018-title22/html/USCODE-2018-title22-chap7-subchapXVIII-sec288.htm. DOJ has brought charges against persons who pay bribes to such employees and representatives of such “public international organizations.” ¹³²
Delete	1031	38	¶
Delete	1032	38	29
Add	1033	38	33
Delete	1034	38	0
Add	1035	38	4
Delete	1036	38	¶
Delete	1037	38	21¶
Delete	1038	38	chapter 2¶
Delete	1039	38	The FCPA:¶
Delete	1040	38	Anti-Bribery Provisions¶
Delete	1041	38	1
Add	1042	38	5
Delete	1043	38	For instance, a four-company joint venture used two agents—a British lawyer and a Japanese trading company—to bribe Nigerian government officials in order to win a series of liquefied natural gas construction projects. ¹³² Together, the four multinational corporations and the Japanese trading company paid a combined \$1.7 billion in civil and criminal sanctions for their decade-long bribery scheme. In addition, the subsidiary of one of the companies pleaded guilty and a number of individuals,

			including the British lawyer and the former CEO of one of the companies' subsidiaries, received significant prison terms.¶
Delete	1044	38	Similarly, a medical device manufacturer entered into a deferred prosecution agreement as the result of corrupt payments it authorized its local Chinese distributor to pay to Chinese officials.133 Another company, a manufacturer of specialty chemicals, committed multiple FCPA violations through its agents in Iraq: a Canadian national and the Canadian's companies. Among other acts, the Canadian national paid and promised to pay more than \$1.5 million in bribes to officials of the Iraqi Ministry of Oil to secure sales of a fuel additive. Both the company and the Canadian national pleaded guilty to criminal charges and resolved civil enforcement actions by SEC. 134¶
Add	1045	38	For example, a French global financial services institution and a U.S.-based investment management firm retained a third-party sales agent to win business in Libya. The financial institutions repeatedly engaged the third-party sales agent to win business with Libyan state-owned financial institutions, ultimately paying the sales agent over \$90 million in commissions. In fact, the sales agent¶
Add	1046	38	used portions of the commission payments to bribe¶
Add	1047	38	high-level Libyan government officials in order¶
Add	1048	38	to secure the placement of approximately \$3.66¶
Add	1049	38	billion in assets with the financial institutions. As¶
Add	1050	38	a consequence, the French global financial services¶
Add	1051	38	institution and the U.S. investment management¶
Add	1052	38	firm paid a combined approximately \$600 million¶
Add	1053	38	in penalties; the French financial institution entered¶
Add	1054	39	into a deferred prosecution agreement with DOJ,¶
Add	1055	39	and a wholly owned subsidiary pleaded guilty; while¶
Add	1056	39	the U.S. financial institution entered into a non-¶
Add	1057	39	prosecution agreement with DOJ, and disgorged¶
Add	1058	39	\$34.5 million as part of its resolution with SEC.136¶
Add	1059	39	In another case, between 1996 and 2012, a¶
Add	1060	39	publicly traded energy company in the Netherlands¶
Add	1061	39	engaged in the regular practice of retaining third-¶
Add	1062	39	party sales agents to pay bribes to foreign officials¶
Add	1063	39	in at least five countries: Brazil, Angola, Equatorial¶
Add	1064	39	Guinea, Kazakhstan, and Iraq. Over the course of the¶
Add	1065	39	conspiracy, the company paid at least \$180 million¶
Add	1066	39	in "commission" payments to its agents, earning¶
Add	1067	39	profits of at least \$2.8 billion. The company and¶
Delete	1068	39	In another case, the
Add	1069	39	its
Delete	1070	39	of a Swiss freight forwarding company was charged with paying

			bribes on behalf of its customers in several countries. ¹³⁵ Although the U.S. subsidiary was not an issuer under the FCPA, it was an “agent” of several U.S. issuers and was thus charged directly with
Add	1071	39	admitted to
Delete	1072	39	. Charges against the freight forwarding company and seven of its customers resulted in over \$236.5 million in sanctions
Add	1073	39	,¶
Add	1074	39	as did its former CEO and a sales and marketing¶
Add	1075	39	executive
Delete	1076	39	6
Add	1077	39	7
Delete	1078	39	third-party
Add	1079	39	third–¶
Add	1080	39	party
Add	1081	39	¶
Add	1082	39	¶
Add	1083	39	¶
Add	1084	39	¶
Add	1085	39	¶
Delete	1086	39	7
Add	1087	39	8
Add	1088	39	mind
Delete	1089	39	mind
Add	1090	39	that such circumstance exists, or that such
Delete	1091	39	that such circumstance exists, or that such
Delete	1092	39	¶
Delete	1093	39	8
Add	1094	39	9
Add	1095	39	22¶
Delete	1096	39	¶
Add	1097	39	aware of a high probability of the existence of such circumstance
Delete	1098	39	aware of a high probability of the existence of such circum–¶
Delete	1099	39	stance
Delete	1100	39	circum–
Add	1101	39	circumstance
Delete	1102	39	stance
Delete	1103	39	39
Add	1104	39	40
Add	1105	39	¶
Delete	1106	39	vari-ously
Add	1107	39	variously
Delete	1108	40	0
Add	1109	40	1

Add	1110	40	¶
Delete	1111	40	¶
Delete	1112	40	¶
Delete	1113	40	include
Add	1114	40	include
Delete	1115	40	line of
Add	1116	40	line of
Delete	1117	40	¶
Delete	1118	40	22¶
Delete	1119	40	foreign
Add	1120	40	Republic of
Add	1121	40	's
Delete	1122	40	Republic's
Delete	1123	40	Are
Add	1124	40	Are
Add	1125	41	23¶
Delete	1126	41	1
Add	1127	41	2
Delete	1128	41	2
Add	1129	41	3
Add	1130	41	of criminal liability
Delete	1131	41	¶
Delete	1132	41	23¶
Delete	1133	41	chapter 2¶
Delete	1134	41	The FCPA:¶
Delete	1135	41	Anti-Bribery Provisions¶
Delete	1136	41	of criminal liability
Delete	1137	41	3
Add	1138	41	4
Add	1139	41	In United States v. Ng Lap Seng, the district court rejected the defendant's request to instruct the jury with respect to the local law affirmative defense. ¹⁴⁵ In that case, the defendant was convicted of conspiracy, violating the FCPA, bribery, and money laundering, in connection with a scheme to bribe two ambassadors to the United Nations. In arguing in favor of a jury instruction for the local law affirmative defense, the defendant maintained that a finding by the jury that the payments at issue were not unlawful under the written laws and regulations of Antigua and the Dominican Republic would require acquittal on the FCPA-related counts. The court denied the defendant's request for the affirmative defense instruction, finding that the proposed instruction was "inconsistent with the plain meaning of the language of the written laws and regulations affirmative defense contained in the FCPA." ¹⁴⁶ The court further explained that the defendant's request was not directly supported by t

Delete	1140	41	4
Add	1141	41	8
Delete	1142	42	5
Add	1143	42	9
Delete	1144	42	mischarac-terization
Add	1145	42	¶
Add	1146	42	24¶
Add	1147	42	mischaracterization
Delete	1148	42	46
Add	1149	42	50
Add	1150	42	¶
Add	1151	42	¶
Add	1152	42	¶
Add	1153	42	¶
Add	1154	42	¶
Add	1155	42	whether a
Delete	1156	42	whether a
Add	1157	42	¶
Delete	1158	42	47
Add	1159	42	51
Delete	1160	42	-determined
Delete	1161	42	48
Add	1162	42	52
Delete	1163	42	49
Add	1164	42	53
Add	1165	42	»
Delete	1166	42	0
Add	1167	42	4
Add	1168	42	»
Add	1169	42	¶
Delete	1170	42	1
Add	1171	42	5
Delete	1172	42	2
Add	1173	42	6
Delete	1174	42	¶
Delete	1175	42	3
Add	1176	42	7
Delete	1177	42	4
Add	1178	42	8
Delete	1179	42	5
Add	1180	42	9
Add	1181	42	¶
Delete	1182	42	56
Add	1183	42	0

Add	1184	42	¶
Delete	1185	42	57
Add	1186	42	61
Add	1187	43	:
Delete	1188	43	,
Delete	1189	43	58
Add	1190	43	62
Delete	1191	43	24¶
Add	1192	43	Payments?
Delete	1193	43	Payments?¶
Delete	1194	43	59
Add	1195	43	63
Delete	1196	43	0
Add	1197	43	4
Delete	1198	43	1
Add	1199	43	5
Delete	1200	43	2
Add	1201	43	6
Add	1202	43	25¶
Add	1203	43	¶
Delete	1204	43	which
Add	1205	43	that
Add	1206	43	¶
Delete	1207	43	—
Add	1208	43	:
Delete	1209	43	□
Add	1210	43	•
Add	1211	43	¶
Add	1212	43	¶
Delete	1213	43	□
Add	1214	43	•
Delete	1215	43	□
Add	1216	43	•
Delete	1217	43	□
Add	1218	43	•
Delete	1219	43	□
Add	1220	43	•
Add	1221	43	.
Delete	1222	43	3
Add	1223	43	7
Delete	1224	44	4
Add	1225	44	8
Delete	1226	44	-pany's
Delete	1227	44	5

Add	1228	44	9
Delete	1229	44	66
Add	1230	44	70
Delete	1231	44	67
Add	1232	44	1
Add	1233	44	are permissible under the FCPA, they may still subject a company or individual to sanctions. As with any expenditure, facilitating payments may violate the FCPA if they are not properly recorded in an issuer's books and records.172
Delete	1234	44	25¶
Add	1235	44	26
Table Del	1236	44	
Delete	1237	44	-national
Delete	1238	45	26¶
Delete	1239	45	¶
Delete	1240	45	69
Add	1241	45	73
Delete	1242	45	real-world
Add	1243	45	real- world
Delete	1244	45	0
Add	1245	45	4
Add	1246	45	¶
Add	1247	45	27¶
Delete	1248	45	1
Add	1249	45	5
Delete	1250	45	2
Add	1251	45	6
Delete	1252	45	3
Add	1253	45	7
Delete	1254	45	4
Add	1255	45	8
Delete	1256	45	5
Add	1257	45	9
Delete	1258	45	countries
Add	1259	45	environments
Delete	1260	45	76
Add	1261	45	80
Delete	1262	46	77
Add	1263	46	81
Delete	1264	46	parent-subsubsidiary
Add	1265	46	parent- subsidiary
Add	1266	46	As described more fully below, unlike with most other statutes, DOJ has instituted an FCPA Corporate Enforcement Policy that applies to corporate resolutions in the FCPA context.

Add	1267	46	¶
Delete	1268	46	78
Add	1269	46	2
Add	1270	46	and the subsidiary is acting within the scope of authority conferred by the parent
Delete	1271	46	79
Add	1272	46	83
Delete	1273	46	0
Add	1274	46	4
Add	1275	46	¶
Add	1276	46	28¶
Delete	1277	46	¶
Delete	1278	46	27¶
Delete	1279	46	ial
Add	1280	46	er
Delete	1281	46	1
Add	1282	46	5
Delete	1283	46	2
Add	1284	46	6
Delete	1285	46	3
Add	1286	46	7
Add	1287	46	At the same time, DOJ and SEC recognize the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity.
Delete	1288	47	4
Add	1289	47	8
Add	1290	47	¶
Delete	1291	47	¶
Delete	1292	47	chapter 2¶
Delete	1293	47	The FCPA:¶
Delete	1294	47	Anti-Bribery Provisions¶
Delete	1295	47	5
Add	1296	47	9
Add	1297	47	DOJ and SEC also recognize that, in certain instances, robust pre-acquisition due diligence may not be possible. In such instances, DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts.¶
Add	1298	47	29¶
Add	1299	47	¶
Add	1300	47	»
Delete	1301	47	86

Add	1302	47	90
Delete	1303	47	only
Add	1304	47	only
Delete	1305	47	87
Add	1306	47	91
Delete	1307	47	tobacco leaf merchants
Add	1308	47	oil and gas companies
Delete	1309	47	each
Add	1310	47	both predecessor
Delete	1311	47	y
Add	1312	47	ies
Delete	1313	47	through its foreign subsidiaries, involving multiple countries
Delete	1314	48	At each company, the bribes were directed by the parent company's senior management. The two issuers then
Add	1315	48	The two companies, one of which was an issuer and the other a former issuer operating through a U.S.-based subsidiary,
Add	1316	48	ly
Add	1317	48	traded
Delete	1318	48	public
Add	1319	48	bribery—both the new entity and the foreign subsidiaries were liable under the FCPA. The new parent entered into a deferred prosecution agreement with DOJ and settled a civil action with SEC, while the company's U.S.-based subsidiary pleaded guilty. ¹⁹²
Delete	1320	48	28¶
Add	1321	48	More often, DOJ and SEC have pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition. In one such case, a U.S.-based multinational conglomerate acquired the power business of a French power and transportation company, which had paid bribes to obtain contracts prior to the acquisition. In that case the matter was resolved with a guilty plea for the French power and transportation company, and deferred prosecution agreements for two of the newly acquired subsidiaries; no successor liability was sought against the acquiring entity. ¹⁹³ ¶
Delete	1322	48	□ →
Add	1323	48	¶
Delete	1324	48	□ →
Add	1325	48	¶
Delete	1326	48	(
Add	1327	48	¶
Add	1328	48	(cont'd)¶

Add	1329	48	30¶
Add	1330	48	(
Delete	1331	48	,
Delete	1332	49	bribery—both the new entity and the foreign subsidiaries were liable under the FCPA. The new parent entered into a non-prosecution agreement with DOJ and settled a civil action with SEC, while the company’s subsidiaries, which also merged, pleaded guilty.188¶
Delete	1333	49	More often, DOJ and SEC have pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government’s investigation of the predecessor company preceded the acquisition. In one such case, an Ohio-based health care company’s due diligence of an acquisition target uncovered FCPA violations by the target’s subsidiary, and, before the merger was completed, the subsidiary’s violations were disclosed to DOJ and SEC. The subsidiary pleaded guilty and paid a \$2 million criminal fine,189 the acquisition target settled with SEC and paid a \$500,000 civil penalty,190 and no successor liability was sought against the acquiring entity.
Delete	1334	49	1
Add	1335	49	4
Delete	1336	49	DOJ and SEC have also brought actions only against a predecessor company where its FCPA violations are discovered after acquisition. For
Add	1337	49	In another
Delete	1338	49	¶
Delete	1339	49	29¶
Delete	1340	49	chapter 2¶
Delete	1341	49	The FCPA:¶
Delete	1342	49	Anti-Bribery Provisions¶
Delete	1343	49	2
Add	1344	49	5
Delete	1345	49	3
Add	1346	49	6
Delete	1347	49	4
Add	1348	49	7
Delete	1349	49	5
Add	1350	49	8
Delete	1351	49	6
Add	1352	49	9
Delete	1353	50	197
Add	1354	50	200
Add	1355	50	¶

Add	1356	50	31¶
Delete	1357	50	-pany's
Add	1358	50	201
Delete	1359	50	98
Add	1360	50	In fact, under the DOJ FCPA Corporate Enforcement Policy, in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.
Delete	1361	50	30
Add	1362	50	\
Add	1363	51	-corruption
Add	1364	51	¶
Add	1365	51	(cont'd)¶
Add	1366	51	32¶
Delete	1367	51	¶
Delete	1368	51	(cont'd)¶
Delete	1369	51	31¶
Delete	1370	51	chapter 2¶
Delete	1371	51	The FCPA:¶
Delete	1372	51	Anti-Bribery Provisions¶
Delete	1373	52	.
Delete	1374	52	incorporates
Add	1375	52	integrates
Add	1376	52	33¶
Delete	1377	52	are
Delete	1378	52	¶
Delete	1379	52	¶
Delete	1380	52	(cont'd)¶
Delete	1381	52	32¶
Add	1382	53	-corruption
Add	1383	53	(cont'd)¶
Add	1384	53	34¶
Delete	1385	54	33¶
Delete	1386	54	Additional Principles of Criminal¶
Add	1387	54	Additional Principles of Criminal
Add	1388	54	Aiding and Abetting and Conspiracy
Delete	1389	54	Aiding and Abetting and Conspiracy¶
Delete	1390	54	199
Add	1391	54	202
Delete	1392	54	0
Add	1393	54	3
Add	1394	54	Under normal principles of conspiracy liability,
Delete	1395	54	Individuals
Add	1396	54	individuals

Delete	1397	54	1
Add	1398	54	4
Add	1399	54	35¶
Delete	1400	54	2
Add	1401	54	5
Delete	1402	54	3
Add	1403	54	6
Add	1404	54	However, in <i>United States v. Hoskins</i> , the Second Circuit addressed the question of whether individuals not directly covered by the FCPA anti-bribery provisions could nevertheless be guilty of conspiring to violate, or aiding and abetting the violation of, the FCPA anti-bribery provisions, and concluded they could not. ²⁰⁷ Therefore, at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an FCPA anti-bribery violation only if that individual’s conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA’s anti-bribery provisions.¶
Add	1405	54	At least one district court from another circuit has rejected the reasoning in the <i>Hoskins</i> decision, and concluded that the defendants could be criminally liable for conspiracy to violate the FCPA anti-bribery provisions, and aiding and abetting a violation, even though they do not “belong to the class of individuals capable of committing a substantive FCPA violation.” ²⁰⁸ ¶
Delete	1406	55	4
Add	1407	55	9
Add	1408	55	10
Delete	1409	55	5
Delete	1410	55	06
Add	1411	55	11
Add	1412	55	the FCPA
Add	1413	55	statutes of limitations periods apply. For substantive violations of the FCPA anti-bribery provisions, the
Delete	1414	55	to substantive criminal
Add	1415	55	.212 For
Delete	1416	55	Act.
Add	1417	55	FCPA accounting provisions, which are defined as “securities fraud offense[s]” under 18 U.S.C. § 3301, there is a limitations period of six years.
Delete	1418	55	07
Add	1419	55	13
Add	1420	55	36¶
Delete	1421	55	five-year
Add	1422	55	general

Delete	1423	55	¶
Delete	1424	55	chapter 2¶
Delete	1425	55	The FCPA: Anti-Bribery Provisions¶
Delete	1426	55	34¶
Add	1427	55	or six
Add	1428	55	, respectively,
Delete	1429	55	08
Add	1430	55	14
Add	1431	55	Companies and individuals may choose to do this so that they may have additional time to do their own investigation of the conduct, as well as to give them an opportunity to meet with the government to discuss the case and attempt to reach a negotiated resolution.
Delete	1432	55	posed
Add	1433	55	period
Add	1434	55	¶
Add	1435	55	earlier of the
Delete	1436	55	.
Add	1437	55	, or three years.
Delete	1438	55	09
Add	1439	55	15
Delete	1440	56	or the disgorgement of ill-gotten gains
Add	1441	56	Kokesh v. SEC, the Supreme Court ruled that, because the disgorgement remedy constitutes a “penalty,” it is therefore subject to the five-year statute of limitations in 28 U.S.C. § 2462.216¶
Add	1442	56	In
Delete	1443	56	0
Add	1444	56	7
Delete	1445	56	cooperating with SEC
Add	1446	56	Graphic
Delete	1447	56	35
Delete	1448	56	chapter 2¶
Delete	1449	56	The FCPA:¶
Delete	1450	56	Anti-Bribery Provisions¶
Delete	1451	56	6
Add	1452	56	7
Delete	1453	56	chapter 3¶
Add	1454	56	Chapter 3
Delete	1455	56	¶
Delete	1456	56	1
Add	1457	56	8
Delete	1458	57	2
Add	1459	57	9

Delete	1460	57	issu-er's
Add	1461	57	issuer's
Delete	1462	57	13
Add	1463	57	20
Add	1464	57	221
Delete	1465	57	4
Delete	1466	57	ensure
Add	1467	57	require
Delete	1468	57	15
Add	1469	57	22
Delete	1470	57	»
Add	1471	57	avenue of
Delete	1472	57	avenue of coverup ”¶
Add	1473	57	coverup.”
Delete	1474	57	-terized
Delete	1475	57	16
Add	1476	57	23
Delete	1477	57	17
Add	1478	57	24
Delete	1479	57	18
Add	1480	57	25
Delete	1481	57	19
Add	1482	57	26
Delete	1483	57	0
Add	1484	57	7
Delete	1485	57	1
Add	1486	57	8
Delete	1487	58	2
Add	1488	58	9
Add	1489	58	atic
Add	1490	58	, and both DOJ and SEC look to the nature and seriousness of the conduct in determining whether to pursue an enforcement action
Add	1491	58	39¶
Delete	1492	58	□
Add	1493	58	•
Delete	1494	58	□
Add	1495	58	•
Delete	1496	58	□
Add	1497	58	•
Delete	1498	58	□
Add	1499	58	•
Delete	1500	58	□
Add	1501	58	•
Delete	1502	58	□

Add	1503	58	•
Delete	1504	58	□
Add	1505	58	•
Delete	1506	58	□
Add	1507	58	•
Delete	1508	58	□
Add	1509	58	•
Delete	1510	58	□
Add	1511	58	•
Delete	1512	58	□
Add	1513	58	•
Delete	1514	58	□
Add	1515	58	•
Delete	1516	58	□
Add	1517	58	•
Delete	1518	58	□
Add	1519	58	•
Delete	1520	58	39¶
Delete	1521	58	chapter 3¶
Delete	1522	58	The FCPA:¶
Delete	1523	58	Accounting Provisions¶
Delete	1524	58	An effective compliance program is a critical component of an issuer's internal controls. Fundamentally, the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business, such as: the nature of its products or services; how the products or services get to market; the nature of its work force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. A company's compliance program should be tailored to these differences. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different internal controls than businesses that have a lesser exposure to corruption, just as a financial services company would be expected to devise and employ different internal controls than a manufacturer.¶
Delete	1525	58	A 2008 case against a German manufacturer of industrial and consumer products illustrates a systemic internal controls problem involving bribery that was unprecedented in scale and geographic reach. From 2001 to 2007, the company created elaborate payment schemes—including slush¶
Add	1526	58	Accounting
Delete	1527	58	¶
Add	1528	58	accounting
Delete	1529	58	compa–

Add	1530	58	companies
Delete	1531	58	nies
Delete	1532	58	-
Add	1533	58	ity
Delete	1534	58	ity
Delete	1535	59	organi-
Add	1536	59	organization
Delete	1537	59	zation
Delete	1538	59	con-
Add	1539	59	control
Delete	1540	59	trol
Delete	1541	59	-
Add	1542	59	ing
Delete	1543	59	ing
Add	1544	59	¶
Add	1545	59	¶
Add	1546	59	•→
Delete	1547	59	-agement's
Add	1548	59	•→
Add	1549	59	¶
Add	1550	59	•→
Add	1551	59	•→
Delete	1552	59	223
Add	1553	59	0
Delete	1554	59	24
Add	1555	59	31
Add	1556	59	accounting
Add	1557	59	Although a company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer's internal accounting controls. Fundamentally, the design of a company's internal controls must take into account the operational realities and risks attendant to the company's business, such as: the nature of its products or services; how the products or services get to market; the nature of its work¶
Add	1558	59	40¶
Add	1559	59	force; the degree of regulation; the extent of its government interaction; and the degree to which it has operations in countries with a high risk of corruption. Just as a company's internal accounting controls are tailored to its operations, its compliance program needs to be tailored to the risks specific to its operations. Businesses whose operations expose them to a high risk of corruption will necessarily devise and employ different compliance programs than businesses that have a lesser exposure

			to corruption, just as a financial services company would be expected to devise and employ different internal accounting controls than a manufacturer.¶
Delete	1560	59	»
Delete	1561	59	40¶
Add	1562	59	A 2008 case against a German manufacturer of industrial and consumer products illustrates a systemic internal controls problem involving bribery that was unprecedented in scale and geographic reach.¶
Delete	1563	60	funds,
Add	1564	60	From 2001 to 2007, the company created elaborate payment schemes—including slush funds, off
Delete	1565	60	off-the-books
Add	1566	60	32
Delete	1567	60	5
Delete	1568	60	26
Add	1569	60	33
Delete	1570	60	27
Add	1571	60	34
Delete	1572	60	-national
Delete	1573	60	28
Add	1574	60	35
Delete	1575	60	29
Add	1576	60	36
Delete	1577	60	0
Add	1578	60	7
Delete	1579	60	1
Add	1580	60	8
Delete	1581	60	2
Add	1582	60	9
Delete	1583	60	33
Add	1584	60	40
Add	1585	60	accounting
Delete	1586	60	34
Add	1587	60	1
Add	1588	60	¶
Add	1589	60	41¶
Delete	1590	60	35
Add	1591	60	42
Add	1592	60	43
Delete	1593	60	6
Delete	1594	60	37
Add	1595	60	44
Delete	1596	60	38

Add	1597	60	45
Delete	1598	61	engaged
Add	1599	61	involved
Delete	1600	61	engaged in
Add	1601	61	perpetrated
Delete	1602	61	39
Add	1603	61	46
Delete	1604	61	41¶
Add	1605	61	»
Delete	1606	61	0
Add	1607	61	7
Delete	1608	61	-pany's
Delete	1609	61	compa-ny's
Add	1610	61	company's
Delete	1611	61	that
Add	1612	61	stating
Delete	1613	61	states
Add	1614	61	¶
Add	1615	61	42¶
Add	1616	61	s
Delete	1617	61	¶
Delete	1618	61	chapter 3¶
Delete	1619	61	The FCPA: Accounting Provisions¶
Delete	1620	62	compa-ny's
Add	1621	62	company's
Delete	1622	62	1
Add	1623	62	8
Delete	1624	62	state-ments
Add	1625	62	statements
Delete	1626	62	2
Add	1627	62	9
Delete	1628	62	43
Add	1629	62	50
Delete	1630	62	»
Add	1631	62	Provisions?
Delete	1632	62	Provisions?¶
Delete	1633	62	44
Add	1634	62	51
Delete	1635	62	45
Add	1636	62	2
Delete	1637	62	¶
Delete	1638	62	42¶
Delete	1639	62	46
Add	1640	62	53

Delete	1641	62	requirements
Add	1642	62	provisions
Delete	1643	62	issu-er's
Add	1644	62	issuer's
Add	1645	62	54
Delete	1646	62	7
Add	1647	62	¶
Add	1648	62	43¶
Delete	1649	63	48
Add	1650	63	55
Delete	1651	63	49
Add	1652	63	56
Delete	1653	63	-visions
Delete	1654	63	0
Add	1655	63	7
Delete	1656	63	1
Add	1657	63	8
Delete	1658	63	2
Add	1659	63	9
Delete	1660	63	53
Add	1661	63	60
Delete	1662	63	brought an administrative action
Add	1663	63	instituted a proceeding
Delete	1664	63	54
Add	1665	63	61
Delete	1666	63	55
Add	1667	63	62
Delete	1668	63	56
Add	1669	63	3
Delete	1670	63	¶
Delete	1671	63	43¶
Delete	1672	63	chapter 3¶
Delete	1673	63	The FCPA: Accounting Provisions¶
Delete	1674	63	57
Add	1675	63	64
Add	1676	63	65
Delete	1677	63	8
Add	1678	63	44¶
Delete	1679	63	59
Add	1680	63	66
Delete	1681	64	0
Add	1682	64	7
Delete	1683	64	1
Add	1684	64	8

Delete	1685	64	2
Add	1686	64	9
Add	1687	64	and willfully
Delete	1688	64	63
Add	1689	64	70
Delete	1690	64	As with the FCPA’s anti-bribery provisions, individuals are only subject to the FCPA’s criminal penalties for violations of the accounting provisions if they acted “willfully.” ²⁶⁴
Delete	1691	64	For example, a French company was criminally charged with failure to implement internal controls and failure to keep accurate books and records, among other violations. ²⁶⁵ As part of its deferred prosecution agreement, the company admitted to numerous internal control failures, including failure to implement sufficient anti-bribery compliance policies, maintain a sufficient system for the selection and approval of consultants, and conduct appropriate audits of payments to purported “business consultants.” ²⁶⁶ Likewise, a German company pleaded guilty to internal controls and books and records violations where, from 2001 through 2007, it made payments totaling approximately \$1.36 billion through various mechanisms, including \$805.5 million as bribes and \$554.5 million for unknown purposes. ²⁶⁷
Add	1692	64	For example, a U.S.-based hedge fund was criminally charged with violating the books and records and the internal accounting controls provisions of the FCPA, among other things. As part of its deferred prosecution agreement, the company admitted to falsifying its books and records by falsifying records related to the retention and nature of services of, and payments to, an intermediary it used in Libya in order to conceal the true nature of the payments. Also, the hedge fund admitted that it failed to implement a system of internal controls relating to due diligence for the retention of third-party intermediaries, pre-clearance and approval of agreements with third parties and agents, notification to clients and prospective clients of arrangements with third parties having an impact on the client arrangements, documentation and proof of services provided by the third parties, auditing assets and operations in areas that posed a high risk of corruption, ensuring appropriate justification
Add	1693	65	appropriate controls. ²⁷¹ → Similarly, a U.S.-based»
Add	1694	65	electronics company entered into a deferred prosecution agreement to resolve charges that it
Add	1695	65	45
Add	1696	65	knowingly and willfully caused its Japanese-parent issuer to falsify its books and records concerning the improper retention of consultants and concealment of payments to third-party sales agents. As part of its agreement, the company admitted that it retained certain so-called consultants, who did little or no actual

			consulting work, through a third-party service provider and paid for those services out of a budget over which a senior executive had complete control and discretion, without meaningful oversight by anyone at the company or the parent. By mischaracterizing these payments as “consultant payments” on its general ledger, the company caused its issuer-parent to incorrectly designate those payments as “selling and general administrative expenses” on its books, records, and accounts. In addition, the company admitted that its senior executives provided false or incomplete representations about the effectiveness of the company’s internal controls to the parent on their Sarbanes-
Delete	1697	65	¶
Delete	1698	65	44¶
Delete	1699	65	68
Add	1700	65	73
Delete	1701	65	As with the FCPA’s anti-bribery provisions,
Delete	1702	65	companies
Add	1703	65	Companies
Add	1704	65	and
Delete	1705	65	and
Add	1706	65	and
Delete	1707	65	and anti-bribery violations.
Add	1708	65	anti-briberyviolations.
Delete	1709	65	69
Add	1710	65	74
Delete	1711	65	0
Add	1712	65	5
Delete	1713	65	1
Add	1714	65	6
Add	1715	66	Unlike the FCPA anti-bribery provisions, the accounting provisions apply to “any person,” and thus are not subject to the reasoning in the Second Circuit’s decision in <i>United States v. Hoskins</i> limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions.277¶
Add	1716	66	¶
Add	1717	66	46¶
Delete	1718	66	2
Add	1719	66	8
Add	1720	66	¶
Delete	1721	66	These
Add	1722	66	The
Delete	1723	66	3
Add	1724	66	9
Delete	1725	66	74
Add	1726	66	80

Add	1727	67	Graphic
Delete	1728	67	45
Delete	1729	67	chapter 3¶
Delete	1730	67	The FCPA:¶
Delete	1731	67	Accounting Provisions¶
Delete	1732	67	6
Add	1733	67	7
Delete	1734	67	chapter
Add	1735	67	Chapter
Delete	1736	67	-ity
Delete	1737	67	75
Add	1738	67	81
Delete	1739	67	76
Add	1740	67	82
Delete	1741	67	77
Add	1742	67	83
Delete	1743	68	78
Add	1744	68	4
Delete	1745	68	79
Add	1746	68	85
Add	1747	68	¶
Add	1748	68	48¶
Add	1749	68	¶
Add	1750	68	violations,286 they can be prosecuted for money laundering violations where the specified unlawful activity is a violation of the FCPA.287
Delete	1751	68	48¶
Delete	1752	68	violations,280 three former Haitian officials involved in the same scheme were convicted of money laundering.281¶
Delete	1753	68	-sidiary's
Delete	1754	68	2
Add	1755	68	8
Delete	1756	68	3
Add	1757	68	9
Delete	1758	68	84
Add	1759	68	90
Delete	1760	68	85
Add	1761	68	91
Delete	1762	68	86
Add	1763	68	92
Delete	1764	69	87
Add	1765	69	93
Delete	1766	69	Service-Criminal
Add	1767	69	Service – Criminal

Add	1768	69	Graphic
Add	1769	69	¶
Delete	1770	69	chapter 4¶
Delete	1771	69	Other Related U.S. Laws¶
Delete	1772	69	50¶
Delete	1773	69	chapter
Add	1774	69	Chapter
Delete	1775	69	¶
Add	1776	69	and FCPA Corporate Enforcement Policy
Delete	1777	69	U.S. Attorney's
Add	1778	69	Justice
Delete	1779	69	88
Add	1780	69	94
Add	1781	69	:
Delete	1782	69	-son's
Delete	1783	69	-son's
Delete	1784	69	89
Add	1785	69	5
Delete	1786	70	U.S. Attorney's
Add	1787	70	¶
Add	1788	70	50¶
Add	1789	70	Justice
Delete	1790	70	0
Add	1791	70	6
Add	1792	70	¶
Add	1793	70	¶
Add	1794	70	¶
Add	1795	70	¶
Add	1796	70	than
Delete	1797	70	52¶
Delete	1798	70	than
Add	1799	70	¶
Add	1800	70	¶
Delete	1801	70	Nine
Add	1802	70	Ten
Add	1803	70	¶
Add	1804	70	¶
Add	1805	70	¶
Delete	1806	70	including the risk of harm to the public;
Add	1807	70	including the risk of harm to the public;¶
Add	1808	70	¶
Delete	1809	70	timely and voluntary disclosure of wrongdoing and its
Delete	1810	70	in the
Add	1811	70	with the government's

Delete	1812	70	of its
Add	1813	70	, including as to potential wrongdoing by the corporation's
Delete	1814	70	existence
Add	1815	70	adequacy
Delete	1816	70	pre-existing
Add	1817	70	at the time of the offense, as well as at the time of a charging or resolution decision
Add	1818	70	•→the corporation's timely and voluntary disclosure of wrongdoing;¶
Add	1819	70	adequate and
Add	1820	70	to
Add	1821	70	to
Add	1822	70	to
Add	1823	70	or to
Delete	1824	70	, and cooperate with the relevant government agencies
Add	1825	70	¶
Add	1826	70	•→the adequacy of remedies such as civil or regulatory enforcement actions, including remedies resulting from the corporation's cooperation with relevant government agencies; and¶
Delete	1827	70	; and
Add	1828	70	.
Delete	1829	70	•→the adequacy of remedies such as civil or regulatory enforcement actions.¶
Delete	1830	70	corpora-tion's
Add	1831	70	corporation's
Delete	1832	70	-zation's
Delete	1833	71	-tigation
Delete	1834	71	1
Add	1835	71	7
Add	1836	71	DOJ FCPA Corporate Enforcement Policy¶
Add	1837	71	The FCPA Corporate Enforcement Policy (CEP), contained in the Justice Manual, provides that, where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances.298 CEP declinations are public and available on the Fraud Section's website at https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations . Aggravating circumstances that may warrant a criminal resolution instead of a declination include, but are not limited to: involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.299 Even where aggravating circumstances

			exist, DOJ may still¶
Add	1838	71	51¶
Add	1839	71	decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme.300¶
Add	1840	71	If a criminal resolution is appropriate, where a company that voluntarily self-discloses, fully cooperates, and timely and appropriately remediates, DOJ will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (Guidelines) fine range, except in the case of a criminal recidivist; and generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.301¶
Add	1841	71	The CEP also recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the CEP, there will be a presumption of a declination in accordance with and subject to the other requirements of the CEP. In appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.¶
Add	1842	71	Where a company does not voluntarily self-disclose the misconduct, but nevertheless fully cooperates, and timely and appropriately remediates, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the Guidelines fine range.302¶
Add	1843	71	To be eligible for the benefits of the CEP, including a declination, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.303¶
Add	1844	71	The CEP also provides definitions of the terms “voluntary self-disclosure,” “full cooperation,” and “timely and appropriate remediation.” By outlining in the Justice Manual how DOJ defines these terms and the benefits that will accrue to a company that engages in such behavior, companies can make an informed decision as to whether they believe such behavior is in their best interest. Of course, if a company chooses not to engage in such behavior, and DOJ learns of the misconduct and establishes sufficient proof for prosecution, the company should not expect to receive any benefits outlined in the CEP or to otherwise receive leniency.304¶

Add	1845	72	The CEP applies only to DOJ, and does not bind or apply to SEC. 305 The CEP and the declinations that have been announced pursuant to it are posted on DOJ's website. ³⁰⁶ Three such cases are as follows:¶
Add	1846	72	CEP Declination Example 1¶
Add	1847	72	In 2018, DOJ declined prosecution of a privately held company based in the United Kingdom that manufactures and sells equipment used to detect earthquakes and other seismic events. The company had voluntarily self-disclosed to DOJ that it had made numerous payments amounting to nearly \$1 million to the director of a Korean government-funded research center. Following the disclosure of these payments, DOJ indicted the director and in July 2017 tried and convicted him in the Central District of California of one count of money laundering in violation of 18 U.S.C. § 1957. The director was subsequently sentenced to 14 months in prison in October 2017.¶
Add	1848	72	The company received a declination under¶
Add	1849	72	52¶
Add	1850	72	the CEP because it voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated pursuant to the CEP. In addition, the company was the subject of a parallel investigation by the United Kingdom's Serious Fraud Office (SFO) for legal violations relating to the same conduct and committed to accepting responsibility with the SFO (the company subsequently entered into a deferred prosecution with the SFO and agreed to pay approximately £2.07M of gross profits arising from the payments to the director).¶
Add	1851	72	CEP Declination Example 2¶
Add	1852	72	In 2018, DOJ declined prosecution of an insurance company incorporated and headquartered in Barbados. DOJ's investigation found that the company, through its employees and agents, paid approximately \$36,000 in bribes to a Barbadian government official in exchange for insurance contracts resulting in approximately \$686,827 in total premiums for the contracts and approximately \$93,940 in net profits. Specifically, in or around August 2015 and April 2016, high-level employees of the company took part in a scheme to pay approximately \$36,000 in bribes to the Minister of Industry in Barbados, and to launder the bribe payments into the United States.¶
Add	1853	72	Despite the high-level involvement of corporate officers in the misconduct, DOJ declined prosecution based on a number of factors, including but not limited to: (1) the company's timely, voluntary self-disclosure of the conduct; (2) the company's thorough and comprehensive investigation; (3) the company's cooperation (including its provision of all known relevant facts about the misconduct) and its agreement to continue to cooperate

			in DOJ's ongoing investigations and/or prosecutions; (4) the company's agreement to disgorge to DOJ all profits it made from the illegal conduct, which equaled \$93,940; (5) the steps the company had taken to enhance its compliance program and its internal accounting controls; (6) the company's remediation, including but not limited to terminating all of the executives and employees who were involved in the misconduct; and (7) the fact that DOJ had been able to identify and charge the culpable individuals.¶
Add	1854	72	CEP Declination Example 3¶
Add	1855	72	In 2019, DOJ declined prosecution of a publicly traded technology services company. DOJ's investigation found that the company, through its employees, authorized its agents to pay an approximately \$2 million bribe to one or more government officials in India in exchange for securing and obtaining a statutorily required planning permit in connection with the development of an office park, as well as other improper payments in connection with other projects in India. Despite the fact that certain members of senior management participated in and directed the criminal conduct at issue, DOJ declined prosecution of the company based on an assessment of the factors set forth in the CEP and the Principles of Federal Prosecution of Business Organizations, including but not limited to: (1) the company's voluntary self-disclosure within two weeks of the Board learning of the criminal conduct; (2) the company's thorough and comprehensive investigation; (3) the company's full and proactive cooperat
Add	1856	73	53¶
Add	1857	73	compliance program and internal accounting controls; (7) the company's full remediation, including but not limited to terminating the employment of, and disciplining, employees and contractors involved in misconduct; (8) the adequacy of remedies such as civil or regulatory enforcement actions, including the company's resolution with SEC and agreement to pay a civil penalty of \$6 million and disgorgement; (9) the company's agreement to disgorge the full amount of its cost savings from the bribery; and (10) the fact that, as a result of the company's timely voluntary disclosure, DOJ was able to conduct an independent investigation and identify individuals with culpability for the corporation's malfeasance.¶
Add	1858	73	Staff
Delete	1859	73	¶
Delete	1860	73	Bring
Add	1861	73	Recommend
Delete	1862	73	292
Add	1863	73	307

Delete	1864	73	¶
Delete	1865	73	53¶
Delete	1866	73	chapter 5¶
Delete	1867	74	Guiding Principles of Enforcement¶
Delete	1868	74	http://www.sec.gov/divisions/enforce.shtml .
Add	1869	74	https://www.sec.gov/divisions/enforce/enforcementmanual.pdf .
Add	1870	74	Remedial Efforts
Delete	1871	74	Remedial Efforts¶
Add	1872	74	54¶
Add	1873	74	and the CEP
Delete	1874	74	prosecutors consider a company's cooperation in determining how to resolve a corporate criminal case. Specifically,
Delete	1875	74	an d
Add	1876	74	and
Add	1877	74	¶
Delete	1878	74	wrong-doers
Add	1879	74	wrongdoers
Delete	1880	74	293
Add	1881	74	08
Delete	1882	74	294
Add	1883	74	309
Delete	1884	74	4
Delete	1885	74	295
Add	1886	74	310
Delete	1887	74	¶
Delete	1888	75	296
Add	1889	75	311
Add	1890	75	312
Delete	1891	75	97
Delete	1892	75	¶
Delete	1893	75	54¶
Delete	1894	75	298
Add	1895	75	313
Add	1896	75	¶
Add	1897	75	55¶
Add	1898	75	¶
Add	1899	75	¶
Add	1900	75	¶
Add	1901	75	¶
Add	1902	75	¶
Add	1903	75	¶
Add	1904	75	¶
Add	1905	75	¶

Delete	1906	75	299
Add	1907	75	314
Delete	1908	76	-ual's
Delete	1909	76	55¶
Delete	1910	76	is a critical component of
Add	1911	76	reinforces
Add	1912	76	¶
Delete	1913	76	-lations
Delete	1914	76	00
Add	1915	76	15
Add	1916	76	»
Delete	1917	76	01
Add	1918	76	6
Add	1919	76	¶
Add	1920	76	56¶
Delete	1921	76	02
Add	1922	76	17
Delete	1923	76	well-constructed, thoughtfully implemented, and consistently enforced
Add	1924	76	company's
Add	1925	76	can
Delete	1926	76	s
Add	1927	76	, where it is well-constructed, effectively implemented, appropriately resourced, and consistently enforced
Add	1928	76	and effectiveness
Add	1929	76	at the time of the misconduct and at the time of the resolution
Delete	1930	76	The program
Add	1931	76	In criminal resolutions, the compliance program factors into three key areas of decision: (1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate and the length and nature of any reporting obligations). ³¹⁸ For example, compliance program adequacy
Add	1932	76	guilty plea,
Delete	1933	76	It will often affect the penalty amount and the need for a monitor or self-report-ing.
Delete	1934	76	03
Add	1935	76	19
Add	1936	77	20
Delete	1937	77	4
Delete	1938	77	nine
Add	1939	77	ten
Delete	1940	77	and

Add	1941	77	,
Add	1942	77	and effectiveness,
Delete	1943	77	existence
Add	1944	77	adequacy
Delete	1945	77	pre-existing
Add	1946	77	the nature of
Delete	1947	77	05
Add	1948	77	21
Delete	1949	77	¶
Delete	1950	77	chapter 5¶
Delete	1951	77	Guiding Principles of Enforcement¶
Delete	1952	77	06
Add	1953	77	22
Delete	1954	77	07
Add	1955	77	23
Add	1956	77	In other words, is the program adequately resourced
Add	1957	77	and empowered to function effectively?¶
Add	1958	77	in practice
Delete	1959	77	08
Add	1960	77	24
Add	1961	77	¶
Add	1962	77	57¶
Delete	1963	77	09
Add	1964	77	25
Delete	1965	77	56¶
Delete	1966	77	¶
Delete	1967	77	10
Add	1968	77	26
Delete	1969	77	-
Delete	1970	77	-national
Delete	1971	78	11
Add	1972	78	27
Delete	1973	78	by
Add	1974	78	bymiddle
Add	1975	78	and
Delete	1976	78	and
Add	1977	78	at
Delete	1978	78	at
Delete	1979	78	12
Add	1980	78	8
Add	1981	78	¶
Add	1982	78	58¶
Delete	1983	78	-pany's
Delete	1984	78	¶

Delete	1985	79	57¶
Delete	1986	79	Among the
Add	1987	79	The
Delete	1988	79	-pany's
Delete	1989	79	13
Add	1990	79	29
Delete	1991	79	¶
Delete	1992	79	chapter 5¶
Delete	1993	79	Guiding Principles of Enforcement¶
Delete	1994	79	14
Add	1995	79	30
Add	1996	79	331
Delete	1997	79	5
Add	1998	79	¶
Add	1999	79	59¶
Delete	2000	79	16
Add	2001	79	32
Delete	2002	80	17
Add	2003	80	33
Delete	2004	80	¶
Delete	2005	80	58¶
Delete	2006	80	risk-based
Add	2007	80	risk- based
Add	2008	80	¶
Add	2009	80	60¶
Delete	2010	80	18
Add	2011	80	34
Delete	2012	81	-tiveness
Delete	2013	81	19
Add	2014	81	35
Add	2015	81	¶
Add	2016	81	¶
Add	2017	81	¶
Add	2018	81	¶
Add	2019	81	¶
Delete	2020	81	These
Add	2021	81	The
Add	2022	81	¶
Delete	2023	81	¶
Delete	2024	81	59¶
Add	2025	81	¶
Add	2026	81	¶
Delete	2027	81	pro-
Add	2028	81	program, and

Delete	2029	81	gram, and
Delete	2030	81	20
Add	2031	81	36
Add	2032	81	¶
Add	2033	81	compliance a significant metric for
Delete	2034	81	compliance a significant metric for
Delete	2035	81	an integral part of management's
Add	2036	81	an integral part of management's
Delete	2037	81	Beyond financial incentives, some compa-
Add	2038	81	Beyond financial incentives, some companies have¶
Delete	2039	81	nies have
Delete	2040	81	internal audit
Add	2041	81	internal audit
Delete	2042	81	the company's compli-
Add	2043	81	the company's compliance organization a way to¶
Delete	2044	81	ance organization a way to
Add	2045	81	¶
Add	2046	81	¶
Delete	2047	82	21
Add	2048	82	37
Add	2049	82	61¶
Delete	2050	82	¶
Delete	2051	82	com-
Add	2052	82	compliance
Delete	2053	82	pliance
Delete	2054	82	disci-
Add	2055	82	disciplined
Delete	2056	82	plined
Delete	2057	82	sanc-
Add	2058	82	sanctioning
Delete	2059	82	tioning
Delete	2060	82	¶
Delete	2061	82	chapter 5¶
Delete	2062	82	Guiding Principles of Enforcement¶
Delete	2063	82	third-party
Add	2064	82	third party
Delete	2065	82	22
Add	2066	82	38
Delete	2067	82	¶
Delete	2068	82	60¶
Delete	2069	82	Compliance Program Case Study¶
Delete	2070	82	Recent DOJ and SEC actions relating to a financial institution's real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a

			comprehensive risk-based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District’s real estate arm. The government entity conducted the transactions through two special purpose vehicles (“SPVs”), with the second SPV purchasing a 12% stake in a real estate project.¶
Delete	2071	83	The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs . Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity’s payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity’s offices; searching media sources; and conducting background checks on the entity’s principals. The financial instituti
Delete	2072	83	Notwithstanding the financial institution’s robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution’s executive in charge of the project, and the SPV’s attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA’s internal control provisions and also settled with SEC.¶
Delete	2073	83	Confidential Reporting and Internal Investigation¶
Delete	2074	83	An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis and without fear of retaliation.323 Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures

			taken. Companies will want to consider taking “lessons learned” from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.¶
Delete	2075	83	Continuous Improvement: Periodic Testing and Review¶
Delete	2076	83	Finally, a good compliance program should constantly evolve. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its¶
Delete	2077	83	61¶
Delete	2078	83	industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale.¶
Delete	2079	84	According to one survey, 64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs. ³²⁴ An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines. ³²⁵ Although the nature and the frequency of proactive evaluations
Delete	2080	84	Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration¶
Delete	2081	84	In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks. ³²⁷ Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business’s profitability and reputation, as well as potential civil and criminal liability.¶
Delete	2082	84	In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target’s value and negotiate for the costs of the bribery to be

			borne by the target. In addition,¶
Delete	2083	84	chapter 5¶
Delete	2084	84	Guiding Principles of Enforcement¶
Delete	2085	84	such actions demonstrate to DOJ and SEC a company’s commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government, cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company.328 When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence.329¶
Delete	2086	84	FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.¶
Delete	2087	85	For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions.330¶
Delete	2088	85	Other Guidance on Compliance and¶
Delete	2089	85	International Best Practices¶
Delete	2090	85	In addition to this guide, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce’s International Trade Administration has published Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies,331 and the Department of State has published Fighting Global Corruption: Business Risk Management.332¶
Delete	2091	85	There is also an emerging international consensus on compliance

			best practices, and a number of inter-governmental and non-governmental organizations have issued guidance regarding best practices for compliance. ³³³ Most notably, the OECD’s 2009 Anti-Bribery Recommendation and its Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance, ³³⁴ published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources: [¶]
Delete	2092	85	•→Asia-Pacific Economic Cooperation—Anti-Corruption Code of Conduct for Business; ^{335¶}
Delete	2093	85	•→International Chamber of Commerce—ICC Rules on Combating Corruption; ^{336¶}
Delete	2094	85	•→Transparency International—Business Principles for Countering Bribery; ^{337¶}
Delete	2095	85	•→United Nations Global Compact—The Ten Principles; ^{338¶}
Delete	2096	85	•→World Bank—Integrity Compliance Guidelines; ³³⁹ and [¶]
Delete	2097	85	•→World Economic Forum—Partnering Against Corruption—Principles for Countering Bribery. ^{340¶}
Delete	2098	86	vaguely-defined
Add	2099	86	vaguely defined
Delete	2100	86	¶
Delete	2101	86	(cont’d) [¶]
Delete	2102	86	63 [¶]
Delete	2103	86	chapter 5 [¶]
Delete	2104	86	Guiding Principles of Enforcement [¶]
Delete	2105	86	Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A’s [¶]
Delete	2106	86	products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project [¶]
Table Del	2107	86	
Delete	2108	86	the
Add	2109	86	Instead of hiring Consultant, Company A retains an often-used local distributor (Distributor) to sell Company A’s products to the Ministry of Immigration. In negotiating the pricing structure, Distributor, which had introduced the project to Company A, claims that the standard discount price to Distributor creates insufficient margin for Distributor to cover warehousing, distribution, installation, marketing, and training costs and requests an additional discount or rebate, or, in the
Add	2110	86	m
Delete	2111	86	m
Delete	2112	86	to perform installation, training, and other services that would

			normally have been performed by Distributor or Company A . According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.
Add	2113	87	(cont'd)¶
Add	2114	87	63¶
Add	2115	87	to perform installation, training, and other services that would normally have been performed by Distributor of Company A. According to Distributor, the Ministry has a solid working relationship with Local Partner, and it would cause less disruption for Local Partner to perform most of the on-site work at the Ministry. One of the principals (Principal 1) of the Local Partner is an official in another government ministry.¶
Delete	2116	87	(cont'd)¶
Delete	2117	87	64¶
Delete	2118	88	-shore
Add	2119	88	¶
Add	2120	88	(cont'd)¶
Add	2121	88	64¶
Delete	2122	88	-shore
Delete	2123	88	-shore
Delete	2124	88	¶
Add	2125	89	Confidential Reporting and Internal Investigation¶
Add	2126	89	An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis and without fear of retaliation.339 Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken. Companies will want to consider taking “lessons learned” from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program and focus future training on such issues, as appropriate.¶
Add	2127	89	Continuous Improvement: Periodic Testing and¶
Delete	2128	89	chapter 5
Add	2129	89	Review
Delete	2130	89	Guiding Principles of Enforcement¶
Add	2131	89	Finally, a good compliance program should constantly evolve. A company’s business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern

			its actions, and the standards of its industry. In addition, compliance programs that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements. Consequently, DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and do not allow them to become stale.¶
Add	2132	89	An organization should take the time to review and test its controls, and it should think critically about its potential weaknesses and risk areas. For example, some companies have undertaken employee surveys to measure their compliance culture and strength of internal controls, identify best practices, and detect new risk areas. Other companies periodically test their internal controls with targeted audits to make certain that controls on paper are working in practice. DOJ and SEC will give meaningful credit to thoughtful efforts to create a sustainable compliance program if a problem is later discovered. Similarly, undertaking proactive evaluations before a problem strikes can lower the applicable penalty range under the U.S. Sentencing Guidelines. ³⁴⁰ Although the nature and the frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement and sustainability. ³⁴¹ ¶
Add	2133	90	Mergers and Acquisitions: Pre-Acquisition Due¶
Add	2134	90	Diligence and Post-Acquisition Integration¶
Add	2135	90	In the context of the FCPA, mergers and acquisitions present both risks and opportunities. A company that does not perform adequate FCPA due diligence prior to a merger or acquisition may face both legal and business risks. ³⁴² Perhaps most commonly, inadequate due diligence can allow a course of bribery to continue—with all the attendant harms to a business’ profitability and reputation, as well as potential civil and criminal liability.¶
Add	2136	90	In contrast, companies that conduct effective FCPA due diligence on their acquisition targets are able to evaluate more accurately each target’s value and negotiate for the costs of the bribery to be borne by the target. In addition, such actions demonstrate to DOJ and SEC a company’s commitment to compliance and are taken into account when evaluating any potential enforcement action. For example, DOJ and SEC declined to take enforcement action against an acquiring issuer when the issuer, among other things, uncovered the corruption at the company being acquired as part of due diligence, ensured that the corruption was voluntarily disclosed to the government,¶
Add	2137	90	cooperated with the investigation, and incorporated the acquired company into its compliance program and internal controls. On

			the other hand, SEC took action against the acquired company, and DOJ took action against a subsidiary of the acquired company. ³⁴³ When pre-acquisition due diligence is not possible, DOJ has described procedures, contained in Opinion Procedure Release No. 08-02, pursuant to which companies can nevertheless be rewarded if they choose to conduct thorough post-acquisition FCPA due diligence. ³⁴⁴
Add	2138	90	FCPA due diligence, however, is normally only a portion of the compliance process for mergers and acquisitions. DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units.
Add	2139	90	For example, as a result of due diligence conducted by a California-based issuer before acquiring the majority interest in a joint venture, the issuer learned of corrupt payments to obtain business. However, the issuer only implemented its internal controls “halfway” so as not to “choke the sales engine and cause a distraction for the sales guys.” As a result, the improper payments continued, and the issuer was held liable for violating the FCPA’s internal controls and books and records provisions. ³⁴⁵
Add	2140	90	Investigation, Analysis, and Remediation of
Add	2141	90	Misconduct
Add	2142	90	The truest measure of an effective compliance program is how it responds to misconduct. Accordingly, for a compliance program to be truly effective, it should have a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company’s response, including any disciplinary or remediation measures taken.
Add	2143	91	In addition to having a mechanism for responding to the specific incident of misconduct, the company’s program should also integrate lessons learned from any misconduct into the company’s policies, training, and controls. To do so, a company will need to analyze the root causes of the misconduct to timely and appropriately remediate those causes to prevent future compliance breaches.
Add	2144	91	Other Guidance on Compliance and International Best Practices
Add	2145	91	In addition to this guide, DOJ has published guidance concerning the Evaluation of Corporate Compliance Programs. ³⁴⁶ The Evaluation of Corporate Compliance Programs is meant to assist prosecutors in making informed decisions as to whether, and to

			what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate: (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations). The DOJ compliance guidance provides companies insight into the types of questions that prosecutors ask to evaluate and assess a company’s compliance program.¶
Add	2146	91	In addition, the U.S. Departments of Commerce and State have both issued publications that contain guidance regarding compliance programs. The Department of Commerce’s International Trade Administration¶
Add	2147	91	67¶
Add	2148	91	has published Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies,347 and the Department of State has published Fighting Global Corruption: Business Risk Management.348¶
Add	2149	91	There is also a developing international consensus on compliance best practices, and a number of inter-governmental and¶
Add	2150	91	non-governmental→organizations→have»
Add	2151	91	issued guidance regarding best practices for compliance.349 Most notably, the OECD’s 2009 Anti-Bribery Recommendation and its Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance,350 published in February 2010, were drafted based on consultations with the private sector and civil society and set forth specific good practices for ensuring effective compliance programs and measures for preventing and detecting foreign bribery. In addition, businesses may wish to refer to the following resources:¶
Add	2152	91	•→Asia-Pacific Economic Cooperation—Anti-¶
Add	2153	91	Corruption Code of Conduct for Business351¶
Add	2154	91	•→International Chamber of Commerce— ICC Rules on Combating Corruption352¶
Add	2155	91	•→Transparency International—Business Principles for Countering Bribery353¶
Add	2156	91	•→United Nations Global Compact—»
Add	2157	91	The Ten Principles354¶
Add	2158	91	•→World Bank—Integrity Compliance Guidelines355¶
Add	2159	91	•→World Economic Forum—Partnering Against Corruption—Principles for Countering Bribery356¶
Add	2160	91	Compliance Program Case Study¶
Add	2161	91	DOJ and SEC actions relating to a financial institution’s real estate transactions with a government agency in China illustrate the benefits of implementing and enforcing a comprehensive risk-

			based compliance program. The case involved a joint venture real estate investment in the Luwan District of Shanghai, China, between a U.S.-based financial institution and a state-owned entity that functioned as the District’s real estate arm. The government entity conducted the transactions through two special purpose vehicles (“SPVs”), with the second SPV purchasing a 12% stake in a real estate project.¶
Add	2162	92	The financial institution, through a robust compliance program, frequently trained its employees, imposed a comprehensive payment-approval process designed to prevent bribery, and staffed a compliance department with a direct reporting line to the board of directors. As appropriate given the industry, market, and size and structure of the transactions, the financial institution (1) provided extensive FCPA training to the senior executive responsible for the transactions and (2) conducted extensive due diligence on the transactions, the local government entity, and the SPVs. Due diligence on the entity included reviewing Chinese government records; speaking with sources familiar with the Shanghai real estate market; checking the government entity’s payment records and credit references; conducting an on-site visit and placing a pretextual telephone call to the entity’s offices; searching media sources; and conducting background checks on the entity’s principals. The financial institutio
Add	2163	92	Notwithstanding the financial institution’s robust compliance program and good faith enforcement of it, the company failed to learn that the Chinese Official personally owned nearly 50% of the second SPV (and therefore a nearly 6% stake in the joint venture) and that the SPV was used as a vehicle for corrupt payments. This failure was due, in large part, to misrepresentations by the Chinese Official, the financial institution’s executive in charge of the project, and the SPV’s attorney that the SPV was 100% owned and controlled by the government entity. DOJ and SEC declined to take enforcement action against the financial institution, and its executive pleaded guilty to conspiracy to violate the FCPA’s internal control provisions and also settled with SEC.¶
Add	2164	92	Graphic
Add	2165	92	¶
Add	2166	92	68¶
Delete	2167	92	chapter
Add	2168	92	Chapter
Delete	2169	92	¶
Delete	2170	92	41
Add	2171	92	57
Delete	2172	92	42
Add	2173	92	58

Delete	2174	92	43
Add	2175	92	59
Delete	2176	92	44
Add	2177	92	60
Delete	2178	93	45
Add	2179	93	61
Delete	2180	93	46
Add	2181	93	2
Delete	2182	93	(Guidelines)
Delete	2183	93	47
Add	2184	93	63
Delete	2185	93	cooperation,
Add	2186	93	-existing
Add	2187	93	69¶
Delete	2188	93	for
Add	2189	93	64
Delete	2190	93	8
Delete	2191	93	¶
Delete	2192	93	68¶
Delete	2193	93	49
Add	2194	93	65
Delete	2195	93	50
Add	2196	93	66
Delete	2197	93	51
Add	2198	93	67
Delete	2199	93	52
Add	2200	93	68
Delete	2201	93	53
Add	2202	93	69
Delete	2203	93	54
Add	2204	93	70
Delete	2205	94	55
Add	2206	94	71
Add	2207	94	-existing
Delete	2208	94	56
Add	2209	94	72
Add	2210	94	¶
Add	2211	94	70¶
Delete	2212	94	57
Add	2213	94	3
Add	2214	94	21,410
Delete	2215	94	6,000
Add	2216	94	410
Delete	2217	94	00

Delete	2218	94	58
Add	2219	94	74
Add	2220	94	21,410
Delete	2221	94	6,000
Add	2222	94	410
Delete	2223	94	00
Add	2224	94	75
Delete	2225	94	9
Add	2226	94	76
Delete	2227	94	0
Add	2228	94	in district court actions
Delete	2229	94	egregiousness
Add	2230	94	nature
Add	2231	94	and potential risk to investors
Delete	2232	94	7,500
Add	2233	94	9,639
Delete	2234	94	150,000
Add	2235	94	192,768
Delete	2236	94	75,000
Add	2237	94	96,384
Delete	2238	94	725,000
Add	2239	94	963,837
Delete	2240	94	61
Add	2241	94	77
Delete	2242	94	62
Add	2243	94	78
Add	2244	94	Forfeiture and Disgorgement¶
Add	2245	94	In addition to criminal and civil penalties, companies may also be required to forfeit the proceeds of their crimes, or disgorge the profits generated from the crimes. While the purpose of a penalty or fine is to punish and deter misconduct, the purpose of forfeiture and disgorgement is primarily to return the perpetrator to the same position as before the crime, ensuring that the perpetrator does not profit from the misconduct. However, in <i>Kokesh v. SEC</i> , the Supreme Court ruled that the civil disgorgement remedy is subject to the same five-year statute of limitations as a penalty under 28 U.S.C. § 2462. Following <i>Kokesh</i> , in <i>SEC v. Liu</i> , the court again addressed the disgorgement remedy stating, “[e]quity courts have routinely deprived wrongdoers of their net profits from unlawful activity,” and holding that disgorgement is permissible equitable relief when it does not exceed a wrongdoer’s net profits and is awarded for victims. ³⁷⁹ ¶
Add	2246	94	Coordinated Resolutions and Avoiding “Piling On”¶
Add	2247	94	In resolving cases against companies, DOJ and SEC strive to avoid imposing duplicative penalties, forfeiture, and

			disgorgement for the same conduct. DOJ and SEC attempt to similarly credit fines, penalties, forfeiture, and disgorgement of foreign authorities resolving with the same company for the same conduct. In a case involving a publicly-traded Brazilian petrochemical company, DOJ, SEC, Brazilian authorities, and Swiss authorities credited one another in imposing fines and disgorgement. ³⁸⁰
Add	2248	95	DOJ has coordinated resolutions with foreign authorities in more than 10 cases, and SEC has coordinated resolutions with foreign authorities in at least five. ³⁸¹ DOJ has memorialized this practice of coordinating resolutions to avoid “piling on” in the Justice Manual, which instructs prosecutors to “endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/ or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct.” ³⁸² In determining whether and how much to credit another authority, prosecutors are to consider, among other factors, “the egregiousness of a company’s misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company’s disclosures and its cooperation with the Department, separate from any such disclosures and cooperati
Add	2249	95	71
Delete	2250	95	
Delete	2251	95	69
Delete	2252	95	63
Add	2253	95	84
Delete	2254	95	64
Add	2255	95	85
Add	2256	95	86
Delete	2257	95	5
Delete	2258	95	66
Add	2259	95	87
Delete	2260	95	67
Add	2261	95	88
Delete	2262	96	
Delete	2263	96	chapter 6
Delete	2264	96	FCPA Penalties, Sanctions, and
Delete	2265	96	Remedies
Delete	2266	96	68
Add	2267	96	9
Delete	2268	96	U.S. Attorney’s
Add	2269	96	Justice
Delete	2270	96	agen-cy’s

Add	2271	96	agency's
Delete	2272	96	69
Add	2273	96	0
Add	2274	96	¶
Add	2275	96	72¶
Delete	2276	96	70
Add	2277	96	91
Delete	2278	96	¶
Delete	2279	96	70¶
Delete	2280	96	71
Add	2281	96	92
Delete	2282	96	72
Add	2283	96	93
Delete	2284	96	73
Add	2285	96	94
Delete	2286	96	74
Add	2287	96	95
Delete	2288	97	75
Add	2289	97	96
Add	2290	97	97
Delete	2291	97	6
Delete	2292	97	77
Add	2293	97	98
Delete	2294	97	¶
Add	2295	97	399
Delete	2296	97	378
Add	2297	97	400
Add	2298	97	¶
Add	2299	97	73¶
Add	2300	97	and a monitor should never be imposed for punitive purposes,
Delete	2301	97	In addition, companies are sometimes allowed to engage in self-monitoring, typically in cases when the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.
Add	2302	97	DOJ's guidance provides that, in determining whether to impose a monitor as part of a corporate resolution, prosecutors should assess (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation. ⁴⁰¹ In evaluating the potential benefits of a monitor, prosecutors consider, among other factors: (a) whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems; (b) whether the misconduct at issue was pervasive across the business organization or approved or

			facilitated by senior management; (c) whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems; and (d) whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they wo
Add	2303	97	In civil cases, a company may similarly be required to retain an independent compliance consultant or monitor to provide an independent, third-party review of the company's internal controls. The consultant recommends improvements, to the extent necessary, which the company must adopt. When both DOJ and SEC require a company to retain a monitor, the two agencies have been able to coordinate their requirements so that the company can retain one monitor to fulfill both sets of requirements.¶
Add	2304	98	The most successful monitoring relationships are those in which the company embraces the monitor or consultant. If the company takes the recommendations and suggestions seriously and uses the monitoring period as a time to find and fix any outstanding compliance issues, the company can emerge from the monitorship with a stronger, long-lasting compliance program.¶
Delete	2305	98	□→
Add	2306	98	•→Nature and
Delete	2307	98	Seriousness
Add	2308	98	seriousness
Delete	2309	98	□
Add	2310	98	•
Delete	2311	98	□
Add	2312	98	•
Delete	2313	98	□→Nature and size
Add	2314	98	•→The risk profile
Add	2315	98	, including its nature, size, geographical reach, and business model
Delete	2316	98	□
Add	2317	98	•
Delete	2318	98	□
Add	2319	98	•
Add	2320	98	and quality of the company's compliance program at the time of resolution
Delete	2321	98	71¶
Add	2322	98	•→Whether the company's current compliance program has been fully implemented and tested¶
Add	2323	98	Graphic
Table Del	2324	98	
Add	2325	98	74
Delete	2326	98	72¶
Delete	2327	98	chapter

Add	2328	98	Chapter
Add	2329	99	¶
Delete	2330	99	379
Add	2331	99	404
Add	2332	99	¶
Add	2333	99	75¶
Add	2334	99	its obligations during
Delete	2335	99	two or
Add	2336	99	Other countries, such as the United Kingdom and France, have also instituted DPA-like frameworks to resolve corporate matters whereby a company can avoid prosecution if it adheres to conditions imposed upon it for a set period of time.
Delete	2337	99	74¶
Add	2338	100	and the CEP
Delete	2339	100	380
Add	2340	100	405
Add	2341	100	5
Delete	2342	100	381
Add	2343	100	406
Delete	2344	100	nine
Add	2345	100	ten
Delete	2346	100	-pany's
Add	2347	100	whether the company voluntarily self-disclosed the misconduct; the extent of the company's cooperation with the¶
Add	2348	100	76¶
Add	2349	100	government's investigation; the company's remediation; the collateral consequences that would flow from the resolution; the adequacy of prosecutions against individuals;
Delete	2350	100	382
Add	2351	100	407
Delete	2352	100	-public
Delete	2353	100	in the past two years alone,
Add	2354	100	recently
Add	2355	100	In addition to the Principles of Federal Prosecution of Business Organizations, as discussed above, DOJ has implemented the CEP to provide additional incentives and benefits to companies that voluntarily self-disclose misconduct, fully cooperate, and fully remediate, including a presumption of a declination (with the disgorgement of ill-gotten profits), absent aggravating circumstances. A declination pursuant to the CEP is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/ or restitution. If a case would have been declined in the absence of such circumstances, it is not considered as a declination pursuant to the

			CEP. Declinations awarded under the CEP are made public on the DOJ/FCPA website.¶
Delete	2356	101	As mentioned above, there are rare occasions in which, in conjunction with the public filing of charges against an individual, it is appropriate to disclose that a company is not also being prosecuted. That was done in a recent case where a former employee was charged but the former corporate employer was not.383¶
Delete	2357	101	75¶
Delete	2358	101	compelling
Add	2359	101	enjoining
Delete	2360	101	to obey the law in the future. Violating such an order can result in civil or criminal contempt proceedings
Add	2361	101	from future violations of the laws charged in the action
Delete	2362	101	-judgment
Add	2363	101	77¶
Delete	2364	101	¶
Delete	2365	101	chapter 7 Resolutions¶
Add	2366	101	appearing or
Delete	2367	101	384
Add	2368	101	408
Delete	2369	101	4
Delete	2370	101	-judgment
Delete	2371	101	obtain other equitable relief
Add	2372	101	order other relief to effect compliance with the federal securities laws
Delete	2373	102	long-term
Add	2374	102	longterm
Delete	2375	102	76¶
Delete	2376	102	385
Add	2377	102	409
Delete	2378	102	govern-ment's
Add	2379	102	government's
Delete	2380	102	386
Add	2381	102	410
Delete	2382	102	387
Add	2383	102	411
Add	2384	102	78¶
Delete	2385	102	388
Add	2386	102	412¶
Add	2387	102	Termination Letters and Declinations¶
Add	2388	102	As discussed above, SEC's decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in SEC's
Delete	2389	102	's

Add	2390	102	's
Add	2391	102	413
Delete	2392	102	89
Delete	2393	103	»
Add	2394	103	¶
Add	2395	103	¶
Add	2396	103	¶
Add	2397	103	¶
Delete	2398	103	company identified and remediated the misconduct
Add	2399	103	¶
Add	2400	103	company identified and remediated the misconduct¶
Add	2401	103	¶
Add	2402	103	¶
Add	2403	103	¶
Add	2404	103	¶
Add	2405	103	¶
Add	2406	103	¶
Add	2407	103	¶
Delete	2408	103	information on matters it has declined to prosecute.
Add	2409	103	information related to closed investigations unless¶
Add	2410	103	required by law.¶
Delete	2411	103	»
Delete	2412	103	Neither DOJ
Add	2413	103	As discussed above, under the CEP, DOJ has announced declinations of companies that voluntarily self-disclosed, fully cooperated and timely and appropriately remediated. Other than those pursuant to the CEP, neither DOJ
Delete	2414	103	nor
Delete	2415	103	recent,
Delete	2416	103	Termination Letters and Declinations¶
Delete	2417	103	As discussed above, SEC's decision to bring or decline to bring an enforcement action under the FCPA is made pursuant to the guiding principles set forth in SEC's¶
Delete	2418	103	77¶
Add	2419	103	-
Add	2420	103	¶
Add	2421	103	(cont'd)¶
Add	2422	103	79¶
Add	2423	104	¶
Delete	2424	104	¶
Delete	2425	104	¶
Delete	2426	104	chapter 7 Resolutions¶
Delete	2427	104	»
Delete	2428	104	»

Delete	2429	104	-
Add	2430	104	tion
Delete	2431	104	tion
Delete	2432	104	»
Delete	2433	104	»
Add	2434	104	(cont'd)¶
Add	2435	104	80¶
Delete	2436	105	»
Delete	2437	105	¶
Delete	2438	105	78¶
Add	2439	105	¶
Delete	2440	105	-corruption
Add	2441	105	¶
Delete	2442	105	investi-¶
Add	2443	105	investigation
Delete	2444	105	gation
Delete	2445	105	¶
Add	2446	105	The total amount of the bribes was small.
Delete	2447	105	•→The total amount of the bribes was small.¶
Delete	2448	105	»
Delete	2449	106	79
Add	2450	106	81
Delete	2451	106	chapter 7 Resolutions¶
Delete	2452	106	80¶
Delete	2453	106	chapter
Add	2454	106	Chapter
Delete	2455	106	-ers
Delete	2456	106	390
Add	2457	106	414
Delete	2458	106	391
Add	2459	106	415
Add	2460	106	5
Delete	2461	106	an SEC
Add	2462	106	s
Delete	2463	106	392 The awards range is between
Add	2464	106	416 The Commission issues awards in an aggregate amount equal to not less than
Delete	2465	106	%
Add	2466	106	percent,
Add	2467	106	not more than
Delete	2468	106	%
Add	2469	106	percent,
Delete	2470	106	the
Delete	2471	106	recovered by the government

Add	2472	106	that have been collected in the actions
Delete	2473	106	393
Add	2474	106	417
Add	2475	106	a
Delete	2476	106	s
Add	2477	106	an
Delete	2478	106	s
Delete	2479	106	consideration, the
Add	2480	106	,
Delete	2481	106	394
Add	2482	106	18
Delete	2483	106	it does
Add	2484	106	they do
Delete	2485	106	395
Add	2486	106	419
Delete	2487	106	5
Delete	2488	106	Intake
Add	2489	106	system
Delete	2490	106	Resolution System
Add	2491	106	complaint form
Delete	2492	106	dene-bleo
Add	2493	106	www
Delete	2494	106	TCRExternal/disclaimer.xhtml
Add	2495	106	tcr
Delete	2496	107	a
Add	2497	107	an
Delete	2498	107	reward
Add	2499	107	award
Delete	2500	107	396
Add	2501	107	420
Delete	2502	107	397
Add	2503	107	421
Delete	2504	107	»
Add	2505	107	¶
Add	2506	107	Graphic
Add	2507	107	¶
Delete	2508	107	chapter 8¶
Delete	2509	107	Whistleblower Provisions and Protections¶
Delete	2510	107	84¶
Delete	2511	107	chapter
Add	2512	107	Chapter
Delete	2513	107	is
Add	2514	107	remains
Delete	2515	107	398

Add	2516	107	422
Add	2517	107	423
Delete	2518	107	99
Delete	2519	107	00
Add	2520	107	24
Delete	2521	108	01
Add	2522	108	25
Delete	2523	108	02
Add	2524	108	6
Delete	2525	108	03
Add	2526	108	27
Delete	2527	108	04
Add	2528	108	28
Delete	2529	108	only
Add	2530	108	only
Delete	2531	108	05
Add	2532	108	29
Add	2533	108	¶
Add	2534	108	84¶
Add	2535	108	30
Delete	2536	108	6
Delete	2537	108	07
Add	2538	108	31
Delete	2539	108	86¶
Delete	2540	108	08
Add	2541	108	32
Delete	2542	108	09
Add	2543	108	33
Delete	2544	108	10
Add	2545	108	34
Add	2546	108	¶
Delete	2547	108	11
Add	2548	108	35
Delete	2549	108	12
Add	2550	108	36
Delete	2551	108	13
Add	2552	108	7
Delete	2553	108	14
Add	2554	108	38
Delete	2555	108	15
Add	2556	108	39
Delete	2557	109	16
Add	2558	109	40
Add	2559	109	441

Delete	2560	109	7
Delete	2561	109	18
Add	2562	109	42
Add	2563	109	Graphic
Delete	2564	109	87
Delete	2565	109	chapter 9¶
Delete	2566	109	DOJ Opinion Procedure¶
Delete	2567	109	8
Add	2568	109	5
Delete	2569	109	chapter
Add	2570	109	Chapter
Add	2571	109	43
Delete	2572	109	5
Add	2573	109	-governmental
Delete	2574	109	90
Add	2575	109	86
Delete	2576	109	¶
Delete	2577	109	¶
Delete	2578	109	:
Add	2579	109	Prohibited foreign trade practices by issuers
Delete	2580	109	Prohibited foreign trade practices by issuers
Add	2581	110	87¶
Delete	2582	110	92¶
Delete	2583	110	¶
Delete	2584	110	of this section
Delete	2585	110	of this section
Add	2586	111	»
Delete	2587	111	¶
Add	2588	111	¶
Delete	2589	111	Title
Add	2590	111	title
Add	2591	111	¶
Add	2592	111	88¶
Delete	2593	112	t
Delete	2594	112	Title
Add	2595	112	title
Delete	2596	112	93¶
Delete	2597	112	APPENDIX¶
Delete	2598	112	The Foreign Corrupt¶
Delete	2599	112	Practices Act¶
Delete	2600	112	Order
Add	2601	112	order
Delete	2602	112	1 of the International Organizations Immunities Act (
Add	2603	112	288 of title

Delete	2604	112	U.S.C. § 288)
Add	2605	113	89¶
Delete	2606	113	¶
Delete	2607	113	decision-making
Add	2608	113	decision making
Add	2609	113	1101
Delete	2610	113	the Immigration and Nationality Act (
Add	2611	113	title
Delete	2612	113	U.S.C. § 1101)
Add	2613	113	* * *¶
Delete	2614	114	¶
Delete	2615	114	94¶
Delete	2616	114	or
Add	2617	114	90¶
Add	2618	114	¶
Delete	2619	114	¶
Add	2620	115	»
Add	2621	115	91¶
Delete	2622	115	¶
Delete	2623	115	95¶
Delete	2624	116	Title
Add	2625	116	title
Add	2626	116	(f) Opinions of Attorney General¶
Delete	2627	116	APPENDIX¶
Delete	2628	116	The Foreign Corrupt¶
Delete	2629	116	Practices Act¶
Add	2630	116	(1) The Attorney
Add	2631	116	, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General
Delete	2632	116	Title
Add	2633	116	title
Add	2634	116	92¶
Delete	2635	117	Title
Add	2636	117	title

Delete	2637	117	by
Add	2638	117	be
Delete	2639	117	(f) Opinions of Attorney General¶
Delete	2640	117	(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice’s present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice’s present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney
Delete	2641	117	96¶
Delete	2642	118	Section
Add	2643	118	section
Delete	2644	118	1 of the International Organizations Immunities Act (
Add	2645	118	288 of title
Delete	2646	118	U.S.C. § 288)
Add	2647	118	93¶
Delete	2648	119	¶
Add	2649	119	(
Delete	2650	119	97¶
Delete	2651	119	APPENDIX¶
Delete	2652	119	The Foreign Corrupt¶
Delete	2653	119	Practices Act¶
Delete	2654	119	influence any act or decision of such government or instrumentality,¶
Delete	2655	119	in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or¶
Delete	2656	119	(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—¶
Delete	2657	119	(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or¶

Delete	2658	119	(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,¶
Delete	2659	119	in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.¶
Delete	2660	119	(b) Exception for routine governmental action¶
Delete	2661	119	Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.¶
Delete	2662	119	(
Add	2663	119	1101
Delete	2664	119	the Immigration and Nationality Act (
Add	2665	119	title
Delete	2666	119	U.S.C. § 1101)
Add	2667	119	* * *¶
Add	2668	120	(as defined in section 78dd-2 of this title)
Add	2669	120	¶
Add	2670	120	94¶
Add	2671	120	candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or
Add	2672	120	(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,¶
Add	2673	120	in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.¶
Add	2674	120	(b) Exception for routine governmental action¶
Add	2675	120	Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.¶
Add	2676	120	(c) Affirmative defenses¶
Delete	2677	120	(c) Affirmative defenses
Add	2678	120	influence any act or decision of such government or instrumentality,
Add	2679	120	in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or¶
Add	2680	120	(3) any person, while knowing that all or a portion of such money

			or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—¶
Add	2681	120	(A) (i) influencing any act or decision of such foreign official, political party, party official, or¶
Delete	2682	121	98¶
Add	2683	121	»
Add	2684	121	¶
Add	2685	121	95¶
Add	2686	122	section 1101 of title
Delete	2687	122	U.S.C. § 1101
Add	2688	122	.
Delete	2689	122	Order
Add	2690	122	order
Delete	2691	122	Section
Add	2692	122	section
Delete	2693	122	1 of the International Organizations Immunities Act (
Add	2694	122	288 of title
Delete	2695	122	U.S.C. § 288)
Add	2696	122	96¶
Delete	2697	122	“
Delete	2698	122	”
Delete	2699	122	99¶
Delete	2700	123	the
Add	2701	123	The
Delete	2702	123	the
Add	2703	123	The
Add	2704	123	Periodical and other reports
Delete	2705	123	Periodical and other reports¶
Delete	2706	123	APPENDIX¶
Delete	2707	123	The Foreign Corrupt¶
Delete	2708	123	Practices Act¶
Add	2709	123	¶
Add	2710	123	97¶
Delete	2711	124	the
Add	2712	124	The
Delete	2713	124	100¶
Delete	2714	124	manage-ment’s
Add	2715	124	management’s
Add	2716	125	¶
Add	2717	125	98¶
Add	2718	125	¶
Add	2719	125	[Reminder of the statute omitted]¶

Delete	2720	125	,
Delete	2721	126	¶
Delete	2722	126	101¶
Delete	2723	126	APPENDIX¶
Delete	2724	126	The Foreign Corrupt¶
Delete	2725	126	Practices Act¶
Add	2726	126	¶
Add	2727	126	99¶
Add	2728	127	Graphic
Delete	2729	127	102
Add	2730	127	100¶
Delete	2731	127	S.
Add	2732	127	→H.
Delete	2733	127	EP
Add	2734	127	. Rep
Delete	2735	127	114
Add	2736	127	640
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Delete	2739	127	S
Add	2740	127	H
Delete	2741	127	EP
Add	2742	127	. Rep
Delete	2743	127	114
Add	2744	127	640
Add	2745	127	0
Add	2746	127	s
Delete	2747	127	criminal/fraud/fcpa/history/1977/ senaterpt-
Add	2748	127	sites/default/files/criminal-fraud/legacy/2010/04/11/ houseprt-
Delete	2749	127	114
Add	2750	127	640
Add	2751	127	0
Delete	2752	127	Id.; H.R. REP
Add	2753	127	→S. Rep
Delete	2754	127	640
Add	2755	127	114
Delete	2756	127	0
Delete	2757	127	-5
Delete	2758	127	H
Add	2759	127	S
Delete	2760	127	R
Add	2761	127	Rep
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Add	2763	127	No

Delete	2764	127	640
Add	2765	127	114
Delete	2766	127	0
Delete	2767	127	houseprt-
Add	2768	127	senaterpt-
Delete	2769	127	640
Add	2770	127	114
Delete	2771	127	0
Delete	2772	127	The House Report made clear Congress's concerns:
Add	2773	127	3→Id.; H.R. Rep. No. 95-640, at 4-5. The House Report made clear Congress' concerns: “
Add	2774	127	”
Delete	2775	128	3
Add	2776	128	4→
Delete	2777	128	AGENCY FOR INT'L DEV
Add	2778	128	Agency for Int'l Dev
Delete	2779	128	ANTICORRUPTION STRATEGY
Add	2780	128	Anticorruption Strategy
Add	2781	128	s
Delete	2782	128	transition
Add	2783	128	www
Delete	2784	128	policy/ ads/200/
Add	2785	128	sites/default/files/documents/1868/
Delete	2786	128	4
Add	2787	128	5→
Delete	2788	128	http://issuu.com/transparencyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011 ; U.S. AGENCY FOR INT'L DEV., FOREIGN AID IN THE NATIONAL INTEREST
Add	2789	128	https://issuu.com/transparencyinternational/docs/ti-working_paper_human_trafficking_28_jun_2011?mode=window&backgroundColor=%23222222 ; U.S. Agency for Int'l Dev., Foreign Aid in the National Interest
Delete	2790	128	5
Add	2791	128	6→
Delete	2792	128	.
Delete	2793	128	PUB
Add	2794	128	Pub
Delete	2795	128	PAPERS
Add	2796	128	Papers
Add	2797	128	former
Delete	2798	128	.
Add	2799	128	former

Delete	2800	128	THE WHITE HOUSE
Add	2801	128	The White
Add	2802	128	101
Add	2803	128	House
Delete	2804	128	NATIONAL SECURITY STRATEGY
Add	2805	128	National Security Strategy
Add	2806	128	s
Delete	2807	128	www.whitehouse
Add	2808	128	obamawhitehouse.archives
Delete	2809	129	6
Add	2810	129	7→
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Add	2812	129	Int'l Chamber of Commerce, et al., Clean Business Is Good Business: The Business Case Against Corruption
Add	2813	129	s
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Add	2815	129	d306pr3pise04h. cloudfront.net
Delete	2816	129	/
Add	2817	129	%2F
Add	2818	129	1
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Add	2821	129	Fclean
Delete	2822	129	Fact Sheet No. 335, Medicines: Corruption and Pharmaceuticals (Dec.
Add	2823	129	Reinforcing the Focus on Anti-corruption, Transparency and Accountability in National Health Policies, Strategies and Plans (
Delete	2824	129	09
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Add	2826	129	s
Delete	2827	129	www
Add	2828	129	apps
Delete	2829	129	mediacentre/factsheets/fs335/ en/; Daniel Kaufmann, Corruption: The Facts, FOREIGN POL'Y, Summer 1997, at 119-20; Paolo Mauro, Corruption and Growth, 110 Q. J. Econ. 681, 683, 705 (1995) (finding that "corruption lowers private investment . . . [and] reduc[es] economic growth . . ."); THE WORLD BANK, THE DATA REVOLUTION: MEASURING GOVERNANCE AND CORRUPTION, (Apr. 8, 2004), available at http://go.worldbank.org/87JUY8GJH0 .
Add	2830	129	iris/bitstream/handle/10665/326229/9789241515689-eng.pdf?ua=1.
Delete	2831	129	7

Add	2832	129	8→
Delete	2833	129	ECONOMIST
Add	2834	129	Economist
Delete	2835	129	¶
Delete	2836	129	104¶
Delete	2837	129	8
Add	2838	129	9→
Add	2839	129	Criminal Information, United States v. Cyrus Allen Ahsani, et al., No. 19-cr-147 (S.D. Tex. Mar. 4, 2019), ECF No. 1 [hereinafter United States v. Ahsani] (paying kickbacks to executives who were involved in bribe payments), available at https://www.justice.gov/criminal-fraud/case/file/1266861/download ; Criminal Information, United States v. Colin Steven, No. 17-cr-788 (S.D.N.Y. Dec. 21, 2017), ECF No. 2 [hereinafter United States v. Steven] (receiving kickbacks related to certain corrupt payments made by Embraer, S.A.), available at https://www.justice.gov/criminal-fraud/file/1021856/download ; Criminal Information, United States v. Robert Zubiato, No. 17-cr-591 (S.D. Tex. Oct. 6, 2017), ECF No. 1 [hereinafter United States v. Zubiato] (receiving kickbacks related to certain corrupt payments made by SBM Offshore, N.V. in Brazil), available at https://www.justice.gov/criminal-fraud/file/1017281/download ;
Add	2840	129	s
Delete	2841	129	criminal/fraud/fcpa/cases/ petersong
Add	2842	129	sites/ default/files/criminal-fraud/legacy/2012/04/26
Add	2843	130	s
Delete	2844	130	criminal/fraud/ fcpa/cases/stanleya
Add	2845	130	sites/ default/files/criminal-fraud/legacy/2012/03/19
Add	2846	130	s
Delete	2847	130	criminal/fraud/fcpa/cases/sapsizianc
Add	2848	130	sites/default/files/criminal-fraud/ legacy/2011/02/16
Delete	2849	130	9
Add	2850	130	10→
Add	2851	130	Criminal Information, United States v. Société Générale S.A., No. 18-cr-253 (E.D.N.Y. May 18, 2018), ECF No. 4 [hereinafter United States v. Société Générale], available at https://www.justice.gov/criminal-fraud/file/1072456/ download ;
Delete	2852	130	0
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Add	2857	130	sites/default/files/criminal-fraud/ legacy/2011/10/18
Delete	2858	130	1

Add	2859	130	2
Delete	2860	130	REP
Add	2861	130	Rep
Delete	2862	130	REP
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Delete	2868	130	2
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Delete	2870	130	SEC. AND EXCHANGE CoMM., REPoRT oF THE SECURITIES AND EXCHANGE CoMMISSIoN oN QUESTIoNABLE AND ILLEGAL CoRPoRATE PAYMENTS AND PRACTICES
Add	2871	130	Sec. and Exchange Comm., Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices
Delete	2872	130	3
Add	2873	130	4
Delete	2874	130	REP
Add	2875	130	Rep
Delete	2876	130	REP
Add	2877	130	Rep
Delete	2878	130	4
Add	2879	130	5
Delete	2880	130	REP
Add	2881	130	Rep
Delete	2882	130	REP
Add	2883	130	Rep
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Delete	2885	130	5
Add	2886	130	6
Delete	2887	130	REP
Add	2888	130	Rep
Delete	2889	130	REP
Add	2890	130	Rep
Delete	2891	130	6
Add	2892	130	7
Delete	2893	130	REP
Add	2894	130	Rep
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Add	2896	130	8
Add	2897	130	-

Delete	2898	130	REP
Add	2899	130	Rep
Delete	2900	130	REP
Add	2901	130	Rep
Delete	2902	130	8
Add	2903	130	9
Delete	2904	130	¶
Add	2905	130	“
Add	2906	131	”
Delete	2907	131	REP
Add	2908	131	Rep
Delete	2909	131	REP
Add	2910	131	Rep
Delete	2911	131	19
Add	2912	131	20→
Add	2913	131	¶
Add	2914	131	102¶
Delete	2915	131	0
Add	2916	131	1
Delete	2917	131	REP
Add	2918	131	Rep
Delete	2919	131	1
Add	2920	131	2
Delete	2921	131	2
Add	2922	131	3
Delete	2923	131	DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL
Add	2924	131	Dept. of Justice, Justice Manual
Delete	2925	131	USAM
Add	2926	131	JM
Add	2927	131	s
Delete	2928	131	usao/eousa/foia_reading_room/usam/
Add	2929	131	jm/justice-manual
Delete	2930	131	3
Add	2931	131	4
Add	2932	131	s
Add	2933	131	www.trade.gov/virtual-services and https://2016.
Add	2934	131	25→See International Trade Administration, Country Commercial Guides, available at: https://www.trade.gov/ccg-landing-page.¶
Delete	2935	131	4
Add	2936	131	6
Delete	2937	131	Additional information about publicly available market research and due diligence assistance is available online. See In'l Trade Admin., Market Research and Due Diligence, available at

			http://export.gov/salesandmarketing/eg_main_018204.asp .
Delete	2938	131	In'l
Add	2939	131	International
Delete	2940	131	Admin.
Add	2941	131	Administration
Add	2942	131	s
Delete	2943	131	export
Add	2944	131	www.trade
Delete	2945	131	salesandmarketing/eg_main_018198.asp .
Add	2946	131	international-company-profile-0.
Delete	2947	131	25 The Commercial Services' domestic and foreign offices can also be found at http://export.gov/usoffices/index.asp and http://export.gov/worldwide_us/index.asp .¶
Add	2948	132	27→See International Trade Administration, The U.S. Commercial Service – Virtual Services, available at https://www.trade.gov/virtual-services .¶
Delete	2949	132	6
Add	2950	132	8
Delete	2951	132	This form can be located at
Add	2952	132	→See
Add	2953	132	s
Delete	2954	132	27 See IN'L TRADE ADMIN., "DoING BUSINESS IN" GUIDES, available at http://export.gov/about/eg_main_016806.asp .¶
Delete	2955	132	28 The BUSINESS ETHICS MANUAL is available at¶
Delete	2956	132	http://www.ita.doc.gov/goodgovernance/business_ethics/manual.a sp.¶
Add	2957	132	services
Add	2958	132	s
Delete	2959	132	export
Add	2960	132	www.trade
Delete	2961	132	advocacy
Add	2962	132	advocacy-center-services
Delete	2963	132	WEEKLY CoMP. PRES
Add	2964	132	Weekly Comp. Pres
Delete	2965	132	32 Colombia is also a member of the Working Group and is expected to accede to the Anti-Bribery Convention.¶
Delete	2966	132	3
Add	2967	132	2
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Add	2975	132	5
Delete	2976	132	7
Add	2977	132	6
Delete	2978	132	¶
Delete	2979	132	105¶
Delete	2980	132	APPENDIX Endnotes¶
Add	2981	132	s
Delete	2982	132	dataoecd/10/49/46213841
Add	2983	132	unitedstates/ UnitedStatesphase3reportEN
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Add	2985	132	7
Delete	2986	132	TREATY
Add	2987	132	Treaty
Add	2988	132	s
Delete	2989	132	treaties/UNCAC/Publications/
Add	2990	132	brussels/UN_
Delete	2991	132	/08-50026_E
Add	2992	132	_Against_Corruption
Delete	2993	132	9
Add	2994	132	8
Delete	2995	133	40
Add	2996	133	39→
Delete	2997	133	12 July
Add	2998	133	6 February
Delete	2999	133	12
Add	3000	133	0
Delete	3001	133	1
Add	3002	133	0
Add	3003	133	103¶
Delete	3004	133	2
Add	3005	133	1
Add	3006	133	1
Delete	3007	133	3
Add	3008	133	2
Add	3009	133	¶
Add	3010	133	»
Delete	3011	133	4
Add	3012	133	3
Add	3013	133	52-64, United States¶
Add	3014	133	v. Mark Lambert, No. 18-cr-012 (D. Md. Nov. 14, 2019), ECF No. 152 [hereinafter United States v. Lambert] (FCPA jury instructions); Jury Instructions at 1259-66, United States v.

			Lawrence Hoskins, No. 12-cr-238 (D. Conn. Nov. 6, 2019), ECF No. 601 [hereinafter United States v. Hoskins] (same); Jury Instructions at 33-37, United States v. Joseph Baptiste, No. 17-cr-10305 (D. Mass. June 19, 2019), ECF No. 195 [hereinafter United States v. Baptiste] (same); Jury Instructions at 1081-89, United States v. Chi Ping Patrick Ho, No. 17-cr-779 (S.D.N.Y. Dec. 4, 2018), ECF No. 214 [hereinafter United States v. Ho] (same); Jury Instructions at 4249-62, United States v. Ng Lap Seng, No. 15-cr-706 (S.D.N.Y. July 26, 2017), ECF No. 609 [hereinafter United States v. Ng] (same); Jury Instructions at
Delete	3015	133	FCPA jury instructions
Add	3016	133	same
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Delete	3018	133	5
Add	3019	133	4
Delete	3020	133	6
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Delete	3022	133	7
Add	3023	133	6
Delete	3024	134	8
Add	3025	134	7
Add	3026	134	¶
Delete	3027	134	complaints/2010/comp-pr2010-175. pdf; Complaint,
Add	3028	134	¶
Add	3029	134	complaints/2010/comp-pr2010-175.pdf;→Complaint,»
Delete	3030	134	y
Delete	3031	134	Magyar Telekom, Plc.
Add	3032	134	Telefonaktiebolaget LM Ericsson
Delete	3033	134	1
Add	3034	134	9
Delete	3035	134	597
Add	3036	134	884
Delete	3037	134	E
Add	3038	134	S
Delete	3039	134	Va
Add	3040	134	N.Y
Delete	3041	134	29
Add	3042	134	6
Delete	3043	134	1
Add	3044	134	9
Delete	3045	134	1
Add	3046	134	3 [hereinafter United States v. Ericsson]
Add	3047	134	s
Add	3048	134	/justice.gov/criminal-fraud/file/1226526/ download; Non-Pros. Agreement, In re Petróleo Brasileiro S.A. (Sept. 26, 2018),

			available at https://
Delete	3049	134	criminal/fraud/ fcpa/cases/magyar-telekom/2011-12-29-information-magyar-telekom. pdf; Non-Pros. Agreement, In re Deutsche Telekom AG (Dec. 29, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/deutsche-telekom/2011-12-29-deustche-telekom-mpa.pdf
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Add	3062	134	s
Delete	3063	134	criminal/fraud/fcpa/cases/alcatel-et-al/12-27-10alcatel-et-al-info.pdf
Add	3064	134	criminal-fraud/file/920421/download
Delete	3065	134	Daimler
Add	3066	134	Braskem S.
Delete	3067	134	G
Add	3068	134	.
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Delete	3071	134	63
Add	3072	134	709
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Add	3074	134	E
Delete	3075	134	C
Add	3076	134	N
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Add	3078	134	Y
Add	3079	134	Dec.
Delete	3080	134	2
Add	3081	134	1
Delete	3082	134	0
Add	3083	134	6
Delete	3084	134	1 [hereinafter United States v. Daimler AG]
Add	3085	134	6
Add	3086	134	s

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Add	3088	134	criminal-fraud/file/920086/download.
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Add	3090	134	8
Delete	3091	134	shtml
Delete	3092	134	50
Add	3093	134	49→
Delete	3094	134	Complaint, SEC v. Turner, et al., No. 10-cv-1309 (D.D.C. Aug. 4, 2010), ECF No. 1 [hereinafter, SEC v. Turner] (charging a Lebanese/Canadian agent of a UK company listed on U.S. exchange with violating the FCPA for bribes of Iraqi officials), available at http://www.sec.gov/litigation/complaints/2010/comp21615.pdf ; Indictment
Add	3095	134	Criminal Information
Delete	3096	134	Naaman
Add	3097	134	Ericsson, supra note 47 (charging issuer company with violating FCPA for paying bribes to foreign officials in Djibouti, China, Vietnam, Indonesia, and Kuwait); Criminal Information, United States v. Tim Leissner
Delete	3098	134	08
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Add	3102	134	39
Delete	3103	134	D
Add	3104	134	E
Delete	3105	134	C
Add	3106	134	N.Y
Delete	3107	134	7
Add	3108	134	28
Delete	3109	134	08
Add	3110	134	18
Delete	3111	134	3 [hereinafter United States v. Naaman] (same
Add	3112	135	16 (charging an employee and agent of U.S. publicly traded company with violating FCPA for bribery of official in Malaysia
Add	3113	135	s
Delete	3114	135	criminal/fraud/fcpa/cases/naamano/08-07-08naaman-indict.pdf; Complaint, SEC v. Elkin, et al., No. 10-cv-661 (D.D.C. Apr. 28, 2010), ECF No. 1 [hereinafter SEC v. Elkin] (charging an

Add	3115	135	criminal-fraud/file/1231346/download; United States v. Steven, supra note 9 (charging a UK
Delete	3116	135	Kyrgyzstan), available at http://www.sec.gov/litigation/complaints/2010/comp21509.pdf ; Criminal Information, United States v. Elkin, No. 10-cr-15 (W.D. Va. Aug. 3, 2010), ECF No. 8 [hereinafter United States v. Elkin] (same), available at http://www.justice.gov/criminal/fraud/fcpa/cases/elkin/08-03-10elkin-information.pdf ; Indictment, United States v. Tesler, et al., No. 09-cr-98 (S.D. Tex. Feb. 17, 2009), ECF No. 1 [hereinafter United States v. Tesler] (charging a British agent of U.S. publicly traded company with violating the FCPA for bribery of Nigerian officials), available at http://www.justice.gov/criminal/fraud/fcpa/cases/tesler/tesler-indict.pdf ; Superseding Indictment, United States v. Sapsizian, et al., supra note 8, ECF 32 (charging a French employee of French company traded on a U.S. exchange with violating the FCPA).
Add	3117	135	Saudi Arabia).
Delete	3118	135	1
Add	3119	135	0
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Add	3121	135	1
Delete	3122	135	3
Add	3123	135	2
Delete	3124	135	15 U.S.C. § 78dd-2(a).
Delete	3125	135	Superseding
Delete	3126	135	Nexus Technologies, et al., No. 08-cr-522 (E.D. Pa. Oct. 28, 2009), ECF No. 106 [hereinafter United States v. Nexus Technologies] (private U.S. company and corporate executives
Add	3127	135	Lambert, supra note 43, ECF No. 1 (employee of domestic concern
Delete	3128	135	in Vietnam
Add	3129	135	to a Russian government official
Add	3130	135	s
Delete	3131	135	criminal/ fraud/fcpa/cases/nguyenn/09-04-08nguyen-indict.pdf; Indictment
Add	3132	135	criminal-fraud/ file/1044676/download; Criminal Information
Delete	3133	135	Esquenazi, supra note 44, (private U.S. company and corporate executives charged with FCPA violations for bribes paid in Haiti
Add	3134	135	James Finley, No. 17-cr-160 (S.D. Ohio July 21, 2017), ECF No. 3 (executive of foreign parent company charged as an agent of a domestic concern in directing bribes to Kazakh official on behalf of U.S.-based subsidiary
Add	3135	135	s
Delete	3136	135	criminal/fraud/fcpa/cases/ esquenazij/12-08-09esquenazi-indict.pdf.

Add	3137	135	criminal-fraud/file/1009596/download; Superseding Indictment, United States v. Dmitrij Harder, No. 15-cr-001 (E.D.N.Y. Dec. 15, 2015), ECF No. 62 [hereinafter United States v. Harder] (owner of U.S. corporation charged for bribes paid to an official at the European Bank for Reconstruction and Development), available at https://www.justice.gov/criminal-fraud/file/843621/download .
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Add	3139	135	3
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Delete	3141	135	106¶
Delete	3142	135	5
Add	3143	135	4
Delete	3144	135	DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL
Add	3145	135	Dept. of Justice, Criminal Resource¶
Add	3146	135	104¶
Add	3147	136	Manual
Delete	3148	136	REP
Add	3149	136	Rep
Delete	3150	136	.
Delete	3151	136	19
Add	3152	136	20
Delete	3153	136	6
Add	3154	136	5
Delete	3155	136	15 U.S.C. § 78dd-3(a);
Delete	3156	136	see
Add	3157	136	See
Delete	3158	136	Alcatel-Lucent France,
Add	3159	136	Airbus
Add	3160	136	E
Delete	3161	136	.A., et al.
Delete	3162	136	10
Add	3163	136	20
Delete	3164	136	20906
Add	3165	136	021
Delete	3166	136	S.
Delete	3167	136	Fla
Add	3168	136	D
Delete	3169	136	Dec
Add	3170	136	C
Add	3171	136	Jan.
Delete	3172	136	7
Add	3173	136	8
Delete	3174	136	10

Add	3175	136	20
Add	3176	136	(Netherlands-headquartered company with main offices in France convicted of FCPA violations for paying bribes to Chinese officials in order to obtain contracts to sell aircraft)
Delete	3177	136	Alcatel-Lucent France] (subsidiary of French publicly traded company convicted of conspiracy to violate FCPA)
Add	3178	136	Airbus]
Add	3179	136	s
Delete	3180	136	criminal/fraud/fcpa/cases/alcatel-lucent-sa-et-al/12-27-10alcatel-et-al-info.pdf; Criminal Information
Add	3181	136	criminal-fraud/file/1242046/download; Superseding Indictment
Delete	3182	136	DaimlerChrysler Automotive Russia SAO, No. 10-cr-64 (D.D.C. Mar. 22, 2010), ECF No. 1 (subsidiary of German publicly traded company convicted of violating FCPA)
Add	3183	136	Ng, supra note 43, ECF No. 322 (Chinese businessman convicted of paying bribes to former United Nations (U.N.) Ambassador from the Dominican Republic and former Permanent Representative of Antigua and Barbuda to the U.N. in exchange for corrupt assistance in obtaining formal U.N. support for defendant's conference center in Macau)
Add	3184	136	s
Delete	3185	136	criminal/fraud/fcpa/cases/daimler/03-22-10daimlerrussia-info.pdf
Add	3186	136	criminal-fraud/file/913286/download
Delete	3187	136	Siemens S.A. (Argentina)
Add	3188	136	Samuel Mebiame
Delete	3189	136	08
Add	3190	136	16
Delete	3191	136	368
Delete	3192	136	8
Add	3193	136	27
Delete	3194	136	D
Add	3195	136	E
Delete	3196	136	C
Add	3197	136	N.Y
Delete	3198	136	12
Add	3199	136	9
Delete	3200	136	08
Add	3201	136	16
Add	3202	136	9
Delete	3203	136	subsidiary of German publicly traded
Add	3204	136	Gabonese consultant who worked on behalf of a British Virgin Islands company and a joint venture between a U.S. company and a Turks and Caicos
Delete	3205	136	violating
Add	3206	136	violations for paying bribes to officials in Niger, Chad, and

			Guinea
Add	3207	136	s
Delete	3208	136	criminal/fraud/fcpa/cases/ siemens/12-12-08siemensargen-info.pdf.
Add	3209	136	criminal-fraud/file/943121/download.
Delete	3210	136	7
Add	3211	136	6
Delete	3212	136	8
Add	3213	136	7
Delete	3214	136	9
Add	3215	136	8
Delete	3216	136	60 Criminal Information
Add	3217	136	59→See, e.g., Superseding Indictment
Add	3218	136	Nervis
Delete	3219	136	JGC
Delete	3220	136	C
Delete	3221	136	Corp
Add	3222	136	. Villalobos-Cardenas, et al
Delete	3223	136	1
Add	3224	136	7
Delete	3225	136	260
Add	3226	136	514
Delete	3227	136	6
Add	3228	136	24
Delete	3229	136	1
Add	3230	136	9
Delete	3231	136), ECF No. 1 [hereinafter United States v. JGC Corp.],
Add	3232	136) (establishing jurisdiction under 15 U.S.C. § 78dd-3 based on meetings in the U.S.),
Add	3233	136	s
Delete	3234	136	criminal/fraud/fcpa/cases/ jgc-corp/04-6-11jgc-corp-info.pdf
Add	3235	136	criminal-fraud/file/1267066/download
Delete	3236	136	Snamprogetti Netherlands B.V.
Add	3237	136	Steven Hunter
Delete	3238	136	0
Add	3239	136	8
Delete	3240	136	60
Add	3241	136	15
Delete	3242	136	Jul
Add	3243	136	Sept
Add	3244	136	17
Delete	3245	136	0
Add	3246	136	8
Delete	3247	136), ECF No. 1 [hereinafter United States v. Snamprogetti],

Add	3248	136) (same),
Add	3249	136	s
Delete	3250	136	criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf.
Add	3251	136	criminal-fraud/ file/1266876/download; United States v. Ramiro Andres Luque Flores, No. 17-cr-537 (E.D.N.Y. Oct. 6, 2017) (same); see also United States v. Société Générale, supra note 10 (establishing corporate jurisdiction under 15 U.S.C. § 78dd-3 based on, among other things, meetings in the U.S.).
Delete	3252	137	1
Add	3253	137	0
Delete	3254	137	2
Add	3255	137	1
Delete	3256	137	REP
Add	3257	137	Rep
Delete	3258	137	3
Add	3259	137	2
Delete	3260	137	4
Add	3261	137	3
Delete	3262	137	5
Add	3263	137	4
Delete	3264	137	REP
Add	3265	137	Rep
Delete	3266	137	,
Delete	3267	137	6
Add	3268	137	5
Delete	3269	137	Siemens AG, supra note
Add	3270	137	Telefonaktiebolaget LM Ericsson, No. 19-cv-11214 (S.D.N.Y. Dec. 6, 2019), ECF No. 1 [hereinafter SEC v. Ericsson], available at https://www.sec.gov/litigation/complaints/2019/comp-pr2019-
Add	3271	137	254
Delete	3272	137	8
Add	3273	137	.pdf
Delete	3274	137	Siemens AG
Add	3275	137	Ericsson
Delete	3276	137	8
Add	3277	137	7
Delete	3278	137	.
Add	3279	137	; SEC v. Ericsson, https://www.sec.gov/news/press-release/2019-254 .
Delete	3280	137	7
Add	3281	137	6
Delete	3282	137	¶
Add	3283	137	“

Delete	3284	137	“
Add	3285	137	‘
Delete	3286	137	”
Add	3287	137	’
Add	3288	137	”
Delete	3289	137	REP
Add	3290	137	Rep
Delete	3291	137	8
Add	3292	137	7
Delete	3293	137	Complaint, SEC v. Panalpina, Inc., No. 10-cv-4334 (S.D. Tex. Nov. 4, 2010), ECF No. 1 [hereinafter SEC v. Panalpina, Inc.], available at http://www.sec.gov/litigation/complaints/2010/comp21727.pdf ; Criminal Information, United States v. Panalpina, Inc., No. 10-cr-765 (S.D. Tex. Nov. 4, 2010), ECF No. 1 [hereinafter United States v. Panalpina, Inc.]
Add	3294	137	Non-Pros. Agreement, In re: Wal-Mart, Inc. (June 20, 2019) (holding company liable for internal controls failures resulting in corrupt payments related to obtaining permits and licenses)
Add	3295	137	s
Delete	3296	137	criminal/fraud/ fcpa/cases/panalpina-inc/11-04-10panalpina-info.pdf; Criminal Information, United States v. Panalpina World Transport (Holding) Ltd., No. 10-cr-769 (S.D. Tex. Nov. 4, 2010), ECF No. 1,
Add	3297	137	criminal-fraud/page/file/1177596/download; Non-Pros. Agreement, In re: Archer Daniels Midland Company (Dec. 20, 2013) (favorable tax treatment),
Add	3298	137	s
Delete	3299	137	criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-info.pdf; see also Press Release, U.S. Sec. and Exchange Comm., SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010) (“The SEC alleges that the companies bribed customs officials in more than 10 countries in exchange for such perks as avoiding applicable customs duties on imported goods, expediting the importation of goods and equipment, extending drilling contracts, and lowering tax assessments.”), available at http://www.sec.gov/news/press/2010/2010-214.htm ; Press Release, U.S. Dept. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties (Nov. 4, 2010) (logistics provider and its subsidiary engaged in scheme to pay thousands of bribes totaling at least \$27 million to numerous foreign officials on behalf of customers in oil and gas ind

Add	3300	138	sites/default/files/criminal-fraud/ legacy/2014/01/03/adm-npa.pdf; Non-Pros. Agreement, In re Ralph Lauren Corporation (Apr. 22, 2013) (customs clearance), available at https
Delete	3301	138	opa/pr/2010/November/10-crm-1251.html.
Add	3302	138	sites/default/ files/criminal-fraud/legacy/2013/04/23/Ralph-Lauren.-NPA-Executed.pdf.
Delete	3303	138	9
Add	3304	138	8
Delete	3305	138	70
Add	3306	138	69→
Delete	3307	138	1
Add	3308	138	0
Delete	3309	138	2
Add	3310	138	1
Add	3311	138	105¶
Delete	3312	138	3
Add	3313	138	2
Delete	3314	138	4
Add	3315	138	3
Delete	3316	138	REP
Add	3317	138	Rep
Delete	3318	138	,
Delete	3319	138	5
Add	3320	138	4
Delete	3321	138	¶
Add	3322	138	“
Delete	3323	138	“
Add	3324	138	‘
Delete	3325	138	”
Add	3326	138	’
Delete	3327	138	“
Add	3328	138	‘
Delete	3329	138	”
Add	3330	138	’
Delete	3331	138	“
Add	3332	138	‘
Delete	3333	138	”
Add	3334	138	’
Add	3335	138	”
Add	3336	138	“
Delete	3337	138	“
Add	3338	138	‘
Delete	3339	138	”
Add	3340	138	’

Delete	3341	138	¶
Delete	3342	138	107¶
Delete	3343	138	PENDIX¶
Delete	3344	139	nd¶
Delete	3345	139	AP E¶
Delete	3346	139	notes¶
Delete	3347	139	“
Add	3348	139	‘
Delete	3349	139	”
Add	3350	139	,
Add	3351	139	”
Delete	3352	139	6
Add	3353	139	5
Delete	3354	139	7
Add	3355	139	6
Delete	3356	139	8
Add	3357	139	7
Add	3358	139	56, United States v. Lambert, supra note 43; Jury Instructions at 34, United States v. Baptiste, supra note 43; Jury Instructions at 1261, United States v. Hoskins, supra note 43; Jury Instructions at 1084-85, United States v. Ho, supra note 43; Jury Instructions at 4242, United States v. Ng, supra note 43; Jury Instructions at
Delete	3359	139	4
Add	3360	139	3
Delete	3361	139	4
Add	3362	139	3
Delete	3363	139	4
Add	3364	139	3
Delete	3365	139	4
Add	3366	139	3
Delete	3367	139	4
Add	3368	139	3
Delete	3369	139	4
Add	3370	139	3
Add	3371	139	78→See Indictment, United States v. Joo Hyun Bahn, et al., No. 16-cr-831 (S.D.N.Y. Dec. 15, 2016), ECF No. 1, available at https://www.justice.gov/criminal-fraud/case/file/942226/download ; see also, In the Matter of JooHyun Bahn, available at https://www.sec.gov/news/press-release/2018-181 .¶
Add	3372	139	s
Delete	3373	139	criminal/fraud/fcpa/cases/innospec-inc
Add	3374	139	sites/default/files/criminal-fraud/ legacy/2011/02/16
Delete	3375	139	80 See Complaint, SEC v. Innospec, supra note 79; Criminal Information, United States v. Innospec, supra note 79.¶

Delete	3376	139	1
Add	3377	139	0
Delete	3378	139	2
Add	3379	139	1
Delete	3380	139	for
Add	3381	139	under
Delete	3382	139	for
Add	3383	139	under
Delete	3384	139	3
Add	3385	139	2
Add	3386	139	56-57, United States v. Lambert, supra note 43; Jury Instructions at 34-35, United States v. Baptiste, supra note 43; Jury Instructions at 1261, United States v. Hoskins, supra note 43; Jury Instructions at 1084-85, United States v. Ho, supra note 43; Jury Instructions at 4242, United States v. Ng, supra note 43; Jury Instructions at
Delete	3387	140	4
Add	3388	140	3
Delete	3389	140	4
Add	3390	140	3
Delete	3391	140	4
Add	3392	140	3
Delete	3393	140	4
Add	3394	140	3
Delete	3395	140	4
Add	3396	140	3
Delete	3397	140	4
Add	3398	140	3
Add	3399	140	-
Delete	3400	140	5
Add	3401	140	4
Delete	3402	140	6
Add	3403	140	5
Delete	3404	140	7
Add	3405	140	6
Delete	3406	140	8
Add	3407	140	7
Add	3408	140	¶
Add	3409	140	106¶
Delete	3410	140	9
Add	3411	140	8
Delete	3412	140	Complaint, SEC v. Daimler AG, supra note 48;
Add	3413	140	→See
Delete	3414	140	Daimler AG, supra note 48.

Add	3415	140	Odebrecht
Add	3416	140	S.A., No. 16-CR-643 (E.D.N.Y. Dec. 21, 2016), ECF No. 8, available at https://www.justice.gov/criminal-fraud/file/920096/download .
Add	3417	140	89
Delete	3418	140	0
Add	3419	140	¶
Add	3420	141	¶
Add	3421	141	»
Add	3422	141	s
Delete	3423	141	criminal/fraud/fcpa/cases/kelloggb
Add	3424	141	sites/default/files/criminal-fraud/legacy/2011/02/16
Delete	3425	141	1
Add	3426	141	0
Add	3427	141	89
Delete	3428	141	0
Add	3429	141	¶
Add	3430	141	89
Delete	3431	141	0
Delete	3432	141	2
Add	3433	141	1
Add	3434	141	¶
Add	3435	141	s
Delete	3436	141	criminal/fraud/fcpa/cases/ rae-systems
Add	3437	141	sites/default/files/criminal-fraud/ legacy/2011/02/16
Delete	3438	141	8
Add	3439	141	7
Delete	3440	141	8
Add	3441	141	7
Add	3442	141	92→See Criminal Information, United States v. SBM¶
Add	3443	141	Offshore, N.V., No. 17-cr-686 (S.D. Tex. Nov. 21, 2017), ECF No. 1 [hereinafter United States v. SBM], available at https://www.justice.gov/criminal-fraud/file/1017351/download .
Add	3444	141	¶
Add	3445	141	s
Delete	3446	141	criminal/fraud/fcpa/cases/abb
Add	3447	141	sites/default/ files/criminal-fraud/legacy/2014/11/07
Delete	3448	141	94 Complaint, SEC v. UTStarcom, Inc., No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), ECF No. 1 [hereinafter SEC v. UTStarcom], available at http://www.sec.gov/litigation/complaints/2009/comp21357.pdf ; Non-Pros. Agreement, In re UTStarcom Inc. (Dec. 31, 2009) [hereinafter In re UTStarcom], available at http://www.justice.gov/criminal/fraud/fcpa/ cases/utstarcom-inc/12-31-09utstarcom-agree.pdf .

Delete	3449	141	5
Add	3450	141	4
Delete	3451	141	Complaint, SEC
Add	3452	141	→Criminal Information, United States
Delete	3453	141	UTStarcom
Add	3454	141	Ericsson
Delete	3455	141	note 94; Non-Pros. Agreement, In re UTStarcom, supra note 94.
Delete	3456	141	96 Complaint, SEC v. UTStarcom, supra note 94; Non-Pros. Agreement, In re UTStarcom, supra note 94.¶
Add	3457	141	note 47.¶
Delete	3458	141	7
Add	3459	141	5
Add	3460	141	¶
Add	3461	141	s
Delete	3462	141	criminal/fraud/fcpa/ cases/lucent-tech
Add	3463	141	sites/default/ files/criminal-fraud/legacy/2011/02/16
Delete	3464	141	8
Add	3465	141	6
Delete	3466	141	7
Add	3467	141	5
Delete	3468	141	7
Add	3469	141	5
Delete	3470	141	9
Add	3471	141	7
Delete	3472	142	¶
Delete	3473	142	108¶
Delete	3474	142	→No. 1 [hereinafter
Delete	3475	142	York Int'l Corp.], available at http://www.sec.gov/litigation/complaints/2007/comp20319.pdf ; Criminal Information,
Delete	3476	142	SEC v.
Delete	3477	142	7
Add	3478	142	5
Delete	3479	142	→gov/litigation/complaints/2007/comp20319.pdf; Criminal Information,
Delete	3480	142	→United States v. York Int'l Corp., No. 07-cr-253 (D.D.C. Oct. 1, 2007),
Delete	3481	142	7
Add	3482	142	5
Delete	3483	142	→ECF No. 1 [hereinafter United States v. York Int'l Corp.], available at
Delete	3484	142	100
Add	3485	142	98→
Delete	3486	142	→ http://www.justice.gov/criminal/fraud/fcpa/cases/york/10-01-07york –
Delete	3487	142	101

Add	3488	142	99→
Delete	3489	142	→info.pdf; Complaint, SEC v. Textron Inc., No. 07-cv-1505 (D.D.C. Aug.¶
Delete	3490	142	→23, 2007), ECF No. 1 [hereinafter SEC v. Textron], available at http://
Delete	3491	142	→ www.sec.gov/litigation/complaints/2007/comp20251.pdf ; Non-Pros.
Add	3492	142	100 Non-Pros. Agreement, In re Credit Suisse (May 30, 2018), available at https://www.justice.gov/criminal-fraud/file/1079596/download ; In the Matter of Credit Suisse Group AG, available at https://www.sec.gov/news/press-release/2018-128.¶
Delete	3493	142	2
Add	3494	142	1
Delete	3495	142	→Agreement, In re Textron Inc. (Aug. 23, 2007), available at http://www.¶
Delete	3496	142	→ justice.gov/criminal/fraud/fcpa/cases/textron-inc/08-21-07textron-¶
Add	3497	142	complaints/comp18740.pdf ; Admin. Proc. Order, In the Matter
Delete	3498	142	complaints/comp18740.pdf ; Admin. Proceeding Order, In the Matter→ agree.pdf . DOJ has issued opinion procedure releases concerning¶
Delete	3499	142	→payments (that were, in essence, donations) to government agencies or¶
Add	3500	142	2004) (finding that company violated FCPA accounting provisions and
Delete	3501	142	2004) (finding that company violated FCPA accounting provisions and→departments. See U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 09-01¶
Delete	3502	142	→(Aug. 3, 2009) (involving donation of 100 medical devices to foreign
Add	3503	142	gov/litigation/admin/34-49838.htm .
Delete	3504	142	gov/litigation/admin/34-49838.htm .→government), available at http://www.justice.gov/criminal/fraud/¶
Delete	3505	142	103 FCPA opinion procedure releases can be found at http://www.→fcpa/opinion/2009/0901.pdf ; U.S. DEPT. OF JUSTICE, FCPA OP.¶
Delete	3506	142	justice.gov/criminal/fraud/fcpa/ . In the case of the company seeking to→RELEASE 06-01 (Oct. 16, 2006) (involving contribution of \$25,000 to¶
Add	3507	142	102→FCPA opinion procedure releases can be found at https://www.justice.gov/criminal-fraud/opinion-procedure-releases . In the case of the company seeking to
Delete	3508	142	→regional customs department to pay incentive rewards to improve local¶

Delete	3509	142	→enforcement of anti-counterfeiting laws), available at http://www.
Add	3510	142	others, that would minimize the likelihood that anything of value would be given to any officials of the Eurasian country. U.S. Dept. of
Delete	3511	143	justice
Add	3512	143	Justice
Delete	3513	143	.¶
Add	3514	143	,
Delete	3515	143	others, that would minimize the likelihood that anything of value would→ gov/criminal/fraud/fcpa/opinion/2006/0601.pdf .¶
Delete	3516	143	be given to any officials of the Eurasian country. U.S. DEPT. OF JUSTICE,→116 The United States has some state-owned entities, like the Tennessee¶
Delete	3517	143	OP
Add	3518	143	Op
Delete	3519	143	RELEASE
Add	3520	143	Release
Delete	3521	143	→Valley Authority, that are instrumentalities of the government. McCarthy
Delete	3522	143	→v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 411 n.18
Delete	3523	143	4
Add	3524	143	3
Delete	3525	143	DEPT
Add	3526	143	Dept
Delete	3527	143	OF JUSTICE
Add	3528	143	of Justice
Delete	3529	143	OP
Add	3530	143	Op
Delete	3531	143	RELEASE
Add	3532	143	Release
Delete	3533	143	→(6th Cir. 2006) (“[T]here is no question that TVA is an agency and¶
Delete	3534	143	→instrumentality of the United States.”) (internal quotes omitted).
Delete	3535	143	→117 During the period surrounding the FCPA’s adoption, state-owned
Add	3536	143	104→Id.¶
Delete	3537	143	→entities held virtual monopolies and operated under state-controlled
Delete	3538	143	106 Id.→price-setting in many national industries around the world. See generally¶
Delete	3539	143	107 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 97-02 (Nov. 5,→WORLD BANK, BUREAUCRATS IN BUSINESS:

			THE ECONOMICS¶
Add	3540	143	106→U.S. Dept. of Justice, FCPA Op. Release 97-02 (Nov. 5,
Delete	3541	143	→AND POLITICS OF GOVERNMENT OWNERSHIP, WORLD BANK¶
Add	3542	143	opinion/1997/9702.pdf; U.S. Dept. of Justice, FCPA Op. Release
Delete	3543	143	opinion/1997/9702.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE→POLICY RESEARCH Report at 78 (1995); SUNITA KIKERI AND¶
Add	3544	143	s
Delete	3545	143	criminal/→AISHETU KOLO, STATE ENTERPRISES, THE WORLD BANK GROUP
Add	3546	143	sites/default/files/criminal-fraud/ legacy/2010/04/11/0601.pdf.
Delete	3547	143	fraud/fcpa/opinion/2006/0601.pdf.→(Feb. 2006), available at http://rru.worldbank.org/documents/¶
Add	3548	143	107¶
Delete	3549	143	8
Add	3550	143	7
Delete	3551	143	DEPT
Add	3552	143	Dept
Delete	3553	143	OF JUSTICE
Add	3554	143	of Justice
Delete	3555	143	OP
Add	3556	143	Op
Delete	3557	143	RELEASE
Add	3558	143	Release
Delete	3559	143	.→publicpolicyjournal/
Add	3560	143	, supra note
Delete	3561	143	304
Add	3562	143	106
Delete	3563	143	4
Add	3564	143	6
Delete	3565	143	Kikeri_Kolo.pdf.
Add	3566	143	.
Add	3567	143	108→Id.¶
Add	3568	143	109→Id.¶
Delete	3569	143	109 Id.→118 Id. at 1 (“[A]fter more than two decades of privatization, government¶
Delete	3570	143	110 Id.→ownership and control remains widespread in many regions—and in¶
Delete	3571	143	1
Add	3572	143	0
Delete	3573	143	→many parts of the world still dominates certain sectors.”).¶
Delete	3574	143	→119 To date, consistent with the approach taken by DOJ and SEC, all

Delete	3575	143	2
Add	3576	143	1
Delete	3577	143	→district courts that have considered this issue have concluded that this is¶
Delete	3578	143	→an issue of fact for a jury to decide. See Order, United States v. Carson,
Delete	3579	143	113 Under the FCPA, any person “acting in an official capacity for→2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No.¶
Delete	3580	143	or on behalf of” a foreign government, a department, agency, or→373 [hereinafter United States v. Carson]; United States v. Aguilar, 783¶
Delete	3581	144	instrumentality thereof, or a public international organization, is a→F. Supp. 2d 1108 (C.D. Cal. 2011); Order, United States v. Esquenazi,¶
Add	3582	144	112→Under the FCPA, any person “acting in an official capacity for or on behalf of” a foreign government, a department, agency, or instrumentality thereof, or a public international organization, is a
Delete	3583	144	→supra note 44, ECF No. 309; see also Order, United States v. O’Shea, No.¶
Delete	3584	144	DEPT. OF→09-cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, United States
Add	3585	144	Dept. of Justice,
Delete	3586	144	JUSTICE,
Delete	3587	144	OP
Add	3588	144	Op
Delete	3589	144	RELEASE
Add	3590	144	Release
Delete	3591	144	→v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 144. These
Delete	3592	144	→district court decisions are consistent with the acceptance by district
Add	3593	144	(listing safeguards to ensure that consultant was not acting on behalf of foreign government).
Delete	3594	144	(listing safeguards to ensure that consultant was not acting on behalf of→courts around the country of over 35 guilty pleas by individuals who¶
Delete	3595	144	foreign government).→admitted to violating the FCPA by bribing officials of state-owned or¶
Delete	3596	144	4
Add	3597	144	3
Delete	3598	144	→state-controlled entities. See Government’s Opposition to Defendants’¶
Delete	3599	144	→Amended Motion to Dismiss Counts One Through Ten of the¶

Add	3600	144	(4) (facilitating payments exception). Even though payments to a foreign government may not violate the anti-bribery provisions of the FCPA, such payments may violate other
Delete	3601	144	(4) (facilitating payments exception).→Indictment at 18, United States v. Carson, supra note 119, ECF No. 332;¶
Delete	3602	144	115 Even though payments to a foreign government may not violate the→Exhibit I, United States v. Carson, supra note 119, ECF No. 335 (list of¶
Delete	3603	144	anti-bribery provisions of the FCPA, such payments may violate other→examples of enforcement actions based on foreign officials of state-owned¶
Delete	3604	144	→entities).¶
Add	3605	144	accounting provisions. This was the case in a series of matters brought by DOJ and SEC involving kickbacks to the Iraqi government through the
Delete	3606	144	accounting provisions. This was the case in a series of matters brought by→120 Jury Instructions, United States v. Esquenazi, supra note 44, ECF No.¶
Delete	3607	144	DOJ and SEC involving kickbacks to the Iraqi government through the→520; Order at 5 and Jury Instructions, United States v. Carson, supra note¶
Delete	3608	144	→119, ECF No. 373 and ECF No. 549; Aguilar, 783 F. Supp. 2d at 1115.¶
Add	3609	144	Innospec, supra note 79;
Delete	3610	144	Innospec, supra note 79; Criminal Information, United States v. Innospec,→121 Criminal Information, United States v. C.E. Millier Corp., et al.,¶
Delete	3611	144	supra note 79;
Delete	3612	144	→No. 82-cr-788
Delete	3613	144	C.
Delete	3614	144	Cal. Sept. 17, 1982), available at http://www .
Delete	3615	144	(D.
Delete	3616	144	→ justice.gov/criminal/fraud/fcpa/cases/ce-miller/1982-09-17-ce-miller –
Delete	3617	144	→ information.pdf .
Delete	3618	144	→122 See Complaint, SEC v. Sam P. Wallace Co., Inc., et al., No. 81-cv–
Delete	3619	144	→1915 (D.D.C. Aug. 31, 1982); Criminal Information, United States v.
Delete	3620	145	→Sam P. Wallace Co., Inc
Add	3621	145	SEC v. Ingersoll-Rand Company Ltd
Delete	3622	145	83
Add	3623	145	07
Delete	3624	145	r-
Add	3625	145	v-

Delete	3626	145	34
Add	3627	145	1955
Delete	3628	145	P
Add	3629	145	D
Delete	3630	145	R
Add	3631	145	C
Delete	3632	145	Feb
Add	3633	145	Oct
Delete	3634	145	23
Add	3635	145	1
Delete	3636	145	1983
Add	3637	145	2007
Add	3638	145	, ECF No. 1
Add	3639	145	at http://www.sec.gov/litigation/complaints/2007/comp20353.pdf ; Criminal Information, United States
Delete	3640	145	SEC
Delete	3641	145	Company Ltd.
Add	3642	145	Italiana SpA
Delete	3643	145	v-
Add	3644	145	r-
Delete	3645	145	1955
Add	3646	145	294
Add	3647	145	31, 2007), ECF No. 1, available
Delete	3648	145	sam-wallace-
Add	3649	145	ingerand-italiana/10-31-07ingersollrand-info.pdf; Complaint
Delete	3650	145	31
Add	3651	145	SEC v. York Int'l Corp., No. 07-cv-1750 (D.D.C. Oct. 1,
Add	3652	145	[hereinafter SEC v. York Int'l Corp.]
Add	3653	145	s
Delete	3654	145	→company/1983-02-23-sam-wallace-company-information.pdf; see also
Delete	3655	145	53
Add	3656	145	19
Delete	3657	145	→Criminal Information, United States
Delete	3658	145	Goodyear
Add	3659	145	York
Delete	3660	145	89-
Add	3661	145	07-cr-253 (D.D.C. Oct. 1, 2007), ECF No. 1 [hereinafter United States v. York Int'l Corp.], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/19/10-01-07york-info.pdf ; Complaint, SEC v. Textron Inc., No. 07-cv-1505 (D.D.C. Aug. 23, 2007), ECF No. 1 [hereinafter SEC v. Textron], available at

			https://www.sec.gov/litigation/complaints/2007/comp20251.pdf ; Non-Pros. Agreement, In re Textron Inc. (Aug. 22, 2007), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/08-21-07textron-agree.pdf . DOJ has issued opinion procedure releases concerning payments (that were, in essence, donations) to government agencies or departments. See U.S. Dept. of Justice, FCPA Op. Release 09-01 (Aug. 3, 2009) (involving donation of 100 medical devices to foreign government), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf ; U.S. Dept. of Justice, FCPA Op. Release 06-01 (Oct. 16, 2006) (involving contribut
Delete	3662	145	v. Ingersoll-Rand Italiana SpA, No. 07-cr-294 (D.D.C. Oct. 31, 2007), → cr-156 (D.D.C. May 11, 1989) (Iraqi Trading Company identified as ¶
Delete	3663	145	ECF No. 1, available at http://www.justice.gov/criminal/fraud/fcpa/ → “instrumentality of the Government of the Republic of Iraq”), available ¶
Delete	3664	145	cases/ingerand-italiana/10-31-07ingersollrand-info.pdf; Complaint, → at http://www.justice.gov/criminal/fraud/fcpa/cases/goodyear/1989- ¶
Add	3665	145	114 → Exhibit I, United States v. Carson, infra note 118, ECF No. 335 (list of examples of enforcement actions based on foreign officials of state-owned entities). ¶
Add	3666	145	115 → The United States has some state-owned entities, like the Tennessee Valley Authority, that are instrumentalities of the government. <i>McCarthy v. Middle Tenn. Elec. Membership Corp.</i> , 466 F.3d 399, 411 n.18 (6th Cir. 2006) (“[T]here is no question that TVA is an agency and instrumentality of the United States.”) (internal quotes omitted). ¶
Add	3667	145	116 → During the period surrounding the FCPA’s adoption, state-owned entities held virtual monopolies and operated under state-controlled price-setting in many national industries around the world. See generally World Bank, <i>Bureaucrats in Business: The Economics</i> 1997), and <i>Politics of Government Ownership</i> , World Bank Policy Research Report at 78 (1995); Sunita Kikeri and Aishetu Kolo, <i>State Enterprises</i> , The World Bank Group (Feb. 2006), available at http://documents.worldbank.org/curated/en/169041468768316446/pdf/353300PAPER0VP0304Kikeri1Kolo.pdf . ¶
Add	3668	145	117 → Id. at 1 (“[A]fter more than two decades of privatization, government ownership and control remains widespread in many regions—and in many parts of the world still dominates certain sectors.”). ¶
Add	3669	146	118 → To date, consistent with the approach taken by DOJ and

			SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide. See Order, United States v. Carson, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No. 373 [hereinafter United States v. Carson]; United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order, United States v. Esquenazi, supra note 43, ECF No. 309; see also Order, United States v. O’Shea, No. 09-cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, United States v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 144. These district court decisions are consistent with the acceptance by district courts around the country of over 35 guilty pleas by individuals who admitted to violating the FCPA by bribing officials of state-owned or state-controlled entities. See Government’s Opposition to Defendants’ Amended Motion to Dismiss Counts One Through Ten of the Indictment at 18, United
Add	3670	146	119→United States v. Esquenazi, 752 F.3d 912, 920-33 (11th Cir. 2014).¶
Add	3671	146	120→Id. at 925.¶
Add	3672	146	121→Id.¶
Add	3673	146	122→Id. at 926.¶
Add	3674	146	123→See Jury Instructions at 60-61, United States v. Lambert, supra note 43; Jury Instructions at 1264, United States v. Hoskins, supra note 43; Order at 5 and Jury Instructions, United States v. Carson, supra note 118, ECF No. 373 and ECF No. 549; Aguilar, 783 F. Supp. 2d at 1115.¶
Add	3675	146	108¶
Add	3676	146	124→Criminal Information, United States v. C.E. Miller Corp., et al., No. 82-cr-788 (C.D. Cal. Sept. 17, 1982), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/22/1982-09-17-ce-miller-information.pdf .¶
Add	3677	146	125→See Complaint,
Delete	3678	146	York Int’l Corp
Add	3679	146	Sam P. Wallace Co., Inc., et al
Delete	3680	146	07
Add	3681	146	81
Delete	3682	146	750
Add	3683	146	915
Delete	3684	146	0
Delete	3685	146	Oct
Add	3686	146	Aug
Add	3687	146	31
Delete	3688	146	2007), ECF→
Add	3689	146	1982); Criminal Information, United States v. Sam P. Wallace Co., Inc., No. 83-cr-34 (D.P.R. Feb. 23, 1983), available at http://www.justice.gov/criminal/fraud/fcpa/cases/sam-wallace-

			company/1983-02-23-sam-wallace-company-information.pdf; see also Criminal Information, United States v. Goodyear Int'l Corp., No. 89-cr-156 (D.D.C. May 11, 1989) (Iraqi Trading Company identified as “instrumentality of the Government of the Republic of Iraq”), available at http://www.justice.gov/criminal/fraud/fcpa/cases/goodyear/1989-
Delete	3690	146	109¶
Delete	3691	146	3
Add	3692	146	6
Delete	3693	146	8
Add	3694	146	7
Add	3695	146	s
Delete	3696	146	criminal/fraud/fcpa/cases/abb
Add	3697	146	sites/default/files/ criminal-fraud/legacy/2014/11/07
Delete	3698	146	4
Add	3699	146	7
Add	3700	146	Esquenazi, 752 F.3d at 928-29, supra note 119;
Delete	3701	146	4
Add	3702	146	3
Delete	3703	147	5
Add	3704	147	8
Delete	3705	147	supra note 56, ECF No. 10.
Add	3706	147	S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), ECF No. 1 [hereinafter United States v. Alcatel-Lucent France], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/07/29/12-27-10alcatel-et-al-info.pdf .
Delete	3707	147	6
Add	3708	147	9
Delete	3709	147	27
Add	3710	147	30
Delete	3711	147	28
Add	3712	147	31
Add	3713	147	132→See, e.g., Superseding Indictment, United States v. Ng, supra note 43 (charging violations of the FCPA for payment of bribes to ambassadors to the United Nations); Superseding Indictment, United States v. Harder, supra note 52 (charging FCPA violations for bribes paid to an official at the European Bank for Reconstruction and Development).¶
Delete	3714	147	29
Add	3715	147	33
Delete	3716	147	0
Add	3717	147	4
Delete	3718	147	1
Add	3719	147	5
Delete	3720	147)

Add	3721	147	s
Add	3722	147	s
Delete	3723	147	criminal/fraud/fcpa/cases/ depuy-inc
Add	3724	147	sites/default/files/ criminal-fraud/legacy/2011/04/27
Delete	3725	147	8
Add	3726	147	7
Delete	3727	147	3
Add	3728	147	6
Add	3729	147	s
Delete	3730	147	criminal/fraud/fcpa/cases/international-harvester
Add	3731	147	sites/default/files/criminal-fraud/ legacy/2012/06/22
Add	3732	147	136→See United States v. Société Générale; Information, United States v. SGA Société Générale Acceptance, N.V., No. 18-cr-274 (E.D.N.Y. May 30, 2018), ECF No. 4, available at https://www.justice.gov/criminal-fraud/file/1072436/download ; Non-Pros. Agreement, In re Legg Mason (June 4, 2018), available at https://www.justice.gov/criminal-fraud/file/1072461/download ; In the Matter of Legg Mason, Inc., https://www.sec.gov/news/press-release/2018-168 .¶
Delete	3733	147	2
Add	3734	147	7
Delete	3735	147	Criminal Information,
Delete	3736	147	Marubeni Corp., No. 12-cr-22 (S.D. Tex. Jan. 17, 2012), ECF No. 1 [hereinafter United States v. Marubeni], available at http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-information.pdf
Add	3737	147	SBM, supra note 92
Delete	3738	147	JGC Corp., supra note 60, ECF No. 1; Criminal Information, United States v. Snamprogetti, supra note 60, ECF No. 1; Complaint, SEC v. ENI, S.p.A. and Snamprogetti Netherlands B.V
Add	3739	147	SBM Offshore USA, Inc
Delete	3740	147	0
Add	3741	147	7
Delete	3742	147	v-
Add	3743	147	r-
Delete	3744	147	2414
Add	3745	147	685
Delete	3746	147	July 7
Add	3747	147	Nov. 21
Delete	3748	147	0
Add	3749	147	7
Add	3750	147	s
Delete	3751	147	sec
Add	3752	147	justice

Delete	3753	147	litigation/complaints/2010/comp-pr2010-119.pdf
Add	3754	148	criminal-fraud/file/1017336/ download
Delete	3755	148	Technip S.A.
Add	3756	148	Anthony Mace
Delete	3757	148	0
Add	3758	148	7
Delete	3759	148	439
Add	3760	148	618
Delete	3761	148	June 28
Add	3762	148	Oct. 19
Delete	3763	148	0
Add	3764	148	7
Delete	3765	148	Technip
Add	3766	148	Mace
Add	3767	148	s
Delete	3768	148	justice.gov/criminal/fraud/fcpa/cases/technip-sa/06-28-10-technip-%20information.pdf; Complaint, SEC v. Technip, No. 10-cv-2289 (S.D. Tex. June 28, 2010), ECF No. 1 [hereinafter SEC v. Technip], available at http://www.sec.gov/litigation/complaints/2010/comp-pr2010-110.pdf ; Indictment, United States v. Tesler, supra note 50; Complaint, SEC v. Halliburton and KBR, supra note 90; Criminal Information, United States v. KBR, supra note 90; Criminal Information, United States v. Stanley, No. 08-cr-597 (S.D. Tex. Sept. 3, 2008), ECF No. 1, available at http://justice.gov/criminal/fraud/fcpa/cases/stanleya/08-29-08stanley-info.pdf .
Add	3769	148	justice.gov/criminal-fraud/file/1017326/download;→United»
Delete	3770	148	133 See Criminal Information, United States v. AGA Medical Corp., No. 08-cr-172, ECF No. 1 (D. Minn. June 3, 2008), available at http://www.justice.gov/criminal/fraud/fcpa/cases/agamedcorp/06-03-08aga-info.pdf .¶
Delete	3771	148	134 Complaint, SEC v. Innospec, supra note 79; Criminal Information, United States v. Innospec, supra note 79; Superseding Criminal Information, United States v. Naaman, supra note 50, ECF No. 15, available at http://www.justice.gov/criminal/fraud/fcpa/cases/naamano/06-24-10naaman-superseded-info.pdf ; Complaint, SEC v. Turner, supra note 50.¶
Delete	3772	148	135 See sources cited
Add	3773	148	States v. Zubiato,
Delete	3774	148	68
Add	3775	148	9
Delete	3776	148	136 See sources cited supra note 68.¶

Delete	3777	148	7
Add	3778	148	8
Delete	3779	148	8
Add	3780	148	9
Delete	3781	148	39
Add	3782	148	40
Delete	3783	148	REP
Add	3784	148	Rep
Add	3785	148	-
Add	3786	148	Cf. Plea Agreement, <i>United States v. Mace</i> , supra note 137, ECF No. 18, available at https://www.justice.gov/criminal-fraud/file/1017331/download (former CEO admitting he was guilty of FCPA violation by “continuing to make payments that furthered [a] bribery scheme and deliberately avoiding learning that certain payments, including payments Defendant authorized and approved, were in fact bribes paid to foreign officials”).
Delete	3787	148	0
Add	3788	148	1
Delete	3789	148	REP
Add	3790	148	Rep
Delete	3791	148	1
Add	3792	148	2
Delete	3793	148	2
Add	3794	148	3
Delete	3795	148	REP
Add	3796	148	Rep
Add	3797	148	109¶
Delete	3798	148	3
Add	3799	148	4
Add	3800	149	145→See Trial Transcript 715-18, <i>United States v. Ng</i> , supra note 43.¶
Add	3801	149	146→Id.¶
Add	3802	149	147→Id.¶
Delete	3803	149	4
Add	3804	149	8
Delete	3805	149	5
Add	3806	149	9
Delete	3807	149	46
Add	3808	149	50
Add	3809	149	,
Delete	3810	149	DEPT
Add	3811	149	Dept
Delete	3812	149	OF JUSTICE
Add	3813	149	of Justice

Delete	3814	149	OP
Add	3815	149	Op
Delete	3816	149	RELEASE
Add	3817	149	Release
Delete	3818	149	DEPT
Add	3819	149	Dept
Delete	3820	149	OF JUSTICE
Add	3821	149	of Justice
Delete	3822	149	OP
Add	3823	149	Op
Delete	3824	149	RELEASE
Add	3825	149	Release
Add	3826	149	s
Delete	3827	149	criminal/fraud/fcpa/opinion/2008/
Add	3828	149	sites/default/files/criminal-fraud/ legacy/2010/
Add	3829	149	04/11/0803
Delete	3830	149	DEPT
Add	3831	149	Dept
Delete	3832	149	OF JUSTICE
Add	3833	149	of Justice
Delete	3834	149	OP
Add	3835	149	Op
Delete	3836	149	RELEASE
Add	3837	149	Release
Add	3838	149	s
Delete	3839	149	criminal/fraud/fcpa/ opinion/2007/
Add	3840	149	sites/default/ files/criminal-fraud/legacy/2010/
Add	3841	149	04/11/0702
Delete	3842	149	DEPT
Add	3843	149	Dept
Delete	3844	149	OF JUSTICE
Add	3845	149	of Justice
Delete	3846	149	OP
Add	3847	149	Op
Delete	3848	149	RELEASE
Add	3849	149	Release
Add	3850	149	s
Delete	3851	149	criminal/fraud/fcpa/opinion/2007/
Add	3852	149	sites/ default/files/criminal-fraud/legacy/2010/
Add	3853	149	04/11/0701
Delete	3854	149	DEPT
Add	3855	149	Dept
Delete	3856	149	OF JUSTICE
Add	3857	149	of Justice

Delete	3858	149	OP
Add	3859	149	Op
Delete	3860	149	RELEASE
Add	3861	149	Release
Add	3862	149	s
Delete	3863	149	criminal/fraud/fcpa/opinion/2004/
Add	3864	149	sites/default/files/criminal-fraud/legacy/2010/
Add	3865	149	04/11/0404
Delete	3866	149	DEPT
Add	3867	149	Dept
Delete	3868	149	OF JUSTICE
Add	3869	149	of Justice
Delete	3870	149	OP
Add	3871	149	Op
Delete	3872	149	RELEASE
Add	3873	149	Release
Add	3874	149	s
Delete	3875	149	criminal/fraud/fcpa/opinion/2004/0403.pdf; U.S. DEPT. OF JUSTICE
Add	3876	149	sites/default/files/¶
Add	3877	149	criminal-fraud/legacy/2010/04/11/0403.pdf; →U.S. →Dept.»
Add	3878	149	of Justice
Delete	3879	149	OP
Add	3880	149	Op
Delete	3881	149	RELEASE
Add	3882	149	Release
Add	3883	149	s
Delete	3884	149	criminal/fraud/fcpa/ opinion/2004/
Add	3885	149	sites/default/files/criminal-fraud/ legacy/2010/
Add	3886	149	04/11/0401
Delete	3887	149	DEPT
Add	3888	149	Dept
Delete	3889	149	OF JUSTICE
Add	3890	149	of Justice
Delete	3891	149	OP
Add	3892	149	Op
Delete	3893	149	RELEASE¶
Add	3894	150	Release
Delete	3895	150	ENDIX notes¶
Delete	3896	150	110¶
Delete	3897	150	→eventual act or decision or which do not involve any discretionary action,”
Delete	3898	150	→giving the examples of “a gratuity paid to a customs official to speed the

Delete	3899	150	→processing of a customs document” or “payments made to secure permits,
Delete	3900	150	DEPT
Add	3901	150	Dept
Delete	3902	150	OF JUSTICE
Add	3903	150	of Justice
Delete	3904	150	OP. RELEASE→licenses, or the expeditious performance of similar duties of an essentially
Add	3905	150	Op. Release
Delete	3906	150	→ministerial or clerical nature which must of necessity be performed in any
Delete	3907	150	joint→event.” H.R. REP. No. 95-640, at 8.
Add	3908	150	joint-venture
Delete	3909	150	venture
Delete	3910	150	→161 Section 30A(f)(3)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(3)
Delete	3911	150	→(B); 15 U.S.C. §§ 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).
Delete	3912	150	→162 In a 2004 decision, the Fifth Circuit emphasized this precise point,
Delete	3913	150	47
Add	3914	150	51
Delete	3915	150	DEPT
Add	3916	150	Dept
Delete	3917	150	OF JUSTICE
Add	3918	150	of Justice
Delete	3919	150	OP
Add	3920	150	Op
Delete	3921	150	RELEASE
Add	3922	150	Release
Delete	3923	150	→commenting on the limited nature of the facilitating payments exception:¶
Delete	3924	150	DEPT
Add	3925	150	Dept
Delete	3926	150	OF JUSTICE
Add	3927	150	of Justice
Delete	3928	150	OP
Add	3929	150	Op
Delete	3930	150	RELEASE
Add	3931	150	Release
Delete	3932	150	→A brief review of the types of routine governmental
Delete	3933	150	DEPT
Add	3934	150	Dept
Delete	3935	150	OF JUSTICE
Add	3936	150	of Justice

Delete	3937	150	OP
Add	3938	150	Op
Delete	3939	150	RELEASE
Add	3940	150	Release
Delete	3941	150	→actions enumerated by Congress shows how limited
Delete	3942	150	DEPT
Add	3943	150	Dept
Delete	3944	150	OF JUSTICE
Add	3945	150	of Justice
Delete	3946	150	OP
Add	3947	150	Op
Delete	3948	150	RELEASE
Add	3949	150	Release
Delete	3950	150	→Congress wanted to make the grease exceptions.
Add	3951	150	Dept. of Justice
Delete	3952	150	DEPT. OF JUSTICE
Delete	3953	150	OP
Add	3954	150	Op
Delete	3955	150	RELEASE
Add	3956	150	Release
Delete	3957	150	→Routine governmental action, for instance, includes
Add	3958	150	Dept of Justice,
Delete	3959	150	DEPT. OF JUSTICE,
Delete	3960	150	OP
Add	3961	150	Op
Delete	3962	150	RELEASE
Add	3963	150	Release
Delete	3964	150	→“obtaining permits, licenses, or other official
Delete	3965	150	48
Add	3966	150	52
Delete	3967	150	DEPT
Add	3968	150	Dept
Delete	3969	150	OF JUSTICE
Add	3970	150	of Justice
Delete	3971	150	OP
Add	3972	150	Op
Delete	3973	150	RELEASE
Add	3974	150	Release
Delete	3975	150	→documents to qualify a person to do business in
Delete	3976	150	49
Add	3977	150	53
Delete	3978	150	DEPT
Add	3979	150	Dept
Delete	3980	150	OF JUSTICE

Add	3981	150	of Justice
Delete	3982	150	OP
Add	3983	150	Op
Delete	3984	150	RELEASE
Add	3985	150	Release
Delete	3986	150	→a foreign country,” and “scheduling inspections¶
Delete	3987	150	DEPT
Add	3988	150	Dept
Delete	3989	150	OF JUSTICE
Add	3990	150	of Justice
Delete	3991	150	OP
Add	3992	150	Op
Delete	3993	150	RELEASE
Add	3994	150	Release
Delete	3995	150	→associated with contract performance or inspections
Delete	3996	150	DEPT
Add	3997	150	Dept
Delete	3998	150	OF JUSTICE
Add	3999	150	of Justice
Delete	4000	150	OP
Add	4001	150	Op
Delete	4002	150	RELEASE
Add	4003	150	Release
Delete	4004	150	→related to transit of goods across country.”
Delete	4005	150	DEPT
Add	4006	150	Dept
Delete	4007	150	OF JUSTICE
Add	4008	150	of Justice
Delete	4009	150	OP
Add	4010	150	Op
Delete	4011	150	RELEASE
Add	4012	150	Release
Delete	4013	150	→Therefore, routine governmental action does not
Add	4014	150	Dept
Delete	4015	150	DEPT
Delete	4016	150	OF JUSTICE
Add	4017	150	of Justice
Delete	4018	150	OP
Add	4019	150	Op
Delete	4020	150	RELEASE
Add	4021	150	Release
Delete	4022	150	→include the issuance of every official document or
Table Add	4023	150	
Delete	4024	151	150 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan.

			6, 2004).→every inspection, but only (1) documentation that¶
Delete	4025	151	151 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 08-03 (July 11, 2008).→qualifies a party to do business and (2) scheduling an¶
Delete	4026	151	152 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 11-01 (June 30, 2011);→inspection—very narrow categories of largely non-¶
Add	4027	151	(June 30, 2011);
Delete	4028	151	DEPT
Add	4029	151	Dept
Delete	4030	151	OF JUSTICE
Add	4031	151	of Justice
Delete	4032	151	OP
Add	4033	151	Op
Delete	4034	151	RELEASE
Add	4035	151	Release
Delete	4036	151	→discretionary, ministerial activities performed by
Delete	4037	151	3
Add	4038	151	7
Delete	4039	151	DEPT
Add	4040	151	Dept
Delete	4041	151	OF JUSTICE
Add	4042	151	of Justice
Delete	4043	151	OP
Add	4044	151	Op
Delete	4045	151	RELEASE
Add	4046	151	Release
Delete	4047	151	→mid- or low-level foreign functionaries.
Delete	4048	151	154 Id.→United States v. Kay; 359 F.3d 738, 750-51 (5th Cir. 2004) (internal¶
Add	4049	151	158→Id.¶
Delete	4050	151	5
Add	4051	151	9
Delete	4052	151	DEPT
Add	4053	151	Dept
Delete	4054	151	OF JUSTICE
Add	4055	151	of Justice
Delete	4056	151	OP
Add	4057	151	Op
Delete	4058	151	RELEASE
Add	4059	151	Release
Delete	4060	151	→footnote omitted) (emphasis in original).¶
Delete	4061	151	DEPT
Add	4062	151	Dept

Delete	4063	151	OF JUSTICE
Add	4064	151	of Justice
Delete	4065	151	OP
Add	4066	151	Op
Delete	4067	151	RELEASE
Add	4068	151	Release
Delete	4069	151	→163 Non-Pros. Agreement, In re Helmerich & Payne, Inc. (July 29, 2009)
Delete	4070	151	DEPT
Add	4071	151	Dept
Delete	4072	151	OF JUSTICE
Add	4073	151	of Justice
Delete	4074	151	OP
Add	4075	151	Op
Delete	4076	151	RELEASE
Add	4077	151	Release
Delete	4078	151	→[hereinafter In re Helmerich & Payne], available at http://www.justice.gov/criminal/fraud/fcpa/cases/helmerich-payne/06-29-09helmerich-¶
Add	4079	151	2007).
Delete	4080	151	2007).→ gov/criminal/fraud/fcpa/cases/helmerich-payne/06-29-09helmerich-¶
Delete	4081	151	56
Add	4082	151	0
Delete	4083	151	DEPT
Add	4084	151	Dept
Delete	4085	151	OF JUSTICE
Add	4086	151	of Justice
Delete	4087	151	OP
Add	4088	151	Op
Delete	4089	151	RELEASE
Add	4090	151	Release
Delete	4091	151	→agree.pdf;
Delete	4092	151	Proceeding
Add	4093	151	Proc.
Delete	4094	151	¶
Delete	4095	151	U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-02 (Sept. 11, 2007);→
Delete	4096	151	U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-01 (July 24, 2007);→
Add	4097	151	litigation/admin/2009/34-60400.pdf .
Delete	4098	151	U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-04 (Sept. 3, 2004); U.S.→ litigation/admin/2009/34-60400.pdf .¶
Delete	4099	151	DEPT. OF JUSTICE, FCPA OP. RELEASE 04-03 (June 14, 2004); U.S.→164 Criminal Information, Vetco Gray Controls

			Inc., et al., No. 07-¶
Delete	4100	151	DEPT. OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan. 6, 2004).→cr-4 No. (S.D. Tex. Jan. 5, 2007), ECF Nos. 1-2, available at http://¶
Delete	4101	151	57
Add	4102	151	61
Delete	4103	151	DEPT
Add	4104	151	Dept
Delete	4105	151	OF JUSTICE
Add	4106	151	of Justice
Delete	4107	151	OP
Add	4108	151	Op
Delete	4109	151	RELEASE
Add	4110	151	Release
Delete	4111	151	→ www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-¶
Delete	4112	151	DEPT
Add	4113	151	Dept
Delete	4114	151	OF JUSTICE
Add	4115	151	of Justice
Delete	4116	151	OP
Add	4117	151	Op
Delete	4118	151	RELEASE
Add	4119	151	Release
Delete	4120	151	→07vetcogray-info.pdf.
Delete	4121	151	158 For example, DOJ has previously approved expenditures on behalf of→165 Complaint, SEC v. Noble Corp., No. 10-cv-4336 (S.D. Tex. Nov.¶
Delete	4122	151	family members or for entertainment purposes under certain, limited→4, 2010), ECF No. 1, available at http://www.sec.gov/litigation/¶
Add	4123	151	162→For example, DOJ has previously approved expenditures on behalf of family members or for entertainment purposes under certain, limited
Delete	4124	151	DEPT
Add	4125	151	Dept
Delete	4126	151	OF JUSTICE
Add	4127	151	of Justice
Delete	4128	151	Ev
Add	4129	151	ev
Delete	4130	151	RELEASE→ complaints/2010/comp21728.pdf ; Non-Pros. Agreement, In re Noble¶
Add	4131	151	Release
Delete	4132	151	→Corp. (Nov. 4,
Add	4133	151	company seeking to provide promotional tour for foreign official

			and wife, where both had already planned a trip to the United States at their own expense and company proposed to pay only for all reasonable and necessary actual domestic expenses for the extension of their travel to allow the promotional tour, which would not exceed \$
Delete	4134	152	2010
Add	4135	152	5,000
Delete	4136	152	10
Add	4137	152	0
Delete	4138	152	http://www.justice.gov/criminal/
Delete	4139	152	company seeking to provide promotional tour for foreign official and→ fraud/fcpa/cases/noble-corp/11-04-10noble-corp-npa.pdf ; see also
Delete	4140	152	wife, where both had already planned a trip to the United States at their→sources cited supra note 68.
Delete	4141	152	own expense and company proposed to pay only for all reasonable and→166 Working Group on Bribery, 2009 Recommendation of the Council for
Delete	4142	152	necessary actual domestic expenses for the extension of their travel to→Further Combating Bribery of Foreign Public Officials in International
Delete	4143	152	allow the promotional tour, which would not exceed \$5,000), available at→Business Transactions, at § VI (recommending countries should
Delete	4144	152	→periodically review their policies and approach to facilitation payments
Add	4145	152	110
Delete	4146	152	59
Add	4147	152	63
Delete	4148	152	defenses, the→and should encourage companies to prohibit or discourage facilitation
Add	4149	152	defenses, the
Delete	4150	152	→payments “in view of the corrosive effect of small facilitation payments,
Delete	4151	152	→particularly on sustainable economic development and the rule of law”);
Delete	4152	152	→Working Group on Bribery, United States: Phase 3, at 24 (Oct. 15,
Delete	4153	152	→2010), available at http://www.oecd.org/dataoecd/10/49/46213841 .
Delete	4154	152	→pdf (commending United States for steps taken in line with 2009
Delete	4155	152	→recommendation to encourage companies to prohibit or discourage
Delete	4156	152	→facilitation payments).

Delete	4157	152	→167 Facilitating payments are illegal under the U.K. Bribery Act 2010,
Delete	4158	152	→which came into force on July 1, 2011, and were also illegal under
Delete	4159	152	→prior U.K. legislation. See Bribery Act 2010, c.23 (Eng.), available
Delete	4160	152	→at http://www.legislation.gov.uk/ukpga/2010/23/contents ; see also
Delete	4161	152	→U.K. MINISTRY OF JUSTICE, The Bribery Act 2010: Guidance About
Delete	4162	152	REP
Add	4163	152	Rep
Delete	4164	152	→Procedures Which Relevant Commercial Organisations Can Put into Place
Delete	4165	152	→to Prevent Persons Associated with Them from Bribing (Section 9 of the
Delete	4166	152	→Bribery Act 2010), at 18 (2011), available at http://www.justice.gov.uk/
Delete	4167	152	→ guidance/docs/bribery-act-2010-guidance.pdf .
Delete	4168	152	REP
Add	4169	152	Rep
Delete	4170	152	→168 See, e.g., Non-Pros. Agreement, In re Helmerich & Payne, <i>supra</i> note
Delete	4171	153	→163; Admin. Proceeding Order, In the Matter of Helmerich & Payne,
Delete	4172	153	→ <i>supra</i> note 163.
Delete	4173	153	→169
Add	4174	153	¶
Add	4175	153	164→In exempting facilitating payments, Congress¶
Add	4176	153	sought to distinguish them as “payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action,” giving the examples of “a gratuity paid to a customs official to speed the processing of a customs document” or “payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event.” H.R. Rep. No. 95-640, at 8.¶
Add	4177	153	165→Section 30A(f)(3)(B) of the Exchange Act, 15 U.S.C.¶
Add	4178	153	§ 78dd-1(f)(3)(B); 15 U.S.C. §§ 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).¶
Add	4179	153	166→In a 2004 decision, the Fifth Circuit emphasized¶
Add	4180	153	this precise point, commenting on the limited nature of the facilitating payments exception:¶
Add	4181	153	A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to

			make the grease exceptions. Routine governmental action, for instance, includes “obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country,” and “scheduling inspections associated with contract performance or inspections related to transit of goods across country.” Therefore, routine governmental action does not include the issuance of every official document or every inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid-or low-level foreign functionaries.¶
Add	4182	153	United States v. Kay, 359 F.3d 738, 750-51 (5th Cir. 2004) (internal footnote omitted) (emphasis in original).¶
Add	4183	153	167→Non-Pros. Agreement, In re Helmerich & Payne, Inc.¶
Add	4184	153	(July 29, 2009) [hereinafter In re Helmerich & Payne], available¶
Add	4185	153	at→ https://www.justice.gov/sites/default/files/criminal→
Add	4186	153	fraud/legacy/2011/02/16/06-29-09helmerich-agree.pdf. 168→Criminal Information, Vetco Gray Controls Inc., et al., No. 07-cr-4 No. (S.D. Tex. Jan. 5, 2007), ECF Nos. 1-2, available at http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-info.pdf .¶
Add	4187	153	169→Complaint, SEC v. Noble Corp., No. 10-cv-4336 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available at http://www.sec.gov/litigation/complaints/2010/comp21728.pdf ; Non-Pros. Agreement, In re Noble Corp. (Nov. 4, 2010), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/11-04-10noble-corp-npa.pdf ; see also sources cited supra note 67.¶
Add	4188	153	170→Working Group on Bribery, 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, at § VI (recommending countries should periodically review their policies and approach to facilitation payments and should encourage companies to prohibit or discourage facilitation payments “in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law”); Working Group on Bribery, United States: Phase 3, at 24 (Oct. 15, 2010), available at https://www.oecd.org/daf/anti-bribery/44176910.pdf (commending United States for steps taken in line with 2009 recommendation to encourage companies to prohibit or discourage facilitation payments).¶
Add	4189	154	171→Facilitating payments are illegal under the U.K. Bribery Act 2010, which came into force on July 1, 2011, and were also illegal under prior U.K. legislation. See Bribery Act 2010, c.23 (Eng.), available at http://www.legislation.gov.uk/ukpga/2010/23/contents ; see also U.K. Ministry of Justice, The

			Bribery Act 2010: Guidance About Procedures Which Relevant Commercial Organisations Can Put into Place to Prevent Persons Associated with Them from Bribing (Section 9 of the Bribery Act 2010), at 18 (2011), available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf .¶
Add	4190	154	172→See, e.g., Non-Pros. Agreement, In re Helmerich & Payne, supra note 167; Admin. Proc. Order, In the Matter of Helmerich & Payne, supra note 160.¶
Add	4191	154	173→
Delete	4192	154	160 In exempting facilitating payments, Congress sought to distinguish→
Delete	4193	154	them as “payments which merely move a particular matter toward an→
Delete	4194	154	¶
Delete	4195	154	111¶
Delete	4196	154	ENDIX notes¶
Add	4197	154	20
Delete	4198	154	3
Delete	4199	154	6
Add	4200	154	8
Delete	4201	154	01
Add	4202	154	9
Delete	4203	154	0
Add	4204	154	9
Delete	4205	154	1998
Add	4206	154	2012
Delete	4207	154	0
Add	4208	154	4
Delete	4209	154	REP
Add	4210	154	Rep
Delete	4211	154	1
Add	4212	154	5
Delete	4213	154	2
Add	4214	154	6
Delete	4215	154	3
Add	4216	154	7
Add	4217	154	777¶
Delete	4218	154	4
Add	4219	154	8
Delete	4220	154	Kozeny, 582 F. Supp. 2d
Add	4221	154	→Id.
Delete	4222	154	REP
Add	4223	154	Rep
Delete	4224	154	5

Add	4225	154	9
Delete	4226	154	76
Add	4227	154	80
Delete	4228	154	Kazakhstan
Add	4229	154	Kazakhstan
Delete	4230	154	Kazakhstani
Add	4231	154	Kazakh
Delete	4232	155	Proceeding
Add	4233	155	Proc.
Delete	4234	155	77
Add	4235	155	81
Delete	4236	155	78
Add	4237	155	2
Delete	4238	155	.
Delete	4239	155	79
Add	4240	155	83
Delete	4241	155	0
Add	4242	155	4
Delete	4243	155	1
Add	4244	155	5
Delete	4245	155	Proceeding
Add	4246	155	Proc.
Delete	4247	155	orzel
Add	4248	155	urzel
Delete	4249	155	2
Add	4250	155	6
Delete	4251	155	CoRP
Add	4252	155	Corp
Delete	4253	155	3
Add	4254	155	7
Delete	4255	155	Hio
Add	4256	155	hio
Delete	4257	155	Ev
Add	4258	155	ev
Delete	4259	155	¶
Add	4260	155	188→
Delete	4261	155	184
Delete	4262	155	-
Delete	4263	155	;
Delete	4264	155	5
Add	4265	155	9
Add	4266	155	s
Add	4267	155	s
Delete	4268	155	criminal/fraud/fcpa/ cases/titan-corp

Add	4269	155	sites/default/files/criminal-fraud/legacy/2011/02/16
Delete	4270	155	86
Add	4271	155	90
Delete	4272	155	87
Add	4273	155	91
Delete	4274	156	me
Add	4275	156	s
Delete	4276	156	88
Add	4277	156	92
Delete	4278	156	Complaint, SEC v. Alliance One Int'l, Inc.
Add	4279	156	→Criminal Information, United States v. TechnipFMC plc
Delete	4280	156	0
Add	4281	156	9
Delete	4282	156	v-
Add	4283	156	r-
Delete	4284	156	1319
Add	4285	156	278
Delete	4286	156	D
Add	4287	156	E
Delete	4288	156	C
Add	4289	156	N
Delete	4290	156	Aug
Add	4291	156	Y
Delete	4292	156	6
Add	4293	156	June 25
Delete	4294	156	0
Add	4295	156	9
Delete	4296	156	1
Add	4297	156	5 [hereinafter United States v. TechnipFMC]
Add	4298	156	s
Delete	4299	156	://www.sec.gov/litigation/ complaints/2010/comp21618-alliance-one.pdf; Non-Pros. Agreement, In re Alliance One Int'l, Inc. (Aug. 6, 2010), available at http
Delete	4300	156	criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-mpa.pdf; Criminal Information,
Add	4301	156	criminal-fraud/file/1225056/download;
Delete	4302	156	Alliance One Int'l
Add	4303	156	Technip Offshore
Add	4304	156	USA
Delete	4305	156	G
Add	4306	156	, Inc.
Delete	4307	156	0
Add	4308	156	9
Delete	4309	156	17

Add	4310	156	279
Add	4311	156	9
Delete	4312	156	W
Add	4313	156	E
Delete	4314	156	Va
Add	4315	156	N
Delete	4316	156	Aug
Add	4317	156	Y
Delete	4318	156	6
Add	4319	156	June 25
Delete	4320	156	0
Add	4321	156	9
Delete	4322	156	3
Add	4323	156	5
Add	4324	156	s
Delete	4325	156	criminal/fraud/fcpa/cases/alliance-one/08-06-10alliance-one-info.pdf; Criminal Information, United States v. Alliance One Tobacco Osh, LLC, No. 10-cr-16 (W.D. Va. Aug. 6, 2010), ECF No. 3
Add	4326	156	criminal-fraud/file/1225066/download; Cease-and-Desist Order, In the Matter of TechnipFMC plc, Admin. Proc. 3-19493 (Sept. 23, 2019)
Add	4327	156	s
Delete	4328	156	justice
Add	4329	156	sec
Delete	4330	156	criminal/fraud/fcpa/cases/ alliance-one/08-06-10alliance-one-tobaccoinfo
Add	4331	156	litigation/ admin/2019/34-87055
Delete	4332	156	89
Add	4333	156	3
Delete	4334	156	Criminal Information
Add	4335	156	Plea Agreement
Delete	4336	156	Syncor Taiwan
Add	4337	156	Alstom S.A., No. 14-cr-246 (D. Conn. Dec. 22, 2014), ECF No. 1 [hereinafter United States v. Alstom], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/09/DE-5-Plea-Agreement-for-SA.pdf ; Deferred Pros. Agreement, United States v. Alstom Grid
Delete	4338	156	02
Add	4339	156	14
Delete	4340	156	1244
Delete	4341	156	4
Add	4342	156	7
Delete	4343	156	C.
Delete	4344	156	Cal

Add	4345	156	Conn
Delete	4346	156	5
Add	4347	156	22
Delete	4348	156	02
Add	4349	156	14
Add	4350	156	s
Delete	4351	156	criminal/fraud/fcpa/cases/syncor-taiwan/12-05-02syncor-taiwan-info.pdf; Plea
Add	4352	156	sites/default/files/criminal-fraud/legacy/2015/01/09/DE-4-DPA-Grid.pdf; Deferred Pros.
Delete	4353	156	Syncor Taiwan
Add	4354	156	Alstom Power
Delete	4355	156	02
Add	4356	156	14
Delete	4357	156	1244
Delete	4358	156	4
Add	4359	156	8
Delete	4360	156	C.
Delete	4361	156	Cal
Add	4362	156	Conn
Delete	4363	156	9
Add	4364	156	22
Delete	4365	156	02
Add	4366	156	14
Delete	4367	156	4
Add	4368	156	s
Delete	4369	156	criminal/fraud/fcpa/cases/syncor-taiwan/12-03-02syncor-taiwan-plea-agree
Add	4370	156	sites/default/files/ criminal-fraud/legacy/2015/01/09/DE-4-DPA-Power
Delete	4371	156	190 See Complaint, SEC v. Syncor Int'l Corp., No. 02-cv-2421 (D.D.C. Dec. 10, 2002), ECF No. 1, available at http://www.sec.gov/litigation/complaints/comp17887.htm ; SEC v. Syncor International Corp., SEC Lit. Rel. 17997, (Dec. 10, 2002), available at http://www.sec.gov/litigation/litreleases/lr17887.htm .¶
Delete	4372	156	1
Add	4373	156	4
Delete	4374	156	5
Add	4375	156	3
Delete	4376	156	5
Add	4377	156	3
Delete	4378	156	2
Add	4379	156	5

Add	4380	156	s
Delete	4381	156	criminal/fraud/fcpa/cases/litton-applied
Add	4382	156	sites/default/ files/criminal-fraud/legacy/2011/02/16
Add	4383	156	s
Add	4384	156	112¶
Delete	4385	156	3
Add	4386	156	6
Add	4387	156	s
Delete	4388	156	criminal/fraud/fcpa/cases/salvoch/12-17-10
Add	4389	156	sites/default/files/ criminal-fraud/legacy/201 3/09/05/12-17-1 0sa
Delete	4390	156	salvoch-info
Delete	4391	157	available at http://www.justice.gov/criminal/fraud/fcpa
Add	4392	157	¶
Add	4393	157	available→at→ https://www.justice.gov/sites/default/»
Add	4394	157	files
Delete	4395	157	cases/vasquezjp
Add	4396	157	criminal-fraud/legacy/2013/09/05
Add	4397	157	s
Add	4398	157	sites/default/files/criminal-fraud/ legacy/2011/10/18/12-21-10granados-indict.pdf.
Delete	4399	157	112¶
Delete	4400	157	criminal/fraud/fcpa/cases/granados-jorge/12-21-10granados-indict.pdf.→within five years next after such offense shall have been committed.”¶
Delete	4401	157	4
Add	4402	157	7
Delete	4403	157	, supra→208 See <i>Grunewald v. United States</i> , 353 U.S. 391, 396-97 (1957
Add	4404	157	<i>Netherlands B.V.</i> , No. 4:10-cr-00460 (S.D. Tex. July 7, 2010
Delete	4405	157	¶
Delete	4406	157	note 60
Add	4407	157	[hereinafter <i>United States v. Snamprogetti</i>]
Add	4408	157	s
Delete	4409	157	→(holding government must prove conspiracy still existed and at least
Delete	4410	157	→one overt act was committed within the statute of limitations); <i>Fiswick</i>
Delete	4411	157	5
Add	4412	157	8
Delete	4413	157	supra→ <i>v. United States</i> , 329 U.S. 211, 216 (1946) (“The statute of limitations,¶
Add	4414	157	No. 4:10-cr-00460 (S.D. Tex. July 7, 2010), ECF No. 1
Delete	4415	157	note 60
Add	4416	157	, available at https://www.justice.gov/sites/default/files/criminal-

			fraud/legacy/2011/02/16/07-07-10snamprogetti-info.pdf
Delete	4417	157	→unless suspended, runs from the last overt act during the existence of
Add	4418	157	supra note 197.
Delete	4419	157	supra note 60, ECF No. 3.→the conspiracy. The overt acts averred and proved may thus mark the¶
Delete	4420	157	6
Add	4421	157	9
Delete	4422	157	→duration, as well as the scope, of the conspiracy.”) (citation omitted); see¶
Add	4423	157	s
Delete	4424	157	→generally Julie N. Sarnoff, Federal Criminal Conspiracy, 48 AM. CRIM. L.
Delete	4425	157	→REv. 663, 676 (Spring 2011).
Delete	4426	157	Tech.
Add	4427	157	Technologies,
Delete	4428	157	→209 18 U.S.C. § 3292.
Add	4429	157	s
Delete	4430	157	→210 28 U.S.C. § 2462.
Delete	4431	157	→211 S. REP. No. 95-114, at 3 (noting that, in the past, “corporate bribery
Delete	4432	157	TIMES
Add	4433	157	Times
Delete	4434	157	→has been concealed by the falsification of corporate books and records,”
Add	4435	157	C4.
Delete	4436	157	C4.→that the accounting provisions “remove [] this avenue of coverup,” and¶
Delete	4437	157	197
Add	4438	157	200→
Delete	4439	157	→that “[t]aken together, the accounting requirements and criminal [anti-¶
Add	4440	157	https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-03-04
Delete	4441	157	http://www.justice.gov/criminal/fraud/fcpa/cases/invision-tech/12-03 →bribery] prohibitions . . . should effectively deter corporate bribery of¶
Delete	4442	157	04
Delete	4443	157	→foreign government officials”).
Add	4444	157	s
Delete	4445	157	→212
Add	4446	157	cases/invision-tech/12-03-04invisiontech-agree-ge.pdf; Complaint,
Add	4447	157	EC
Delete	4448	157	. REP. No. 95-114, at 7.¶

Delete	4449	158	cases/invision-tech/12-03-04invisiontech-agree-ge.pdf; Complaint, SEC→213 Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).¶
Delete	4450	158	,→214 Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).
Add	4451	158	(
Delete	4452	158	(
Add	4453	158	s
Delete	4454	158	→215 The accounting provisions contain a narrow exemption related to
Add	4455	158	litigation/ complaints/comp19078.pdf.
Delete	4456	158	litigation/complaints/comp19078.pdf.→national security and the protection of classified information. Under¶
Add	4457	158	201
Delete	4458	158	98
Delete	4459	158	DEPT
Add	4460	158	Dept
Delete	4461	158	oF JUSTICE
Add	4462	158	of Justice
Delete	4463	158	OP
Add	4464	158	Op
Delete	4465	158	RELEASE
Add	4466	158	Release
Delete	4467	158	→this “national security” provision, “no duty or liability [under Section¶
Add	4468	158	s
Delete	4469	158	→13(b)(2) of the Exchange Act] shall be imposed upon any person acting
Delete	4470	158	→in cooperation with the head of any federal department or agency
Delete	4471	158	→responsible for such matters if such act in cooperation with such head of
Delete	4472	158	→a
Add	4473	158	acquisition of Wyeth, Pfizer Inc., in consultation with the
Delete	4474	158	or agency was done upon the specific, written directive of¶
Add	4475	158	, conducted a due diligence and investigative review of the Wyeth business
Delete	4476	158	acquisition of Wyeth, Pfizer Inc., in consultation with the department,→the head of such department or agency pursuant to Presidential authority¶
Delete	4477	158	conducted a due diligence and investigative review of the Wyeth business→to issue such directives.” Section 13(b)(3) of the Exchange Act, 15 U.S.C.¶
Delete	4478	158	→§ 78m(b)(3). As Congress made clear, however, the exception is narrowly¶

Add	4479	158	the former Wyeth business entities. The department considered these extensive efforts and SEC resolution in its determination not to pursue a criminal resolution for the pre-acquisition improper conduct of
Delete	4480	158	the former Wyeth business entities. The department considered these→tailored and intended to prevent the disclosure of classified information.¶
Delete	4481	158	extensive efforts and the SEC resolution in its determination not to→H.R. REP. 94-831, at 11, available at http://www.justice.gov/criminal/ ¶
Delete	4482	158	pursue a criminal resolution for the pre-acquisition improper conduct of→ fraud/fcpa/history/1977/corruptrpt-94-831.pdf .¶
Add	4483	158	s
Add	4484	158	August/
Delete	4485	158	216
Delete	4486	158	6
Add	4487	158	2
Delete	4488	158	Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. §
Add	4489	158	-crm-
Delete	4490	158	78
Add	4491	158	980
Add	4492	158	0
Delete	4493	158	m(b)(2)(A).
Add	4494	158	.html.
Delete	4495	158	August/12-crm-980.html.→217 H.R. REP. No. 94-831, at 10.¶
Delete	4496	158	199
Add	4497	158	202→
Delete	4498	158	→218 Id.
Delete	4499	158	200 In enacting the FCPA in 1977, Congress explicitly noted that “[t]he→219 Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7).¶
Add	4500	158	203→In enacting the FCPA in 1977, Congress explicitly noted that “[t]he
Delete	4501	158	→220 H.R. REP. No. 100-576, at 917 (1988), available at http://www.justice.gov/ ¶
Add	4502	158	violation under this bill in the same manner in which those concepts have
Delete	4503	158	violation under this bill in the same manner in which those concepts have→ gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf . Congress¶
Delete	4504	158	→rejected the addition of proposed cost-benefit language to the definition
Delete	4505	159	REP
Add	4506	159	Rep
Delete	4507	159	→“in response to concerns that such a statutory provision might

			be abused
Delete	4508	159	1
Add	4509	159	4
Delete	4510	159	→and weaken the accounting provisions at a time of increasing concern¶
Delete	4511	159	→about audit failures and financial fraud and resultant recommendations
Delete	4512	159	→by experts for stronger accounting practices and audit standards.” Id.
Delete	4513	159	→221 See, e.g., Complaint, SEC v. Biomet, Inc., No. 12-cv-454 (D.D.C. Mar.
Delete	4514	159	2
Add	4515	159	5
Delete	4516	159	→26, 2012), ECF No. 1 [hereinafter SEC v. Biomet], available at http://¶
Delete	4517	159	→ www.sec.gov/litigation/complaints/2012/comp22306.pdf ; Criminal
Delete	4518	159	3
Add	4519	159	6
Delete	4520	159	, supra note→Information, United States v. Biomet, Inc
Add	4521	159	Corp
Delete	4522	159	80
Add	4523	159	22
Delete	4524	159	D
Add	4525	159	S
Delete	4526	159	C
Add	4527	159	Tex
Delete	4528	159	Mar.¶
Add	4529	159	Jan. 17
Delete	4530	159	132; Criminal Information, United States v. JGC Corp., supra note 60;→26
Add	4531	159	, ECF No. 1
Delete	4532	159	Biomet
Add	4533	159	Marubeni
Add	4534	159	s
Add	4535	159	justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-information.pdf ;
Add	4536	159	JGC Corp., supra note 60; Criminal Information, United States v.
Delete	4537	159	60
Add	4538	159	198
Delete	4539	159	→ justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet –
Delete	4540	159	32
Add	4541	159	92

Delete	4542	159	→information.pdf; Complaint, SEC v. Smith & Nephew Inc., No. 12-cv-
Add	4543	159	207→United State v. Hoskins, 902 F.3d 69, 76-97 (2d Cir. 2018).¶
Add	4544	159	208→United States v. Firtash, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019).¶
Delete	4545	159	4
Add	4546	159	9
Delete	4547	159	→187 (D.D.C. Feb. 6, 2012), ECF No. 1, available at http://www.sec.gov/ ¶
Delete	4548	159	→litigation/complaints/2012/comp22252.pdf; Criminal Information,
Delete	4549	159	→United States v. Smith & Nephew plc., No. 12-cr-30 (D.D.C. Feb. 6,
Delete	4550	159	→2012), ECF No. 1, available at http://www.justice.gov/criminal/fraud/
Delete	4551	159	→fcpa/cases/smith-nephew/2012-02-06-s-n-information.pdf; Complaint,
Delete	4552	159	→SEC v. Johnson & Johnson, supra note 131; Criminal Information,
Delete	4553	159	→United States v. DePuy, supra note 131; Complaint, SEC v. Maxwell
Delete	4554	159	→Technologies Inc., No. 11-cv-258 (D.D.C. Jan. 31, 2011), ECF No. 1
Add	4555	159	10
Delete	4556	159	5
Delete	4557	159	the
Delete	4558	159	→[hereinafter SEC v. Maxwell Technologies], available at http://www.sec. ¶
Add	4559	159	cease-and-desist order through SEC's administrative proceedings
Delete	4560	159	cease-and-desist order through the SEC's administrative proceedings→gov/litigation/complaints/2011/comp21832.pdf; Criminal Information,¶
Delete	4561	159	→United States v. Maxwell Technologies Inc., No. 11-cr-329 (S.D. Cal.¶
Add	4562	159	provision of the Exchange Act or any rule or regulation thereunder, and upon any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would
Delete	4563	160	provision of the Exchange Act or any rule or regulation thereunder, and→Jan. 31, 2011), ECF No. 1, available at http://www.justice.gov/criminal/ ¶
Delete	4564	160	upon any other person that is, was, or would be a cause of the violation,→fraud/fcpa/cases/maxwell/01-31-11maxwell-tech-info.pdf; Complaint,¶

Delete	4565	160	due to an act or omission the person knew or should have known would→SEC v. Transocean, Inc., No. 10-cv-1891 (D.D.C. Nov. 4, 2010), ECF¶
Delete	4566	160	→No. 1, available at http://www.sec.gov/litigation/complaints/2010/
Delete	4567	160	→comp21725.pdf; Criminal Information, United States v. Transocean,
Delete	4568	160	06
Add	4569	160	11
Delete	4570	160	supra note 68.→Inc.,
Delete	4571	160	r-
Add	4572	160	v-
Delete	4573	160	768
Add	4574	160	4334
Add	4575	160	https://www.sec.gov/litigation/complaints/2010/comp21727.pdf .
Delete	4576	160	07
Add	4577	160	12
Delete	4578	160	→ http://www.justice.gov/criminal/fraud/fcpa/cases/transocean-inc/11-¶
Delete	4579	160	→04-10transocean-info.pdf.
Delete	4580	160	→222 S. REP. No. 95-114, at 7.
Add	4581	160	within five years next after such offense shall have been committed.”
Add	4582	160	213→See 18 U.S.C. § 3301(a) (“[T]he term ‘securities fraud offense’ means a violation of, or a conspiracy or an attempt to violate . . . section 32(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(a))”); 18 U.S.C. § 3301(b) (“No person shall be prosecuted, tried, or punished for a securities fraud offense,¶
Add	4583	160	unless the indictment is found or the information is instituted within 6 years after the commission of the offense.”).¶
Add	4584	160	214→See <i>Grunewald v. United States</i> , 353 U.S. 391, 396-97 (1957) (holding government must prove conspiracy still existed and at least one overt act was committed within the statute of limitations); <i>Fiswick v. United States</i> , 329 U.S. 211, 216 (1946) (“The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy. The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.”) (citation omitted); see generally Julie N. Sarnoff, <i>Federal Criminal Conspiracy</i> , 48 <i>Am. Crim. L. Rev.</i> 663, 676 (Spring 2011); see also <i>United States v. SBM</i> , supra note 92 (charging a single conspiracy to violate the FCPA spanning conduct from in or around 1996 until in or around 2012).¶
Add	4585	160	215→18 U.S.C. § 3292.¶
Add	4586	160	216→ <i>Kokesh v. SEC</i> , 137 S. Ct. 1635 (2017).¶

Add	4587	160	217→28 U.S.C. § 2462.¶
Add	4588	160	218→S. Rep. No. 95-114, at 3 (noting that, in the past, “corporate bribery has been concealed by the falsification of corporate books and records,” that the accounting provisions “remove [] this avenue of coverup,” and that “[t]aken together, the accounting requirements and criminal [anti-bribery] prohibitions . . . should effectively deter corporate bribery of foreign government officials”).¶
Add	4589	160	219→S. Rep. No. 95-114, at 7.¶
Add	4590	160	220→Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).¶
Delete	4591	160	3
Add	4592	160	1
Add	4593	160	222→The accounting provisions contain a narrow exemption related to national security and the protection of classified information. Under this “national security” provision, “no duty or liability [under Section 13(b)(2) of the Exchange Act] shall be imposed upon any person acting in cooperation with the head of any federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives.” Section 13(b)(3) of the Exchange Act, 15 U.S.C. § 78m(b)(3). As Congress made clear, however, the exception is narrowly tailored and intended to prevent the disclosure of classified information. H.R. Rep. 94-831, at 11 (1977), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/corruptrpt-94-831.pdf .¶
Add	4594	161	223→Section 13(b)(2)(A) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(A).¶
Add	4595	161	224→H.R. Rep. No. 94-831, at 10.¶
Add	4596	161	225→Id.¶
Add	4597	161	226→Section 13(b)(7) of the Exchange Act, 15 U.S.C. § 78m(b)(7).¶
Add	4598	161	227→H.R. Rep. No. 100-576, at 917 (1988), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/tradeact-100-418.pdf . Congress rejected the addition of proposed cost-benefit language to the definition “in response to concerns that such a statutory provision might be abused and weaken the accounting provisions at a time of increasing concern about audit failures and financial fraud and resultant recommendations by experts for stronger accounting practices and audit standards.” Id.¶
Add	4599	161	228→See, e.g., Complaint, SEC v. Biomet, Inc., No. 12-cv-454 (D.D.C. Mar. 26, 2012), ECF No. 1 [hereinafter SEC v. Biomet], available at https://www.sec.gov/litigation/complaints/2012/

			comp22306.pdf; Criminal Information, United States v. Biomet, Inc., No. 12-cr-80 (D.D.C. Mar. 26, 2012) [hereinafter United States v. Biomet], available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/30/2012-03-26-biomet-information.pdf ; Complaint, SEC v. Smith & Nephew plc, No. 12-cv-187 (D.D.C. Feb. 6, 2012), ECF No. 1, available at https://www.sec.gov/litigation/complaints/2012/comp22252.pdf ; Criminal Information, United States v. Smith & Nephew, Inc., No. 12-cr-30 (D.D.C. Feb. 6, 2012), ECF No. 1, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/02/08/2012-02-06-s-n-information.pdf ; Complaint, SEC v. Johnson & Johnson, supra note 135; Criminal Information, United States v. DePuy, supra note 135; Complaint, SEC v. Maxwell Techs. Inc.,
Add	4600	161	229→S. Rep. No. 95-114, at 7.¶
Add	4601	161	230→Section 13(b)(2)(B) of the Exchange Act, 15 U.S.C. § 78m(b)(2)(B).¶
Delete	4602	161	24
Add	4603	161	31
Add	4604	161	32
Delete	4605	161	5
Delete	4606	161	8
Add	4607	161	7
Delete	4608	162	AG, supra note
Add	4609	162	Aktiengesellschaft, No. 08-cr-367 (D.D.C. Dec. 12, 2008), ECF No. 1 [hereinafter United States v. Siemens AG], available at https://www.justice.gov/archive/opa/pr/2008/December/
Delete	4610	162	48
Add	4611	162	08
Delete	4612	162	.
Add	4613	162	-crm-1105.html.
Delete	4614	162	26
Add	4615	162	33
Delete	4616	162	8
Add	4617	162	7
Delete	4618	162	48
Add	4619	162	232
Add	4620	162	s
Add	4621	162	archive/
Delete	4622	162	27
Add	4623	162	34
Delete	4624	162	1
Add	4625	162	8
Add	4626	162	¶
Add	4627	162	114¶

Delete	4628	162	1
Add	4629	162	8
Delete	4630	162	8
Add	4631	162	7
Delete	4632	162	, S.A.
Add	4633	162	France
Delete	4634	162	48
Add	4635	162	128
Delete	4636	162	28
Add	4637	162	35
Delete	4638	162	8
Add	4639	162	7
Delete	4640	162	8
Add	4641	162	7
Delete	4642	162	29
Add	4643	162	36
Delete	4644	162	0
Add	4645	162	7
Delete	4646	162	1
Add	4647	162	8
Delete	4648	162	2
Add	4649	162	9
Delete	4650	162	33
Add	4651	162	40
Delete	4652	162	234 See, e.g., Complaint, SEC v. Tyco Int'l, supra note 9; Complaint, SEC v. Willbros, No. 08-cv-1494 (S.D. Tex. May 14, 2008), ECF No. 1, available at http://www.sec.gov/litigation/complaints/2008/comp20571.pdf .¶
Add	4653	162	241→See supra note 10.¶
Delete	4654	162	35
Add	4655	162	42
Delete	4656	162	8
Add	4657	162	7
Add	4658	162	s
Delete	4659	162	criminal/fraud/fcpa/cases/control-inc
Add	4660	162	sites/default/files/criminal-fraud/legacy/2011/02/16
Add	4661	162	[hereinafter United States v. SSI Int'l]
Delete	4662	162	[hereinafter United States v. SSI Int'l]
Add	4663	162	s
Delete	4664	162	criminal/fraud/fcpa/cases/ssi-intl
Add	4665	162	sites/default/files/criminal-fraud/legacy/2011/02/16
Add	4666	162	43
Delete	4667	162	6
Add	4668	162	s

Delete	4669	162	237 Plea Agreement, United States v. Stanley, supra note 8; Plea Agreement, United States v. Sapsizian, supra note 8.¶
Add	4670	162	244→See supra note 9.¶
Delete	4671	162	38
Add	4672	162	45
Delete	4673	162	1
Add	4674	162	8
Delete	4675	162	39
Add	4676	162	46
Delete	4677	162	9
Add	4678	162	10
Delete	4679	162	0
Add	4680	162	7
Delete	4681	162	,
Delete	4682	163	1
Add	4683	163	8
Add	4684	163	s
Add	4685	163	s
Delete	4686	163	2
Add	4687	163	9
Delete	4688	163	SEC. AND EXCHANGE COMM., COMMISSION GUIDANCE REGARDING MANAGEMENT'S REPORT ON INTERNAL CONTROL OVER FINANCIAL REPORTING UNDER SECTION 13(A) OR 15(D) OF THE SECURITIES EXCHANGE ACT OF
Add	4689	163	Sec. and Exchange Comm'n, Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13(a) or 15(d) of the Securities Exchange Act of
Delete	4690	163	-
Add	4691	163	s
Delete	4692	163	43
Add	4693	163	50
Delete	4694	163	44
Add	4695	163	51
Delete	4696	163	45
Add	4697	163	2
Delete	4698	163	8
Add	4699	163	7
Delete	4700	163	SEC v.
Add	4701	163	In the Matter of
Add	4702	163	FMC
Add	4703	163	plc
Delete	4704	163	32

Add	4705	163	92
Delete	4706	163	32
Add	4707	163	92
Delete	4708	163	Proceeding
Add	4709	163	Proc.
Delete	4710	163	re
Add	4711	163	the Matter of
Add	4712	163	s
Delete	4713	163	Proceeding
Add	4714	163	Proc.
Delete	4715	163	re
Add	4716	163	the Matter of
Add	4717	163	s
Add	4718	163	s
Delete	4719	163	criminal/fraud/fcpa/cases/statoil-asa-inc
Add	4720	163	sites/default/files/criminal-fraud/legacy/2011/02/16
Delete	4721	163	46
Add	4722	163	53
Add	4723	163	54
Delete	4724	163	7
Delete	4725	163	2
Add	4726	163	1
Delete	4727	163	2
Add	4728	163	1
Delete	4729	163	48
Add	4730	163	55
Delete	4731	163	49
Add	4732	163	56
Add	4733	163	-section
Delete	4734	163	REP
Add	4735	163	Rep
Delete	4736	163	REP
Add	4737	163	Rep
Delete	4738	164	0
Add	4739	164	7
Add	4740	164	115¶
Delete	4741	164	1
Add	4742	164	8
Delete	4743	164	supra note
Add	4744	164	No.
Delete	4745	164	50
Add	4746	164	10
Delete	4747	164	, ECF 1.
Add	4748	164	-cv-661 (D.D.C. Apr. 28, 2010), ECF No. 1, available at

			https://www.sec.gov/litigation/complaints/2010/comp21509.pdf .
Delete	4749	164	2
Add	4750	164	9
Delete	4751	164	SEC v. Elkin, supra note 50
Add	4752	164	→Id.
Add	4753	164	Nos.
Delete	4754	164	53
Add	4755	164	60
Delete	4756	164	Products
Add	4757	164	Prod.
Delete	4758	164	, et al.
Add	4759	164	s
Delete	4760	164	litreleases
Add	4761	164	complaints
Delete	4762	164	lr
Add	4763	164	comp
Delete	4764	164	htm
Add	4765	164	pdf
Delete	4766	164	54
Add	4767	164	61
Delete	4768	164	Proceeding
Add	4769	164	Proc.
Delete	4770	164	Technologies
Add	4771	164	Tech.
Add	4772	164	s
Delete	4773	164	55
Add	4774	164	62
Delete	4775	164	56
Add	4776	164	3
Delete	4777	164	57
Add	4778	164	64
Add	4779	164	65
Delete	4780	164	8
Delete	4781	164	59
Add	4782	164	66
Add	4783	164	.
Delete	4784	164	0
Add	4785	164	7
Delete	4786	164	4
Delete	4787	164	1
Add	4788	164	8
Delete	4789	164	Complaint, id
Add	4790	164	→Id
Add	4791	164	s

Delete	4792	164	;
Add	4793	164	, 3 (Complaint and
Delete	4794	164	, id., ECF No. 3.
Add	4795	164).
Delete	4796	164	2
Add	4797	164	9
Add	4798	164	s
Delete	4799	164	press-room/latest-press-releases/press-releases-2012/innospec-ltd-former-ceo-admits-bribery-to-falsify-product-tests.aspx.
Add	4800	164	2012/07/30/innospec-ltd-former-ceo-admits-bribery-falsify-product-tests/.
Delete	4801	164	263 15 U.S.C. § 78m(b)(4)-(5). Congress adopted this language in 1988 in order to make clear that, consistent with enforcement policy at the time,¶
Delete	4802	164	ENDIX notes¶
Delete	4803	164	114¶
Delete	4804	164	criminal penalties would not be imposed “for inadvertent or insignificant→Nos. 182, 816, 824 (judgments against foreign official defendants).¶
Delete	4805	164	errors in books and records, or inadvertent violations of accounting→282 Criminal Information, United States v. SSI Int’l, supra note 235¶
Delete	4806	164	controls.” See S. REP. No. 100-85, at 49; H.R. REP. No. 100-576, at→(alleging violations of 18 U.S.C. §§ 1343, 1346); Plea Agreement, United¶
Delete	4807	164	916 (“The Conferees intend to codify current Securities and Exchange→States v. SSI Int’l, supra note 235, (Oct. 10, 2006), available at http://¶
Delete	4808	164	Commission (SEC) enforcement policy that penalties not be imposed for→www.justice.gov/criminal/fraud/fcpa/cases/control-inc/07-24-09cci-¶
Delete	4809	164	insignificant or technical infractions or inadvertent conduct.”).→plea-agree.pdf.¶
Delete	4810	164	64
Add	4811	164	70
Delete	4812	164	→283 See Ex-Im Bank, Form of Exporter’s Certificate, EBD-M-56 (Jan.
Delete	4813	165	265 See United States v. Alcatel-Lucent, S.A., supra note 48; see also United→2007), available at http://www.exim.gov/pub/ins/pdf/ebd-m-56.pdf.¶
Delete	4814	165	States v. Alcatel-Lucent France, supra note 56.→284 See 18 U.S.C. § 1001.¶
Delete	4815	165	66
Add	4816	165	71
Delete	4817	165	Prosecution

Add	4818	165	Pros.
Delete	4819	165	Alcatel-Lucent, →285 22 C.F.R. §§ 130.2, 130.9.¶
Add	4820	165	Och-Ziff Capital Mgmt. Group LLC, No. 16-cr-516 (E.D.N.Y. Sept
Delete	4821	165	S
Delete	4822	165	A., supra note 48, ECF No. 10
Add	4823	165	29, 2016)
Add	4824	165	s
Delete	4825	165	→286 For example, in United States v. BAE Systems plc, BAE pleaded guilty
Add	4826	165	criminal-fraud/ file/900261/download.
Delete	4827	165	criminal/fraud/fcpa/cases/alcatel-et-al/02-22-11alcatel-dpa.pdf.→to conspiring to defraud the United States by impairing and impeding its¶
Delete	4828	165	67
Add	4829	165	2
Delete	4830	165	Plea
Add	4831	165	Deferred Pros.
Delete	4832	165	Siemens AG, supra note 48, ECF→lawful functions, to making false statements about its FCPA compliance¶
Add	4833	165	Panasonic Avionics Corp
Add	4834	165	.,
Delete	4835	165	4
Add	4836	165	8
Add	4837	165	-cr-118 (D.D.C. Apr. 30, 2018)
Add	4838	165	s
Delete	4839	165	criminal/fraud/fcpa/cases/→program, and to violating the AECA and ITAR. BAE paid a \$400
Add	4840	165	opa/press-release/ file/1058466/download.
Delete	4841	165	siemens/12-15-08siemensakt-plea.pdf.→million fine and agreed to an independent corporate monitor to ensure¶
Delete	4842	165	68
Add	4843	165	73
Delete	4844	165	→compliance with applicable anti-corruption and export control laws.¶
Add	4845	165	9
Delete	4846	165	8
Add	4847	165	No.
Delete	4848	165	→Criminal Information and Plea Agreement, United States v. BAE Sys.
Delete	4849	165	→plc, No. 10-cr-35 (D.D.C. Mar. 1, 2010), ECF Nos.1, 8, available at
Delete	4850	165	3
Add	4851	165	5
Delete	4852	165	→http://www.

Delete	4853	165	criminal/fraud/fcpa/cases/bae-system/02-01–
Delete	4854	165	justice.gov/
Delete	4855	165	→10baesystems-info.pdf and http://www.justice.gov/criminal/fraud/fcpa/
Delete	4856	165	69
Add	4857	165	74
Delete	4858	165	→cases/bae-system/03-01-10baesystems-plea-agree.pdf. In an action based¶
Add	4859	165	Inc.,
Delete	4860	165	→on the same underlying facts as the criminal guilty plea, BAE entered
Add	4861	165	https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/04-11-07bakerhughesintl-info.pdf .
Delete	4862	165	http://www.justice.gov/criminal/fraud/fcpa/cases/baker-hughs/04-11-07bakerhughesintl-info.pdf .→a civil settlement with the Directorate of Defense Trade Controls for¶
Delete	4863	165	07bakerhughesintl-info.pdf.→violations of AECA and ITAR, including over 2500 ITAR violations¶
Delete	4864	165	0
Add	4865	165	5
Add	4866	165	Criminal Information,
Delete	4867	165	supra note 68.→that included a failure to report the payment of fees or commissions
Add	4868	165	No. 10-cr-765 (S.D. Tex. Nov. 4, 2010), ECF No. 1, available
Delete	4869	165	271 Id.→associated with defense transactions and failure to maintain records¶
Add	4870	165	at→ http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-inc/11-04-10panalpina-info.pdf . 276→Id.¶
Add	4871	165	277→See 15 U.S.C. § 78ff(a).¶
Delete	4872	165	2
Add	4873	165	8
Delete	4874	165	→involving ITAR-controlled transactions. BAE paid \$79 million in
Add	4875	165	63-80.
Delete	4876	166	63-80.→penalties, and the State Department imposed a “policy of denial” for¶
Delete	4877	166	3
Add	4878	166	9
Delete	4879	166	→export licenses on three BAE subsidiaries involved in the wrongful
Delete	4880	166	74
Add	4881	166	80
Delete	4882	166	→conduct. Consent Agreement between BAE Sys. plc and Defense Trade
Delete	4883	166	75

Add	4884	166	81
Delete	4885	166	→Controls at 17-20, Bureau of Political-Military Affairs, U.S. Dept. of State
Delete	4886	166	76
Add	4887	166	82
Delete	4888	166	Nexus Technologies
Add	4889	166	Baptiste
Delete	4890	166	53
Add	4891	166	43
Delete	4892	166	→(May 16,
Add	4893	166	Information, United States v. Ernesto Lujan, No. 13-cr-671 (S.D.N.Y. Aug. 29,
Delete	4894	166	1
Add	4895	166	3
Add	4896	166	, ECF No. 11
Add	4897	166	s
Delete	4898	166	pmddtc.state.gov/compliance/¶
Add	4899	166	justice.gov/sites/default/files/criminal-fraud/legacy/2013/08/30/lujan-filed-information.pdf; Criminal
Delete	4900	166	et al.,
Delete	4901	166	→consent_agreements/pdf/BAES_CA.pdf; Proposed Charging Letter, In
Delete	4902	166	at http://www.justice.gov/criminal/ →re Investigation of BAE Systems plc Regarding Violations of the Arms
Delete	4903	166	fraud/fcpa/cases/kingr-et al
Add	4904	166	at→ https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16
Delete	4905	166	→Export Control Act and the International Traffic in Arms Regulations,
Delete	4906	166	4
Add	4907	166	3
Add	4908	166	, ECF No. 22
Delete	4909	166	→U.S. Dept. of State (May 2011), available at http://www.pmddtc.state .
Delete	4910	166	., et al
Delete	4911	166	→gov/compliance/consent_agreements/pdf/BAES_PCL.pdf.
Delete	4912	166	available at http://www.justice.gov/criminal/ →287 26 U.S.C. § 162(c)(1); see also Plea Agreement, United States v. Smith,
Delete	4913	166	fraud/fcpa/cases/saybolt/08-10-98saybolt-info.pdf.→No. 07-cr-69 (C.D. Cal. Sept. 3, 2009), ECF No. 89, available at http://¶
Add	4914	166	available→at→ https://www.justice.gov/sites/default/files/¶
Add	4915	166	criminal-fraud/legacy/2011/02/16/08-10-98saybolt-info.pdf.¶
Delete	4916	166	77
Add	4917	166	83
Delete	4918	166	→ www.justice.gov/criminal/fraud/fcpa/cases/smith1/09-03-

			09smithl-plea-¶
Delete	4919	166	→agree.pdf; Criminal Information, United States v. Titan Corp., supra note
Delete	4920	166	nd-→185.
Add	4921	166	nd-superseded-indict.
Delete	4922	166	superseded-indict.
Delete	4923	166	→288 See USAM § 9-27.000.
Delete	4924	166	→289 See USAM § 9-27.420 (setting forth considerations to be weighed
Delete	4925	166	→when determining whether it would be appropriate to enter into plea
Delete	4926	166	78
Add	4927	166	4
Delete	4928	166	→agreement).¶
Add	4929	166	242
Delete	4930	166	235
Add	4931	166	, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-24-09cci-plea-agree.pdf
Delete	4932	166	9
Add	4933	166	8
Delete	4934	166	→290 See USAM § 9-28.000 et seq.
Delete	4935	166	→291 See USAM § 9-28.710 (discussing attorney-client and work product
Delete	4936	166	→protections).
Delete	4937	166	→292 See http://www.sec.gov/divisions/enforce/enforcementmanual.pdf .
Delete	4938	166	pdf.→293 See USAM§ 9-28.300.A; see also USAM § 9-28.700.B (explaining¶
Delete	4939	167	79
Add	4940	167	85
Add	4941	167	United States v. Ahsani, supra note 9; Criminal Information, United States v. Matthias Krull, No. 18-cr-20682 (S.D. Fla. Aug. 16, 2018), ECF. No. 23, available at https://www.justice.gov/criminal-fraud/file/1119951/download ; United States v. Ng, supra note 43; Criminal Information, United States v. Darwin Enrique Padron-Acosta, No. 16-cr-437 (S.D. Tex. Sept. 30, 2016), ECF No. 1, available at https://www.justice.gov/criminal-fraud/file/1226941/download ;
Delete	4942	167	→benefits of cooperation for both government and corporation).
Add	4943	167	43
Delete	4944	167	44
Delete	4945	167	4
Add	4946	167	3
Delete	4947	167	→294 See USAM § 9-28.900 (discussing restitution and remediation). The

Delete	4948	167	→commentary further provides that prosecutors should consider and weigh
Delete	4949	167	→whether the corporation appropriately disciplined wrongdoers and a
Delete	4950	167	→corporation’s efforts to reform, including its quick recognition of the
Delete	4951	167	280 Foreign officials may “not be charged with violating the FCPA itself,→flaws in the program and its efforts to improve the program. Id.¶
Add	4952	167	286→Foreign officials may “not be charged with violating the FCPA itself,
Delete	4953	167	→295 See USAM §§ 9-27.230, 9-27.420.¶
Delete	4954	167	→296 U.S. SENTENCING GUIDELINES § 8B2.1(b)(7) (2011).
Delete	4955	167	aff’d
Add	4956	167	aff’d
Delete	4957	167	→297 Id. § 8C2.5(f)(2) (2011).
Add	4958	167	hold that
Add	4959	167	116¶
Delete	4960	167	hold that
Delete	4961	167	→298 U.S. SEC. AND EXCHANGE Comm., REPORT OF INVESTIGATION
Delete	4962	167	→PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT
Delete	4963	167	→OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP
Delete	4964	167	→OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, SEC
Delete	4965	167	→Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) [hereinafter
Delete	4966	167	→Seaboard Report] available at http://www.sec.gov/litigation/
Delete	4967	167	→investreport/34-44969.htm.
Delete	4968	167	→299 U.S. SEC. AND EXCHANGE COMM., POLICY STATEMENT
Delete	4969	167	→CONCERNING COOPERATION BY INDIVIDUALS IN ITS
Add	4970	167	s
Delete	4971	167	→INVESTIGATIONS AND RELATED ENFORCEMENTS ACTIONS, 17
Add	4972	167	sites/default/files/criminal-fraud/ legacy/2011/02/16/01-30-02sengupta-info.pdf.
Add	4973	167	287→See, e.g., Judgments, United States v. Esquenazi, supra note 43, ECF Nos. 182, 816, 824 (judgments against foreign official defendants).¶
Add	4974	167	288→Criminal Information, United States v. SSI Int’l, supra note 242 (alleging violations of 18 U.S.C. §§ 1343, 1346); Plea Agreement, United States v. SSI Int’l, supra note 242, (Oct. 10,

			2006), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/10-10-06ssi-fareast-plea.pdf .¶
Add	4975	168	289→See Ex-Im Bank, Form of Exporter’s Certificate, EIB 15-04 (May 2019), available at https://www.exim.gov/sites/default/files/forms/eib15-04_0.pdf .¶
Add	4976	168	290→See 18 U.S.C. § 1001.¶
Add	4977	168	291→22 C.F.R. §§ 130.2, 130.9.¶
Add	4978	168	292→For example, in <i>United States v. BAE Systems plc</i> , BAE pleaded guilty to conspiring to defraud the United States by impairing and impeding its lawful functions, to making false statements about its FCPA compliance program, and to violating the AECA and ITAR. BAE paid a \$400 million fine and agreed to an independent corporate monitor to ensure compliance with applicable anti-corruption and export control laws. Criminal Information and Plea Agreement, <i>United States v. BAE Sys. plc</i> , No. 10-cr-35 (D.D.C. Mar. 1, 2010), ECF Nos. 1, 8, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-01-10baesystems-info.pdf and https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/03-01-10baesystems-plea-agree.pdf . In an action based on the same underlying facts as the criminal guilty plea, BAE entered a civil settlement with the Directorate of Defense Trade Controls for violations of AECA and ITAR, including over 2500 ITAR violations
Add	4979	168	293→26 U.S.C. § 162(c)(1); see also, e.g., Criminal Superseding Information, <i>United States v. Julia Vivi Wang</i> , No. 16-cr-495 (S.D.N.Y. Apr. 4, 2018), ECF. No. 55, available at https://www.justice.gov/criminal-fraud/file/1061041/download ; Criminal Information, <i>United States v. Roberto Enrique Rincon-Fernandez</i> , No. 15-cr-654 (S.D. Tex. June 15, 2016), ECF No. 61, available at https://www.justice.gov/criminal-fraud/file/878951/download ; Plea Agreement, <i>United States v. Leo Winston Smith</i> , No. 07-cr-69 (C.D. Cal. Sept. 3, 2009), ECF No. 89, available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/09-03-09smith1-plea-agree.pdf ; Criminal Information, <i>United States v. Titan Corp.</i> , supra note 189.¶
Add	4980	168	294→See JM § 9-27.000.¶
Add	4981	168	295→See JM § 9-27.420 (setting forth considerations to be weighed when determining whether it would be appropriate to enter into plea agreement).¶
Add	4982	168	296→See JM § 9-28.000 et seq.¶
Add	4983	168	297→See JM § 9-28.710 (discussing attorney-client and work product protections).¶
Add	4984	168	298→FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download .¶

Add	4985	168	299→Id.¶
Add	4986	168	300→See, e.g., DOJ Declination Letter, Cognizant Technology Solutions Corporation (Feb. 13, 2019), available at https://www.justice.gov/criminal-fraud/file/1132666/download ; DOJ Declination Letter, Insurance Corporation of Barbados Limited (Aug. 23, 2018), available at https://www.justice.gov/criminal-fraud/page/file/1089626/download ; DOJ Declination Letter, Guralp Systems Limited (Aug. 20, 2018), available at https://www.justice.gov/criminal-fraud/page/file/1088621/download .¶
Add	4987	168	301→See FCPA Corporate Enforcement Policy, <i>supra</i> note 298.¶
Add	4988	169	302→Id.¶
Add	4989	169	303→Id.¶
Add	4990	169	304→See Plea Agreement, <i>United States v. Alstom S.A.</i> , <i>supra</i> note 193; Criminal Information, <i>United States v. Marubeni Corp.</i> , Press Release, U.S. Dept. of Justice, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine, available at https://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine .¶
Add	4991	169	305→See, e.g., DOJ Declination Letter, Dun & Bradstreet Corp. (Apr. 23, 2018), available at https://www.justice.gov/criminal-fraud/file/1055401/download ; Cease-and-Desist Order, In the Matter of The Dun & Bradstreet Corp., Admin. Proc. 3-18446 (Apr. 23, 2018), available at https://www.sec.gov/litigation/admin/2018/34-83088.pdf ; DOJ Declination Letter, Nortek Inc. (June 3, 2016), available at https://www.justice.gov/criminal-fraud/file/865406/download ; Nortek Inc., SEC Non-Prosecution Agreement (June 7, 2016), available at https://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf .¶
Add	4992	169	306→DOJ Declination Letters, available at https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations .¶
Add	4993	169	117¶
Add	4994	169	307→See SEC Enforcement Manual, available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf .¶
Add	4995	169	308→See JM § 9-28.300.A; see also JM § 9-28.700.B (explaining benefits of cooperation for both government and corporation).¶
Add	4996	169	309→See JM § 9-28.1000 (discussing restitution and remediation). The commentary further provides that prosecutors should consider and weigh whether the corporation appropriately disciplined wrongdoers and a corporation's efforts to reform, including its quick recognition of the flaws in the program and its efforts to improve the program. Id.¶
Add	4997	169	310→See JM §§ 9-27.230, 9-27.420.¶
Add	4998	169	311→U.S. Sentencing Guidelines § 8B2.1(b)(7) (2018).¶

Add	4999	169	312→Id. § 8C2.5(f)(2) (2011).¶
Add	5000	169	313→U.S. Sec. and Exchange Comm., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) [hereinafter Seaboard Report] available at http://www.sec.gov/litigation/investreport/34-44969.htm .¶
Delete	5001	169	criminal/fraud/fcpa/cases/sengupta/01-30-02sengupta-info.pdf .→
Add	5002	169	314→U.S. Sec. and Exchange Comm., Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcements Actions, 17
Add	5003	169	policy/2010/34-61340.pdf .
Delete	5004	169	281 See, e.g., Judgments, United States v. Esquenazi, supra note 44, ECF→ policy/2010/34-61340.pdf .¶
Delete	5005	169	115¶
Delete	5006	169	00
Add	5007	169	15
Delete	5008	169	SENTENCING GUIDELINES at
Add	5009	169	Sentencing Guidelines
Delete	5010	169	01
Add	5011	169	6
Delete	5012	169	SENTENCING GUIDELINES
Add	5013	169	Sentencing Guidelines
Delete	5014	169	02
Add	5015	169	17
Delete	5016	169	DEBBIE TROKLUS, ET AL., COMPLIANCE 101: HOW TO BUILD AND MAINTAIN AN EFFECTIVE COMPLIANCE AND ETHICS PROGRAM, SOCIETY OF CORP. COMPLIANCE AND ETHICS
Add	5017	169	Debbie Troklus, et al., Compliance 101: How to build and maintain an effective compliance and ethics program, Society of Corp. Compliance and Ethics
Delete	5018	170	COMPLIANCE
Add	5019	170	Compliance
Delete	5020	170	TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY: SMALL AND MEDIUM ENTERPRISE
Add	5021	170	Transparency Int'l, Business Principles for Countering Bribery: Small and Medium Enterprise
Delete	5022	170	EDITION
Add	5023	170	Edition
Delete	5024	170	MARK PIETH, HARMONISING ANTI-CORRUPTION COMPLIANCE: THE OECD GOOD PRACTICE GUIDANCE
Add	5025	170	Mark Pieth, Harmonising Anti-Corruption Compliance: The

			OECD Good Practice Guidance
Delete	5026	170	HARMONISING ANTICORRUPTION COMPLIANCE
Add	5027	170	Harmonising Anti-Corruption Compliance
Add	5028	170	318→U.S. Dep't. of Justice, Crim. Div., Evaluation of Corporate Compliance Programs, at 1 (June 2020) [hereinafter Evaluation of Corporate Compliance Programs], available at https://www.justice.gov/criminal-fraud/page/file/937501/download. ¶
Delete	5029	170	03
Add	5030	170	19
Add	5031	170	20
Delete	5032	170	4
Delete	5033	170	298
Add	5034	170	313
Delete	5035	170	SEC. AND EXCHANGE COMM., REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS
Add	5036	170	Sec. and Exchange Comm., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions
Delete	5037	170	Rel.
Add	5038	170	Release
Delete	5039	170	05
Add	5040	170	21
Delete	5041	170	USAM
Add	5042	170	→JM
Delete	5043	171	900
Add	5044	171	1000
Add	5045	171	0
Delete	5046	171	06
Add	5047	171	22
Delete	5048	171	USAM
Add	5049	171	JM
Delete	5050	171	SENTENCING GUIDELINES
Add	5051	171	Sentencing Guidelines
Delete	5052	171	1
Add	5053	171	8
Delete	5054	171	07
Add	5055	171	23
Delete	5056	171	“
Add	5057	171	“
Delete	5058	171	-

Add	5059	171	¶
Add	5060	171	118¶
Delete	5061	171	08
Add	5062	171	24
Delete	5063	171	USAM
Add	5064	171	JM
Delete	5065	171	09
Add	5066	171	25
Delete	5067	171	INT'L CHAMBER OF COMMERCE, ICC RULES ON COMBATING CORRUPTION
Add	5068	171	Int'l Chamber of Commerce, ICC Rules on Combating Corruption
Delete	5069	171	RULES ON COMBATING CORRUPTION
Add	5070	171	Rules on Combating Corruption
Add	5071	171	s
Delete	5072	171	www
Add	5073	171	cdn
Delete	5074	171	uploadedFiles/ICC/policy/business_in_society/Statements/ICC_Rules_on_Combating_Corruption_2011edition.pdf; TRANSPARENCY INT'L, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY (2d
Add	5075	171	content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf; Transparency Int'l, Business Principles for Countering Bribery (3rd
Delete	5076	171	09
Add	5077	171	13
Delete	5078	171	BUSINESS PRINCIPLES FOR COUNTERING BRIBERY
Add	5079	171	Business Principles for Countering Bribery
Add	5080	171	s
Delete	5081	171	www.transparency.org/global_priorities/private_sector
Add	5082	171	issuu.com/transparencyinternational/docs
Delete	5083	171	/; UNITED KINGDOM MINISTRY OF JUSTICE, THE BRIBERY ACT OF 2010, GUIDANCE ABOUT PROCEDURES WHICH RELEVANT COMMERCIAL ORGANISATIONS CAN PUT INTO PLACE TO PREVENT PERSONS ASSOCIATED WITH THEM FROM BRIBING
Add	5084	171	_web_final; United Kingdom Ministry of Justice, The Bribery Act of 2010, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing
Delete	5085	171	WORLD BANK GROUP, INTEGRITY COMPLIANCE GUIDELINES (
Add	5086	171	World Bank Group, Integrity Compliance Guidelines (
Delete	5087	171	1
Add	5088	171	7

Delete	5089	171	INTEGRITY COMPLIANCE GUIDELINES
Add	5090	171	Integrity Compliance Guidelines
Add	5091	172	s
Delete	5092	172	siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf; ASIA-PACIFIC ECONOMIC COOPERATION, APEC ANTI-CORRUPTION CODE OF CONDUCT FOR BUSINESS
Add	5093	172	wallensteinlawgroup.com/wp-content/uploads/2017/12/WBG-Integrity-Compliance-Guidelines-full.pdf; Asia-Pacific Economic Cooperation, APEC Anticorruption Code of Conduct for Business
Delete	5094	172	ANTI-CORRUPTION CODE
Add	5095	172	Anti-corruption Code
Delete	5096	172	INT'L CHAMBER OF COMMERCE, TRANSPARENCY INT'L, UNITED NATIONS GLOBAL COMPACT, and WORLD ECONOMIC FORUM, RESISTING EXTORTION AND SOLICITATION IN INTERNATIONAL TRANSACTIONS: A COMPANY TOOL FOR EMPLOYEE TRAINING (2011), available at http://www3.weforum.org/docs/WEF_PACI_RESIST_Report_2011.pdf ; INT'L CHAMBER OF COMMERCE, ET AL., CLEAN BUSINESS IS GOOD BUSINESS, available at http://www3.weforum.org/docs/WEF_PACI_BusinessCaseFightingCorruption_2011.pdf ; WORLD ECONOMIC FORUM, PARTNERING AGAINST CORRUPTION – PRINCIPLES FOR COUNTERING BRIBERY (2009) [hereinafter PARTNERING AGAINST CORRUPTION
Add	5097	172	Int'l Chamber of Commerce, et al., Resisting Extortion and Solicitation in International Transactions: A Company Tool for Employee Training (2011), available at https://iccwbo.org/content/uploads/sites/3/2016/11/RESIST-English.pdf ; Int'l Chamber of Commerce, et al., Clean Business Is Good Business: The Business Case against Corruption (2008), available at https://www.unglobalcompact.org/library/158 ; World Economic Forum, Partnering Against Corruption Initiative: Global Principles for Countering Corruption (May 2016) [hereinafter Partnering Against Corruption
Add	5098	172	Global_
Delete	5099	172	2009.pdf; WORKING GROUP ON BRIBERY, OECD, GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE 2010,
Add	5100	172	for_Countering_Corruption.pdf; Working Group on Bribery, OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance (Feb. 2010)
Delete	5101	172	GOOD PRACTICE GUIDANCE]
Add	5102	172	Good Practice Guidance],
Delete	5103	172	dataoecd/5/51

Add	5104	172	daf/ anti-bribery
Delete	5105	172	GLOBAL COMPACT, THE TEN PRINCIPLES
Add	5106	172	Global Compact, The Ten Principles of the UN Global Compact
Delete	5107	172	THE TEN PRINCIPLES]
Add	5108	172	The Ten Principles],
Add	5109	172	s
Delete	5110	172	aboutTheGC/TheTenPrinciples/index.html.
Add	5111	172	what-is-gc/mission/principles.
Delete	5112	172	10
Add	5113	172	26
Add	5114	172	“
Add	5115	172	”
Delete	5116	172	SENTENCING GUIDELINES
Add	5117	172	Sentencing Guidelines
Delete	5118	172	1
Add	5119	172	8
Delete	5120	172	11
Add	5121	172	27
Delete	5122	172	the
Delete	5123	173	¶
Delete	5124	173	ENDIX notes¶
Delete	5125	173	116¶
Delete	5126	173	→available at http://justice.gov/criminal/fraud/fcpa/opinion/2008/0802 .
Delete	5127	173	→pdf.
Delete	5128	173	→330 Complaint, SEC v. Rae Sys., Inc., supra note 92; Non-Pros. Agreement,
Delete	5129	173	April
Add	5130	173	Apr.
Delete	5131	173	→In re Rae Sys. Inc., supra note 92.
Delete	5132	173	→331 U.S. DEPT. OF COMMERCE, BUSINESS ETHICS: A MANUAL FOR
Delete	5133	173	12
Add	5134	173	8
Delete	5135	173	→MANAGING A RESPONSIBLE BUSINESS ENTERPRISE IN EMERGING
Add	5136	173	factor determining the amount of
Delete	5137	173	factor determining the amount of
Delete	5138	173	→MARKET ECONOMIES (2004), available at http://www.ita.doc.gov/
Add	5139	173	business.”→Ethics
Delete	5140	173	business.” ETHICS RESOURCE CENTER, 2009 NATIONAL BUSINESS→goodgovernance/adobe/bem_manual.pdf.¶
Delete	5141	173	ETHICS SURVEY: ETHICS IN THE RECESSION (2009), at

			41. Metrics→332 U.S. DEPT. OF STATE, FIGHTING GLOBAL CORRUPTION: BUSINESS¶
Delete	5142	173	of ethical culture include ethical leadership (tone at the top), supervisor→RISK MANAGEMENT (2d ed. 2001), available at http://www.ogc.doc.gov .¶
Delete	5143	173	reinforcement of ethical behavior (middle management reinforcement),→ gov/pdfs/Fighting_Global_Corruption.pdf .¶
Delete	5144	173	and peer commitment (supporting one another in doing the right→333 See HARMONISING ANTI-CORRUPTION COMPLIANCE, supra note¶
Delete	5145	173	thing). ETHICS RESOURCE CENTER, 2011 NATIONAL BUSINESS→302, at 46 (“Anti-corruption compliance is becoming more and more¶
Delete	5146	173	ETHICS SURVEY: WORKPLACE ETHICS IN TRANSITION (2012) at 19.→harmonised worldwide.”).¶
Delete	5147	173	Strong ethical cultures and strong ethics and compliance programs are→334 OECD GOOD PRACTICE GUIDANCE, supra note 309.¶
Delete	5148	173	related, as data show that a well-implemented program helps lead to a→335 APEC ANTI-CORRUPTION CODE, supra note 309.¶
Delete	5149	173	strong ethical culture. Id. at 34. “Understanding the nature of any gap→336 ICC RULES ON COMBATING CORRUPTION, supra note 309.¶
Delete	5150	173	between the desired culture and the actual culture is a critical first step in→337 BUSINESS PRINCIPLES FOR COUNTERING BRIBERY, supra note 309.¶
Delete	5151	173	determining the nature of any ethics-based risks inside the organization.”→338 THE TEN PRINCIPLES, supra note 309.¶
Delete	5152	173	David Gebler, The Role of Culture at 1.7, in SOCIETY OF CORPORATE→339 INTEGRITY COMPLIANCE GUIDELINES, supra note 309.¶
Delete	5153	173	COMPLIANCE AND ETHICS, THE COMPLETE COMPLIANCE AND→340 PARTNERING AGAINST CORRUPTION, supra note 309.¶
Delete	5154	173	ETHICS MANUAL (2011). To create an ethical culture, attention must be→341 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).¶
Delete	5155	173	paid to norms at all levels of an organization, including the “tone at the→342 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18¶
Add	5156	174	Resource Center, 2009 National Business Ethics Survey: Ethics in the Recession (2009), at 41. Metrics of ethical culture include ethical leadership (tone at the top), supervisor reinforcement of ethical behavior (middle management reinforcement), and peer commitment (supporting one another in doing the right thing). Ethics Resource Center, 2013 National Business Ethics Survey:

			Workplace Ethics in Transition (2014) at 19. Strong ethical cultures and strong ethics and compliance programs are related, as data show that a well-implemented program helps lead to a strong ethical culture. Id. at 17. “Understanding the nature of any gap between the desired culture and the actual culture is a critical first step in determining the nature of any ethics-based risks inside the organization.” David Gebler, The Role of Culture at 1.7, in Society of Corporate Compliance and Ethics, The Complete Compliance and Manual (2011). To create an ethical culture, attention must be paid to norms at all levels o
Delete	5157	174	→U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific
Delete	5158	174	13
Add	5159	174	29
Delete	5160	174	SENTENCING GUIDELINES
Add	5161	174	Sentencing Guidelines
Add	5162	174	b)(
Delete	5163	174	1
Add	5164	174	8
Delete	5165	174	→fine provisions).
Add	5166	174	330→Id.¶
Add	5167	174	331→Id.¶
Add	5168	174	332→Id.¶
Add	5169	174	333→See, e.g., Ethics and Compliance Officer Association Foundation, The Ethics and Compliance Handbook: A Practical Guide From Leading Organizations (2008) at 13-26 [hereinafter The Ethics and Compliance Handbook].¶
Add	5170	174	334→See, e.g., U.S. Sentencing Guidelines § 8B2.1(b)(4) (2018).¶
Add	5171	174	335→See U.S. Sentencing Guidelines § 8B2.1(b)(6) (2018) (“The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.”).¶
Add	5172	174	336→See, e.g., Joseph E. Murphy, Society of Corp. Compliance and Ethics, Using Incentives in Your Compliance and Ethics Program (2011) at 4; The Ethics and Compliance Handbook, supra note 333, at 111-23.¶
Add	5173	174	337→Stephen M. Cutler, Director, Division of Enforcement, SEC, Tone at the Top: Getting It Right, Second Annual General Counsel Roundtable (Dec. 3, 2004), available at http://www.sec.gov/news/speech/spch120304smc.htm .¶
Add	5174	174	119¶

Add	5175	174	338→See, e.g., ICC Rules on Combating Corruption, supra note 325, at 7.¶
Add	5176	174	339→See, e.g., U.S. Sentencing Guidelines § 8B2.1(b)(5)(C) (2018); Compliance 101, supra note 317, at 30-33.¶
Add	5177	174	340→See U.S. Sentencing Guidelines § 8B2.1(b)(5)(B) (2018) (“The organization shall take reasonable steps . . . to evaluate periodically the effectiveness of the organization’s compliance and ethics program.”).¶
Add	5178	174	341→See, e.g., Compliance 101, supra note 317, at 60–61; The Ethics and Compliance Handbook, supra note 333, at 155-60; Business Principles for Countering Bribery, supra note 325, at 14.¶
Add	5179	174	342→See, e.g., Michael M. Mannix and David S. Black., Compliance Issues in M&A: Performing Diligence on the Target’s Ethics and Compliance Program at 5.71-5.81, in Society of Corporate Compliance and Ethics, The Complete Compliance and Ethics Manual (2011).¶
Add	5180	175	343→Complaint, SEC v. Syncor International Corp., No. 02-cv-2421 (D.D.C. Dec. 10, 2002), ECF No. 1, available at http://www.sec.gov/litigation/complaints/comp17887.htm ; Criminal Information, United States v. Syncor Taiwan, Inc., No. 02-cr-1244 (C.D. Cal. Dec. 5, 2002), ECF No. 1, available at https://www.justice.gov/criminal-fraud/case/united-states-v-syncor-taiwan-inc-court-docket-number-02-cr-1244-svw .¶
Add	5181	175	344→U.S. Dept. of Justice, FCPA Op. Release 08-02 (June 13, 2008), available at http://justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf .¶
Add	5182	175	345→Complaint, SEC v. Rae Sys., Inc., supra note 91; Non-Pros. Agreement, In re Rae Sys. Inc., supra note 91.¶
Add	5183	175	346→See Evaluation of Corporate Compliance Programs, supra note 318.¶
Add	5184	175	347→U.S. Dept. of Commerce, Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies (2004), available at https://legacy.trade.gov/goodgovernance/adobe/bem_manual.pdf .¶
Add	5185	175	348→U.S. Dept. of State, Fighting Global Corruption: Business Risk Management (2d ed. 2001), available at http://wgfacml.asa.gov/eg/en/anticorruption/USA/EU%20fighting%20against%20corruption.usa%202001-2003.pdf .¶
Add	5186	175	349→See Harmonising Anti-Corruption Compliance, supra note 317, at 46 (“Anti-corruption compliance is becoming more and more harmonised worldwide.”).¶
Add	5187	175	350→OECD Good Practice Guidance, supra note 325.¶
Add	5188	175	351→APEC Anti-corruption Code, supra note 325.¶
Add	5189	175	352→ICC Rules on Combating Corruption, supra note 325.¶
Add	5190	175	353→Business Principles for Countering Bribery, supra note

			325.¶
Add	5191	175	354→The Ten Principles, supra note 325.¶
Add	5192	175	355→Integrity Compliance Guidelines, supra note 325.¶
Add	5193	175	356→Partnering Against Corruption, supra note 325.¶
Table Add	5194	175	
Add	5195	175	78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).¶
Delete	5196	175	14
Add	5197	175	59
Delete	5198	175	Id.
Delete	5199	175	343
Delete	5200	175	315 Id.→344 15 U.S.C. § 78ff(a).¶
Add	5201	175	360→Id.¶
Add	5202	175	61
Delete	5203	175	6
Delete	5204	175	Id.
Delete	5205	175	345
Delete	5206	175	¶
Delete	5207	175	317 See, e.g., ETHICS AND COMPLIANCE OFFICER ASSOCIATION→
Delete	5208	175	FOUNDATION, THE ETHICS AND COMPLIANCE HANDBOOK: A→
Delete	5209	175	46
Add	5210	175	2
Delete	5211	175	PRACTICAL GUIDE FROM LEADING ORGANIZATIONS (2008) at
Delete	5212	175	13
Add	5213	175	63
Delete	5214	175	-26
Delete	5215	175	347
Add	5216	175	Sentencing Commission:
Delete	5217	175	[hereinafter THE ETHICS AND COMPLIANCE HANDBOOK].→Sentencing Commission:¶
Delete	5218	175	318 See U.S. SENTENCING GUIDELINES § 8B2.1(b)(4) (2011).→The United States Sentencing Commission¶
Delete	5219	176	319 See U.S. SENTENCING GUIDELINES § 8B2.1(b)(6) (2011) (“The→(“Commission”) is an independent agency in the¶
Delete	5220	176	organization’s compliance and ethics program shall be promoted→
Add	5221	176	The United States Sentencing Commission (“Commission”) is an independent agency in the
Delete	5222	176	¶
Delete	5223	176	and enforced consistently throughout the organization through (A)→
Delete	5224	176	¶

Add	5225	176	is to establish sentencing policies and practices for
Delete	5226	176	appropriate incentives to perform in accordance with the compliance and→is to establish sentencing policies and practices for¶
Delete	5227	176	ethics program; and (B) appropriate disciplinary measures for engaging→
Delete	5228	176	in criminal conduct and for failing to take reasonable steps to prevent or→
Delete	5229	176	¶
Add	5230	176	prescribing the appropriate sentences for offenders convicted of federal crimes. The guidelines and policy statements promulgated by the Commission
Delete	5231	176	detect criminal conduct.”).→prescribing the appropriate sentences for offenders¶
Delete	5232	176	320 See, e.g., JOSEPH E. MURPHY, SOCIETY OF CORP. COMPLIANCE AND→convicted of federal crimes. The Guidelines and¶
Delete	5233	176	ETHICS, USING INCENTIVES IN YOUR COMPLIANCE AND ETHICS→policy statements promulgated by the Commission¶
Delete	5234	176	PROGRAM (2011) at 1; THE ETHICS AND COMPLIANCE HANDBOOK,→
Add	5235	176	United States Code.
Delete	5236	176	supra note 317, at 111-23.→United States Code.¶
Delete	5237	176	321 Stephen M. Cutler, Director, Division of Enforcement, SEC, Tone at→U.S. SENTENCING GUIDELINES
Add	5238	176	U.S. Sentencing Guidelines
Delete	5239	176	1
Add	5240	176	8
Delete	5241	176	the Top: Getting It Right, Second Annual General Counsel Roundtable→
Add	5242	176	64
Delete	5243	176	8
Delete	5244	176	(Dec.
Add	5245	176	65
Delete	5246	176	, 2004), available at http://www.sec.gov/news/speech/
Delete	5247	176	349
Delete	5248	176	spch120304smc.htm.
Add	5249	176	366
Delete	5250	176	350
Delete	5251	176	22
Add	5252	176	67
Delete	5253	176	See, e.g., ICC RULES ON COMBATING CORRUPTION, supra note 309,
Delete	5254	176	351

Delete	5255	176	at
Add	5256	176	368
Delete	5257	176	.
Delete	5258	176	352
Delete	5259	176	23
Add	5260	176	69
Delete	5261	176	See, e.g. U.S. SENTENCING GUIDELINES § 8B2.1(b)(5)(C);
Delete	5262	176	353
Delete	5263	176	COMPLIANCE 101, supra note
Add	5264	176	70
Delete	5265	176	2
Delete	5266	176	, at 30-33.
Delete	5267	176	354
Delete	5268	176	24
Add	5269	176	71
Delete	5270	176	Corporate Board Member/FTI Consulting 2009 Legal Study, Buckle→355
Delete	5271	176	Up. Boards and General Counsel May Face a Bumpy Ride in 2009, at 5
Add	5272	176	372
Delete	5273	176	356
Delete	5274	176	(“Interestingly, while 67% of general counsel say their company is subject→357
Add	5275	176	373→
Delete	5276	176	¶
Delete	5277	176	to compliance under the FCPA, 64% of those say there is room for→
Delete	5278	176	improvement in their FCPA training and compliance programs.”).→
Delete	5279	176	325 See U.S. SENTENCING GUIDELINES § 8B2.1(b)(5)(B) (“The→
Delete	5280	176	organization shall take reasonable steps . . . to evaluate periodically the→
Delete	5281	176	effectiveness of the organization’s compliance and ethics program.”).→
Delete	5282	177	326 See, e.g., COMPLIANCE 101, supra note 302, at 60-61; THE ETHICS→
Delete	5283	177	AND COMPLIANCE HANDBOOK, supra note 317, at 155-60; BUSINESS→
Delete	5284	177	PRINCIPLES FOR COUNTERING BRIBERY, supra note 309, at 14.→
Delete	5285	177	327 See, e.g., Michael M. Mannix and David S. Black., Compliance Issues→
Delete	5286	177	in M&A: Performing Diligence on the Target’s Ethics and Compliance→

Delete	5287	177	Program at 5.71-5.81, in SOCIETY OF CORPORATE COMPLIANCE→
Delete	5288	177	AND ETHICS, THE COMPLETE COMPLIANCE AND ETHICS MANUAL→
Add	5289	177	¶
Add	5290	177	120¶
Delete	5291	177	(2011).→
Delete	5292	177	328 Complaint, SEC v. Syncor International Corp., supra note 190;→
Delete	5293	177	Criminal Information, United States v. Syncor Taiwan, Inc., supra note→
Delete	5294	177	189.→
Delete	5295	177	329 U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 08-02 (June 13, 2008),→
Delete	5296	177	¶
Delete	5297	177	117¶
Delete	5298	177	ENDIX notes¶
Delete	5299	177	;¶
Add	5300	177	;
Delete	5301	177	58
Add	5302	177	74
Add	5303	177	75
Delete	5304	177	9
Add	5305	177	76
Delete	5306	177	0
Delete	5307	177	61
Add	5308	177	77
Delete	5309	177	.
Add	5310	177	, available at https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm .
Delete	5311	177	62
Add	5312	177	78
Delete	5313	177	363 48 C.F.R. §§ 9.406-2, 9.407-2.¶
Delete	5314	178	64
Add	5315	178	79
Delete	5316	178	48 C.F.R. §
Add	5317	178	→591 U.S. (
Delete	5318	178	9.402
Add	5319	178	2020
Add	5320	178	0
Delete	5321	178	(b
Delete	5322	178	365 See 48 C.F.R. §§ 9.406-1, 9.407-1(b)(2). Section 9.406-1 sets forth the following non-exhaustive list of factors:¶
Add	5323	178	380→Press Release, United States v. Braskem S.A., No. 16-cr-

			644 (E.D.N.Y. Dec. 21, 2016), available at https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve .¶
Add	5324	178	381→See, e.g., Press Release, United States v. Airbus (DOJ coordinating with France and United Kingdom), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case ; Press Release, United States v. TechnipFMC (DOJ coordinating with Brazil), available at https://www.justice.gov/opa/pr/technipfmc-plc-and-us-based-subsi-dary-agree-pay-over-296-million-global-penalties-resolve ; Press Release, United States v. Société Générale (DOJ coordinating with France), available at https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan ; Press Release, United States v. Keppel Offshore & Marine Ltd., No 17-cr-697 (E.D.N.Y. Dec. 22, 2017) (DOJ coordinating with Brazil and Singapore), available at https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsi-dary-agree-pay-422-million-global-penalties ; Press Release, United States v. SBM Offshore (S.D. Te
Add	5325	178	382→See Rod J. Rosenstein, Deputy Attorney General,¶
Add	5326	178	U.S. Department of Justice, Letter to Heads of Department Components on Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), available at https://www.justice.gov/opa/speech/file/1061186/download .¶
Table Add	5327	178	
Add	5328	179	9.406-1 sets forth the following non-exhaustive list of factors:
Delete	5329	179	¶
Add	5330	179	121¶
Delete	5331	179	¶
Delete	5332	179	¶
Delete	5333	179	66
Add	5334	179	87
Delete	5335	179	67
Add	5336	179	88
Delete	5337	179	68
Add	5338	179	9
Add	5339	179	390→JM § 9-28.1500.B.¶
Delete	5340	179	69
Add	5341	179	1
Delete	5342	179	USAM § 9-28.1300 (2008). 370 See, e.g., AFRICAN DEVELOPMENT BANK GROUP, INTEGRITY AND ANTI-CORRUPTION PROGRESS REPORT
Add	5343	179	→See, e.g., African Development Bank Group, Integrity and Anti-Corruption Progress Report

Add	5344	180	s
Add	5345	180	I
Delete	5346	180	Integrity
Delete	5347	180	The
Delete	5348	180	Group, Procurement: Sanctions Committee (“
Add	5349	180	Report Concerning the Debarment Process of the World Bank, available at https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/ThornburghReport.pdf .
Delete	5350	180	,
Delete	5351	180	.”)
Delete	5352	180	available
Add	5353	180	and are posted
Add	5354	180	s
Delete	5355	180	web
Add	5356	180	www
Delete	5357	180	WBSITE/ EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:500 0 2288—pagePK:84271—piPK:84287— theSitePK:84266,00.html.
Add	5358	180	en/about/unit/sanctions-system/ sanctions-board.
Delete	5359	180	71
Add	5360	180	92
Add	5361	180	s
Delete	5362	180	siteresources.worldbank.org/NEWS/Resources/ AgreementForMutualEnforcementofDebarmentDecisions.pdf
Add	5363	180	www.adb.org/documents/agreement-mutual-enforcement-debarment-decisions
Delete	5364	180	72
Add	5365	180	93
Delete	5366	180	Cross-Debarment Accord
Add	5367	180	Multilateral Development Banks
Delete	5368	180	s
Add	5369	180	Their
Add	5370	180	with Joint Sanction Accord
Add	5371	180	s
Delete	5372	180	web
Add	5373	180	www
Delete	5374	180	WBSITE/EXTERNAL/NEWS/0,,contentMDK:2 2535805— pagePK:64257043—piPK:437376—theSitePK:4607,00.html.
Add	5375	180	en/news/press-release/2010/04/09/ multilateral-development-banks-step-up-fight-against-corruption-joint-sanction-accord.
Delete	5376	180	73
Add	5377	180	94
Delete	5378	180	74

Add	5379	180	95
Delete	5380	180	75
Add	5381	180	96
Add	5382	180	97
Delete	5383	180	6
Delete	5384	180	77
Add	5385	180	98
Delete	5386	180	86
Add	5387	180	92
Delete	5388	180	78
Add	5389	180	99
Add	5390	180	s
Delete	5391	180	dag/
Add	5392	180	sites/default/files/dag/legacy/2008/03/20/
Add	5393	180	400→See Brian A. Benzckowski, Assistant Att’y General, U.S. Department of Justice, Memo to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), available at https://www.justice.gov/opa/speech/file/1100531/download .¶
Add	5394	181	401→Id. at 2.¶
Add	5395	181	402→Id.¶
Add	5396	181	403→Id.¶
Delete	5397	181	379
Add	5398	181	404→
Delete	5399	181	380
Add	5400	181	405
Add	5401	181	5
Delete	5402	181	USAM
Add	5403	181	→JM
Add	5404	181	406→Id.¶
Delete	5405	181	381 USAM § 9-27.230.B.¶
Delete	5406	181	118¶
Delete	5407	181	382
Add	5408	181	407→
Delete	5409	181	recently
Delete	5410	181	→internally and still be treated as if he or she had reported to the SEC¶
Delete	5411	181	→at the earlier reporting date , thus preserving their “place in line” for
Delete	5412	181	→a possible whistleblower award from the SEC; and (3) provide that a
Delete	5413	181	→whistleblower’s voluntary participation in an entity’s internal compliance
Delete	5414	181	→and reporting systems is a factor that can increase the amount

			of an
Delete	5415	181	subsidiaries→award, and that a whistleblower’s interference with internal compliance
Add	5416	181	122¶
Add	5417	181	subsidiaries
Delete	5418	181	→and reporting system is a factor that can decrease the amount of an award.
Delete	5419	181	→See Exchange Act Rule 21F, 17 C.F.R. § 240.21F.
Delete	5420	181	→396
Add	5421	181	resolution with the Securities and Exchange Commission while also demonstrating that criminal declination was appropriate; (6) only a single employee was involved in the improper payments; and (7) the improper payments involved minimal funds compared to overall business revenues.¶
Add	5422	181	408→SEC Rules of Practice, 17 C.F.R. § 201.102(e).¶
Add	5423	181	409→Deferred Pros. Agreement, In the Matter of Tenaris, S.A. (May 17, 2011), available at http://www.sec.gov/news/press/2011/2011-112-dpa.pdf ; see also Press Release, U.S. Sec. and Exchange Comm., Tenaris to Pay \$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement (May 17, 2011), available at http://www.sec.gov/news/press/2011/2011-112.htm .¶
Add	5424	181	410→See Non-Pros. Agreement, In re Tenaris, S.A. (May 17, 2011), available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/12/08/2011-03-14-tenaris.pdf .¶
Add	5425	181	411→See U.S. Sec. and Exchange Comm., Enforcement Manual § 6.2.3. (Mar. 9, 2012), available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf .¶
Add	5426	181	412→See id. § 6.2.4.¶
Add	5427	181	413→See id. § 2.6.¶
Add	5428	181	414→18 U.S.C. § 1514A(c).¶
Add	5429	181	415→18 U.S.C. § 1513(e).¶
Add	5430	181	416→15 U.S.C. § 78u-6(a)(3). The new provision defines “original information” to mean information that:¶
Add	5431	181	(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative or investigation, or from the news media, unless the whistleblower is a source of the information.¶
Add	5432	182	417→15 U.S.C. § 78u-6; see also Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010).¶
Add	5433	182	418→For detailed information about the program, including eligibility requirements and certain limitations that apply, see

			Section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, available at https://www.sec.gov/files/dodd-frank-sec-922.pdf , and the final rules on eligibility, Exchange Act Rule 21F-8, 17 C.F.R. § 240.21F-8, available at https://www.sec.gov/about/offices/owb/reg-21f.pdf .¶
Add	5434	182	419→For example, the rules: (1) make a whistleblower eligible for an award if the whistleblower reports original information internally, and the company informs SEC about the violations; (2) give whistleblowers 120 days to report information to SEC after first reporting internally and still be treated as if he or she had reported to SEC at the earlier reporting date, thus preserving their “place in line” for a possible whistleblower award from SEC; and (3) provide that a whistleblower’s voluntary participation in an entity’s internal compliance and reporting systems is a factor that can increase the amount of an award, and that a whistleblower’s interference with internal compliance and reporting system is a factor that can decrease the amount of an award. See Exchange Act Rule 21F, 17 C.F.R. § 240.21F.¶
Add	5435	182	420→
Delete	5436	182	resolution with the Securities and Exchange Commission while also→397
Add	5437	182	421→
Delete	5438	182	¶
Delete	5439	182	demonstrating that criminal declination was appropriate; (6) only a single→
Delete	5440	182	employee was involved in the improper payments; and (7) the improper→
Delete	5441	182	payments involved minimal funds compared to overall business revenues.→
Delete	5442	182	¶
Add	5443	182	For example, in an administrative or court proceeding, SEC may be required to produce documents or other information that would
Delete	5444	182	383 See Criminal Information, United States v. Peterson, supra note 8,→For example, in an administrative or court proceeding, SEC may be¶
Delete	5445	182	Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing→required to produce documents or other information that would¶
Delete	5446	182	Director Pleads Guilty for Role in Evading Internal Controls Required→
Delete	5447	182	by FCPA (Apr. 25, 2012), available at http://www.justice.gov/opa/ →
Delete	5448	182	¶
Add	5449	182	provided by a whistleblower during the course of the investigation. In

Delete	5450	182	pr/2012/April/12-crm-534.html (“After considering all the available→provided by a whistleblower during the course of the investigation. In¶
Delete	5451	182	facts and circumstances, including that Morgan Stanley constructed and→
Delete	5452	182	¶
Add	5453	182	to confidentiality requirements, to other governmental or regulatory
Delete	5454	182	maintained a system of internal controls, which provided reasonable→to confidentiality requirements, to other governmental or regulatory¶
Delete	5455	182	assurances that its employees were not bribing government officials, the→
Add	5456	182	See
Delete	5457	183	Department of Justice declined to bring any enforcement action against→398 Although SEC does not have an opinion procedure release process,¶
Delete	5458	183	Morgan Stanley related to Peterson’s conduct. The company voluntarily→it has declared its decision to follow the guidance announced through¶
Delete	5459	183	disclosed this matter and has cooperated throughout the department’s→
Add	5460	183	422→Although SEC does not have an opinion procedure release process, it has declared its decision to follow the guidance announced through
Delete	5461	183	¶
Delete	5462	183	investigation.”); see also Press Release, U.S. Sec. and Exchange Comm.,→
Add	5463	183	www.
Delete	5464	183	SEC Charges Former Morgan Stanley Executive with FCPA Violations→www.
Delete	5465	183	No. 34–
Delete	5466	183	and Investment Adviser Fraud (Apr. 25, 2012), available at http://www. →17099 stated that, to encourage issuers to take advantage of the DOJ’s¶
Delete	5467	183	sec.gov/news/press/2012/2012-78.htm (“Morgan Stanley, which is not→FCPA Review Procedure, as a matter of prosecutorial discretion, SEC¶
Delete	5468	183	charged in the matter, cooperated with the SEC’s inquiry and conducted→
Add	5469	183	No. 34-17099 stated that, to encourage issuers to take advantage of DOJ’s FCPA Review Procedure, as a matter of prosecutorial discretion, SEC
Delete	5470	183	¶
Add	5471	183	in any case where an issuer has sought and obtained an FCPA

			Review Procedure letter from the Department, prior to May 31, 1981, stating that the
Delete	5472	183	a thorough internal investigation to determine the scope of the improper→in any case where an issuer has sought and obtained an FCPA Review¶
Delete	5473	183	payments and other misconduct involved.”).→letter from the Department, prior to May 31, 1981, stating that the¶
Delete	5474	183	384 SEC Rules of Practice, 17 C.F.R. § 201.102(e).→
Delete	5475	183	Deferred Pros. Agreement, In the Matter of Tenaris, S.A. (May 17,→
Delete	5476	183	¶
Add	5477	183	would revisit this policy once DOJ had evaluated the results of the
Delete	5478	183	2011), available at http://www.sec.gov/news/press/2011/2011-112-dpa .→would revisit this policy once the DOJ had evaluated the results of the¶
Delete	5479	183	pdf; see also Press Release, U.S. Sec. and Exchange Comm., Tenaris to Pay→
Delete	5480	183	¶
Add	5481	183	stated that SEC would continue to adhere to the policy announced in Release No. 34-17099. U.S. Sec. and Exchange Comm., SEC Release
Delete	5482	183	\$5.4 Million in SEC’s First-Ever Deferred Prosecution Agreement (May→stated that the SEC would continue to adhere to the policy announced¶
Delete	5483	183	17, 2011), available at http://www.sec.gov/news/press/2011/2011-112 .→in Release No. 34-17099. U.S. Sec. and Exchange Comm., SEC Release¶
Delete	5484	183	htm
Add	5485	183	digest/1981/dig111381.pdf.
Delete	5486	183	386 See Non-Pros. Agreement, In re Tenaris, S.A. (May 17, 2011), available→digest/1981/dig111381.pdf.¶
Delete	5487	183	at http://www.justice.gov/criminal/fraud/fcpa/cases/tenaris-sa/2011 -→399
Add	5488	183	423→
Delete	5489	183	¶
Delete	5490	184	14-tenaris.pdf.→
Delete	5491	184	-
Delete	5492	184	387 See U.S. SEC. AND EXCHANGE COMM., ENFORCEMENT MANUAL→
Delete	5493	184	§ 6.2.3. (March 9, 2012), available at http://www.sec.gov/divisions/ →400
Add	5494	184	424→
Delete	5495	184	¶
Delete	5496	184	enforce/enforcementmanual.pdf.→
Delete	5497	184	388 See id. § 6.2.4.

Add	5498	184	425
Delete	5499	184	401
Delete	5500	184	389 See id. §
Add	5501	184	426
Delete	5502	184	.6
Delete	5503	184	.
Delete	5504	184	402
Delete	5505	184	390 18 U.S.C. § 1514A(c).
Add	5506	184	427
Delete	5507	184	403
Delete	5508	184	¶
Delete	5509	184	391 18 U.S.C. § 1513(e).→
Delete	5510	184	392 15 U.S.C. § 78u-6(a)(3). The new provision defines “original→
Delete	5511	184	information” to mean information that:→
Add	5512	184	123¶
Delete	5513	184	(A) is derived from the independent knowledge
Add	5514	184	428
Delete	5515	184	404
Delete	5516	184	or analysis of a whistleblower; (B) is not known
Add	5517	184	429
Delete	5518	184	405
Delete	5519	184	to the Commission from any other source, unless
Add	5520	184	430
Delete	5521	184	406
Delete	5522	184	the whistleblower is the original source of the
Add	5523	184	431
Delete	5524	184	407
Delete	5525	184	¶
Delete	5526	184	information; and (C) is not exclusively derived from→
Add	5527	184	before receiving a response.
Delete	5528	184	an allegation made in a judicial or administrative→before receiving a response.
Delete	5529	184	hearing, in a governmental report, hearing, audit,
Add	5530	184	432
Delete	5531	184	408
Delete	5532	184	or investigation, or from the news media, unless the
Add	5533	184	433
Delete	5534	184	409
Delete	5535	184	whistleblower is a source of the information.
Add	5536	184	434
Delete	5537	184	410
Delete	5538	184	¶
Delete	5539	184	393 15 U.S.C. § 78u-6; see also Dodd-Frank Wall Street Reform

			and→
Delete	5540	184	Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376,→
Delete	5541	184	1841-
Delete	5542	184	9
Add	5543	184	35
Delete	5544	184	(2010).
Delete	5545	184	411
Delete	5546	184	¶
Delete	5547	184	394 For detailed information about the program, including eligibility→
Delete	5548	184	requirements and certain limitations that apply, see Section 922 of the→
Delete	5549	184	Dodd-Frank Wall Street Reform and Consumer Protection Act, available→
Delete	5550	184	at http://www.sec.gov/about/offices/owb/dodd-frank-sec-922.pdf ,→
Delete	5551	184	and the final rules on eligibility, Exchange Act Rule 21F-8, 17 C.F.R. §→
Delete	5552	184	12
Add	5553	184	36
Delete	5554	184	240.21F-8.
Add	5555	184	437
Delete	5556	184	413
Delete	5557	184	¶
Delete	5558	184	395 For example, the rules: (1) make a whistleblower eligible for an award→
Delete	5559	184	if the whistleblower reports original information internally, and the→
Delete	5560	184	company informs the SEC about the violations; (2) give whistleblowers→
Add	5561	185	requested information.” Id.
Delete	5562	185	120 days to report information to the SEC after first reporting→requested information.” Id.¶
Delete	5563	185	119¶
Add	5564	185	438→28 C.F.R. § 80.9 (“No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA opinion letter signed by the Attorney General or his designee.”).¶
Add	5565	185	439→28 C.F.R. § 80.8. FCPA opinions do not bind or obligate any agency other than DOJ. They also do not affect the requesting party’s obligations to any other agency or under any statutory or regulatory provision other than those specifically cited in the particular FCPA opinion. 28 C.F.R. § 80.11. If the conduct for

			which an FCPA opinion is requested is subject to approval by any other agency, such FCPA opinion may not be taken to indicate DOJ's views on any legal or factual issues before that other agency. 28 C.F.R. § 80.13.¶
Add	5566	185	440→28 C.F.R. § 80.10. DOJ can rebut this presumption by a preponderance of the evidence. A court determining whether the presumption has been rebutted weighs all relevant factors, including whether the submitted information was accurate and complete and the activity was within the scope of conduct specified in the request. Id. As of September 2012, DOJ has never pursued an enforcement action against a party for conduct that formed the basis of an FCPA opinion stating that the prospective conduct would violate DOJ's present enforcement policy.¶
Add	5567	185	441→As a general matter, DOJ normally anonymizes much of the information in its publicly released opinions and includes the general nature and circumstances of the proposed conduct. DOJ does not release the identity of any foreign sales agents or other types of identifying information. 28 C.F.R. § 80.14(b). However, DOJ may release the identity of the requesting party, the foreign country in which the proposed conduct is to take place, and any actions DOJ took in response to the FCPA opinion request. Id. If a party believes that an opinion contains proprietary information, it may request that DOJ remove or anonymize those portions of the opinion before it is publicly released. 28 C.F.R. § 80.14(c).¶
Add	5568	185	442→28 C.F.R. § 80.16.
Table Del	5569	185	
Delete	5570	186	¶
Delete	5571	187	120¶
Add	5572	187	124¶
Add	5573	187	Graphic
Add	5574	187	¶