Chapter 15

The Foreign Corrupt Practices Act and the International Conventions on Bribery

§ 15:1 Introduction

Enforcement of the Foreign Corrupt Practices Act (FCPA) has remained active in recent years. Both the U.S. Department of Justice (DOJ), which has criminal and civil enforcement authority, and the U.S. Securities and Exchange Commission (SEC), which has civil enforcement authority, continue to bring FCPA enforcement actions against companies and individuals, and continue to coordinate such enforcement actions with parallel actions by authorities in other countries. In fact, the three largest-ever FCPA settlements have

been announced since September 2017.[1] The DOJ also has appeared focused on establishing policies and guidelines to assist companies in understanding their responsibilities with regard to preventing and redressing FCPA issues, as illustrated by its corporate FCPA Enforcement Policy designed to encourage self-reporting, cooperation, and remediation, and by its guidance on the Evaluation of Corporate Compliance Programs, released in April 2019.

§ 15:1.1 Enforcement Statistics

As of September 2019, DOJ and SEC have announced over $1 billion in corporate settlements of FCPA matters. Among these is the third-largest FCPA settlement of all time: Russia-based Mobile Telesystems Pjsc's agreement to pay the DOJ and SEC a combined $850 million, and retain a compliance monitor for three years in order to resolve FCPA charges related to winning business in Uzbekistan.[2] Also among the settlements announced in 2019 are French oil and gas company TechnipFMC's agreement to a coordinated resolution with the DOJ and Brazilian authorities for a total of $296 million, without the requirement of a monitor (despite being a repeat offender),[3] and Germany-based Fresenius Medical Care's agreement to pay

1. *See* Press Release, U.S. Dep't of Justice, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019) (second largest FCPA settlement); Press Release, U.S. Dep't of Justice, Petróleo Brasileiro S.A.—Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018); Press Release, U.S. Sec. & Exch. Comm'n, Petrobras Reaches Settlement With SEC for Misleading Investors (Sept. 27, 2018) (largest FCPA settlement); Press Release, U.S. Dep't of Justice, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017) (third largest FCPA settlement).
2. Press Release, U.S. Dep't of Justice, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019) (discussing deferred prosecution agreement with Mobile Telesystems Pjsc and guilty plea by Uzbek subsidiary); Press Release, U.S. Sec. & Exch. Comm'n, Mobile TeleSystems Settles FCPA Violations (Mar. 6, 2019).
3. Press Release, U.S. Dep't of Justice, TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019) (discussing deferred prosecution agreement with TechnipFMC plc, guilty plea by Technip USA, Inc., and guilty plea by former Technip consultant).

the DOJ and SEC a combined $231 million, with a monitor for two years.[4]

In 2018, sixteen companies agreed to pay a total of nearly $3 billion in sanctions to resolve FCPA enforcement actions. Most dramatically, in September 2018, Brazilian oil giant Petrobras agreed to pay a total of $1.78 billion to settle enforcement actions by the DOJ and SEC (with credits for amounts already paid to resolve private shareholder litigation in the United States and additional amounts to be paid to Brazilian authorities).[5] Other blockbuster FCPA settlements in 2018 included Société Générale S.A.'s $585 million deal with the DOJ and French authorities (the first-ever coordinated enforcement action with France),[6] and Panasonic Avionics' $280 million deal with the DOJ and the SEC, which also involved the imposition of a compliance monitor.[7] Overall, in 2018 the SEC resolved fourteen

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4. Press Release, U.S. Dep't of Justice, Fresenius Medical Care Agrees to Pay $231 Million in Criminal Penalties and Disgorgement to Resolve Foreign Corrupt Practices Act Charges (Mar. 29, 2019) (discussing non-prosecution agreement); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Medical Device Company With FCPA Violations (Mar. 29, 2019).
5. Press Release, U.S. Dep't of Justice, Petróleo Brasileiro S.A.—Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018) [hereinafter Petrobras Press Release] (discussing non-prosecution agreement); Press Release, U.S. Sec. & Exch. Comm'n, Petrobras Reaches Settlement With SEC for Misleading Investors (Sept. 27, 2018) [hereinafter SEC Petrobras Press Release].
6. Press Release, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018) (discussing deferred prosecution agreement with Société Générale S.A. and guilty plea by a subsidiary, SGA Société Générale Acceptance N.V., with respect to FCPA violations).
7. Press Release, U.S. Dep't of Justice, Panasonic Avionics Corporation Agrees to Pay $137 Million to Resolve Foreign Corrupt Practices Act Charges (Apr. 30, 2018); Press Release, U.S. Sec. & Exch. Comm'n, Panasonic Charged With FCPA and Accounting Fraud Violations (Apr. 30, 2018). The SEC also charged two former senior executives of the U.S. subsidiary of Panasonic Corp. with knowingly violating the books and records and internal accounting controls provisions of the federal securities laws and causing similar violations by the parent company. Without admitting or denying the findings, Paul Margis, the former CEO of and President of Panasonic Avionics Corp., agreed to pay a penalty of $75,000, and Takeshi Uonaga, the former CFO of Panasonic Avionics, agreed to pay a penalty of $50,000 and to a suspension from practicing or appearing before the SEC as an accountant. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Panasonic Executives (Dec. 18, 2018).

enforcement actions against companies, while the DOJ resolved six.[8] Moreover, pursuant to its FCPA Corporate Enforcement Policy, the DOJ announced four declinations, three of which were conditioned on disgorgement of profits to U.S. authorities.[9]

Consistent with its stated policy of holding individuals accountable for corporate wrongdoing, in 2018 the DOJ actively pursued individual prosecutions, charging thirty-one individuals, securing eighteen guilty pleas, and obtaining one conviction at trial in FCPA-related cases.[10] Sentences ranged from ten years in prison for a former Venezuelan official who conspired to launder more than $1 billion in bribes,[11] to no jail time for a cooperating former aircraft sales executive who pleaded guilty to FCPA violations and other crimes yet provided timely and substantial assistance to the DOJ's investigation of his employer, Embraer S.A.[12] The SEC announced the resolution of FCPA charges against four individuals in 2018.[13]

In 2017, DOJ brought twenty-nine criminal FCPA enforcement actions against companies and individuals, while the SEC brought ten civil FCPA enforcement actions against companies and individuals. In the final days of the Obama Administration in January 2017, DOJ and SEC announced large FCPA-related corporate settlements

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8. For a list of the SEC's FCPA enforcement actions by calendar year, see www.sec.gov/spotlight/fcpa/fcpa-cases.shtml, and for a list of the DOJ's FCPA-related enforcement actions in calendar year 2018, see www.justice.gov/criminal-fraud/case/related-enforcement-actions/2018.
9. *See* DOJ Letter re: Polycom, Inc. (Dec. 20, 2018); DOJ Letter re: Insurance Corporation of Barbados Limited (Aug. 23, 2018); DOJ Letter re: Guralp Systems Limited (Aug. 20, 2018); DOJ Letter re: The Dun & Bradstreet Corporation (Apr. 23, 2018). The letters are available at www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.
10. For a list of the DOJ's FCPA-related enforcement actions in calendar year 2018, see www.justice.gov/criminal-fraud/case/related-enforcement-actions/2018.
11. Press Release, U.S. Dep't of Justice, Former Venezuelan National Treasurer Sentenced to 10 Years in Prison for Money Laundering Conspiracy Involving Over $1 Billion in Bribes (Nov. 27, 2018).
12. Pete Brush, *Key Witness In Embraer Case Avoids Prison For Saudi Bribe*, LAW360 (Dec. 12, 2018).
13. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Panasonic Executives (Dec. 18, 2018); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former CEO of Chilean-Based Chemical and Mining Company With FCPA Violations (Sept. 25, 2018); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Real Estate Broker With FCPA Violations (Sept. 6, 2018).

with Orthofix International N.V.;[14] Rolls Royce plc;[15] Las Vegas Sands Corp. (LVSC);[16] Sociedad Química y Minera de Chile, S.A. (SQM);[17]

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14. Without admitting or denying the SEC's allegations, Orthofix agreed to pay $3.2 million in disgorgement and interest as well as a $3.2 million civil penalty to settle charges that improper payments by its Brazilian subsidiary to doctors and hospitals led Orthofix to violate the FCPA's books and records and internal controls provisions. *See* Order Instituting Cease and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease and Desist Order, *In re* Orthofix International N.V., Exchange Act Release No. 79,828 (Jan. 18, 2017), www.sec.gov/litigation/admin/2017/34-79828.pdf.

15. Under the terms of its DPA with the DOJ, which was filed under seal on December 20, 2016, but not made public until January 17, 2017, Rolls Royce agreed to pay a criminal fine of $169.9 million. As discussed *infra*, section 15:3.2, the DPA was part of a $800 million global settlement with U.S., U.K., and Brazilian authorities. *See* Press Release, U.S. Dep't of Justice, Rolls Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017); Deferred Prosecution Agreement, United States v. Rolls Royce plc, No. 2:16cr00247 (S.D. Ohio Dec. 20, 2016), Dkt. Entry 4.

16. LVSC's NPA with the DOJ, under which the casino giant agreed to pay a criminal fine of $6.96 million, followed its April 2016 settlement with the SEC in which LVSC paid a $9 million civil penalty to resolve FCPA books and records and internal control charges in connection with its use of a Chinese consultant. *See* Letter from Andrew Weissmann, Chief, Fraud Sec., Crim. Div., DOJ to Counsel to Las Vegas Sands Corp. (Jan. 17, 2017), www.justice.gov/opa/press-release/file/929836/download; Order Instituting Cease and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease and Desist Order, *In re* Las Vegas Sands Corp., Exchange Act Release No. 77,555 (Apr. 7, 2016), www.sec.gov/litigation/admin/2016/34-77555.pdf.

17. Under a DPA with the DOJ, SQM agreed to pay a $15.5 million criminal fine. *See* Press Release, U.S. Dep't of Justice, Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017), www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt. Without admitting or denying the SEC's charges, SQM also consented to a Cease and Desist order requiring the Chilean chemical company to pay the SEC a $15 million civil penalty for alleged violations of the FCPA's books and records and internal controls provisions. Order Instituting Administrative and Cease and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, Imposing Remedial Sanctions and a Cease and Desist Order, and Notice of Hearing, *In re* Sociedad Química y Minera de Chile, S.A., Exchange Act Release No. 79,795 (Jan. 13, 2017), www.sec.gov/litigation/admin/2017/34-79795.pdf.

Zimmer Biomet Holdings, Inc.;[18] and Mondelēz International, Inc.[19] Despite a brief lull in the first few months of the Trump Administration, FCPA enforcement continued throughout the year. In the second half of 2017, the DOJ announced three blockbuster corporate settlements in coordination with enforcement authorities in other countries—Telia Co. AB and its Uzbek subsidiary agreed to pay a total of $965 million to the United States, the Netherlands, and Sweden;[20] Keppel Offshore agreed to pay more than $422 million to the United States, Singapore, and Brazil;[21] and SBM Offshore agreed to pay $238 million to the United States on top of the $240 million it previously

18. Zimmer Biomet agreed to pay a total of $30.4 million to U.S. officials to resolve FCPA charges in connection with its operations in Mexico and Brazil. Under its DPA with the DOJ, Zimmer Biomet agreed to pay a $17.4 million criminal fine to resolve charges that the medical device company violated the FCPA's internal controls provisions, while the SEC's Cease and Desist order required the medical device company to pay $6.5 million in disgorgement and interest as well as a $6.5 million civil penalty for alleged bribery, books and records, and internal controls violations. Deferred Prosecution Agreement, United States v. Zimmer Biomet Holdings, Inc., No. 12CR00080 (D.D.C. Jan. 12, 2017), https://www.justice.gov/opa/press-release/file/925171/download; Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, *In re* Biomet, Inc., Exchange Act Release No. 79,780 (Jan. 12, 2017), www.sec.gov/litigation/admin/2017/34-79780.pdf.

19. Without admitting or denying the SEC's allegations, Mondelēz agreed to pay a $13 million civil penalty to settle charges that Cadbury, which Mondelēz acquired in 2010, had violated the books and records and internal controls provisions of the FCPA in connection with its operations in India. Order Instituting Administrative and Cease and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, Imposing Remedial Sanctions and a Cease and Desist Order, and Notice of Hearing, *In re* Cadbury Ltd. and Mondelēz International, Inc., Exchange Act Release No. 79,753 (Jan. 6, 2017), www.sec.gov/litigation/admin/2017/34-79753.pdf.

20. Press Release, DOJ, Telia Company AB and Its Uzbek Subsidiary Enter Into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017).

21. Press Release, DOJ, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017). A former senior member of the company's legal department also pleaded guilty to one count of conspiracy to violate the FCPA. *Id.*

paid Dutch authorities and additional penalties it is likely to incur in Brazil.[22]

§ 15:1.2 Trends in Enforcement Policies, Priorities, and Practices

The DOJ and SEC have tried in recent years to clarify their approach to FCPA enforcement, while strengthening their capacity to investigate and prosecute individuals and companies that violate the FCPA. As discussed in further detail in section 15:2.6 below, in November 2012, the Criminal Division of DOJ and the Enforcement Division of the SEC published "A Resource Guide to the U.S. Foreign Corrupt Practices Act," a 120-page primer on the FCPA that provides, inter alia, useful hypothetical examples that illustrate the factors DOJ and the SEC may take into consideration when determining whether and how to pursue an enforcement action.[23]

On November 29, 2017, Deputy Attorney General Rod Rosenstein unveiled a revised Corporate Enforcement Policy for the FCPA.[24] This policy, which incorporates into the Justice Manual[25] key portions of the Obama Administration's FCPA Pilot Program, is "aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct."[26]

The FCPA Corporate Enforcement Policy provides that, "[w]hen a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated . . ., there will be a presumption that the company will receive a declination." Aggravating circumstances—such as where a high-level executive is involved in the misconduct, the company enjoyed significant profit from the misconduct, or the misconduct was pervasive—may overcome the presumption against prosecution. In those

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22. Press Release, DOJ, SBM Offshore N.V. And United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribes in Five Countries (Nov. 29, 2017).
23. CRIM. DIV., DOJ, & ENFORCEMENT DIV., SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (Nov. 14, 2012), www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter Resource Guide].
24. U.S. Dep't of Justice, News, "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2017), www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.
25. DOJ comprehensively revised and renamed the Justice Manual, which was previously known as the United States Attorneys' Manual (USAM), in 2018. U.S. Dep't of Justice, JUSTICE MANUAL (Nov. 2018), www.justice.gov/jm/justice-manual [hereinafter JUSTICE MANUAL].
26. JUSTICE MANUAL § 9-47.120.

cases, companies still may receive a 50% reduction off the low end of the U.S. Sentencing Guidelines fine range (except in the case of a criminal recidivist). Companies also may avoid the appointment of a compliance monitor if, at the time of the resolution, they have in place an effective compliance program. Notably, to qualify for favorable treatment under the Policy, a company must pay all disgorgement, forfeiture, and/or restitution from the misconduct at issue, even if the DOJ declines to bring charges.[27]

The FCPA Corporate Enforcement Policy also provides credit for full cooperation and timely and appropriate remediation in FCPA matters without voluntary self-disclosure. Consistent with the FCPA Pilot Program announced in April 2016, companies that satisfy the DOJ's standards for cooperation and remediation are eligible for a reduction of up to 25% off the low end of the Sentencing Guidelines fine range.[28]

The Policy defines what the DOJ considers "voluntary self-disclosure," "full cooperation," and "timely and appropriate remediation." To receive credit for self-disclosure, a company must report the issue before "an imminent threat of disclosure or government investigation," and must report all relevant facts known to the company at that time. Meanwhile, "full cooperation" requires that a company not only disclose the findings of any independent or internal investigation and any relevant documents and information, but also, if requested, the company must "deconflict" by deferring the interviews of employee witnesses or other investigative steps until after the government has had an opportunity to do so itself. Full credit for "timely and appropriate remediation" will be awarded only to companies that have analyzed and redressed the root causes of the misconduct, implemented an effective compliance program, appropriately disciplined any employee that participated in the misconduct, and taken steps that "demonstrate recognition of the company's misconduct," including acceptance of responsibility.[29]

The DOJ's FCPA Corporate Enforcement Policy makes permanent many of the core elements of the Pilot Program, which has guided the DOJ's FCPA enforcement decisions over the past year and a half. What is new is the presumption in favor of non-prosecution when companies self-report, cooperate, and remediate. This presumption is intended to encourage more self-reporting of violations.

Relatedly, in April 2019, the DOJ's Criminal Division published new guidance discussing factors that prosecutors should consider

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27. *Id.*
28. *See id.*
29. *See id.*

when evaluating the effectiveness of compliance programs for the purposes of determining whether and how to prosecute or resolve corporate criminal enforcement actions, including those involving alleged FCPA violations.[30] The new guidance "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)."[31] The Updated Compliance Guidance, which analyzes twelve topics that prosecutors in the Criminal Division have "found relevant in evaluating a corporate compliance program,"[32] is organized around three "fundamental questions" that the Justice Manual directs prosecutors ask when considering compliance program effectiveness:

1. Is the program well designed?
2. Is the program being implemented effectively?
3. Does the compliance program work in practice?[33]

As with previous DOJ guidance documents addressing compliance-related issues,[34] the Updated Compliance Guidance emphasizes that prosecutors' assessments of compliance program effectiveness are not based on a checklist or formula; rather, prosecutors make individualized determinations based on companies' particular risk profiles and the measures they have undertaken to mitigate such risks, including those involving the FCPA. However, the Updated Compliance Guidance gives companies a clearer and more comprehensive sense of the DOJ's views on the design, implementation, and operation of effective compliance programs, which, as discussed

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30. U.S. Dep't of Justice, Crim. Div., "Evaluation of Corporate Compliance Programs," www.justice.gov/criminal-fraud/page/file/937501/download (Apr. 2019).
31. *Id*. at 2.
32. *Id*.
33. *Id*. at 3; *see also* section 9-28.000, *Principles of Federal Prosecution of Business Organizations*, JUSTICE MANUAL.
34. *See, e.g.*, Resource Guide, *supra* note 23; U.S. Dep't of Justice, News, "Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act" (Nov. 29, 2017), www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign; U.S. Dep't of Justice, Crim. Div., "Evaluation of Corporate Compliance Programs," www.justice.gov/criminal-fraud/page/file/937501/download (Apr. 2019).

above, may be particularly important in helping companies facing FCPA allegations to avoid prosecution or reduce potential penalties.

[A] Multi-Jurisdictional Cooperation

As discussed in more detail in section 15:3 below, cooperation with international regulators, investigators, and prosecutors has become increasingly critical to FCPA enforcement activities. As Daniel Kahn, then-Chief of the DOJ Criminal Division's Fraud Section, explained in an article in the October 2018 issue of the *Department of Justice Journal of Federal Law and Practice*, FCPA "investigations and prosecutions, by their very nature, involve evidence from abroad in every case and often include multiple foreign authorities."[35] Kahn further noted that, between 2016 and October 2018, the DOJ "coordinated [FCPA] resolutions with foreign authorities in nine cases . . . more than twice as many as all previous years combined."[36] Such figures merely evince a continual and growing emphasis on cross-border cooperation in foreign bribery-related cases in recent years. Before leaving office, President Obama's Attorney General, Loretta Lynch, emphasized that "international cooperation is more important than ever in dismantling transnational schemes, thwarting attempts to hide ill-gotten assets, and bringing perpetrators to justice."[37] In public remarks in November 2016, Leslie Caldwell, then-Assistant Attorney General for DOJ's Criminal Division, stressed coordination with foreign counterparts as a means of not only enhancing the U.S. FCPA enforcement efforts but also encouraging other countries to investigate and prosecute corruption.[38] In February 2017, Charles Cain, Deputy Chief of the SEC's FCPA unit, commented that the "pace and the quality of the assistance we receive [from foreign counterparts] continues to grow," and noted that, in October 2016, the DOJ and SEC co-hosted their third foreign bribery training program for over

35. Daniel Kahn, *Responding to the Upward Trend in Multijurisdictional Cases: Problems and Solutions*, 66(5) DEP'T OF JUSTICE J. OF FED. L. & PRAC. 125, 125 (Oct. 2018). *The DOJ Journal of Federal Law and Practice* is the renamed *United States Attorneys' Bulletin*.
36. *Id*. at 126.
37. Loretta E. Lynch, U.S. Att'y Gen., Remarks on Department of Justice Efforts in the Fight Against International Fraud and Corruption (Oct. 20, 2016), www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-department-justice-efforts-fight.
38. Leslie R. Caldwell, Ass't Att'y Gen., Remarks Highlighting Foreign Corrupt Practices Act Enforcement at the George Washington University Law School (Nov. 3, 2016), www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-delivers-remarks-highlighting-foreign.

130 prosecutors and regulators from around the world representing seventy-two agencies in thirty-seven jurisdictions.[39]

International collaboration has strengthened the ability of U.S. officials to pursue FCPA enforcement actions. The largest corporate FCPA settlements in recent years were the product of international coordination. For example, as discussed above, in June 2018, Société Générale S.A. agreed to pay $585 million to settle charges with the DOJ and French authorities (the first-ever coordinated enforcement action with France),[40] and, in September 2018, Petrobras agreed to pay a total of $1.78 billion to settle enforcement actions by the DOJ and SEC with additional amounts to be paid to Brazilian authorities).[41] In January 2017, U.S., British, and Brazilian officials announced in January that Rolls Royce would pay $800 million in a global settlement to resolve allegations of criminal conduct spanning three decades in seven jurisdictions and involving three business sectors.[42] In 2016, the SEC publicly acknowledged the assistance it had received from authorities in more than two dozen jurisdictions in FCPA cases the Commission brought.[43] Adding to the effort, foreign authorities increasingly are bringing their own foreign bribery and related cases in parallel with the DOJ and/or SEC. For example, the investigation into VimpelCom, which involved assistance from officials in fourteen different jurisdictions, resulted in a global settlement that required the company to pay $397.5 million to U.S. authorities (split between DOJ and the SEC), and $397.5 million to the Prosecution Authority of the Netherlands.[44] Similarly, in December 2016, Odebrecht and

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39. Charles Cain, Deputy Chief, FCPA Unit, Sec. & Exch. Comm'n, Remarks at SEC Speaks in 2017 Conference (Feb. 24, 2017).

40. *See* Press Release, U.S. Dep't of Justice, Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018).

41. *See* Press Release, U.S. Dep't of Justice, Petróleo Brasileiro S.A.—Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018); Press Release, U.S. Sec. & Exch. Comm'n, Petrobras Reaches Settlement With SEC for Misleading Investors (Sept. 27, 2018).

42. *See* Press Release, U.S. Dep't of Justice, Rolls Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017); Press Release, SFO, SFO completes £497.25m Deferred Prosecution Agreement with Rolls Royce PLC (Jan. 17, 2017).

43. *See* Andrew Ceresney, Dir., Enforcement Div., U.S. Sec. & Exch. Comm'n, Keynote Speech at ACI's 33rd International Conference on the FCPA (Nov. 30, 2016), www.sec.gov/news/speech/speech-ceresney-113016.html; Charles Cain, Deputy Chief, FCPA Unit, Sec. & Exch. Comm'n, Remarks at SEC Speaks in 2017 Conference (Feb. 24, 2017).

44. *See* Press Release, U.S. Dep't of Justice, VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016), http://www.justice.gov/

Braskem agreed to pay at least $3.5 billion in penalties to U.S., Brazilian, and Swiss authorities to resolve foreign bribery and related charges.[45]

§ 15:2 The Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act of 1977 (FCPA)[46] prohibits corruptly offering, paying, promising to pay, or authorizing the payment of any money or other thing of value to a foreign (that is, non-U.S.) public official in order to obtain or retain business. In addition, the FCPA requires "issuers" of securities to comply with record-keeping and internal controls requirements. The DOJ and SEC share FCPA enforcement authority, but only the DOJ may bring criminal charges.[47]

§ 15:2.1 Who Is Subject to the FCPA?

Domestic concerns: The FCPA's anti-bribery provisions extend to "any individual who is a citizen, national, or resident of the United States" and "any corporation [or other entity] . . . 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,"[48] as well as "any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern. . . ."[49] Domestic concerns are subject to the FCPA with respect to their conduct anywhere in the world.

Issuers: The FCPA's anti-bribery and books-and-records and internal controls provisions apply to "any issuer which has a class of securities registered pursuant to section 78l of [the Securities Exchange Act of 1934] or which is required to file reports under section 78o(d) [of the Securities Exchange Act of 1934], or . . . any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer. . . ."[50] In practice, this category includes issuers

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opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million; Press Release, Sec. & Exch. Comm'n, VimpelCom to Pay $795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html.

45. *See* Press Release No. 16-1515, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.
46. Pub. L. No. 95-213 (codified as amended in 15 U.S.C. § 78dd *et seq.*).
47. *See id.; see also* Resource Guide, *supra* note 23, at 2.
48. 15 U.S.C. § 78dd-2(h)(1).
49. *Id.* § 78dd-2(a).
50. *Id.* § 78dd-1(a).

with securities listed on a U.S. exchange, with American Depository Receipts listed on a U.S. exchange, or with securities quoted in the over-the-counter market in the United States and required to file periodic reports with the SEC.[51] Like domestic concerns, issuers are subject to the FCPA with respect to their conduct anywhere in the world.

Persons other than issuers or domestic concerns: Persons other than an issuer or domestic concern—that is, foreign persons who are not issuers—are also subject to the anti-bribery provisions of the FCPA if they or their officers, directors, employees, or agents, or any stockholder acting on their behalf does any act "in furtherance of" a corrupt payment "while in the territory of the United States."[52] This is often referred to as "territorial jurisdiction."[53]

§ 15:2.2 Anti-Bribery Provisions

The FCPA's anti-bribery provisions prohibit the corrupt offer, payment, promise to pay, or authorization of the giving of anything of value to a foreign official, a foreign political party or official thereof, or any candidate for political office, for purposes of:

(i) influencing any act or decision by the foreign official in his or her official capacity;

(ii) inducing the foreign official to do or omit to do any act in violation of his or her lawful duty;

(iii) securing any improper advantage; or

(iv) inducing the foreign official to use his or her influence to affect a governmental decision

in order to obtain or retain business.[54] Things of value may include cash, gifts, travel, entertainment, charitable contributions, and even internships.[55]

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51. Resource Guide, *supra* note 23, at 11.
52. *Id*. § 78dd-3(a).
53. *See, e.g.*, Resource Guide, *supra* note 23, at 2.
54. 15 U.S.C. § 78dd-1(a)(1). In *United States v. Kay*, for example, the Fifth Circuit took an expansive view of this "business nexus" requirement, holding that payments to foreign officials as consideration for unlawful evasions of customs duties and sales taxes could fall within the scope of the FCPA so long as it could be shown "that the bribery was intended to produce an effect—here, through tax savings—that would 'assist in obtaining or retaining business.'" 359 F.3d 738, 756 (5th Cir. 2004).
55. *See* Resource Guide, *supra* note 23, at 15–19; *see also* Press Release, U.S. Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), http://www.sec.gov/news/

The FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[56] DOJ and SEC have taken the position, which courts have affirmed, that state-owned or state-controlled entities may qualify as an "instrumentality" of a foreign government, making the employees of such an entity "foreign officials" for purposes of the FCPA.[57]

The FCPA's anti-bribery provisions cover payments made to any person, while knowing that all or a portion of the payment will be made to a foreign official.[58] A person's state of mind is deemed to be "knowing" with respect to a result if the person is aware "that such result is substantially certain to occur."[59] The knowledge requirement is met with respect to a particular circumstance "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." Payments to an agent or broker therefore can trigger liability if the payment is made "while knowing" that all or part of the payment will be used as a bribe. Actual knowledge need not be proven; liability may be imposed for "willful blindness" or "deliberate ignorance."[60]

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pressrelease/2016-241.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), www.sec.gov/news/pressrelease/2015-170.html.

56. 15 U.S.C. § 78dd-1(f)(1)(A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

57. *See* United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014). In *Esquenazi*, Eleventh Circuit held that an "instrumentality" of a foreign government is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The Court explained that this is a fact-specific inquiry and outlined a number of factors that should be considered, including the extent to which the foreign government owns the entity, controls the entity's staffing, and receives the entity's profits. In affirming convictions based on payments made to officials of a state-owned telecommunications company in Haiti, the Eleventh Circuit's opinion took an expansive view of who may qualify as a "foreign official" and provides the U.S. government with support for its broad interpretation of the FCPA's reach. *See also* United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011); Complaint at 4, SEC v. Veraz Networks, Inc., No. 10-cv-2489 (N.D. Cal. June 29, 2010).

58. 15 U.S.C. § 78dd-1(f)(2).

59. *Id*.

60. *See* Resource Guide, *supra* note 23, at 22 (citing H.R. REP. NO. 100-576, at 920 (1988)). A useful discussion of the knowledge requirement is found in the decision of the district court in United States v. Kozeny, 664 F. Supp. 2d 369 (S.D.N.Y. 2009), denying defendant Frederick

To violate the FCPA, a payment (or offer, promise, or authorization of payment) must be made "corruptly." An act is deemed to have been done "corruptly" if it is done "'voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.'"[61] The Fifth and Second circuits have held that it is not necessary for the government to show that the defendant was aware that his or her actions violated the FCPA specifically; it is sufficient to show that the defendant knew that his or her actions were intended to influence a foreign official to misuse his or her position.[62] The mere fact that a foreign official demands payment is not a defense.

§ 15:2.3 Penalties for Anti-Bribery Provision Violations

Under the FCPA, individuals (including officers, directors, stockholders, and agents of companies) may be fined up to $250,000 or imprisoned up to five years, or both, for each criminal violation of the anti-bribery provisions[63] and may be fined up to $16,000 for

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Bourke's motion for judgment of acquittal following his conviction for conspiracy to violate the FCPA. The court determined that Bourke, who was aware that "corruption was rampant in Azerbaijan" and had "serious concerns" that his co-defendant was engaged in corrupt practices, "was not merely negligent, but was deliberately attempting to shield himself from actual knowledge." *Id.* at 386–89. Among other things, the court cited Bourke's refusal to join the board of the co-defendant's company, instead forming companies "in which he could participate without being held accountable for [the co-defendant's] actions." *Id.* at 389. The court noted that knowledge would not be established, however, if the defendant "merely failed to learn the fact through negligence or . . . actually believed that the transaction was legal." *Id.* at 392. The decision was upheld on appeal. *See* United States v. Kozeny, 667 F.3d 122 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 1794 (2013).

61. United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991); *see also* Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 327 F.3d 173, 183 (2d Cir. 2003) (citing *Liebo*).

62. *See* United States v. Kay, 513 F.3d 461, 466 (5th Cir. 2008) (en banc); *Schreiber*, 327 F.3d at 183; *see also Kozeny*, 664 F. Supp. 2d 369 (S.D.N.Y. 2009), *aff'd*, United States v. Bourke, No. 09-4704-cr (2d Cir. Dec. 14, 2011) (holding that for a conviction based on conspiracy to violate the FCPA, the government must only prove that the defendant "had knowledge of the *object of the conspiracy*, which was to violate the FCPA, not that bribes had, in fact, been paid.") *Id.* at 374. The court noted that a defendant can be convicted of conspiracy even if the object of the conspiracy (for example, the making of corrupt payments in return for some improper advantage) is never fully consummated. *Id.*

63. 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571(b)(3), (e) (fine provision that supersedes FCPA-specific fine provisions).

each civil violation.[64] Companies are subject to criminal fines up to $2 million[65] and/or civil penalties up to $16,000 for each violation.[66]

Under the Alternative Fines Act, where a criminal offense results in pecuniary gain or loss, the court can order a maximum fine of equal to twice the gain or twice the loss.[67] As a practical matter, the potential fines under this "twice the gain or loss" provision can dwarf the statutory penalties set forth in the FCPA itself.[68] Penalties imposed on any officer, director, employee, agent, or stockholder of an issuer or domestic concern may not be paid, directly or indirectly, by the issuer or domestic concern.[69] Companies as well as individuals convicted of FCPA violations can also be debarred from U.S. government contracts and denied U.S. export licenses.

In determining criminal sentences, the U.S. Sentencing Guidelines and DOJ policy take into account a party's voluntary disclosure of potential violations, cooperation in DOJ's investigation, and remediation of any problems.[70] Companies and individuals subject to FCPA

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64. 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).
65. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78dd-3(e)(1)(A), 78ff(c)(1)(A).
66. 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).
67. 18 U.S.C. § 3571(d).
68. Numerous companies have received criminal penalties of hundreds of millions for violations of the FCPA. *See, e.g.*, Siemens (2008) (criminal fine of $450 million to DOJ, among other sanctions, totaling over a billion dollars); Alstom (2014) (criminal fine of $772 million to DOJ); KBR (2009) (criminal fine of $402 million to DOJ, plus other sanctions); Teva Pharmaceuticals (2014) (criminal fine of $283 million, plus $236 million in disgorgement to the SEC).
69. 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3); 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).
70. *See* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL ch. 8 (Nov. 2015), www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/CHAPTER_8.pdf; U.S. Dep't of Justice, Crim. Div., Fraud Sec., FCPA Corporate Enforcement Policy, USAM 9-47.120, www.justice.gov/criminal-fraud/file/838416/download. Indeed, in certain cases, DOJ may decline to prosecute altogether. For example, DOJ declined to prosecute Morgan Stanley for violation of the FCPA despite a conviction against a managing director of the firm, Garth Peterson, for "conspiring to evade internal accounting controls that Morgan Stanley was required to maintain under the [FCPA]." Press Release No. 12-534, U.S. Dep't of Justice, Former Morgan Stanley Managing Director Pleased Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), www.justice.gov/opa/pr/2012/April/12-crm-534.html. DOJ's decision was

investigations also will typically experience a wide range of financial and reputational costs, even before any penalties are imposed.[71]

§ 15:2.4 Exceptions and Defenses

The FCPA makes no distinction between payments to senior foreign officials and payments to rank-and-file foreign government employees. Still, not all payments to foreign officials are illegal. A "facilitating" or "expediting" payment to an official for the performance of a "routine governmental action" is not prohibited.[72] To take advantage of this exception, the governmental action must be something "ordinarily and commonly performed," such as obtaining permits or licenses necessary to qualify a person to do business; processing papers such as visas or work orders; providing police protection or mail pickup and delivery; scheduling inspections associated with contract performance or transit of goods; providing phone service, power and water supply; loading and unloading cargo; or "actions of a similar nature."[73] The statute makes clear that the term "routine governmental action" does not include any decision whether, or on what terms, to award a contract or continue business with a contractor.[74] Although the FCPA does not specify a maximum value for facilitating payments, in practice only modest payments are likely to receive protection.

The FCPA includes an "affirmative defense" for gifts or payments that are legal under the *written* laws or regulations of the foreign official's country.[75] For example, an affirmative defense would be available for lawful campaign contributions or gifts (such as working, low-cost lunches or commemorative baseball caps or T-shirts). The "written law" affirmative defense has been read narrowly. In *United States v. Kozeny*, the court refused to charge the jury that the defendant's action may have been lawful under Azerbaijan's criminal code, which provides that "[a] person who has given a bribe shall be *free*

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informed by Morgan Stanley's voluntary disclosure, cooperation, and maintenance of a "system of internal controls, which provided reasonable assurances that its employees were not bribing government officials. . . ." *Id*.

71. Some companies have incurred many hundreds of millions of dollars costs related to FCPA investigations and compliance reviews. *See, e.g.*, WAL-MART, ANNUAL REPORT (Form 10-Q) (Dec. 2014); WAL-MART, ANNUAL REPORT (Form 10-K) (Mar. 21, 2014).
72. 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b).
73. *Id.* § 78dd-1(f)(3)(A).
74. *Id.* § 78dd-1(f)(3)(B).
75. *Id.* §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1).

from criminal responsibility" if the bribe was extorted or was voluntarily reported.[76] The court observed that, "although a bribe-payer is absolved from criminal responsibility . . . his actions are not deemed lawful under Azeri law."[77] An individual "may be prosecuted under the FCPA for a payment that violates foreign law," the court held, "even if the individual is relieved of criminal responsibility for his actions by a provision of the foreign law."[78] At the same time, the court noted that "true extortion," if proved, would demonstrate that the defendant lacked the necessary corrupt intent required to make out the offense.[79]

The FCPA also provides an affirmative defense for bona fide expenses, such as travel and lodging, incurred on behalf of a government official and "directly related" to promotion or demonstration of services (for example, a factory visit), or the execution or performance of a contract (for example, travel to a job site).[80] Where expenses are not directly related to a legitimate business purpose, companies

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76. *Kozeny*, 664 F. Supp. 2d at 394.
77. *Id*.
78. *Id*. at 395.
79. *Id.*; *cf*. Complaint, SEC v. NATCO Grp., Inc., No. 4:10-CV-98 (S.D. Tex. Jan. 11, 2010), Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21c of the Securities Exchange Act of 1934, *In re* Natco Grp. Inc., Exchange Act Release No. 61,325 (Jan. 11, 2010), www.sec.gov/litigation/admin/2010/34-61325.pdf. In this enforcement action, the SEC charged NATCO with a "books-and-records" violation in connection with cash payments to Kazakh immigration prosecutors made by the Kazakhstan branch office of NATCO's wholly owned subsidiary, TEST Automation & Controls, Inc. (TEST). The books-and-records count is notable because it acknowledges that cash payments made to the immigration official were "extorted," thus suggesting that extortion, even if a defense to bribery charges, is not a defense to books-and-records charges if the payments are not accurately recorded. In this regard, it bears noting that the SEC also charged NATCO with an "internal controls" violation relating to cash payments that TEST paid to an "immigration consultant" to assist him in obtaining worker visas. NATCO settled the SEC's allegations by paying a $65,000 monetary fine.
80. 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2); *see also* DOJ, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 04-04 (Sept. 3, 2004) (permitting payment of expenses for a nine-day "study tour" by five foreign government officials to develop a practical understanding of how mutual insurance companies are managed and regulated), http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0404.pdf; DOJ, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 07-01 (July 24, 2007) (permitting payment of domestic expenses for foreign government delegation for a four-day educational and promotional tour at U.S. sites), www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf.

can get in trouble. For example, in 2007 the SEC brought an FCPA enforcement action against Ingersoll-Rand Company, alleging an Ingersoll-Rand subsidiary had treated eight Iraqi government officials to a two-day holiday in Florence, complete with $1,000 each in "pocket money," following a two-day visit to the company's manufacturing facilities in Italy.[81] While noting that the factory tour had "a legitimate business purpose," the SEC complaint concluded that the side trip to Florence "did not."[82]

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81. *See* Press Release, Sec. & Exch. Comm'n, SEC Files Settled Books and Records and Internal Controls Charges Against Ingersoll-Rand Company Ltd. for Improper Payments to Iraq Under the U.N. Oil for Food Program—Company Agrees to Pay Over $4.2 Million and to Make Certain Undertakings Regarding its Foreign Corrupt Practices Act Compliance Program (Oct. 31, 2017).

82. Complaint ¶ 39, SEC v. Ingersoll-Rand Co., No. 1:07-cv-01955 (D.D.C. 2007), http://www.sec.gov/litigation/complaints/2007/comp20353.pdf. As illustrated in another case, leisure trips disguised as official business can result in substantial penalties. According to DOJ, Lucent Technologies, Inc. (Lucent) spent millions of dollars on more than 300 trips by Chinese government officials from at least 2000 to 2003, including some sixty-five pre-sale trips, at least a fifth of which were predominantly sightseeing ventures. Other sightseeing visits with little or no business content to locations in the United States, Europe, and elsewhere were post-sale trips. Lucent typically characterized these trips as "factory inspections" or "training," despite the fact that Lucent had outsourced most of its manufacturing by 2001 and no longer had any factories to tour. In a deferred prosecution agreement with the DOJ, Lucent admitted to this conduct, as well as the improper recording of expenses associated with the trips in its corporate books and records. Lucent agreed to pay a fine of $1 million and to implement a compliance code, among other remedies. In a settlement agreement with the SEC, Lucent also agreed to pay an additional $1.5 million civil penalty without admitting or denying the allegations in the SEC's complaint. Press Release, U.S. Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), www.justice.gov/opa/pr/2007/December/07_crm_1028.html; Press Release, SEC, SEC Files Settled Action Against Lucent Technologies Inc. in Connection with Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty (Dec. 21, 2007), www.sec.gov/litigation/litreleases/2007/lr20414.htm. As illustrated in another case, leisure trips disguised as official business can result in substantial penalties. According to DOJ, Lucent Technologies, Inc. (Lucent) spent millions of dollars on more than 300 trips by Chinese government officials from at least 2000 to 2003, including some sixty-five pre-sale trips, at least a fifth of which were predominantly sightseeing ventures. Other sightseeing visits with little or no business content to locations in the United States, Europe, and elsewhere were post-sale trips. Lucent typically characterized these trips as "factory inspections" or "training," despite the fact that Lucent had outsourced most of its manufacturing by 2001 and no longer

DOJ Advisory Opinions explain that, under certain circumstances, training programs and internships may be covered by the defense.[83] However, in recent years, the DOJ and SEC have brought FCPA enforcement actions against companies for improperly giving jobs and internships to relatives and friends of foreign officials.[84]

§ 15:2.5 Accounting Violations

Although the anti-bribery provisions of the FCPA may get the most attention, many enforcement actions are for civil violations of the statute's books-and-records and internal controls provisions ("accounting provisions"). Often, these cases are easier to prove. They do not require a showing of mens rea or materiality. The SEC need only prove a violation under a civil "preponderance of the evidence" standard rather a criminal "beyond a reasonable doubt" standard.

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had any factories to tour. In a deferred prosecution agreement with the DOJ, Lucent admitted to this conduct, as well as the improper recording of expenses associated with the trips in its corporate books and records. Lucent agreed to pay a fine of $1 million and to implement a compliance code, among other remedies. In a settlement agreement with the SEC, Lucent also agreed to pay an additional $1.5 million civil penalty without admitting or denying the allegations in the SEC's complaint. Press Release, U.S. Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), www.justice.gov/opa/pr/2007/December/07_crm_1028.html; Press Release, SEC, SEC Files Settled Action Against Lucent Technologies Inc. in Connection with Payments of Chinese Officials' Travel and Entertainment Expenses; Company Agrees to Pay $1.5 Million Civil Penalty (Dec. 21, 2007), www.sec.gov/litigation/litreleases/2007/lr20414.htm.

83. *See* DOJ, Foreign Corrupt Practices Act Review, Review Procedure Release No. 92-01 (Feb. 1992) (permitting payment of expenses for foreign government officials and employees to attend seminars, symposia, and workshops attended by other industry personnel), http://www.justice.gov/criminal/fraud/fcpa/review/1992/r9201.pdf; DOJ, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 07-02 (Sept. 11, 2007) (permitting payment of domestic expenses for a trip by approximately six foreign government officials for a six-week-long internship program), www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf.

84. *See* Press Release, Sec. & Exch. Comm'n, JPMorgan Chase Paying $264 Million to Settle FCPA Charges (Nov. 17, 2016), www.sec.gov/news/pressrelease/2016-241.html (JPMorgan agreed to pay $130 million to the SEC, $72 million to DOJ, and $61.9 million to the Federal Reserve Board of Governors for a total of more than $264 million in sanctions resulting from the firm's referral hiring practices); Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), www.sec.gov/news/pressrelease/2015-170.html (Bank of New York Mellon agrees to pay SEC $14.8 million to settle charges relating to internships provided to family members of officials at a Middle Eastern sovereign wealth fund to secure future business).

The SEC also can rely on an administrative proceeding to bring such cases, and avoid having to file a civil complaint in U.S. District Court.

While an issuer that makes an "off-the-books" payment to a sales agent may or may not have done so "knowing" that the payment would be used to bribe a foreign government official, the failure to record the payment properly is itself a violation of the FCPA.[85] The SEC has charged recording a bribe as a "facilitating" payment as a violation of the books-and-records provision when the SEC disagreed with the characterization of the payment.[86] It is not surprising, therefore, that many foreign bribery-related cases are settled in the civil enforcement context under the accounting provisions of the FCPA.[87] Indeed, some enforcement actions under the books-and-records provisions of the FCPA do not even involve acts of foreign bribery.

Section 13b2(A) of the Exchange Act, which was added by the FCPA,[88] gives the SEC wide-ranging enforcement authority over the record-keeping procedures of publicly held companies, including foreign companies whose shares are publicly traded in the United States. It requires these companies to keep books and records that "in reasonable detail, accurately and fairly reflect the transactions and

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85. Under 15 U.S.C. § 78m(b)(4), no criminal liability can be imposed for books-and-records violations unless a person "knowingly" circumvents or falsifies books and records. Although negligent or inadvertent errors will not trigger criminal liability, a "knowing" falsification does not require knowledge that the act is illegal, only that the defendant knowingly falsified the record. "*The knowledge required is that the defendant be aware that he is committing the act which is false—not that he know that his conduct is illegal*." United States v. Reyes, 577 F.3d 1069, 1081 (9th Cir. 2009) (quoting S. REP. NO. 95-114, at 9 (1977)).

86. Complaint at 6, SEC v. Noble Corp., No. 4:10-cv-4336 (S.D. Tex. Nov. 4, 2010), www.sec.gov/litigation/complaints/2010/comp21728.pdf.

87. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Files Settled FCPA Charges Against AON Corporation (Dec. 20, 2011), http://www.sec.gov/litigation/litreleases/2011/lr22203.htm; Press Release, Sec. & Exch. Comm'n, SEC Settles Case against Chiquita Brands International, Inc. (Oct. 3, 2001), www.sec.gov/litigation/litreleases/lr17169.htm; Press Release, Sec. & Exch. Comm'n, SEC v. Montedison, SpA (Mar. 30, 2001), www.sec.gov/litigation/litreleases/lr16948.htm; Press Release, Sec. & Exch. Comm'n, SEC Settles Case against Chiquita Brands International, Inc. (Oct. 3, 2001), www.sec.gov/litigation/litreleases/lr17169.htm; Press Release, Sec. & Exch. Comm'n, SEC v. Montedison, SpA (Mar. 30, 2001), www.sec.gov/litigation/litreleases/lr16948.htm; Press Release, SEC, SEC v. Triton Energy Corp. (June 26, 1997), www.sec.gov/litigation/litreleases/lr15266.txt.

88. 15 U.S.C. § 78m(b)(2).

dispositions of the [companies'] assets."[89] Exchange Act Rule 13b2-1,[90] moreover, prohibits any person from directly or indirectly falsifying or causing the falsification of any books, records or accounts subject to section 13b2(A). In effect, these provisions require issuers to keep honest books and records.

Under section 13b2(B), issuers also must devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, transactions are executed in accordance with management's general or specific authorization and are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles (GAAP). Further, Rule 13b2-2[91] prohibits directors or officers of companies from making false representations or omissions to accountants in connection with financial statements filed with the SEC, the audit of those statements and any other work by an accountant that culminates in the filing of a document with the SEC.

For violations of the accounting provisions, the SEC may obtain a civil penalty not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violations or (ii) a specified dollar limitation, which is based on the egregiousness of the violation, and ranges from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company.[92]

The SEC has stated that, in considering FCPA penalties, it will give great weight to whether the violator discovered the illegal activity through its internal controls, investigated the violations, and then voluntarily reported the violations to the SEC staff. For example, in *SEC v. Dow Chemical Co.*, the SEC agreed to a comparatively modest civil penalty and an administrative cease-and-desist order to settle FCPA books-and-records and internal controls charges relating to improper payments allegedly made by a fifth-tier subsidiary of Dow doing business in India. In approving the settlement agreement, the SEC credited Dow's discovery and internal investigation of the allegedly improper payments to Indian officials, Dow's voluntary disclosure of these payments, Dow's remedial actions (including employee disciplinary action and employee training programs), and Dow's cooperation with the SEC.[93]

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89. *Id*. § 78m(b)(2)(A).
90. 17 C.F.R. § 240.13b2-1.
91. *Id*. § 240.13b2-2.
92. 15 U.S.C. § 78u(d)(3); *see also* 17 C.F.R. § 201.1004 (providing adjustments for inflation).
93. Press Release, Sec. & Exch. Comm'n, SEC Files Settled Enforcement Action Against the Dow Chemical Company for Foreign Corrupt Practices Act Violations (Feb. 13, 2007), www.sec.gov/litigation/litreleases/2007/lr20000.htm; Order Instituting Cease-and-Desist Proceedings, Making

On occasion, books-and-records violations have been prosecuted criminally. For example, in 2008, Siemens AG pleaded guilty to criminal violations of the books-and-records and internal controls provisions of the FCPA arising out of some $1.36 billion in mischaracterized and improperly recorded payments to third parties. Among other things, Siemens was cited for a series of knowing violations, including:

- allowing third-party payments in contravention of Siemens policies that required authorization by two managers;
- continued use of off-books accounts for corrupt payments after the compliance risks were raised at the highest level of management;
- failure to establish a "sufficiently empowered and competent" compliance officer;
- failure to report to the audit committee serious allegations of corrupt payments;

Findings and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities and Exchange Act of 1934 (No. 3-12567), *In re* Dow Chem. Co. (Feb. 13, 2007), http://www.sec.gov/litigation/admin/2007/34-55281.pdf. The resolution of the DOJ and SEC actions against Archer Daniels Midland in late 2013 provide a reminder of how the agencies value voluntary disclosure and cooperation. In its press release announcing a non-prosecution agreement, the DOJ acknowledged "ADM's timely, voluntary and thorough disclosure . . . ; ADM's extensive cooperation . . . ; and ADM's early and extensive remedial efforts"; Press Release, U.S. Dep't of Justice, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), www.justice.gov/opa/pr/2013/December/13-crm-1356.html. The resolution of the DOJ and SEC actions against Archer Daniels Midland in late 2013 provide a reminder of how the agencies value voluntary disclosure and cooperation. In its press release announcing a non-prosecution agreement, the DOJ acknowledged "ADM's timely, voluntary and thorough disclosure . . .; ADM's extensive cooperation . . . ; and ADM's early and extensive remedial efforts"; Press Release, U.S. Dep't of Justice, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), www.justice.gov/opa/pr/2013/December/13-crm-1356.html. While ADM's settlements included more than $54 million in criminal and civil sanctions, the agencies did not impose a compliance monitor. Instead, the company agreed to the significantly less invasive requirement of submitting annual reports for three years "regarding remediation and implementation of the compliance program and internal controls" described in the non-prosecution agreement. *See* Letter from Jeffrey Knox, Chief, Fraud Sec., Crim. Div., DOJ to Counsel to Archer Daniels Midland Company (Dec. 20, 2013), www.justice.gov/criminal/fraud/fcpa/cases/archer-daniels-midland/adm-npa.pdf.

- failure to exercise due diligence to prevent and detect criminal conduct;
- failure to investigate and respond to allegations of corrupt payments;
- failure to discipline employees involved in making corrupt payments;
- vesting substantial authority with individuals whom Siemens knew had engaged in illegal and other improper conduct;
- failure to take reasonable steps to ensure that its compliance and ethics program was followed (including monitoring and internal audits);
- failure to have and publicize a system whereby employees—and agents—could report or seek guidance regarding potential or actual criminal conduct without fear of retaliation; and
- failure to provide appropriate incentives for performance in accordance with compliance and ethics programs.[94]

DOJ has brought criminal FCPA accounting provision charges against individuals as well as companies.[95]

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94. Criminal Information at 37–38, United States v. Siemens Aktiengesellschaft, No. 08-cr-367 (D.D.C. Dec. 12, 2008), www.justice.gov/opa/documents/siemens-ag-info.pdf; *see* Press Release, U.S. Dep't 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), https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

95. Garth Peterson, a former Morgan Stanley managing director, pleaded guilty to a one-count information charging conspiracy to circumvent internal controls in violation of 18 U.S.C. § 371. As a result, Peterson was sentenced to nine months' imprisonment, followed by three years of supervised release. Judgment, United States v. Peterson, No. CR12-224 (E.D.N.Y. Aug. 28, 2012). The DOJ brought a criminal books-and-records cases against Diebold, Inc. after it paid bribes to secure business in China, Indonesia, and Russia and then attempted to disguise its payments by, inter alia, making payments through third parties designated by prospective clients and by inaccurately recording leisure trips for prospective customers as "training." *See* Press Release, U.S. Dep't of Justice, Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $25.2 Million Criminal Penalty (Oct. 22, 2013), www.justice.gov/opa/pr/2013/October/13-crm-1118.html. In United States v. Scharf, No. 84-CR-76 (N.D. Ohio 1984), *reprinted in* 2 F.C.P.A. Rep. (Business Laws, Inc.) 696.72 (2003), a violation of Rule 13b2-2 resulted in a criminal conviction. There, the former president and CEO of the issuer was sentenced to three years in prison for, among other things,

Willful violations of the FCPA accounting provisions can result in large penalties. For each violation, individuals are subject to a fine of up to $5 million and imprisonment for up to twenty years.[96] Companies are subject to a fine of up to $25 million per violation.[97] And under the Alternative Fines Act, courts may impose fines of up to twice the benefit that the defendant obtained from the corrupt activity.[98]

The *Siemens* case, noted earlier, involved a $450 million criminal fine for knowing violations of the books-and-records and internal controls provisions of the FCPA involving thousands of transactions, as well as a $350 million disgorgement penalty to the SEC on bribery, books and records, and internal controls charges. Together with fines paid to German authorities, the total penalties reached $1.6 billion. The charges included hundreds of millions of dollars in improperly recorded and controlled payments to third parties for commercial bribery and embezzlement, underscoring the reach of the FCPA's books-and-records and internal controls provisions, which do not require a showing that a foreign government official was bribed, only that internal controls were inadequate or that records were improperly maintained.[99]

§ 15:2.6 The Resource Guide

As discussed above, the Resource Guide published by DOJ and the SEC in 2012 is a useful primer on the FCPA. It synthesizes the legislative, judicial, and agency interpretations of the FCPA, while also providing practical advice for compliance. Of particular use to practitioners may be the examples offered to illustrate how DOJ and the SEC would treat certain fact patterns, including hypothetical

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falsely certifying to outside auditors that company management knew of no illegal payments or practices. *See* Deferred Prosecution Agreement between Schnitzer Steel Industries, Inc. and DOJ, Criminal Division, Fraud Section (June 29, 2007), www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-16-06schnitzer-agree.pdf; Information, United States v. SSI Int'l Far E. Ltd., No. 06-CR-398 (D. Or. 2007), www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/10-10-06ssi-information.pdf.

96. 15 U.S.C. § 78ff(a).

97. *Id*. § 78ff(a).

98. 18 U.S.C. § 3571(d).

99. Press Release, SEC, SEC Files Settled Foreign Corrupt Practices Charges Against Siemens AG for Engaging in Worldwide Bribery with Total Disgorgement and Criminal Fines of Over $1.6 Billion (Dec. 15, 2008), www.sec.gov/litigation/litreleases/2008/lr20829.htm.

situations involving jurisdiction; gifts, travel, and entertainment; facilitating payments; successor liability; and third-party vetting.[100]

Also valuable are the Guide's lists of various best practices and risk factors. For example, the Guide offers the following "non-exhaustive list of safeguards" for ensuring that an expenditure on behalf of a foreign official can be justified as a reasonable and bona fide business expense:

- Do not select the particular officials who will participate in the [inviting] party's proposed trip or program or else select them based on pre-determined, merit-based criteria.
- Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.
- Do not advance funds or pay for reimbursements in cash.
- Ensure that any stipends are reasonable approximations of [reasonable] costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable.
- Ensure the expenditures are transparent, both within the company and to the foreign government.
- Do not condition payment of expenses on any action by the foreign official.
- Obtain written confirmation that payment of the expenses is not contrary to local law.
- Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred.
- Ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in the company's books and records.[101]

According to the Guide, common red flags associated with third parties include:

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100. *See* Resource Guide, *supra* note 23, at 12, 17–18, 26, 31–33, 63–65. For example, the DOJ and SEC explain that they are unlikely to find an FCPA violation where a company invites a dozen current and prospective customers for drinks at a trade show and picks up the "modest" tab, noting that there is nothing in the activity to suggest corrupt intent. (But the agencies reach a contrary answer when a company's largesse includes first-class travel for officials and their spouses to Las Vegas (where the company has no facilities), arguing that the conduct "evinces a corrupt intent.") *Id.* at 17–18.

101. Resource Guide, *supra* note 23, at 24 (citations omitted).

- excessive commissions to third-party agents or consultants;
- unreasonably large discounts to third-party distributors;
- third-party "consulting agreements" that include only vaguely described services;
- the third-party consultant is in a different line of business than that for which it has been engaged;
- the third party is related to or closely associated with the foreign official;
- 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.[102]

The Resource Guide further provides valuable insight into the standards DOJ and the SEC will use when assessing the adequacy of a company's compliance program. Simple "check-the-box" programs will not suffice. Because DOJ and the SEC consider the commitment of corporate leaders to a "culture of compliance," business organizations must give compliance leadership responsibilities to senior management, such as the board of directors and senior executives, when designing and implementing their compliance programs. Unless senior management "has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization," DOJ and the SEC are likely to find that a company's compliance program is inadequate.[103]

The Resource Guide identifies the following "hallmarks" of an effective compliance program:

- commitment from senior management;
- code of conduct and clearly articulated compliance policies and procedures;
- oversight, autonomy, and resources;

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102. *See* Resource Guide, *supra* note 23, at 22–23. Red flags do not necessarily equate to illegality, but the failure to take action in the face of red flags can be regarded as tacit authorization of illegal activity when and if corrupt payments are made. Therefore, red flags merit follow-up and, in many cases, protective measures.

103. *Id*. at 57; *see also* chapter 7, *supra* (discussing corporate compliance programs and senior management's role in those programs).

- risk assessment;
- training and continuing advice;
- incentives and disciplinary measures;
- third-party due diligence and payments;
- confidential reporting and internal investigation;
- continuous improvement: periodic resting and review;
- pre-acquisition due diligence and post-acquisition integration in mergers and acquisition.[104]

Although the Resource Guide is non-binding, it is fair to assume that companies following the Resource Guide's recommendations are more likely to receive lenient treatment from DOJ and the SEC—and that companies disregarding the guidance do so at their own peril.

§ 15:3 International Cooperation and Anti-Corruption Enforcement

In recent years, the commitment to combating bribery and corruption has been spreading across the globe. Enforcement in the United States, the United Kingdom, Germany, and, increasingly, Brazil has been more robust than in other countries of late, but with an increase in cooperation between the United States and foreign governments, and an expanding number of countries pursuing domestic prosecution of corruption, international anti-bribery enforcement is on the

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104. Resource Guide, *supra* note 23, at 57–62. The Organizational Sentencing Guidelines of the U.S. Sentencing Commission also address an Effective Compliance and Ethics Program. *See* U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 8B2.1 (Nov. 2015). Indeed, non-prosecution agreements and deferred-prosecution agreements regularly call for the company to maintain an enhanced corporate compliance program. *See, e.g.*, Deferred Prosecution Agreement at C-6, United States v. Bizjet Int'l Sales & Support, Inc., No. 12CR 61 CVE (N.D. Okla. Mar. 14, 2012), www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/03/22/2012-03-14-bizjet-deferred-prosecution-agreement.pdf; Deferred Prosecution Agreement at C-6, United States v. Data Sys. & Sols. LLC, No. 1:12-CR-262 (E.D. Va. June 8, 2012), www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/06/25/2012-06-18-data-systems-dpa.pdf; Deferred Prosecution Agreement, United States v. Marubeni Corp., No. 4:12CR-00022 (S.D. Tex. Jan. 17, 2012), www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf. For an in-depth discussion of the Organizational Sentencing Guidelines' Effective Compliance and Ethics Program, see chapter 7, *supra*.

rise.[105] Therefore, multinational companies today must consider not only the anti-corruption laws of the country in which they are based, but also the laws of the various countries in which they do business.

§ 15:3.1 International Conventions on Bribery

On November 21, 1997, the member nations of the Organisation for Economic Co-operation and Development (OECD) and five non-member nations (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic) adopted a "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (OECD Convention).[106] The OECD Convention required each signatory to enact "effective measures" to deter, combat, and prevent its citizens from bribing foreign public officials for business advantage.[107] As of

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105. In Canada, for example, since 2011, authorities have negotiated the country's second and third ever guilty pleas under the Corruption of Foreign Public Officials Act (CFPOA), with combined fines of nearly C$20 million. *See* Daryl Slade, *Griffiths Energy Fined $10.35-Million in Bribery Case*, CALGARY HERALD (Jan. 25, 2013), www.calgaryherald.com/business/Griffiths+Energy+fined+million+bribery+case+Calgary+says+company+blew+whistle+themselves/7873431/story.html. *See* Samuel Rubenfeld, *Niko Resources Is First to Get RCMP Anti-Bribery Plea Deal*, WALL ST. J. (June 24, 2011), http://blogs.wsj.com/corruption-currents/2011/06/24/niko-resources-is-first-to-get-rcmp-anti-bribery-plea-deal/.

    In 2013, Canada had its first trial and conviction under the CFPOA, which also marked the first prosecution of an individual for violations of the law. *See* Greg McArthur, *Canadian Executive Convicted in Indian Bribery Conspiracy*, GLOBE & MAIL (Aug. 15, 2013), www.theglobeandmail.com/news/national/executive-convicted-in-indian-bribery-conspiracy/article13804839/.

    Also in 2013, the Canadian Parliament amended the CFPOA to add a books-and-records offense, increase maximum sentences for individuals, and extend the reach of the CFPOA to conduct taking place wholly outside of Canada's territorial jurisdiction, so long as the person is a citizen, permanent resident, or an entity formed or organized under the laws of Canada. *See* Fighting Foreign Corruption Act, S.C. 2013, c. 26 (Can.), http://laws-lois.justice.gc.ca/PDF/2013_26.pdf.

106. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Dec. 17, 1997) [hereinafter OECD Convention], www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

107. *Id*. In 2009, the OECD adopted two additional anti-bribery measures, the "Recommendation for Further Combating Bribery of Foreign Public Officials" and the "2009 Recommendation on the Non-Tax Deductibility of Bribes." With the passage of these measures, and by combining them with the OECD Convention, OECD effectively established a three-part anti-bribery framework that calls on the thirty-eight state parties to the Convention to adopt further measures to combat bribery.

September 2019, forty-four OECD signatories had enacted enabling legislation prohibiting foreign bribery.[108]

In December 2003, delegates from ninety-five countries executed the United Nations Convention Against Corruption (UNCAC), the first comprehensive global anti-corruption treaty.[109] The UNCAC shares many provisions with the FCPA and OECD Convention. Among other things, the UNCAC obligates the signatory nations to prohibit the bribery of foreign public officials and to cooperate in criminal investigations. The UNCAC also requires each signatory nation to "consider adopting legislative and other measures"

The Recommendation for Further Combating Bribery calls on the thirty-eight state parties to the OECD Convention to, among other things: (i) ensure that companies cannot avoid sanctions by using agents or intermediaries; (ii) periodically review policies and approach on small facilitation payments; (iii) improve inter-country cooperation on bribery investigations and seizures and recoveries of proceeds related to transnational bribery; (iv) provide effective channels for reporting bribery, and protections for whistleblowers; and (v) work more closely with the private sector to develop more stringent internal controls and ethics and compliance programs. The OECD Good Practice Guidance accompanying the recommendation also states that article 1 of the OECD Convention should be implemented in such a way that it does not provide a defense or exception where the foreign public official solicits a bribe and that, regarding article 5 of the Convention, "[m]ember countries should be vigilant in ensuring that investigations and prosecutions of the bribery of foreign public officials in international business transactions are not influenced by considerations of national economic interest, [or] the potential effect upon relations with another State. . . ." *See* Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 26, 2009), www.oecd.org/daf/anti-bribery/44176910.pdf.

Among other things, the non-tax deductibility measure recommends that OECD members and signatories to the OECD Convention: (i) explicitly, by law or binding effect, disallow the tax deductibility of bribes to foreign public officials for all tax purposes; (ii) conduct ongoing review of the effectiveness of legal, administrative and policy frameworks and practices for disallowing tax deductibility of bribes to foreign officials; and (iii) consider including in bilateral tax treaties language from the OECD's Model Tax Convention that would allow for the sharing of tax information with other law enforcement authorities. *See* Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (May 25, 2009), www.oecd.org/tax/crime/2009-recommendation.pdf.

108. *See* OECD Convention. In May 2014, Latvia became the forty-first signatory to the OECD Convention. OECD Convention Ratification Status as of 21 May 2014, www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf.

109. *See United Nations Convention Against Corruption*, UNODC, www.unodc.org/unodc/en/treaties/CAC/ (last visited May 11, 2017).

that would make it a criminal offense for a public official to solicit or accept a bribe. Similarly, the convention encourages, but does not require, signatory states to criminalize, among other offenses, embezzlement, as well as bribery in the private sector to help eradicate corruption in commercial transactions. The United States ratified the UNCAC on October 30, 2006; as of June 2018, 140 countries and the European Community had signed the agreement.[110] Since the FCPA and other U.S. laws already incorporate all mandatory provisions of the UNCAC (subject to the declarations and reservations approved by the U.S. Senate upon ratification), no amendments to U.S. law are anticipated as a result of the convention.

§ 15:3.2 The U.K. Bribery Act of 2010 and U.K. Enforcement

The United Kingdom's Bribery Act 2010[111] makes it an offense for an individual or a commercial entity to give or receive a bribe; to offer, promise, request, or agree to receive a bribe (whether the bribe is made or not); or to bribe a foreign public official.[112] Unlike the FCPA, the Bribery Act applies to commercial bribery and to the direct or indirect *receipt* of a bribe.[113] The Bribery Act also includes the corporate offense of "failure of commercial organisations to prevent bribery,"[114] imputing liability to a commercial organization if a person "associated with" the organization bribes another person—provided that the intent of the bribe is to obtain or retain business for the

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110. *See* U.N. Office on Drugs & Crime, *United Nations Convention Against Corruption Signature and Ratification Status as of 26 June 2018*, www.unodc.org/unodc/en/corruption/ratification-status.html (last visited Sept. 6, 2019).

111. The Bribery Act, ch. 23, enacted in April 2010, went into effect July 1, 2011. *See* www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

112. *Id*. §§ 1–6, 11. Penalties under the act are set forth in section 11 and include for individuals a fine of £5,000 and/or imprisonment of up to ten years. Interpretation Act, 1978, c. 5, subch. 1 (Eng); *see also* Magistrate Reform Act, 1980, c. 43, § 32 (Eng.). In addition to these penalties, there is the potential for the confiscation of property under the Proceeds of Crime Act, 2002, c. 29 (Eng.), disqualification of directors under the Company Directors Disqualification Act, 1986, c. 46 (Eng.), and blacklisting for U.K. or EU contractors under applicable procurement rules.

113. Bribery Act, ch. 23, §§ 1–2. Although receipt of a bribe by a foreign official is not a defined offense, a foreign official could presumably be prosecuted for receipt of a bribe if other jurisdictional elements of the offense of "being bribed" were met (for example, if the bribe was received in England).

114. *Id*. § 7.

organization, or to obtain or retain an advantage in the conduct of the organization's business.[115]

Under the Bribery Act, an offense is committed if "any act or omission which forms part of the offence takes place in" England, Wales, Scotland, or Northern Ireland.[116] The Bribery Act also provides that persons having a "close connection with the United Kingdom"[117] (for example, U.K. citizens or persons "ordinarily resident" in the United Kingdom, and U.K. corporations)[118] commit an offense if the offense would be illegal if done or made in the United Kingdom, regardless of where the offense occurred.[119] Transparency International, noting the long extra-territorial reach of the Bribery Act, has said that the Bribery Act allows "almost no hiding place for companies which for some misguided reason decide to pay bribes."[120] If a commercial entity commits a bribery offense, senior officers with a "close connection" to the United Kingdom may be prosecuted if they "consent[ed] or conniv[ed]" in the commission of the offense.[121] Senior officers include directors, secretaries, managers, partners, or an individual purporting to act in that capacity.[122]

The Bribery Act's "failure to prevent bribery" provision reaches not only U.K. corporations, but also "any other body corporate (*wherever incorporated*) which carries on a business, or part of a business, in any part of the United Kingdom."[123] This provision extends the extra-territorial jurisdictional reach of the Bribery Act to U.S. and other companies that do business in the United Kingdom, even though they are organized elsewhere. The Bribery Act contains an affirmative

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115. *Id*. § 7(1). Any person who "performs services for or on behalf of" the organization is deemed a person "associated with" the organization, thus extending the company's Bribery Act exposure to the acts of its agents. *Id*. § 8.
116. *Id.* § 12(1).
117. *Id*. § 12(2)(c).
118. *Id*. § 12(4).
119. *Id*. § 12.
120. PETER WILKINSON, TRANSPARENCY INTERNATIONAL UK, THE 2010 UK BRIBERY ACT ADEQUATE PROCEDURES: GUIDANCE ON GOOD PRACTICE PROCEDURES FOR CORPORATE ANTI-BRIBERY PROGRAMMES (July 2010); *see Adequate Procedures Guidance*, TRANSPARENCY INT'L UK, www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures-guidance/ (last visited May 11, 2017).
121. Bribery Act, ch. 23, § 14(2); *see also* § 12(4), defining "close connection with the United Kingdom," inter alia, a British citizen; a body incorporated under the law of any part of the United Kingdom; an individual ordinarily resident in the United Kingdom.
122. *Id*. § 14(4).
123. *Id*. § 7(5)(b) (emphasis added).

defense to prosecution for failure to prevent bribery: proof that the organization "had in place adequate procedures designed to prevent persons associated with [the organization] from undertaking such conduct."[124] On March 30, 2011, the U.K. Ministry of Justice (MOJ) published comprehensive final 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)."[125]

The request for or agreement to receive a bribe must be made in connection with the performance of a "relevant function or activity."[126] The term "relevant function or activity" is defined as a public function or business activity, any activity performed in the course of a person's employment, or any activity performed by or on behalf of a body of persons, provided that the person performing the function or activity is expected to perform it in good faith, impartially, or is in a position of trust by virtue of performing it.[127] The person who requests or agrees to receive the bribe may or may not be the person carrying out the relevant function or activity and it "does not matter" whether the solicitor or the intended recipient of the bribe knows or believes that the performance of the relevant activity at issue is or would be improper.[128] The act itself is the offense.

The Bribery Act's prohibition on offering or promising to bribe another person describes a bribe as a "financial or other advantage" intended to induce or reward a person for *improper* performance of a "relevant function."[129] Therefore, the offer or promise of a bribe offense requires proof that the offeror intended the bribe to induce the recipient to perform a "relevant function" improperly, or to reward the recipient for improper performance.[130] Under either theory (bribing another or agreeing to receive the bribe), whether the relevant function or activity has any connection with the United Kingdom or is performed outside the United Kingdom is irrelevant if the jurisdictional requirements of the Bribery Act are otherwise satisfied.[131]

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124. *Id.* § 7(2).
125. Ministry of Justice, The Bribery Act 2010—Guidance (Mar. 2011), www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.
126. Bribery Act, ch. 23, § 2(2)–(5).
127. *Id.* § 3(3)–(5).
128. *Id.* § 2(7)–(8).
129. *Id.* § 1(2)(a), (b)(i). A "relevant function" is any function of a public nature, any activity connected with a business, any activity performed in the course of the person's employment, and any activity performed by or on behalf of a body of persons ("whether corporate or unincorporate[d]"). *Id.* § 3(2)(a)–(d).
130. *Id.* § 1(2)(b).
131. *Id.* § 3(6).

The offenses of bribing a foreign public official and failure to prevent bribery require proof that the bribe was made, offered, or promised with the intent of obtaining or retaining business, or obtaining or retaining "an advantage in the conduct of business."[132] For bribery of a foreign official, the government must also show that the intent of the bribe is to influence the official in his or her official capacity, which includes any omission to act.[133] The Bribery Act's definition of "foreign public official" reaches only persons who "hold[ ] a legislative, administrative or judicial position of any kind, whether appointed or elected," or exercise a public function (including service for "any public agency or public enterprise") outside the United Kingdom.[134] Unlike the FCPA, the Bribery Act definition of foreign public official does not extend to candidates for public office or political party officials, but the commercial bribery provisions of the Bribery Act could be used to pursue those that could not otherwise be pursued under the bribery of a foreign public official provision.

In 2015, the Serious Fraud Office brought three actions involving the corporate offense of failing to prevent bribery by associated persons. One of these actions, against Standard Bank, resulted in the United Kingdom's first deferred prosecution agreement.[135] In January 2017, U.K.-based engineering company Rolls Royce plc agreed to a nearly $800 million global settlement to resolve U.K., U.S., and Brazilian investigations into a three decade, worldwide scheme to bribe government officials in exchange for government contracts.[136] Rolls Royce agreed to pay more than $600 million to the United Kingdom, $170 million to the United States, and more than $25 million to Brazil, making this the United Kingdom's most significant criminal enforcement action against a company.[137] Rolls Royce also entered into deferred prosecution agreements with U.S. and U.K. authorities; the U.K. DPA relates to conduct in seven countries: Indonesia, Thailand, India, Russia, Nigeria, China, and Malaysia.

In July 2019, one of the four individuals charged as part of the SFO's corruption investigation into Unaoil, a Monaco-based oil and gas company, pleaded guilty to five counts of conspiracy to pay bribes

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132. *Id*. § 6(2).
133. *Id*. § 6(1).
134. *Id*. § 6(5).
135. SFO, Case Information, Standard Bank, PLC, www.sfo.gov.uk/cases/standard-bank-plc/.
136. Press Release, U.S. Dep't of Justice, Rolls Royce plc Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case (Jan. 17, 2017).
137. *Id*.; *see* Press Release, SFO, SFO completes £497.25m Deferred Prosecution Agreement with Rolls Royce PLC (Jan. 17, 2017).

in connection with contract awards in Iraq.[138] The guilty plea came after the SFO announced in June 2019 that it was dropping its investigation into a trio of former Unaoil executives accused of paying multimillion-pound bribes for contracts in the energy industry.[139] The three remaining individuals charged in the investigation are scheduled to face trial beginning in January 2020.

In February 2019, the ability of U.K. enforcement authorities to access and use information from overseas sources received a boost when the Crime (Overseas Production Orders) Bill received Royal Assent to become law.[140] This legislation will allow law enforcement agencies to accelerate the process by which they can obtain disclosure of electronic data stored outside the United Kingdom for use in U.K. criminal and regulatory investigations. However, before the law can be enforced, the U.K. Secretary of State must ratify corresponding international cooperation arrangements with foreign governments, and as of publication, no such agreements have been concluded.

§ 15:3.3 Brazilian Anti-Corruption Laws and Enforcement

Brazil's newest anti-corruption law, known as the Clean Company Act (*Lei Anti-Corrupção*) (the "Act"), enacted in August 2013 and effective since January 2014, allows for the imposition of civil and administrative (not criminal) liability on companies, foundations, or associations registered or operating in Brazil that, through employees or agents, pay bribes to foreign or domestic public officials, commit fraud in connection with public procurement, or obstruct a government investigation.[141] Unlike the U.K. Bribery Act, and like the FCPA, the Clean Company Act does not apply to bribe recipients or to commercial bribery.[142]

The Act applies not only to Brazilian companies, but, like the U.K. Bribery Act, to foreign companies operating in Brazil through

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138. News Release, SFO, Former Unaoil Executive Pleads Guilty to Conspiracy to Give Corrupt Payments (July 19, 2019), www.sfo.gov.uk/2019/07/19/former-unaoil-executive-pleads-guilty-to-conspiracy-to-give-corrupt-payments/.
139. David Pegg & Rob Evans, *Serious Fraud Office Faces Questions Over Decision to Drop Bribery Investigation*, THE GUARDIAN (June 30, 2019), www.theguardian.com/uk-news/2019/jun/30/serious-office-faces-questions-over-decision-to-drop-bribery-investigation.
140. U.K. Parliament, News, Royal Assent: Crime (Overseas Production Orders) Bill Signed Into Law (Feb. 12, 2019), www.parliament.uk/business/news/2019/february/royal-assent-crime-overseas-production-orders-bill-signed-into-law/.
141. *See* Law No. 12, 846/13 [Clean Company Act].
142. *Id*.

branches, subsidiaries, or offices.[143] Theoretically, therefore, a multinational corporation operating in both Brazil and the United Kingdom could be subject to sanctions under both countries' laws for conduct that occurred in neither country. Under the Act, companies will be held strictly liable for the illegal bribes of their employees and/or agents.[144] Further, violation of the Act could result in fines up to 20% of the company's gross revenue.[145]

The Act does not define "public official." The law does define "foreign public administration" as any entity directly or indirectly controlled by the public administration of a foreign state as well as any public international organization.[146] This definition provides guidance on what individuals the Brazilian government may consider to be foreign public officials under the law. It is unclear, however, what individuals the Brazilian government may deem to be domestic public officials (e.g., employees of state-owned enterprises).

A number of other Brazilian laws, including Brazil's Administrative Improbity Law,[147] Public Procurement Law,[148] and Criminal Code,[149] also prohibit corruption. While there is no corporate criminal liability for corruption, Brazilian laws allow for the imposition of administrative, civil, and/or criminal penalties on individuals that engage in corruption in Brazil.

Brazil continues to experience political and economic turmoil from a wide-ranging inquiry into corruption at majority state-owned energy company Petroleo Brasileiro S.A. (Petrobras). The Petrobras scandal—often referred to as Operation "Lava Jato" (Operation Car Wash)—has sent numerous corporate executives to prison, resulted in the blacklisting of various companies for state contracts, and implicated high-ranking politicians.

Cooperation between U.S. and Brazilian authorities has resulted in coordinated settlements involving foreign companies implicated in Operation Car Wash. A recent example is Technip's 2019 settlement for $296 million with the Advogado-Geral da União (AGU), the Controladoria-Geral da União (CGU) and the Ministério Público Federal (MPF) in Brazil, along with the U.S. DOJ.[150] Another example

143. *Id*. art. 1.
144. *Id*. art. 2.
145. *Id*. art. 6.
146. *Id.* arts. 5(1)–(3).
147. *See* Law No. 8,429/92.
148. *See* Law No. 8,666/93.
149. *See, e.g.*, Legislative Decree No. 2,848/40.
150. Press Release, U.S. Dep't of Justice, TechnipFMC Plc and U.S.-Based Subsidiary Agree to Pay Over $296 Million in Global Penalties to Resolve Foreign Bribery Case (June 25, 2019).

is Keppel Offshore & Marine Ltd.'s 2017 settlement for $422 million with the MPF in Brazil, the U.S. DOJ, and Singaporean authorities.[151]

Although not coordinated with its settlement of corruption charges in the United States or the Netherlands, SBM Offshore N.V. (SBM) concluded two agreements providing for a total payment of $347 million to Brazilian authorities and Petrobras in order to resolve allegations that the Dutch oil and gas services provider paid bribes to secure contracts with Brazil's state-owned oil company. Specifically, SBM entered into a leniency agreement with the AGU, CGU, and Petrobras in July 2018, and an additional agreement with the MPF in September 2018 to resolve corruption-related charges under the Clean Company Act, Public Procurement Law, and Improbity Law.[152] Brazilian companies, too, have faced enforcement actions at home and abroad. For example, on December 21, 2016, Brazil-based construction company Odebrecht S.A. and its petrochemical unit, Braskem S.A., agreed to a global settlement with Brazilian, U.S., and Swiss authorities to resolve charges relating to the bribery of government officials around the world.[153] Odebrecht admitted to engaging in a massive bribery and bid-rigging scheme for more than a decade, during which time it paid approximately $788 million in bribes to government officials to win business in a number of countries. Odebrecht agreed to pay $2.391 billion to Brazilian authorities, $116 million to Swiss authorities, $93 million to U.S. authorities (an amount which would have been higher but for Odebrecht's inability to pay the full fine that the DOJ and Odebrecht agreed should apply).[154]

In a case unrelated to Operation Car Wash, on October 24, 2016, Brazilian aircraft manufacturer Embraer S.A. agreed to pay Brazilian authorities $20 million in disgorgement, and to cooperate with

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151. Press Release, U.S. Dep't of Justice, Keppel Offshore & Marine Ltd. and U.S.-Based Subsidiary Agree to Pay $422 Million in Global Penalties to Resolve Foreign Bribery Case (Dec. 22, 2017).

152. SBM Offshore N.V., concluded two agreements in July 2018 and September 2018 to pay a total of $347 million to Brazilian authorities and Petrobras in order to resolve allegations that the Dutch oil and gas services provider paid bribes to secure contracts with Brazil's state-owned oil company. Press Release, SBM Offshore, Leniency Agreement Signed Between SBM Offshore, Brazilian Authorities and Petrobras (July 26, 2018); Press Release, SBM Offshore, Agreement Signed Between SBM Offshore and Brazilian Public Prosecutor (Sept. 1, 2018).

153. Press Release No. 16-1515, U.S. Dep't of Justice, Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve.

154. Judgment, United States v. Odebrecht S.A., 16-cr-643 (E.D.N.Y. Apr. 17, 2017).

Brazilian authorities in ongoing criminal investigations of individuals, in connection with improper payments to government officials in the Dominican Republic, Saudi Arabia, and Mozambique between 2008 and 2010.[155] Embraer also agreed to pay more than $205 million to settle related DOJ and SEC enforcement actions, and entered into a three-year deferred prosecution agreement with DOJ to resolve the matter.[156] As part of its investigation, Brazilian authorities have charged eleven Brazilians for their alleged roles in Embraer's misconduct in the Dominican Republic.[157] Saudi Arabian authorities have charged two Saudi individuals for their alleged roles in Embraer's misconduct in Saudi Arabia.[158]

155. *See* Press Release, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges; *see also* Press Release, Ministério Público Federal, Corrupção Internacional: MPF e CVM fecham acordo com Embraer (Oct. 24, 2016), www.mpf.mp.br/rj/sala-de-imprensa/noticias-rj/corrupcao-internacional-mpf-e-cvm-fecham-acordo-com-embraer.

156. *See* Press Release, U.S. Dep't of Justice, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016), www.justice.gov/opa/pr/embraer-agrees-pay-more-107-million-resolve-foreign-corrupt-practices-act-charges.

157. *Id*.

158. *Id*.