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The Oil Industry and Africa: The Expanding Reach of the Foreign Corrupt Practices Act

Stuart H. Deming

Abstract

As a statute designed to deter improper inducements to foreign officials in connection with business activities, the enforcement of the Foreign Corrupt Practices Act (FCPA) has over time dramatically increased in its reach. This article examines the reach of the FCPA into Africa with special reference to corrupt practices in the oil industry. Owing to the combined enforcement activities of the US Department of Justice and the Securities and Exchange Commission, it concludes by arguing that the FCPA's impact and potency in the developing world will continue to grow.

KEYWORDS: oil, Africa, corruption, Foreign Corrupt Practices Act, public officials

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I. INTRODUCTION

The FCPA is a statute designed to deter improper inducements to foreign officials in connection with business activities.[1] Initially enacted in 1977, and amended in 1988 and 1998,[2] the FCPA plays a major role in legal jurisprudence of the United States. The FCPA's influence; however, extends all over the world as well. On a daily basis, it bears directly on the foreign and domestic operations of publicly-held entities. It also directly affects business practices of individuals and entities in international settings. Increasingly, and in often unexpected ways, it impacts on litigation and arbitral proceedings.

As the enforcement of the Foreign Corrupt Practices Act (FCPA) has expanded at an increasing rate, corrupt conduct on the part of individuals and entities seeking to do business in Africa and, in particular, the oil industry has been subject to much greater enforcement activity. In a number of ways, the U.S. Department of Justice (Justice Department) and Securities and Exchange Commission (SEC) have broadened the reach of the FCPA to address corrupt conduct often perceived as being beyond its jurisdiction. In so doing, the potency of the FCPA, and its impact, continue to grow.

II. DISCUSSION

A. The Basic Contours of the FCPA

Through the FCPA, the U.S. Congress sought to deter foreign corrupt practices and, specifically, the offer or payment of anything of value to foreign officials in connection with business activities, through two principal mechanisms: the anti-bribery provisions and the accounting and record-keeping provisions. The two sets of provisions conceptually differ from one another; the former is proscriptive in orientation and the latter is largely prescriptive. Their scope and application also differ.

The anti-bribery provisions constitute a general prohibition on payments to foreign officials. This prohibition applies to U.S. nationals, including entities

[1]Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m, 78dd-1 to -3, 78ff (2009)) [hereinafter FCPA].

[2]The amendments in 1988 and 1998 related principally to the anti-bribery provisions. The accounting and record-keeping provisions have been subject to amendment at various times over the years. The most noteworthy of those amendments are associated with legislation commonly referred to as "Sarbanes-Oxley." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204.

organized under U.S. law or whose principal place of business is in the United States,[3] certain foreign entities that enter U.S. capital markets and, in one category of circumstances, almost anyone. The second mechanism imposes requirements on the accounting and record-keeping practices of the domestic and foreign operations of issuers, which are typically publicly-held entities.

Although the purpose and language of the FCPA appears to be straightforward in nature, the statute is much more nuanced than is generally recognized. Its scope and means of application can be complex and may lead to dramatically unexpected results. The same set of facts in one setting may also lead to an entirely different result in another setting. Also, the same set of facts may constitute a violation of one part of the FCPA and may, at the same time, not be a violation of another part of the FCPA.

In sum, essential to any analysis of a situation that may involve an FCPA violation is the consideration of whether the anti-bribery provisions or the accounting and record-keeping provisions, or both, may be involved. Each set of provisions must be considered separately, yet neither set of provisions should be considered alone. They were intended to work in tandem and thereby complement one another.

B. The FCPA and Africa

Over the years, the FCPA has been consistently applied with respect to Africa and other regions of the world. Enforcement has not focused on a particular region or country. Nor has there been a policy to disregard a certain part of the world. To the degree that any pattern may exist, it is, in large part, quite by coincidence. From a geographical perspective, the pattern of enforcement relates to conduct associated with undeveloped and emerging economies. This is particularly so where valuable access to valuable natural recourses or large markets are involved.

Africa and, in particular, Nigeria, with its large population and large oil reserves, fit this profile. In the past, FCPA enforcement efforts have not corresponded with the level of corruption that is generally viewed as being endemic to parts of Africa and especially the oil industry in Nigeria. The apparent inaction is; however, undergoing tremendous change with respect to Africa in terms of enforcement of the FCPA. A number of factors are responsible for this change.

[3]As used throughout, the term "entity" is meant to apply to any form of juridical person or entity. A juridical person or entity is an organization created by law to have a separate identity and an ability to function on its own.

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1. The FCPA's history of enforcement

Enforcement of the FCPA is divided between the Justice Department and the SEC. The Justice Department is responsible for investigating and prosecuting all criminal charges that are brought against an individual or entity for violations of the FCPA. The SEC's civil enforcement authority is limited to issuers as well as individuals, such as officers, directors, employees, agents, stockholders of issuers, and anyone acting on behalf of issuers. All other civil enforcement action of the FCPA is left to the Justice Department. This includes taking civil enforcement action for violations of the anti-bribery provisions.

Historically, the Justice Department's focus has been almost entirely devoted to taking criminal enforcement action but, on occasion, it has resorted to resolving matters in a civil context.[4] Although relatively few cases have been brought by the Justice Department under the anti-bribery provisions, a far greater number of cases are always under active investigation. The Justice Department's enforcement of the anti-bribery provisions has also not waned over time. Regardless of which political party was in power, enforcement of the FCPA has remained remarkably consistent and has steadily grown since the adoption of the FCPA. In recent years, enforcement activity has increased dramatically.

Unlike the Justice Department, the SEC enforcement of the anti-bribery provisions of the FCPA waned for many years after an initial period of enforcement activity. In contexts unrelated to foreign bribery, the accounting and record-keeping provisions were actively enforced by the SEC throughout the period in which there was a lull in enforcement of the anti-bribery provisions. That lull came to an end in the latter part of the 1990s when the SEC began to actively enforce the anti-bribery provisions of the FCPA.

Since that time, the SEC's enforcement of the anti-bribery provisions has steadily grown. The SEC has even recently established a special unit focusing specifically on enforcement of the FCPA. The implications of the enforcement efforts of the SEC cannot be overstated. Even though it cannot bring criminal cases, the SEC holds extraordinary power over the operations of publically-held companies. Relying, in large part, on enforcing the FCPA's accounting and record-keeping provisions, the SEC has an almost unique ability to enforce the anti-bribery mandate of the FCPA.

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[4] *E.g., United States v. Metcalf & Eddy, Inc*., No. 99CV12566NG, Consent and Undertaking (D. Mass. Dec. 14, 1999), *reprinted in* 5 FCPA REP. 699.749 (2d ed. 2009); *United States v. American Totalisator Co. Inc*. (D. Md. 1993); *United States v. Dornier GmbH* (D. Minn., filed Jan. 12, 1990), *reprinted in* 3 FCPA REP. 697.74; *United States v. Carver* (S.D. Fla., Apr. 9, 1979), *reprinted in* 2 FCPA REP. 645.

2. Increased reliance on the accounting and record-keeping provisions

The FCPA's accounting and record-keeping provisions provide an effective mechanism for overcoming many of the limitations of the anti-bribery provisions. This has the practical effect of expanding the application of the anti-bribery provisions. Unlike the anti-bribery provisions, they apply directly to foreign subsidiaries. Proving a violation of the accounting and record-keeping provisions is much more straight-forward and likely to succeed. Additionally, in a civil context, no proof of intent is required.

In many situations, a number of elements of a violation of the anti-bribery provisions may require evidence from abroad. If the legal system in the foreign setting is deficient, this difficulty is complicated by the question of whether evidence obtained in a foreign setting will be admissible in a U.S. court. However, in the context of prosecuting a violation of the record-keeping provisions, the evidence is more likely to be documentary in nature and to be in the possession or control of an issuer. A publically-held company is subject to compulsion by U.S. enforcement authorities to produce records, including foreign records, in its custody or control.

3. Increased focus on various forms of vicarious liability

One of the most overlooked aspects of compliance with the FCPA relates to the conduct of third parties. Most violations of the anti-bribery provisions are indirect in nature and take place through intermediaries such as agents, consultants, and representatives. Alternatively, others may be accomplices by their actions as facilitators. Enforcement efforts have increasingly focused on holding entities liable for the conduct of those individuals or entities acting on their behalf. These efforts are, in turn, leading to heightened vigilance on the part of entities to oversee and monitor the conduct of those acting on their behalf.

4. Increased use of deferred-prosecution and non-prosecution agreements

As opposed to risking debarment associated with a conviction as well as other collateral consequences, the use by the Justice Department and, more recently, the SEC, of deferred-prosecution and non-prosecution agreements is increasingly having an impact in facilitating enforcement. As a result, entities have been more inclined to resolve matters, to implement extensive compliance programs, and to be subject to a compliance monitor. By agreeing to these measures, the impact of the FCPA is extended over a greater period and to a broader range of individuals and entities. The breadth of enforcement has thereby been enhanced, especially in the developing world.

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5. Increased international cooperation

A series of international anti-bribery conventions began to be adopted in the latter part of the 1990s. The adoption and implementation of these conventions has given greater impetus to addressing issues associated with the supply side of corruption. Though difficult to quantify, they have led to increased cooperation that bears directly on increased enforcement activity. Over time, the conventions' impact will continue to grow with broader implementation and increased enforcement in much of the world.

C. The Anti-Bribery Provisions

The anti-bribery provisions, in general, prohibit the making or authorizing of any promise, offer, or payment of anything of value if the offeror "knows" that any portion will be offered, given, or promised to a foreign official, a foreign political party or party official, or a foreign political candidate for the purpose of influencing a governmental decision. The jurisdiction of the anti-bribery provisions is broad. They apply to what are known as (1) "issuers," (2) "domestic concerns," and (3) anyone within the territory of the United States causing an act in furtherance of an improper inducement of a foreign public official.

1. Issuers

An issuer is an entity that is required under the Securities Exchange Act to register under Section 12 or to file reports under Section 15(d).[5] In general, publicly-held entities traded on a national exchange in the United States are issuers. Issuers can include foreign entities, including a foreign entity with American Depository Receipts (ADRs), which are registered pursuant to Section 12 or required to file reports pursuant to Section 15(d).
ADRs represent an ownership interest in the securities of a foreign private issuer, which are deposited,[6] usually outside of the United States, with a financial institution as a depository.[7]

[5]15 U.S.C. §§ 781, 780(d) (2009).
[6]"ADRs represent an ownership interest in the securities of a foreign private issuer that are deposited, usually outside of the United States, with a financial institution as the depository." Stuart H. Deming, *The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act,* 96 J. CRIM. L. & CRIMINOLOGY 465, 473 (2006).
ADRs are negotiable certificates issued by a U.S. bank or trust company. Mark Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign*

Yet the scope of entities that may be considered issuers is actually much broader:

- Entities, whether foreign or domestic, with securities listed on a national securities exchange in the United States.[8] These entities include the National Association of Securities Dealers Automated Quotation System (NASDAQ).[9] This can also include foreign entities with ADRs listed on a national securities exchange.[10]
- Unless otherwise exempt, entities, whether foreign or domestic, that are issuers of securities with $10 million or more in assets at the end of their most recent fiscal year

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Companies, 17 FORDHAM INT'L L.J. 48, 49 (1993). Unless an exemption is available, ADRs must be registered under the Securities Act before they may be publicly distributed within the United States. 15 U.S. § 77(b)(1). "[T]he public offering of ADRs is no different than the public offering of ordinary shares in many respects, from a legal point of view." Frode Jensen, III, *The Attractions of the U.S. Securities Markets to Foreign Issuers and the Alternative Methods of Accessing the U.S. Markets: From a Legal Perspective,* 17 FORDHAM INT'L L.J. S25, S29 (1994). The legislative history of U.S. securities laws reflects an intent to treat foreign private issuers the same as domestic issuers. Saunders, *supra*, at 59 (citing R. Adee, *Offerings by Foreign Private Issuers,* in SECURITIES UNDERWRITING-PRACTITIONER'S GUIDE 413, 428 (K. Bialkin et al. eds. PLI 1985)). "[T]he more voluntary steps a foreign company has taken to enter U.S. capital markets, the degree of regulation and amount of disclosure more closely approaches the regulation of domestic registrants." *Id.* at 60 (quoting Integrated Disclosure System for Foreign Private Issuers, Securities Act Release No. 6360 [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,054, at 84,651 (Dec. 2, 1981)).

Id., at 473 n.50.

[7]"ADRs may be either sponsored or unsponsored." *Pinker v. Roche Holdings Ltd*., 292 F.3d 361,368 (3d Cit. 2002).

> An unsponsored ADR is established with little or no involvement of the issuer of the underlying security. A sponsored ADR, in contrast, is established with the active participation of the issuer of the underlying security. [B. Hertz, *American Depository Receipts,* 600 P.L.I./COMM. 237,] 239 [(1992).] An issuer who sponsors an ADR enters into an agreement with the depositary bank and the ADR owners. *Id*. at 243. The agreement establishes the terms of the ADRs and the rights and obligations of the parties, such as the ADR holders' voting rights. *Id.*

Id. "ADRs that are traded on American securities exchanges must abide by the Exchange Act's periodic reporting requirements." *Id.* (citing B. Hertz, *supra*, at 288-89). "ADRs that are not traded on exchanges . . . are not subject to the Exchange Act's reporting requirements, but under SEC Rule 12g3-2(b) the issuer must furnish such annual reports, shareholder communications, and other materials that are required to be prepared pursuant to regulations in its home country." *Id.* (citing B. Hertz, *supra*, at 289-90 (citing C.F.R. § 240.12g3-2(b)).

[8]15 U.S.C. § 78l(b) (2009).

[9]SEC Release No. 34-54240 (July 31, 2006), available at <http://www.sec.gov/rules/other/2006/34-54240.pdf>.

[10]*Pinker*, 292 F.3d at 368 (citing B. Hertz, *supra* note 3, at 242, 246)

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with any class of securities held of record by 500 or more persons worldwide, including 300 or more in the United States.[11]

- For the fiscal year in which the registration statement for a class of securities under the Securities Act of 1933 becomes effective or is required to be updated,[12] entities with a class of securities held of record by more than 300 persons.[13]
- Banks and savings associations that issue securities and that are insured in accordance with the Federal Deposit Insurance Act.[14]

An individual's or entity's status as an officer, director, employee, or agent of an issuer or a stockholder of an issuer may subject the individual or entity to the anti-bribery provisions if they act on behalf of the issuer.[15] However, when the use of U.S. territory is not involved in furtherance of a prohibited inducement, foreign entities, including foreign subsidiaries of an issuer, are not subject to the anti-bribery provisions.[16] It does not matter whether the foreign affiliate or subsidiary is wholly or partially owned by an issuer.[17] It is only when

[11]"When read in conjunction with Exchange Act Rules 12g-1 (17 CFR 240.12g-1) and 12g3-2(a)(17 CFR 240.12g3-2(a)), Exchange Act Section 12(g) requires an issuer to file an Exchange Act registration statement regarding a class of securities within 120 days of the last day of its fiscal year if, on that date, the number of its record holders is 500 or greater, the number of its U.S. resident holders is 300 or more, and the issuer's total assets exceed $10 million." SEC Release No. 34-58465, at 4 n.11 (Sept. 5, 2008), available at <http://www.sec.gov/rules/final/2008/34-58465.pdf>. In some circumstances, an exemption from this registration requirement may be available to a foreign private issuer, 15 U.S.C. § 78(g)(3) (2009); 17 C.F.R. § 240.12g3-2(b) (2009).

[12]15 U.S.C. § 780(d) (2009); 17 C.F.R. § 240.12h-3(c) (2009).

[13]*Id.,* § 780(d) (2009); 17 C.F.R. § 240.12h-3(a) (2009).

[14]15 U.S.C. § 78l(i) (2009). The civil enforcement jurisdiction relative to the accounting and record keeping provisions is delegated to the respective U.S. banking regulators with jurisdiction over the particular bank or savings association. *Id.* Criminal enforcement jurisdiction remains unchanged and resides with the Justice Department.

[15]15 U.S.C. § 78dd-1(a) (2009).

[16]*C.F. Dooley v. United Technologies Corp.,* 803 F. Supp. 428, 439 (D.D.C. 1992).

[17]15 U.S.C. § 78dd-1(a) (2009). This concept can be conceptually confusing especially when a foreign subsidiary or affiliate is a wholly-owned subsidiary of an issuer or domestic concern. But, as a practical matter, in many situations it may not make a difference. As an accomplice or co-conspirator to a violation by the parent, a foreign subsidiary or affiliate can expose itself to liability. Under agency principles, if the parent has sufficient knowledge, the parent can be held vicariously liable for the conduct of its foreign subsidiary or affiliate for violations of the anti-bribery provisions when the subsidiary or affiliate acts on its behalf. The legislative history makes

the foreign affiliate or subsidiary is acting as an accomplice of an issuer that the foreign affiliate or subsidiary may become subject to the anti-bribery provisions.

2. Domestic concerns

The anti-bribery provisions extend to domestic concerns.[18] A domestic concern can be either an individual or an entity.[19] Any individual who is a "citizen, national, or resident of the United States" is a domestic concern.[20] A national of the United States is a U.S. citizen or a person who owes permanent allegiance to the United States.[21] Individuals who are nationals of the United States are subject to the terms of the anti-bribery provisions. At the very least, a permanent resident alien of the United States is a domestic concern. A basis may also exist for an alien to be considered a domestic concern if he or she resides in the United States and does not have status as a permanent resident alien.[22]

Any juridical entity organized under the law of a state of the United States or a territory, possession, or commonwealth of the United States is a domestic concern.[23] Juridical entities include corporations, partnerships, associations, joint-stock companies, business trusts, unincorporated organizations, sole proprietorships, and, in essence, any other type of entity that may be established under the laws of a state, territory, possession, or commonwealth of the United States.[24] By itself, mere status as a nonprofit organization does not exempt an

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clear that an entity subject to the anti-bribery provisions that engages in bribery of foreign officials "indirectly through any other person or entity" would itself be liable under the Act. H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 919, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1949.

[18]15 U.S.C. § 78dd-2(a)(1) (2009).

[19]*Id.,* § 78dd-2(h)(1).

[20]*Id.,* § 78dd-2(a)(1).

[21]8 U.S.C. § 1101(a)(22) (2009).

[22]Under the Immigration and Nationality Act, the term "residence" means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." *Id.,* § 1101(a)(22). Domicile is distinguished from residence in that an individual may have more than one residence but only one domicile. *Gambelli v. United States*, 904 F. Supp 494, 496 (E.D. Va. 1995) (citing Comm'r of Internal *Revenue v. Nubar*, 185 F.2d 584, 587 (4th Cir. 1950)). As a result, an argument could be made that a domestic concern includes an illegal alien residing in the United States, a foreign student studying in the United States, or an alien residing in the United States on some sort of a temporary visa.

[23]15 U.S.C. § 78dd-2(h)(1)(B) (2009). While the precise language of the statute refers specifically to "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship." *id.,* it should be presumed that the language is not intended to be limited to the juridical entities described. Rather, as suggested by the use of the terms "unincorporated organization," it is intended to include any form of entity that may be created by law.

[24]*Id.*

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organization from being subject to the anti-bribery provisions. Under the anti-bribery provisions, no legal basis exists for distinguishing between a traditional commercial enterprise and one that may have been established as a nonprofit organization.[25]

Any juridical entity with its principal place of business in the United States is also a domestic concern.[26] This means that, regardless of where the entity was organized, under what laws the entity was organized, or what might be commonly referred to as the "nationality" of the entity, it still may be a domestic concern under the terms of the anti-bribery provisions if its principal place of business is in the United States.[27] An officer, director, employee or agent of a domestic concern may be subject to the anti-bribery provisions if they act on behalf of the domestic concern.[28]

The anti-bribery provisions also apply to domestic concerns employed or retained by foreign entities and foreign subsidiaries not subject to the anti-bribery provisions.[29] An individual's or entity's status as a domestic concern does not

[25]In a recent opinion procedure release, the Justice Department explicitly found a nonprofit organization to be a "domestic concern" subject to the terms of the FCPA's anti-bribery provisions. FCPA Opinion Procedure Release No. 10-02 (June 16, 2010). In another opinion release, a nonprofit organization that provides anti-corruption assistance to entities doing business abroad sought an opinion permitting it to pay for the travel and expenses of foreign media to attend its press conference. FCPA Opinion Procedure Release No. 08-03 (July 11, 2008). In its opinion, the Justice Department explicitly found that the organization was a "domestic concern" subject to the terms of the anti-bribery provisions and eligible to seek an opinion under the terms of the opinion procedure. *See also* FCPA Review Procedure Release No. 96-01 (Nov. 25, 1996).

[26]15 U.S.C. § 78dd-2(h)(1)(B) (2009).

[27]This particular provision of the FCPA has yet to be directly addressed by the courts. Case authority in a criminal context may not be of much assistance in providing guidance. However, in a civil context, the courts have looked to a range of factors in determining an entity's principle place of business. *See e.g., Determination of Corporation's Principal Place of Business for Purposes of Diversity Jurisdiction Under 28 U.S.C.A. 1331(c),* 6 A.L.R. FED. 436 (2009) ("nerve center"; "center of corporate activity"; "locus of operations"; "substantial predominance of corporate operations"; "where the principal day-to-day business operations and activities of the corporation are formulated and carried out"). *See also Grimandi v. Beech Aircraft Corp*., 512 F. Supp 764, 776 (D.C. Kan. 1981) (principal place of business of the subsidiary is the location of the parent when the latter acts as the alter ego of the subsidiary); *Steinbock-Sinclair v. Amoco Intern. Oil Co*., 401 F. Supp. 19, 24 (D.C. Ill 1975) ("paramount consideration is where principal day-to-day business operations and activities are formulated and carried out" after a review of entity's total activities are taken into consideration, including such "factors as character of the entity, its purposes, the kind of business in which it is engaged, and the situs of its operations" after "comparison of character, importance scope of activities" where the entity operates).

[28]*Id.* For example, a foreign national not otherwise subject to the anti-bribery provisions of the FCPA becomes subject to its terms by becoming an employee of a domestic concern, even if that employment takes place in a foreign country.

[29]H.R. CONF. REP. NO. 831, *supra* note 17, at 14.

change with location or with business or employment relationships. The domestic concern, whether an individual or entity, is still barred from engaging in the conduct prohibited by the anti-bribery provisions.

3. Essential elements

The basic elements of the anti-bribery provisions are designed to preclude any means of circumventing their terms.[30] Enforcement officials have applied the FCPA in an expansive manner to address conduct that may not normally be perceived as being within the jurisdiction of U.S. authorities. This will have increasing significance for investigations that may relate to questionable conduct in Africa. Conduct that may have previously been perceived as being beyond the scope of the anti-bribery provisions will be subject to enforcement activity.

a. Individual or entity subject to the anti-bribery provisions

The individual or entity must fall under one or more of the categories of individuals or entities subject to the terms of the anti-bribery provisions of the FCPA.

(1) United States person

Based solely on an individual's or entity's status as a United States person, no further proof is required to establish jurisdiction.[31] It does not matter whether use of the mails or any means or instrumentality of interstate commerce is involved.[32] To be a United States person, an individual must be a U.S. citizen or national and an entity must be organized under the laws of the United States, which includes the laws of any state, territory, possession, commonwealth, or any subdivision of each.[33]

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[30]*See United States v. Kay*, 513 F.3d 432, 439-40, 443 (5th Cir. 2007) (*Kay III)* The number of elements varies depending upon the manner in which the statute is broken into separate parts. *See Stichting Ter Behartiging Van de Velangen Van Ouddaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 179-80 (2d Cir. 2003) (six elements identified for a violation); *United States v. Jefferson*, 594 F. Supp. 2d 655, 667-68 (E.D. Va. 2009) (citing *Stichting* for six elements). *See also United States v. Mead*, Cr. No. 98-240-01, Jury Charge, at 3-4, available at <http://www.justice.gov/criminal/fraud/fcpa/append/ix/appendixc.pdf>.

[31]15 U.S.C. §§ 78dd-1(g), -2(i) (2009).

[32]*Id.,* §§ 78dd-1(g)(1), -2(i)(1).

[33]*Id.,* §§ 78dd-1(g)(2), -2(i)(2); 8 U.S.C. § 1101(a)(22) (2009). A national of the United States is either a citizen of the United States or a person who owes permanent allegiance to the United States or an entity organized under the laws of the United States, any state, territory, possession, or

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(2) Foreign issuer or domestic concern using the mails or means or instrumentality of interstate commerce

Where it is established that an entity is an issuer or the individual or entity is a domestic concern, and the issuer or domestic concern is not a United States person, it must also be established that the use of the mails or any means or instrumentality of interstate commerce was used in furtherance of the improper inducement.[34] For individuals, these requirements apply to residents of the United States. For entities, these requirements apply to a foreign issuer or to a foreign entity that is a domestic concern as a result of the United States being its principal place of business.[35]

Meeting the jurisdictional requirement of the use of the mails or any means or instrumentality of interstate commerce in furtherance of the improper inducement can be easily met. "'Interstate commerce' includes trade, commerce, transportation, or communication among the states of the United States, between any foreign country and any state of the United States, or between any state of the United States and any place or ship outside of state."[36] Interstate commerce can also include "intrastate" use of a facility of a national securities exchange, a telephone or other intrastate means of communication, or other interstate instrumentality.[37]

In other contexts, the courts have broadly construed the requirement that there be a use of the mails or any means or instrumentality of interstate commerce in furtherance of prohibited conduct.[38] The use of the mails, means or

commonwealth of the United States, or any subdivision of any state, territory, possession, or commonwealth of the United States. 8 U.S.C. § 1101(a)(22) (2009). The second category of individuals who are not U.S. citizens and who owe allegiance to the United States is now "apparently limited to residents of American Samoa and Swains Island." *Hashmi v. Mukasey*, 533 F.3d 700, 704 n.1 (8th Cir. 2008) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 n.1, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976); *Miller v. Albright*, 523 U.S. 420, 467 n.2, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (Ginsberg J., dissenting).

[34]Nationality jurisdiction does not extend to an issuer or domestic concern not organized under U.S. law. 15 U.S.C. §§ 78dd-1(g)(1), -2(i)(1) (2009).

[35]Particularly in the latter circumstance, proof of the use of the mails or means or instrumentality of interstate commerce is likely to be supported by substantial evidence.

[36]*Id.* § 78c(17).

[37]*Id.*

[38]*Cf., e.g., Pereira v. United States*, 347 U.S. 1, 9, 74 S. Ct. 358, 98 L. Ed. 435 (1954) (citing *United State v. Kenofskey*, 243 U.S. 440, 37 S. Ct. 438, 61 L. Ed. 836 (1917) (Under mail fraud state, "[w] here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."); *United States v. Hammond*, 598 F.2d

instrumentality of interstate commerce can be incidental as opposed to directly in support of furthering the prohibited conduct.[39] If the use of an integral part of interstate commerce is involved, it does not matter whether the use was solely intrastate.[40] In light of the critical role that the various forms of the use of Internet and telecommunications now play in the conduct of international business, it will be a rare situation where the use of a means or instrumentality of interstate commerce cannot be established.[41]

(3) Non-United States person acting on behalf of issuer or domestic concern using the mails or means or instrumentality of interstate commerce

Where it is established that an individual is an officer, director, employee, agent, or stockholder of an issuer or domestic concern, and was acting on behalf of the issuer or domestic concern, it must also be established that the use of the mails or any means or instrumentality of interstate commerce was used in furtherance of the improper inducement. For individuals who are not United States persons and not issuers or domestic concerns, their status of being employed by or acting as an agent for the issuer or a domestic concern subjects them to the anti-bribery

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1008, 1022 (5th Cir), *remanded on reh'g on other grounds,* 650 F.2d 862 (5th Cir. 1979) (under wire fraud statute, no requirement that communication actually furthered the prohibited conduct but rather the defendant need only transmit or cause to transmit an interstate or foreign communication intending that communication will help further the prohibited conduct); *Franklin Sav. Bank of N.Y. v. Levy*, 551 F.2d 521, 524 (2d Cir. 1977) (confirming letter subsequent to questionable conduct sufficient for use of mails in furtherance of prohibited conduct under the Securities Act of 1933).

[39]*See, e.g., United States v. Cashin*, 281 F.2d 669, 657-74 (2d Cir. 1960) (use of mails may be incidental and not central to the prohibited conduct under the Securities Act of 1933).

[40]*See, e.g., Hyzel v. Fields*, 386 F.2d 718, 727-28 (8th Cir. 1967), *cert. denied,* 390 U.S. 951, 88 S. Ct. 1043, 19 L. Ed. 2d 1143 (1968) (intrastate use of integral part of interstate commerce meets requirement for use of interstate commerce under Exchange Act); *Heyman v. Heyman*, 356 F.Supp. 958, 969 (1973) (under the Exchange Act, "[a]ll that is required is that the designated means be used in some phase of the transaction, which need not be the part in which the [prohibited conduct] occurs").

[41]"The Internet is an international network of interconnected computers." *Reno v. ACLU*, 390 U.S. 951, 88 S. Ct. 1043, 19 L. Ed. 2d 1143 (1997). It is comparable to "a sprawling mall offering goods and services." *Id.,* 521 U.S. at 853, 117 S. Ct. 2329, 19 L. Ed. 2d 1143. As both the means to engage in commerce and the method by which transactions occur, "the Internet is an instrumentality and channel of interstate commerce." *United States v. MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006). A computer connected to the Internet is part of "a system that is inexorably intertwined with interstate commerce." *Id. See, e.g., United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009) (use of Internet constitutes use of means or instrumentality of interstate commerce).

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provisions if they use the mails or means or instrumentality of interstate commerce in furtherance of an improper inducement.[42]

(4) Non-United States person doing an act or using the mails or means or instrumentality of interstate commerce while in U.S. territory

Where it is established that an individual or entity, who or which is not a United States person, was in the territory of the United States, it must be established that an act was done in the United States or, alternatively, that the mails or means or instrumentality of interstate commerce were used in furtherance of the improper inducement.[43] These requirements apply to foreign individuals who, and entities which, cause an act in furtherance of an improper inducement while they are within the territory of the United States.[44]

Under the circumstances of being within the territory of the United States, it does not matter whether the person is a domestic concern or an issuer. Nor is there a requirement "that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce."[45] The critical requirement is that the act in furtherance of offering or making the prohibited inducement takes place within the territory of the United States. This requirement may include situations

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[42]In *United States v. Sapsizian*, No. 1:06-CR-20797-PAS-1, Plea Agreement (S.D. Fla., filed June 11, 2007), available at <http://www.justice.gov/criminal/pr-press_releases/2007/06/06-07-07sapsizian-plea-agree.pdf>, a French citizen employed by a French company pled guilty to conspiring to violate the anti-bribery provisions and to violating the anti-bribery provisions for making payments to Costa Rican officials in order to obtain a mobile telephone contract from the state-owned telecommunications authority. Press Release, U.S. Dep't of Justice, Former Alcatel Executive Pleads Guilty to participation in Payment of $2.5 Million in Bribes to Senior Costa Rican Officials to Obtain a Mobile Telephone Contract (June 7, 2007), available at <http://www.justice.gov/criminal/pr/press_releases/2007/06/06-07-07csapsizian-plea.pdf>.
Jurisdiction was established since the French citizen was an employee of an issuer. The French company had ADRs traded on the New York Stock Exchange. The use of wire transfers from the French company's New York bank to the consulting firm served as the conduit for the bribes and established territorial jurisdiction based upon the use of any means or instrumentality of interstate commerce.

[43]15 U.S.C. § 78dd-3(a) (2009).

[44]*Id.,* § 78dd-3(f)(1). In *United States v. SSI International Far East, Ltd*., No. CR 06-398, Information (D. Or. 2006), a wholly-owned Korean subsidiary of a U.S. issuer, Schnitzer Steel Industries, Inc., pled guilty to an information in which it was alleged to have conspired to violate 15 U.S.C. § 78dd-3(a), for acting as Schnitzer Steel's agent in South Korea and China. Press Release, U.S. Dep't of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a $7.5 Million Criminal Fine (Oct. 16, 2006), available at <http://www.justice.gov/criminal/pr/press_releases/2006/10/2006_4809_10-16-06schnitzerfraud.pdf>.

[45]USAM 9 Criminal Resource Manual § 1018 (2009).

when a foreign national or entity not otherwise subject to the anti-bribery provisions causes an act to be done within the territory of the United States.[46]

How broadly the phrase "while in the territory of the United States" will be interpreted has yet to be determined.[47] Historically, what includes the "territory" of the United States has been interpreted broadly.[48] It includes the

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[46]"Although this section has not yet been interpreted by any court, the [Justice] Department interprets it as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent." *Id.*

In *United States v. Hioki,* No. C-08-795, Information (S.D. Tex., filed Dec. 8, 2008), available at 3 FCPA REP. at 31-206 (2d ed. 2009), a Japanese citizen employed by a Japanese company pled guilty to conspiring to violate the anti-bribery provisions of the FCPA. The basis for the charges related to conspiring to violate 15 U.S.C. § 78dd-3(a) through telephone conversations, facsimiles, and e-mails with employees in the United States of the U.S. subsidiary in planning and approving improper inducements being made in Latin America.

In *United States v. Aibel Group Ltd*., No. CR H-07-005 (LNH), Plea Agreement (S.D. Tex., filed Nov. 21, 2008), available at 3 FCPA REP. at 31-191, Aibel Group entered a plea to conspiring to violate and to violating 15 U.S.C. § 78dd-3(a) by authorizing the payment of an invoice by a telephone call from Norway to Houston. As part of the plea agreement, Aibel Group admitted that it was not in compliance with its deferred prosecution agreement relating to the same underlying conduct. *See* discussion of deferred prosecution agreements, *infra* at 79. At the time, other subsidiaries of Aibel Group, Vetco Gray Controls Inc., Vetco Gray Controls Ltd., and Vetco Gray Ltd., entered guilty pleas to violating the anti-bribery provisions.

In *United States v. Siemens Bangladesh Ltd*., Information (D.D.C., filed Dec. 12, 2008), available at <http://justice.gov/opa/documents/siemens-bangladesh-info.pdf>, and in *United States v. Siemens S.A. (Venezuela)*, Information (D.D.C., filed Dec. 12, 2008) available at <http://justice.gov/opa/documents/siemens-venezuela-info.pdf>, each subsidiary of Siemens was charged with conspiring to violate the anti-bribery and record-keeping provisions in violation of 18 U.S.C. § 371, 15 U.S.C. §§78m(b)(2)(A), 78dd-3(a). In each instance, the allegations relative to establishing jurisdiction under 15 U.S.C. § 78dd-3 related to an individual or entity located in the United States being linked to the overall scheme. In addition, the charges included allegations relative to money being directed to or from a bank account in the United States.

[47]Based upon the legislative history, Congress intended that the "territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." *See* Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Commentary) at para. 24. Further, "territory of the United States" should be understood to encompass all areas over which the United States asserts territorial jurisdiction. *See* 18 U.S.C. § 5 ("The term 'United States,' as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."); 18 U.S.C. § 7 (special maritime and territorial jurisdiction of the United States); 49 U.S.C. § 46501(2) (special aircraft jurisdiction of the United States).

[48]Some courts have found that a U.S. military installation in a foreign country or U.S. embassies and consular offices constitute territory of the United States. *United States v. Corey*, 232 F.3d 1166, 1176-77 (9th Cir. 2000); *United States v. Erdos*, 474 F.2d 157, 158-60 (4th Cir. 1973). *Contra, e.g., United States v. Gatlin*, 216 F.3d 207, 216 (2d Cir. 2000).

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territorial boundaries of the 50 states as well as the territorial boundaries of the territories, possessions, and commonwealths of the United States.[49] It also includes the territorial waters of the United States.[50] An individual on the high seas aboard a ship belonging to a U.S. entity or on a flight on a U.S. aircraft may also be considered to be within the territorial jurisdiction of the United States.[51]

With the critical role that facilities of the United States play in international commerce, such as the Internet, banking,[52] and air travel, a broad interpretation of what constitutes "while in the territory of the United States" could have dramatic implications. In other contexts, U.S. courts have tended to interpret jurisdictional requirements of this nature very broadly in order to enable the prosecution of especially egregious conduct. In interpreting the anti-bribery provisions, U.S. courts may take a similar approach in determining what constitutes the territory of the United States.

b. Willfully

While the FCPA does not define "willfully,"[53] an individual or entity charged with a violation of the anti-bribery provisions must act intentionally and not by accident or mistake.[54] A violation of the anti-bribery provisions is a specific-intent crime.[55] To violate the anti-bribery provisions, an individual or entity is not required to know the terms of the anti-bribery provisions and that the terms of the anti-bribery provisions were being violated.[56] Instead, an individual or entity must know that the act was in some way wrong or unlawful.[57]

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[49]18 U.S.C. § 5 (2009).
[50]*Id.*
[51]*See id.,* §§ 7(1) and (5); 49 U.S.C. § 46501(2) (2009).
[52]Some commentators argue that among the jurisdictional allegations in the charges brought against Siemens and Halliburton/KBR, the Justice Department alleged "that U.S. dollar denominated transactions that typically clear through correspondent accounts in U.S. intermediary banks established U.S. jurisdiction over the foreign banks to the transactions." D. Newcomb & P. Urofsky, *FCPA Digest,* at xi (Mar. 2009, Shearman & Sterling LLP), available at <http://www.shearman.com/shearman-&-sterling-publishes-2009-foreign-corrupt-practices-act-(fcpa)-trends-and-patterns-report-and-fcpa-digest/>.
[53]*Kay III,* 513 F.3d at 447.
[54]*Id.*
[55]U.S. Supplemental Response to OECD Phase 1 Questionnaire § 1.1.2, available at <http://www.justice.gov/criminal/fraud/fcpa/intlagree/related/srph1quest.html>.
[56]*Kay III,* 513 F.3d at 448-51; *Schrieber,* 327 F.3d at 181.
[57]*Kay III,* 513 F.3d at 450.

c. Corrupt intent

The anti-bribery provisions differ from most other fraud statutes in the United States in that they require that the intent be corrupt.[58] "Corrupt intent" is defined as "having an improper motive or purpose."[59] The legislative history of the anti-bribery provisions makes clear that, like the domestic bribery statute,[60] the prohibited conduct occurs only when a payment or offer of payment is made to induce the intended beneficiary to, in some way, misuse his or her official position.

"Corruptly" as used in the anti-bribery provisions signifies "a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position."[61] "[A] person acts 'corruptly' if he or she acts with a 'bad purpose'."[62] The thing of value must be given or offered with the intent to influence as opposed to be simply given whether or not the public official carries out his or her official duties.[63]

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[58] *United States v. Kozeny*, 582 F. Supp. 2d 535, 541 (S.D.N.Y. 2008).

[59] *Id.* (citing S. REP. No. 114, 9th Cong., 1st Sess. 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098). S. REP. No. 114 provides:

> The word "corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrong-fully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.

[60] 18 U.S.C. § 201 (2009).

[61] *Schrieber*, 327 F.3d at 183. As explained in *United States v. Liebo,* 923 F. 2d 1308, 1312 (8th Cir. 1991), "[a]n act is 'corruptly' done if 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. The term 'corruptly' is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position." Cf. *Bryan v. United States*, 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998) (approving a similar definition of "willful").

[62] *Schrieber*, 327 F.3d at 182 (citing *United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990)).

[63] *United States v. Strand*, 574 F.2d 993, 996 (9th Cir. 1978) (distinguishing between intent required for bribery as opposed to an illegal gratuity in domestic bribery statute). "Corrupt intent" as used within the context of the anti-bribery provisions derives from the domestic bribery statute. *Stichting,* 327 F.3d at 184. In the domestic context, "corrupt intent" requires a higher degree of intent than that required for violating the provisions prohibiting gratuities to public officials. It "incorporate[es] a concept of the bribe being the prime mover or producer of the official act." *United States v. Brewster*, 506 F.2d 62, 82 (1974). It is this element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple *mens rea* required for violations of the gratuity sections of the domestic bribery statute.

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Under the anti-bribery provisions, when an inducer intends to cause an official to misuse his or her official position, it is not relevant whether the official has the capacity to influence an official decision. Culpability is determined by the intent of the person making the inducement as opposed to the official's action, inaction, or capacity.[64] The payment or offer does not need to be accepted in order for there to be a violation.[65] Nor does the intended beneficiary need to have the actual authority to make or influence the official decision.[66] Even if the payment or offer was "intended to influence an official act that was lawful," there would still be a violation.[67]

It is also not relevant whether inducements are made directly or indirectly to a foreign government official. Any evidence of intent to influence a foreign official may be sufficient to constitute a violation of the anti-bribery provisions. As the evidence of intent becomes more dramatic, the case from the perspective of an enforcement official becomes stronger. Trial and appellate courts typically provide a degree of flexibility in finding the other elements of a crime to be met if the requisite evidence of intent is present.[68]

Generally, an individual or entity forced to make an improper payment on threat of injury or death would not be liable under the FCPA. Under U.S. law, "actions taken under duress do not ordinarily constitute crimes."[69] Coercion or duress is established by proving three discrete elements: (1) a threat of force directed at the time of the defendant's conduct; (2) a threat sufficient to induce a well-founded fear of impending death or serious bodily injury; and (3) a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity."[70]

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[64]*Kozeny,* 582 F. Supp. 2d at 541.

[65]*Id.* (citing 1 L. SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL, ¶ 16.01, Instr. 16-6 (2008)).

[66]*Id.*

[67]*Id.*

[68]From a technical standpoint, true economic extortion and duress arguably fall into the category of affirmative defenses. However, since the anti-bribery provisions do not explicitly provide for such an affirmative defense, the defenses are addressed in the context of "corrupt intent." The essence of each defense is the absence of corrupt intent. Due to the requirement that there be corrupt intent, the anti-bribery provisions implicitly allow for each of these defenses. *Cf. id.* (citing *United States v. Alfisi*, 308 F.3d 144, 150 n.1 (2d Cir. 2002) (citing *United States v. Kahn*, 472 F.2d 272, 279 (2d Cir. 1973) (finding that the issue of extortion or "economic coercion" is addressed by instructing the jury on the requisite intent of bribery)).

[69]*Id.* (citing *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005)).

[70]*Gonzalez,* 407 F.3d at 122 (citing *United States v. Podlog*, 35 F.3d 699, 704 (2d Cir. 1994)). Limited authority also exists for the proposition that corrupt intent is not established when an individual or entity responds to a situation involving "true extortion." *Kozeny,* 582 F. Supp. 2d at 540. The trial court in *Kay* "instructed the jury that threat of 'serious economic loss' could be

d. Made or authorized payment, offer, or promise

Whether a payment is actually made is not critical. Any offer or promise that could reasonably be believed to be an improper inducement falls within the category of prohibited conduct. A bribe need not actually be received and the object of the bribe need not be actually attainable.[71] Indeed, the public official need not accept the bribe for there to be a violation.[72] All that is required is that what is paid, offered, or promised be sufficient to form the basis for an inducement.

Consistent with the broad net that is cast by the anti-bribery provisions, the manner in which a payment is made, offered, or promised is not controlling. If the other elements of a violation of the anti-bribery provisions are met, the manner or means by which a payment, promise, or offer is made can provide no safe harbor or basis for a defense. Irrespective of how attenuated an offer, promise, or payment may be made or communicated to its intended recipient, any indirect means of making or communicating a prohibited inducement may fall within the ambit of the prohibitions of the anti-bribery provisions.

The anti-bribery provisions not only prohibit an improper inducement to a foreign official, they also prohibit the "authorization" of an improper inducement to be made by another.[73] What constitutes authorization is not defined in the anti-bribery provisions. Yet the legislative history makes clear that authorization can be either explicit or implicit.[74] To "authorize" appears to mean giving approval or direction to carry out the prohibited conduct. Authorization in the form of acquiescence or direction can be implicit and can be derived from a course of conduct that conveys an intent that an improper inducement be made.

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considered in assessing whether a defendant had the requisite corrupt intent." *FCPA Digest, supra* note 52, at xii. The trial court did not require that there be a threat of harm or destruction of property. However, no published opinion was issued in *Kay* with respect to this aspect of the jury instructions. The limited authority is premised on language in the legislative history of the FCPA stating "that 'true extortion situations' [are not] covered by" its provisions. *Kozeny,* 582 F. Supp. 2d at 540 (citing S. REP NO. 114, *supra* note 75).

[71] *See, e.g., United States v. Jacobs*, 431 F.2d 754, 759-60 (2d Cir. 1970), *cert. denied,* 402 U.S. 950, 91 S. Ct., 1613, 29 L. Ed. 2d 120, *reh'g denied,* 403 U.S. 912, 91 S. Ct. 2210, 29 L. Ed. 2d 690 (1971) ("Section 206(b) is violated even though the official offered a bribe is not corrupted, or the object of the bribe could not be attained, or it could make no difference if after the acts were done it turned out that there had been actually no occasion to seek to influence any official conduct"); *United States v. Troop*, 235 F. 2d 123, 125 (7th Cir. 1956) ("[I]t is entirely immaterial that for some reason, subsequently determined, the officer could not have brought about the result desired by the person offering the bribe.").

[72] *Jacobs,* 431 F.2d. at 760.

[73] 15 U.S.C. §§ 78dd-(1)a, -2(a), -3(a) (2009).

[74] *Id.*

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As the phrase "anything of value" suggests, what is given or offered can be as broad and as esoteric as can be reasonably conceived. In addition to cash or some form of monetary instrument, almost any form of direct or indirect benefit may constitute something of value. A thing of value can include intangible benefits.[75] These intangible benefits may include a benefit to a family member or a right or ability to designate to whom a benefit is directed.[76]

"'Anything of value' means anything that is of value to the recipient."[77] How a potential benefit may be perceived is critical to any analysis.[78] Because the FCPA has no *de minims* exception, the context in which the inducement is made may be determinative of what constitutes "anything of value." For someone of limited means, what may be significant in terms of value could be perceived quite differently for someone of substantial means. The particular locale or circumstances may also be determinative of what constitutes "anything of value" sufficient to induce improper conduct.[79]

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[75]*Cf. United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008).

[76]*Cf. Sec. & Exch. Comm. v. Schering-Plough Corp*., 5 FCPA REP. 699.9033. Although charged under the accounting and record-keeping provisions and not under the anti-bribery provisions, a wholly-owned foreign subsidiary of Schering-Plough Corp. made improper payments to a charitable organization headed by an individual who was also director of a governmental fund that provided money for the purchase of pharmaceutical products and who was also in a position to influence pharmaceutical purchases by hospitals and other entities. This case is also an example of how the accounting and record-keeping provisions provide another means of prosecuting improper inducements on the part of a wholly-owned subsidiary where jurisdiction would not otherwise exist under the anti-bribery provisions.

[77]U.S. Supplemental Response to OECD Phase 1 Questionnaire, *supra* at 55, § 1.1.4.

[78]Under the domestic bribery statute, 18 U.S.C., § 201 (2009), "anything of value" has been determined to be a subjective standard as opposed to an objective standard. *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cit. 1983) (value from the perspective of the recipient of the securities was basis of determining "anything of value" as opposed to the objective fact that the securities were worthless). *Cf. United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) (citing *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974) ("The conduct and expectations of both the defendant and the subject of the extortionate threat also *can* establish whether an intangible objective is a 'thing of value'").

[79]For example, where certain natural resources may be limited, like access to water in an arid region, providing access to water may be of significant value. In other contexts, such as a region with an abundance of water, providing access to water may not be of much significance. Among the benefits that have typically been viewed as falling within the prohibitions of the anti-bribery provisions are scholarships for family members, upgrades to first-class airfare, side trips to resorts, hiring a family member for a summer position, and permitting an official to designate where charitable contributions are directed. Under the domestic bribery statute, 18 U.S.C. § 201 (2009), "anything of value" has been found to include a promise of future employment. *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986), transportation of household goods, *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982), loans with favorable interest and repayment terms, *United States v. Hare*, 618 F.2d 1085 (4th Cir. 1980); golf outings, *United States v. Standefer*, 610

f. Foreign official

Who is considered a foreign official under the anti-bribery provisions should be presumed to have as broad an application as possible.[80] Regardless of country, the prohibitions apply to officials of all branches of government as well as to all units of government.[81] This definition includes civil service and political functions in countries where those functions are not unified. It does not matter whether the public official is a paid or an unpaid official.

The anti-bribery provisions provide an independent definition of "foreign official."[82] Who constitutes a foreign official is not dependent on whether the individual is classified as a foreign official under foreign law. A critical factor in determining whether someone is a foreign official is whether the individual occupies a position of public trust with official responsibilities.[83]

(1) Political parties, party officials, or candidates for political office

Within the context of the anti-bribery provisions, a "foreign official" can include *de facto* members of government. Political parties, party officials, or any candidate for political office are specifically included within the prohibitions of the anti-bribery provisions.[84] A precise definition is not provided as to what

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F.2d 1076 (3d Cir. 1979), *aff'd,* 447 F.2d (9th Cir. 1976), an automobile. *United States v. Pommerening*, 500 F.2d 92 (10th Cir. 1974), and golf and umbrella, *United States v. McDade*, 827 F.Supp. 1153, 1173-74 (E.D. Pa, 1993), *aff'd in part, dismissed in part,* 28 F.3d 283 (3rd Cir. 1994).

[80]Under the domestic bribery statute, 18 U.S.C. § 201 (2009), the "proper" inquiry in determining whether an individual is a public official is whether the "person occupies a position of public trust with official. . . responsibilities." *Dixson v. United States*, 465 U.S. 482, 496, 104 S. Ct. 1172, 79 L. Ed. 2d 458 (1983) (The recipients of the improper inducements were executives of a private, nonprofit organization with operational responsibility for administering a federal housing grant). The inquiry is not limited to "persons in an agency or formal employment relationship with the Government." *Id. Cf. United States v. Kenney*, 185 F.3d1217, 1222 (11th Cir. 1999) (management employee of a government contractor who assists a government agency in procuring materials and equipment for a project is a "public official" under 18 U.S.C. § 201(a)(1)).

[81]In *United States v. Control System Specialist, Inc*., 4 FCPA REP. 699.587 (S.D. Ohio 1998), Control Systems Specialist and its president pled guilty to violating the anti-bribery provisions for improper payments to a Brazilian Air Force colonel stationed in the United States at Wright Patterson Air Force Base in Dayton, Ohio, in exchange for the colonel's cooperation in approving purchases of military equipment from Control Systems Specialist.

[82]OECD Phase 1 Report on the United States: Review of Implementation of the Convention and 1997 Recommendations 5, available at **<http://www.oecd.org/dataoecd/16/50/2390377.pdf>.**

[83]*C.f. Dixson,* 465 U.S. at 496. In this regard, foreign law may be of assistance in understanding an individual's role and the nature of his responsibilities.

[84]15 U.S.C. §§78dd-1(a)(2) and (3), -2(a)(2) and (3), and -3(a)(2) and (3) (2009).

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constitutes a candidate for public office. Given the expansive manner in which the anti-bribery provisions have been applied, formalisms such as an announced candidacy should not be assumed to be a controlling factor.

Whether an individual actually holds a position as a party official also may not be controlling in terms of whether an investigation may be instigated. The practical realities of the particular individual's status within a political party may ultimately be more determinative. Perceptions of an individual's influence will be critical to any assessment as to whether there should be an inquiry. For example, a payment to a retired senior party leader may be sufficient because his or her real role, behind the scenes, may be equivalent to that of a party official.

(2) *De Facto* members of government

The line between what does and does not constitute a foreign official can become especially blurred in parts of the world where there are royal families. The classic situation may be in the Middle East where, in some countries, the royal families are large and their unofficial roles in affairs of state can be significant. Depending upon the facts, members of a royal family may be considered to be "foreign officials" within the meaning of the anti-bribery provisions, regardless of whether the family members have official titles or positions.

(3) Parastatals

The anti-bribery provisions apply to "instrumentalities" of foreign governments. Although the issue has been raised in a number of recent cases, the courts have, to date, found that instrumentalities under the FCPA can include what are often referred to as parastatals or state-owned enterprises.[85] The result is that a foreign official under the anti-bribery provisions is not limited to someone who is employed by a commercial enterprise owned or operated by a unit of government or carrying out a public function. Depending upon the country, or even certain parts of a country, the services provided by government can vary quite dramatically. Traditionally, these services can extend to telecommunications,

[85] *E.g.*, United States v. Aguilar, 783 F.Supp.2d 1108 (C.D. Cal. 2011); United States v. Carson, 2011 WL 5101701 (C.D. Cal. 2011). In a number of FCPA Review Procedure and Opinion Procedure Releases, situations addressed involving entities owned or controlled by a foreign government as instrumentalities of a foreign government. FCPA Review Procedure Release Nos. 80-04 (Oct. 29, 1980), 83-2 (July 26, 1983); FCPA Opinion Procedure Release Nos. 93-01 (Apr. 20, 1993), 96-02 (Nov. 25, 1996).

transportation, health care,[86] and sanitation services. However, the range of activities in which a parastatal may be engaged is virtually unlimited.

No definitive test exists for determining what constitutes a parastatal under the anti-bribery provisions.[87] A critical factor will be the degree to which a "government or governments may, directly or indirectly, exercise a dominant influence."[88] Dominant influence may be demonstrated when a government holds a majority of an "enterprise's subscribed capital." Such influence can also be shown if the government controls the "majority of the votes to shares issued" by the enterprises, or can appoint a majority of the enterprise's "administrative or managerial body or supervisory board."[89]

Another factor that bears upon a determination of whether an entity is a parastatal is the degree to which it carries out a public function and may have "preferential subsidies or other privileges."[90] Other factors that may bear upon such a determination include how the enterprises are characterized by its government; whether the foreign government prohibits and prosecutes bribery of the employees of state-owned enterprises as public corruption; and the circumstances surrounding the establishment of the enterprise.[91] Though not conclusive, reference to factors that are considered under other U.S. statutes to

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[86]In *United States v. Syncor Taiwan, Inc*., No. 02-CR-1244-ALL, Information (C.D. Cal., filed Dec. 4, 2002), *reprinted in* 5 FCPA REP. 699.8623, Syncor Taiwan, an owner of medical imaging centers, pled guilty to making improper payments to hospitals in Taiwan owned by governmental authorities in order to obtain business from the hospitals as well as to doctors employed by the same hospitals in order to obtain referrals. *See also United States v. DPC (Tainjin) Co. Ltd.,* No. CR 05-482, Information (C.D. Cal., filed May 20, 2005), *reprinted in* 5 FCPA REP. 699.9317.

[87]*E.g., Carson*, *supra* note 85, at *3-4. The Justice Department "has not adopted a bright-line test for determining which enterprises are instrumentalities or what are referred to as parastatals." U.S. Response to OECD Phase 1 Questionnaire, at § 1.1 OECD Doc. DAFFE/IME/BR(98)8/ADD1/FINAL (Oct. 30, 1998), available at <http://www.justice.gov/criminal/fraud/fcpa/intlagree'related'usrph1quest.html>.

[88]Since the United States ratified the OECD Convention and was intimately involved with its negotiation, the Commentaries to the OECD Convention [hereinafter OECD Commentaries], OECD Doc. DAFFE/IME/BR(97)20, ¶ 14, provide credible authority as to what constitutes a parastatal under the anti-bribery provisions. Given that the OECD Convention was ratified and implemented without any reservation, *United States v. Kay*, 359 F.3d 738, 755 n.68 (5th Cir. 2004) (*Kay II*), the OECD Commentaries have been cited as relevant authority in interpreting the anti-bribery provisions of the FCPA. *Id.,* at 754-55 nn. 65-68.

[89]OECD Commentaries, *supra* note 88, at ¶ 14.

[90]*Id.,* ¶ 15. On the other hand, when an enterprise subject to the dominant control of a government "operates in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges," it does not perform a public function and, according to the OECD Commentaries, should not be considered a parastatal." *Id.*

[91]*Carson*, *supra* note 85, at *3-4. U.S. Response to OECD Phase 1 Questionnaire, *supra* note 87.

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determine what constitutes an instrumentality of government may also be helpful in determining whether an entity is a parastatal.[92]

The likelihood that an entity will be considered a parastatal is increased with the degree to which a country is or has been socialized. As privatization takes place in various parts of the world, the likelihood that entities will be considered a parastatal will diminish. Similarly, the greater the degree to which nationalization takes place, the likelihood that an entity may be considered a parastatal will increase. The incidence of parastatals will vary over time with the political dynamics of a country yet nothing should be assumed. What may appear to be a traditional commercial enterprise may, in reality, be a parastatal.

(4) International organization

The definition of a foreign official in the anti-bribery provisions was expanded in 1998 to include any official or employee of a public international organization or any individual or entity acting on behalf of a public international organization.[93] The public international organizations covered by the anti-bribery provisions are those organizations whose officials are accorded diplomatic immunity under U.S. law or which have been designated by the President of the United States as an international organization for purposes of the anti-bribery provisions.[94]

(f) Influencing an official act

Official action or inaction that is sought to be induced to assist in obtaining or retaining business is known as the *quid pro quo* element of the anti-bribery provisions.[95] As opposed to a gift or gratuity "for or because of" an official act, there must be an intent "to influence" an official act.[96] The types of inducements that are sought to be prohibited fall into four categories:

1. Influencing the official's action in the context of the individual's official capacity;[97]

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[92]*E.g.,* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2009); Federal Tort Claims Act, 28 U.S.C. § 2671 (2009); U.S. anti-boycott regulations, 15 C.F.R. pt. 760.
[93]15 U.S.C. §§ 78ff-1(f)(1)(A), -2(h)(2)(A), -3(f)(2)(A) (2009).
[94]*Id.,* §§ 78ff-1(f)(1)(B), -2(h)(2)(B), -3(f)(2)(B).
[95]For bribery under the domestic bribery statute, 18 U.S.C. § 201 (2009), "there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." *United States v. Sun-Diamond Growers of Cal*., 526 U.S. 398, 404-405, 119 S. Ct. 1402, 143 L. Ed. 2d 576 (1999).
[96]*Id.,* at 404.
[97]15 U.S.C. §§78dd-1(a)(1)(A)(i); dd-2(a)(1)(A)(i); dd-3(a)(1)(A)(i) (2009).

2. Inducing the foreign official to do or not to do an act in violation of the individual's lawful duty;[98]
3. Inducing the official to influence or affect an act or decision of his or her government or instrumentality of that government;[99]
4. Securing any improper advantage.[100]

It is not necessary that the induced action relates to the foreign official's government. "Congress was principally concerned about payments that prompt an official to deviate from his official duty."[101] As long as the action being influenced relates to the official capacity of the individual being induced, the ultimate purpose does not need to relate to that official's government or to any government. The ultimate purpose can relate to influencing the U.S. government or to influencing private enterprise and still be improper. For example, inducing a foreign official to put in a "good word" with the U.S. government relative to procurement by a U.S. firm has served as a basis for an enforcement action.[102]

(g) Obtain or retain business

The anti-bribery provisions prohibit improper inducements to a foreign official in order to assist the individual or entity in obtaining or retaining business for or with, or directing business to, any individual or entity.[103] The inducement must be intended to induce the official to act on the inducer's behalf to assist the individual or entity making the inducement in obtaining or retaining business.[104]

The anti-bribery provisions "apply broadly to [inducements] intended to assist the payor, either directly or indirectly, in obtaining or retaining business for

[98]*Id.,* §§ 78dd-1(a)(1)(A)(ii); dd-2(a)(1)(A)(ii); dd-3(a)(1)(A)(ii).
[99]*Id.,* §§ 78dd-1(a)(1)(B); dd-2(a)(1)(D); dd-3(a)(1)(B).
[100]*Id.,* §§ 78dd-1(a)(1)(A)(i); dd-2(a)(1)(A)(i); dd-3(a)(1)(A)(i).
[101]*Kay II,* 359 F.3d at 749 n.40.
[102]In *Metcalf & Eddy, Inc., supra* note 4, the U.S. government had awarded contracts to a U.S. company in connection with the operation and maintenance of wastewater treatment facilities in Egypt by a local government entity. The chairman of the local governmental entity did not participate in the evaluation of bidders for further work on the wastewater treatment facilities. But officials of the U.S. company knew that the chairman could influence his subordinates who were involved in the evaluation process and that the chairman could make his preferences known to the U.S. officials involved with awarding the contracts. The chairman and his wife and children were provided with two trips in first class to the United States, These trips included travel to tourist destinations. The chairman was also paid a cash per diem despite having already been paid for the trips.
[103]15 U.S.C. §§ 78dd-1(a)(1), (2), and (3), -2(a)(1), (2), and (3), -3(a)(1), (20), and (3) (2009).
[104]*Kay II,* 359 F.3d at 742.

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some person."[105] They should be presumed to extend to an official act or inaction that assists indirectly the individual or entity making the inducement. Seeking official action favorable to carrying on or maintaining a business enterprise satisfies the business purpose element of the anti-bribery provisions.[106] This includes making it easier to do more business, whether, for example, it is a reduction of taxes or customs duties.[107]

The term "assist" in the anti-bribery provisions is to be interpreted broadly.[108] Actions can assist a particular goal simply by making the eventual realization of that goal more likely. This interpretation might include payments to circumvent quotas, bypass licensing requirements, obtain concessions or reduce taxes. In so doing, an improper inducement assists in obtaining or retaining business by increasing the amount of produce available for sale or reducing an inducer's expenses of sale. This activity could extend to, for example, increasing or maintaining the quantity of its sales or other economic dealings.

No requirement exists for the foreign official to be directly involved in awarding or directing the business. Retaining business is not limited to the renewal of contracts or other business. The prohibition extends to more than the renewal or award of a contract. It extends to corrupt payments related to the execution or performance of a contract or the carrying out of existing business. It also extends to inducements to a foreign official for the purpose of obtaining more favorable treatment.

What constitutes "business" under the anti-bribery provisions has yet to be clearly defined. No clarity is provided in the language of the statute or legislative history as to whether activities of a nonprofit organization constitute "business" since that term is used within the context of the anti-bribery provisions. Also, there are no definitive criteria regarding whether the business that is sought to be obtained or retained be commercial in nature or whether it extends more generally to the business of the individual or entity.

While the legislative history of the anti-bribery provisions focuses on business in the classic commercial sense,[109] the legislative history also

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[105] *Id.,* at 755.

[106] "The congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement." *Kay II,* 359 F.3d at 750. In implementing the OECD Convention, "Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country." *Id.,* at 756.

[107] *Id.,* at 755.

[108] *Id.*

[109] Reference was made to "corporate bribery." S. REP. No. 114, *supra* note 59, at 4.

demonstrates that the business nexus requirement was "not to be interpreted unduly narrowly."[110] "When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner."[111] The FCPA was enacted not only because foreign bribery was "morally and economically suspect, but also because it was causing foreign policy problems for the United States."[112]

In determining that U.S. law fulfilled the obligations of the United States under the United Nations Convention Against Corruption (UN Convention) without the need for implementing legislation,[113] U.S. ratification may implicitly have broadened the construction to be applied to the business nexus requirement.[114] The UN Convention expands on what is customarily viewed as the definition of "international business" to include "the provision of international aid" within the meaning of conducting international business.[115] By its very

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[110]*Kay II,* 359 F.3d at 754.

[111]*Id.,* at 761.

[112] *Id.,* at 746 (citing S. Rep. No. 114, *supra* note 59, at 17).

[113]"No implementing legislation is required for the Convention." S. EXEC. REP. NO. 18, 109th Cong., 2d Sess., 9-10 (2006). "The United States of America declares that, in view of its reservations, current United States law, including the laws of the States of United States, fulfills the obligations of the Convention for the United States." *Id.,* at 10.

[114]There was no express reservation, declaration, or understanding directly addressing Article 16 of the UN Convention relating to transnational bribery. *Id.,* at 9-10. Prior to the U.S. ratification of the UN Convention, the settlement reached in Metcalf & Eddy suggested that the anti-bribery provisions might lead to such a result. *Metcalf & Eddy, supra* note 4.

[115]Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions, Addendum, Interpretative Notes for the Official Records (Travaux Preparatoires) of the Negotiations of the United States Convention Against Corruption, A/58/422/Add.1, at ¶ 25, 7 October 2003 [hereinafter Interpretative Notes to UN Convention]. As opposed to the text of the UN Convention, the Interpretative Notes make reference to "the provision of international aid" within the meaning of "international business." In the prepared remarks of Attorney General John Ashcroft associated with the signing of the UN Convention by the United States, he specifically responded to a question as to the authoritative nature of the *travaux preparatoires* submitted to the Senate for its information in connection with the submission of the UN Convention for ratification:

> Answer. The Interpretative Notes for the official records (travaux preparatoires) preserve certain points relating to articles of the instruments that are subsidiary to the text, but nonetheless of potential interpretive importance. In accordance with article 32 of the Vienna Convention of the Law of Treaties, to which the United States is not a party but which reflects several commonly accepted principles of treaty interpretation, preparatory work such as that memorialized in the Interpretative Notes may serve as a supplementary means of interpretation, if an interpretation of the treaty done in good faith and in accordance with the ordinary meaning given to the terms of the treaty results in ambiguity or is manifestly absurd. Thus, the Interpretive Notes, while not binding as a matter of treaty law, could be important as a guide to the meaning of terms in the Convention and Protocols.

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nature, the provision of international aid includes the work of nonprofit organizations.

4. Exceptions and affirmative defenses

Relief from the prohibitions of the anti-bribery provisions is limited. The anti-bribery provisions contain one category of exceptions and two categories of affirmative defenses. Each of these categories refers to circumstances where inducements may be made and would otherwise be prohibited by the anti-bribery provisions. The practical effect is to provide a form of safe harbor where the particular inducement clearly falls within the terms of these exceptions or affirmative defenses.[116]

a. Expediting payments

Through an exception, the anti-bribery provisions permit what are commonly referred to as "expediting," "facilitating," or "grease" payments. These payments are made "to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official."[117] Expediting payments are given to secure or accelerate performance of a nondiscretionary act that an official is already obligated to perform.[118]

S. EXEC. REP. No. 18, *supra* note 114, at 60. The prepared remarks were included in the report of the Senate Foreign Relations Committee recommending ratification of the UN Convention. *Id.,* at 59.

[116]In addition, the Justice Department has developed an opinion procedure by which an individual or entity, in certain circumstances, can secure guidance and a limited form of protection from potential criminal prosecution and civil enforcement. 15 U.S.C. §§ 78dd-1(e), -2(f); 28 C.F.R. §§ 80.1-.16 (2009). The opinion procedure is available only for the anti-bribery provisions and not for the accounting and record-keeping provisions. The opinion procedure provides a rebuttable presumption that the conduct that is the subject of the opinion does not violate the anti-bribery provisions. An opinion binds only the Justice Department and the parties to a request. It does not act as binding precedent with respect to anyone else. Reliance can be placed only on a written opinion and not on oral statements by Justice Department officials. The SEC does not have an equivalent procedure. However, the SEC has taken the position that it will not take civil enforcement action under the anti-bribery provisions against a party that has obtained a favorable opinion from the Justice Department. Exchange Act Release No. 34-18255, 4 Fed. Sec. L. Rep. (CCH) ¶ 26,629 (Nov. 12, 1981). A favorable opinion also does not preclude action by the Justice Department or the SEC relative to the accounting and record-keeping provisions or to any other statutory or regulatory provisions.

[117]15 U.S.C. §§ 78dd-1(b), -2(b), -3(b).

[118]To enhance the likelihood of understanding what is a very difficult and inherently contradictory concept, the term "expediting" is used instead of "facilitating." From a conceptual standpoint, the

Conceptually, an expediting payment relates to "essentially ministerial actions" on the part of foreign officials that are not discretionary in nature.[119] For example, if the issuance of a permit is deemed to be automatic or only a matter of time, it is not subject to discretion. A payment made to expedite the process or move the issuance of a permit up in line is likely to be considered an expediting payment. Payments to a government-run telephone company to expedite installation of service are also apt to be considered expediting payments. No question exists regarding whether one can get the telephone service; the payments are intended only to influence the timing.

The anti-bribery provisions define "routine governmental action" to include only action that is ordinarily and commonly performed by a foreign official.[120] Expediting payments apply to "very narrow categories of largely non-discretionary, ministerial activities performed by mid- or low-level functionaries."[121] The definition does not include a decision by a foreign official to award new business or to continue business.

Expediting payments can include payments made to obtain permits, licenses, or other official documents and to receive services such as police protection, mail, telephone, utilities, cargo handling, and the protection of perishable products.[122] They also include payments made in exchange for the processing of governmental papers, including visas and work orders; scheduling of inspections associated with contract performance or the transit of goods across country; and expediting shipments through customs.[123]

b. Bona fide *business expenditures*

Through an affirmative defense, the anti-bribery provisions permit reasonable and *bona fide* business expenditures.[124] To be permitted, the expenditures must relate directly to the promotion, demonstration or explanation of products or services or to the execution or performance of a contract with a foreign government or

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term "expediting" is more consistent with the conceptual underpinnings of the exception. It also better describes the essence of the exception than does the term "facilitating."

[119] *Kay II,* 359 F.3d at 747. Expediting payments are "essentially ministerial" actions that 'merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.'" *Id.* (citing H.R. REP. NO. 640, 95th Cong., 1st Sess. 8 (1977)).

[120] 15 U.S.C. §§ 78dd-1(f)(A), -2(h)(4)(A), -3(f)(4)(A) (2009).

[121] *Kay II*, 359 F.3d at 751. An expediting payment has been likened "to payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters." *Id.,* at 761.

[122] 15 U.S.C. § 78dd-1(f)(3)(A) (2009).

[123] *Id.*

[124] 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2009).

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agency.[125] Unnecessary diversions to resorts and travel upgrades to first class can be a cause for concern. Expenditures for family members should always give rise to concern.[126] With the radical differences in living standards in various parts of the world, situations may arise where relatively modest expenditures can be viewed as improper inducements. Something that is viewed as a customary practice in certain parts of the world is apt to be viewed as once-in-a-lifetime opportunities in other places.

c. Local law

An affirmative defense exists under the anti-bribery provisions for payments or offers that are lawful under the written laws and regulations of the country of the foreign official, political party, party official, or candidate.[127] It is a rare situation where a government would, as an official matter, permit payments or offers to violate a lawful duty. Recognized customs or practices within a particular country cannot form the basis of an affirmative defense. Nor is it a defense if "everyone does it." The sole basis is whether such a practice is permitted under the written laws, including case law, of the relevant jurisdiction.

D. Increased Application of the Accounting and Record-Keeping Provisions

In addition to prohibiting improper inducements to foreign officials, the FCPA placed new and significant obligations on issuers to maintain records that accurately reflect transactions and dispositions of assets and to maintain systems of internal accounting controls.[128] The accounting and record-keeping provisions apply to all aspects of an issuer's practices relating to the preparation of its financial statements and extend to its worldwide operations.[129] They provide a

[125] *Id.*
[126] FCPA Opinion Procedure Release Nos. 07-01 (June 24, 2007); No. 07-03 (Dec. 24, 2007).
[127] 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1) (2009).
[128] "[T]he more significant addition of the FCPA is the accounting controls or 'books and records' provision, which gives the SEC authority over the entire financial management and reporting requirements of publicly-held United States corporations." *Sec. & Exch. Comm'n v. World-Wide Coin Inv., Ltd.*, 567 F. Supp. 724, 746 (N.D. Ga. 1983).
[129] *See also* Arthur F. Matthews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Degree Settlements,* 18 NW. J. INT'L L. & BUS. 303, 349 (1998) (citing 2 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 9:20, at 279 (1992)).

completely independent basis for prosecuting issuers or those acting on their behalf for making improper inducements.[130]

1. No proof of intent required for a civil violation

Unlike the anti-bribery provisions, no "knowing" requirement for civil liability exists under the accounting and record-keeping provisions.[131] Strict liability is imposed. This practice has dramatic ramifications for an issuer or anyone subject to the jurisdiction of the SEC. The evidentiary requirements are very low regarding what must be proven in order to establish a civil violation of the accounting and record-keeping provisions. All that is required is that the substantive violation be proven by a preponderance of the evidence. Entities subject to the SEC's jurisdiction are left with little recourse but to settle and cooperate relative to the investigation of individuals that may be involved.

2. Broad reach

Seemingly, the application of the accounting and record-keeping provisions is more limited than the anti-bribery provisions. They apply to foreign and domestic issuers of securities as defined by Section 3 of the Securities Exchange Act of 1934 as entities required to register under Section 12 or file reports under Section 15(d).[132] However, issuers can include foreign entities with ADRs.[133] Also, unlike

[130]Deming, *supra* note 6, at 493.

[131]*Sec. & Exch. Comm'n. v. McNulty*, 137 F.3d 732, 740-41 (2d Cir. 1998); *Sec. & Exch. Comm'n v. Softpoint, Inc.*, 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997), *aff'd on other grounds,* 159 F.3d 1348 (2d Cir. 1998); *Sec. & Exch. Comm'n v. Sys. Software Assocs., Inc*., 145 F. Supp. 2d 954, 958 (N.D. Ill. 2001); *World-Wide Coin Invs., Ltd.,* 567 F. Supp. a 749 (N.D. Ga. 1983). *See also Ponce v. Sec. & Exch. Comm'n*, 345 F.3d 722, 736 n.10 (9th Cir. 2003). However, proof of intent may be required to establish civil liability for aiding and abetting a violation of the accounting and record-keeping provisions. *See id.,* at 737; *Sec. & Exch. Comm'n v. Autocorp Equities, Inc*., 292 F. Supp. 2d 1310 (D. Utah 2003) (knowledge or reckless disregard of the fact that the defendant was aiding or abetting a violation of securities law must be established).

[132]15 U.S.C. §§ 77a-77c, 780(d), 781 (2010).

[133]As part of the United Nations Food for Oil investigations, ADRs were used as a basis for jurisdiction to prosecute foreign entities for kickbacks to Iraqi officials. *See, e.g.,* U.S. Dep't of Justice, Press release No. 08-1140, Fiat Agrees to $7 Million Fine in Connection with Payment of $4.4 Million in Kickbacks by Three Subsidiaries Under the U.N. Oil for Food Program (Dec. 22, 2009), available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1140.html>. In the informations filed against two of Fiat's wholly-owned subsidiaries, Iveco S.p.A and CNH Italia S.p.A., available at <http://www.justice.gov/opa/pr/2008/December/08-crm-1140.html>, each foreign subsidiary was charged with conspiracy to commit wire fraud and to violate the record-keeping provisions for making improper payments to Iraqi officials. Kickbacks were inaccurately recorded as "commissions" and "service fees" for agents.

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the anti-bribery provisions, they also apply to majority-owned foreign subsidiaries of an issuer.[134]

Even when an issuer holds an interest of 50 percent or less, it must "proceed in good faith to use its influence to the extent reasonable under the circumstances to cause [the subsidiary] to devise and maintain a system of internal accounting controls" consistent with the accounting and record-keeping provisions.[135] In such circumstances, an issuer will be "conclusively presumed" to have complied when it can demonstrate its good-faith efforts to influence its subsidiary.[136] The degree of effective control can be expected to bear directly on the evaluation.[137]

Individuals can be subject to the terms of the accounting and record-keeping provisions while acting within the scope of their duties on behalf of an

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[134]In *United States v. Titan Corp,* . United States Corp., No. 05CR0314, Plea Agreement (S.D. Cal., filed Mar. 1, 2005), *reprinted in* 5 FCPA REP. 699.9287, Titan pled guilty to violating both the anti-bribery and record-keeping provisions of the FCPA as well as to assisting in the filing of a false tax return in violation of 26 U.S.C. § 7206(2). Titan was an issuer that, along with its subsidiaries, was involved in constructing wireless telephone systems in certain developing countries. The subsidiaries, including foreign subsidiaries, "shared employees, officers, and personnel with Titan" and, with the knowledge of Titan, entered into a business relationship with the President of Benin's business advisor. Titan failed to conduct any formal due diligence regarding its agent in Benin "before or after engaging him." It also made payments without any evidence that the services were actually performed or the expenses actually incurred. At the direction of a senior Titan officer based in the United States, Titan funneled approximately $2 million, through its agent in Benin, toward the election campaign of Benin's president. Titan made the payments to assist its development of a telecommunications project in Benin and to obtain the Benin government's consent to an increase in the percentage of Titan's project management fees for that project. Titan violated the record-keeping provisions by falsely characterizing the payments to its agent in Benin as "social payments."

In *United States v. York Int'l Corp*., Information (D.D.C., filed Oct. 1, 2007), *reprinted in* 3 FCPA REP. 30-257 (2d ed. 2009), one of the counts of the information associated with the deferred prosecution agreement charged York International Corp., an issuer, with record-keeping violations for the failure of two of its subsidiaries to keep accurate books and records. Payments were recorded as "commission" and "consultancy" payments when they were known to be unlawful kickbacks to the Iraqi. No violation of the anti-bribery provisions was charged.

[135]15 U.S.C. § 78m(b)(6) (2010).

[136]*Id.,* § 78o(d).

[137]H.R. REP. No. 100-576, at 917 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547. *See* 15 U.S.C. § 78m(b)(6)(2010). In the SEC's action against BellSouth, In *Re BellSouth Corp, Exchange Act* Release No. 45,279 (Jan. 15, 2002), available at <http://www.sec.gov/litigation/admin/34-45279.htm>, BellSouth's Nicaraguan subsidiary, Telefonia Celular de Nicaragua, S.A. (Telefonia), improperly recorded payments to the wife of a Nicaraguan legislator who chaired a committee with oversight over the legislation that would enable BellSouth to acquire a majority interest in Telefonia. BellSouth "held less than 50 percent of the voting power of Telefonia, but through its operational control, had the ability to cause Telefonia to comply with the FCPA's books and records and internal controls provisions."

issuer. Particular individuals include officers, directors, employees, stockholders, and agents of an issuer.[138] The accounting and record-keeping provisions also extend to individuals who, while acting within the scope of their duties, are officers, directors, employees, or agents of a foreign subsidiary where the issuer has an interest greater than 50 percent. Even individuals and entities not otherwise subject to the accounting and record-keeping provisions can become subject to them.[139] The record-keeping provisions apply to "any person" and not just to officers and directors.[140]

3. Falsification of books and records

Under the record-keeping provisions,[141] an issuer must ensure that the books and records are accurate so that the financial statements can be prepared in conformity with accepted methods of recording economic events.[142] Books and records subject to the record-keeping provisions are not specifically defined; however, generally, "the greater the degree to which a record may relate to the preparation of financial statements, the adequacy of internal controls, or the performance of audits, the more courts are likely to find the record to be subject to the terms of the record-keeping provisions."[143]

The record-keeping provisions can and do play a critical role in buttressing charges of violations of statutes other than the anti-bribery

[138]The one major exception relates to violations of Rule 13b2-2 relating to disclosures to auditors by officers and directors. Yet anyone acting in concert with an officer or director could be liable as an accomplice. *See, e.g.,* 15 U.S.C. § 78t(e) (2010).

[139]*Id. See, e.g., York Int'l Corp., supra* note 134.

[140]*SEC v. Softpoint, Inc*., 958 F. Supp. 846, 865-66 (S.D.N.Y. 1997). The addition of Section 13(b)(5) to the Exchange Act of 1934, 15 U.S.C. § 78m(b)(6) (2010), in the 1988 amendments to the FCPA resolves any question as to the application of the accounting and record-keeping provisions to any person. *See* Matthews, *supra* note 3, at 350-51 (citations omitted).

[141]15 U.S.C. § 78m(b)(2)(A) (2010).

[142]*See* H.R. REP. No. 95-831, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4120. There must be "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7)(2010); 17 C.F.R. § 240.13b2-1 (2010).

[143]"The purpose of the [accounting and record-keeping provisions] is to strengthen the accuracy of the corporate books and records and the reliability of the audit process . . ."). S. REP. NO. 95-114, at 7, *reprinted in* 1977 U.S.C.C.A.N. 4098. They were focused solely with the preparation of financial statements. Promotion of Reliability of Financial Information, Exchange Act Release No. 34-15570, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,959, at 81,960 (Feb. 15, 1979). "Given Sarbanes-Oxley's emphasis on internal controls and deterring conduct that might impede or affect the audit function, . . . by inference Congress has reaffirmed the broad scope of records subject to the terms of the accounting and record-keeping provisions." Deming, *supra* note 6*,* at 486 n. 116.

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provisions.[144] "No requirement exists for violations of the record-keeping provisions to be charged in conjunction with a violation of the anti-bribery provisions or in conjunction with other violations of U.S. law."[145] There is also no requirement that there also be material misstatements or omissions associated with financial statements.[146]

Of great significance is the absence of a materiality requirement.[147] Even if the amount of a transaction does not affect the bottom line of an issuer in quantitative terms, it may still constitute a violation of the record-keeping

[144]"Especially when records are falsified so as to conceal a violation of statutes other than the anti-bribery provisions, the record-keeping provisions can and do play a strategic role in being among the charges brought." Deming, *supra* note 6, at 495. Among others, "[t]he record-keeping provisions have been used in conjunction with allegations of violations by defense contractors, of public corruption within the United States, kickbacks, concealing an off-the-books account, and commercial bribery." *Id.* (citations omitted). *United States v. Konigseder*, Cr. 00-0517, Indictment (N.D. Cal., filed Oct. 5, 2000). *United States v. Bergonzi*, No. CR 00-0505 MJJ, Superseding Indictment (N.D. Cal., filed Jan. 12, 2001). *United States v. UNV/Lear Servs*., No. 3:00-cr-00031, Statement of Facts (W.D. Ky., filed Dec. 8, 1999). *United States v. UNC/Lear Servs*., No. 3:00-cr-00031, Information (W.D. Ky, filed Dec. 8, 1999). In *United States v. Crop Growers Corp.,* 954 F. Supp. 335 (D.D.C. 1997). *United States v. Scharf*, No. Cr-84-76, Information (N.D. Ohio), *reprinted in* 3 FCPA REP. 696.72. *United States v. Duquette*, No. H-84-64, Information (D. Conn. 1984), *reprinted in* 3 FCPA REP. 696.74. *States v. Thomson*, No. CR-04-J-0240-S, Indictment (N.D. Ala., filed July 28, 2004), *reprinted in* 3 FCPA REP. 699.907400.

[145]Deming, *supra* note 6, at 494. In *United States v. Rothrock,* Daniel Ray Rothrock, an officer of the Cooper Division of Allied Products Corporation (Allied), an issuer, pled guilty to a single count of violating the record-keeping provisions for preparing a "bogus" invoice in the amount of $300,000. *United States v. Rothrock*, No. SA01CR3430G, Plea Agreement (W.D. Tex., filed June 13, 2001), *reprinted in* 3 FCPA REP. 699.818801. In 1991, the Cooper division entered into a contract to sell certain rigs to RVO Zarubezhneftestory (Nestro), a government-owned purchasing agency in Russia. At that same time, an agreement was reached to pay a sales commission of $282,076 to Trading & Business Services, Ltd. (TBS), an entity jointly owned by Comco Holding, A.G. (Comco), a Swiss company, and Nestro. This payment was for the ultimate benefit of Nestro. A day after the sales commission was paid, the Cooper Division obtained the rig contract from Nestro. Knowing that no consultation fee or market study had been or would be provided by TBS, Rothrock later delivered to TBS a draft of a $300,000 invoice for a "consultation fee and market study." The draft invoice was in reality a mechanism for disbursing Allied funds to TBS. Rothrock received an invoice similar to the draft invoice from an Austrian company with which the Cooper Division had no contract or relationship. Following the signing of the second contract with Nestro for additional rigs, Rothrock, using the bogus invoice from the Austrian company, had the Cooper Division issue a check to the Austrian company for $300,000. It was in reality an invoice from TBS. While the circumstances suggested a possible violation of the anti-bribery provisions, the record-keeping provisions were ultimately used as the basis for criminal charges.

[146]Deming, *supra* note 6, at 495.

[147]*World-Wide Coins Inv. Ltd.,* 567 F. Supp. at 179. Rule 13b2-1 provides "an independent basis for enforcement action . . . , whether or not a violation of the provisions may lead, in a particular case, to the dissemination of materially false or misleading information to investors." Promotion of Reliability of Financial Information, *supra* note 35.

provisions if not accurately recorded.[148] Manipulating records to mask transactions by characterizing them in some oblique manner or actually falsifying a transaction can implicate an issuer and those individuals involved.[149] Placing a transaction into an abnormal category or "burying" it in some other way may serve as a basis for a violation.[150]

The SEC's posture has been described as one of "zero tolerance" for the falsification of records relating to an improper inducement.[151] Whether an action will be brought by the SEC rests largely upon the underlying circumstances. To the degree that discretion is apt to be exercised by the SEC, a declination is most likely in situations where prompt, effective and comprehensive remedial measures are taken.

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[148]In the action taken by the SEC against Lucent Technologies, Inc., *Sec. & Exch. v, Comm'n v. Lucent Technologies, Inc.*, Case No. 1:07-cv-02301, Complaint (D.D.C., filed Dec. 21, 2007), available at <http://www.sec.gov/litigation/complaints/207comp20414.pdf>, Lucent was alleged to have spent over $10 million for approximately 1,000 employees of Chinese state-owned or state-controlled enterprises for travel to inspect Lucent's factories and to train the officials. During many of these trips, instead of Lucent's facilities, tourist destinations were visited. Although anti-bribery violations were not alleged, Lucent was alleged to have violated the record-keeping provisions for improperly recording many of the trips. Over 160 trips were booked to Lucent's "Factory Inspection Account" even though the customers did not visit a Lucent factory. Also, in violation of the internal control provisions, Lucent was alleged to have lacked sufficient internal controls to detect and prevent trips intended for entertainment and to have properly trained its officers and employees to understand and appreciate the nature and status of its customers in China in the context of the FCPA.

[149]For example, expediting payments, which are permitted under the anti-bribery provisions, 15 U.S.C. § 78dd-1(b)(2010), can pose a problem if not accurately recorded.

[150]*See, e.g., Lucent Technologies, Inc., supra* note 148.

[151]In *Sec. & Exch. Comm'n v. Nature's Sunshine Products, Inc.*, Civil No. 2:09CV0672, Complaint (D. Utah, filed July 31, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp21162.pdf>, the charges related to cash payments made by the Brazilian subsidiary of Nature's Sunshine Products Inc. ("NSP") to customs officials to import product into that country and then the purchase of false documentation to conceal the nature of the payments. The cash payments continued after NSP became aware of the cash payments. The complaint alleged that the chief executive officer and former chief financial officers, in their capacities as control persons under the Securities Exchange Act of 1934, 15 U.S.C. § 20(a), violated the accounting and record-keeping provisions of the securities laws in failing to keep accurate books and records and institute adequate internal controls relative to the cash payments of the Brazilian subsidiary. NSP was also charged with violating the anti-bribery provisions as well as the accounting and record-keeping provisions for characterizing the payments as legitimate importation expenses, for the absence of supporting documentation, and for purchasing fictitious supporting documents. NSP was also charged with violations of the antifraud provisions, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.15b-5, and for false filings with the SEC for omitting material information relating to the cash payments. 15 U.S.C. § 78m(a), 17 C.F.R. §§ 240.112b-20; 240.13a-1; and 240.13a-13.

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However, the record-keeping provisions can provide a completely independent basis for prosecuting issuers or those acting on their behalf in making improper payments.[152] The critical factor with the record-keeping provisions is that the transaction need not be material. In almost every instance, it is unlikely that the making of an improper payment will be accurately recorded. For this reason, the Justice Department can be expected to investigate violations of the record-keeping provisions when investigating violations of the anti-bribery provisions on the part of an issuer or anyone acting on an issuer's behalf.[153]

One practical consideration in prosecuting violations of the anti-bribery provisions is the difficulty in securing evidence in a foreign setting. This difficulty is further complicated by the question of whether evidence obtained in a foreign setting will be admissible in a U.S. court. However, in the context of prosecuting a violation of the record-keeping provisions, the evidence is more likely to be documentary in nature and to be in the possession or control of an issuer. That issuer is subject to compulsion by U.S. enforcement authorities to produce records, including foreign records, in its custody or control.

Moreover, proving a violation of the record-keeping provisions is more straightforward and more likely to succeed than proving a violation of the anti-bribery provisions. The evidence necessary to establish a criminal violation is much simpler and less apt to confuse a jury.[154] Unlike the anti-bribery provisions, proving "corrupt intent" is not required nor is there a requirement to prove whether a "foreign official" was involved or whether a promise, offer, or payment was made "to obtain or retain business." In large part, the elements of the offense

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[152]Deming, *supra* note 6, at 493. In *United States v. Cantor,* Case No. 01 CR 687, Information (S.D.N.Y., filed July 18, 2001), *reprinted in* 4 FCPA REP. 699.821601, *Sec. & Exch. Comm'n v. Weissman*, Civil Action No. 01 CV 6449, Litig. Release No. 17,068A (S.D.N.Y. July 18, 2001), available at <http://www.sec.gov/litigation/litreleases/lr17068a.htm>.

[153]S. REP. NO. 114, *supra* note 59, at 11 ("Under the accounting section no off-the-books accounting fund could be lawfully maintained, either by a U.S. parent or by a foreign subsidiary, and no improper payment could be lawfully disguised").

[154]"In other contexts, prosecutors have historically preferred charges for making false statements to the government because they are much easier to prove to a jury." Deming, *supra* note 6, at 492. There are five elements to proving a false statement to a federal agency in violation of 18 U.S.C. § 1001 (2009): (1) the defendant made a statement; (2) the statement was false or fraudulent; (3) the statement was material; (4) the defendant made the statement knowingly and willfully; and (5) the statement pertained to an activity within the jurisdiction of a federal agency. *E.g., United States v. Steele*, 933 F.2d 1313, 1318-19 (6th Cir. 1991). "Similarly, in tax prosecutions, the filing of a false tax return is much easier to prove than tax evasion." Deming, *supra* note 6, 493. Proof of the filing of a false return only requires proof that the person filing the return believed that it "was not true and correct as to every material matter." 26 U.S.C. § 7206(1) (2009). In contrast, tax evasion, 26 U.S.C. § 7201 (2009), requires proof of willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the payment of the tax. *Sansone v. United States*, 380 U.S. 343, 351, 185 S. Ct. 1004, 13 L. Ed. 2d 882 (1965).

are limited to whether the record is subject to the record-keeping provisions, whether the conduct was willful, and whether the record was accurate in reasonable detail.[155] The documentary nature of the evidence makes proving a violation "less dependent upon recollections that can be subjective and that can fade over time."[156] Unlike proving a bribe, proving "a false statement is likely to be much more clear cut and less susceptible to differing interpretations."[157]

From the standpoint of a prosecutor, "a criminal violation of the record-keeping provisions has an added strategic advantage because it carries a far more severe penalty" than a violation of the anti-bribery provisions.[158] Given the severity of the criminal penalty for a violation of the accounting and record-keeping provisions, and a greater ability to prove a violation, a prosecutor has an enhanced ability to negotiate a plea. It also enhances a prosecutor's ability to secure cooperation to provide evidence relative to violations of the accounting and record-keeping provisions as well as the anti-bribery provisions. Individuals facing a prison sentence are apt to be receptive to alternatives that may limit the possibility of a lengthy prison term.

4. Adequate internal controls

As part of the accounting provisions, the purpose of internal controls is to ensure that entities adopt accepted methods of recording economic events, protecting assets, and confirming transactions to management's authorization.[159] A system of internal controls must be sufficient to provide reasonable assurance that directors, officers, and shareholders are made aware of and thus able to prevent the improper use of assets.[160] "Reasonable assurance" means 'such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."[161] No particular kind of internal controls is required. The standard for compliance is whether a system, taken as a whole, reasonably meets the requirements of the internal control provisions.

[155]*Cf. United States v. Wilson*, No. 01 CR. 53 (DLC), 2001 U.S. Dist. LEXIS 9572, at *19 (S.D.N.Y. July 13, 2001).
[156]Deming, *supra* note 6, at 492.
[157]*Id*
[158]*Id*
[159]H.R. REP. No. 95-831, *supra* note 142, at 10.
[160]15 U.S.C. § 78m(b)(2)(B)(2010).
[161]*Id.,* § 78m(b)(7).

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Due to their esoteric nature,[162] the internal accounting control provisions are seldom the focus of criminal enforcement activity. Yet, in a civil enforcement context, where no proof of intent is required, these provisions provide an almost endless series of bases for the SEC to take action against an issuer. In almost any after-the-fact analysis relating to financial irregularities, the SEC will be able to point to a breakdown of some sort associated with the internal accounting controls of an issuer.[163]

For issuers engaged in international business, the failure to devise or maintain an effective system to prevent or detect violations of the anti-bribery provisions can constitute a violation of the internal controls provisions. At the very least, it must include a formal FCPA policy made applicable to the entire entity, an FCPA compliance program, and a practice of conducting due diligence and maintaining due diligence records on the entity's foreign agents.[164] Those responsible for ensuring compliance with an FCPA policy must have adequate experience and training to address issues that may arise relative to preventing, detecting, and addressing possible violations of the FCPA.[165]

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[162]*See World-Wide Coin Inv. Ltd.,* 567 F. Supp. at 751 ("[T]here are no specific standards by which to evaluate the sufficiency of controls; any evaluation is inevitably a highly subjective process in which knowledgeable individuals can arrive at totally different conclusions").

[163]In the complaint filed by the SEC against Baker Hughes included allegations of violations of the books and records and internal controls provisions of the FCPA in Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan. *Sec. & Exch. Comm'n v. Baker Hughes Inc*., Civil Action No. H-07-108 Complaint (S.D. Tex., filed Apr. 26, 2007), *available* at <http://www.sec.gov/litigation/complaints/2007/comp20094.pdf>. Baker Hughes made payments to agents and other individuals, including public officials, in circumstances that reflected an absence of adequate internal controls. No mechanism was in place to determine whether the payments were for legitimate services, whether the payments would be shared with government officials, or whether these payments would be accurately recorded in Baker Hughes' books and records. For example, in Nigeria, payments were authorized to certain customs brokers to facilitate the resolution of customs deficiencies. Baker Hughes failed to adequately assure itself that such payments were not being passed on, in part, to Nigerian customs officials. In Angola, an agent was paid more than $10.3 million in commissions under circumstances in which the company failed to adequately assure itself that such payments were not being passed on to employees of Sonangol, Angola's state-owned oil company, to obtain or retain business in Angola.

[164]In *Sec. & Exch. Comm'n v. Titan,* the SEC alleged that Titan failed to devise or main an effective system of internal controls. Litig. Release No. 19, 107 (Mar. 1, 2005) available at <http://www.sec.gov/litigation/litreleases/lr19107.htm>. Despite utilizing over 120 agents in over 60 countries, Titan failed to have a company-wide FCPA policy, to implement an FCPA compliance program, maintain sufficient due diligence files on its foreign agents, and have meaningful oversight over its foreign agents, and, at the same time, circumvented the limited FCPA policies and procedures in effect.

[165]In the action taken by the SEC against BellSouth, the SEC referred to the lack of experience of the attorney who approved the arrangement in finding that BellSouth failed to devise and maintain a system of internal accounting controls at Telefonia sufficient to detect and prevent FCPA

E. Vicarious Liability

An individual or entity can be held vicariously liable for the conduct of a third party when the third party is acting for or on behalf of the individual or entity. This definition can include agents, consultants, representatives, distributors, joint venture partners, foreign subsidiaries or affiliates, contractors, or subcontractors. Even if a third party is not directly subject to the FCPA, an individual or entity can become subject to vicarious liability for the actions taken by a third party if the individual or entity authorizes, directs, or in some way ratifies or acquiesces to conduct prohibited by the FCPA.

1. Knowledge of an entity

Whether the context is civil or criminal, understanding what constitutes knowledge on the part of an entity is critical to understanding the ease by which an entity may be found to have the requisite knowledge under U.S. law. The knowledge requirement under U.S. law for an entity is distinctly different from that of a natural person.[166] The practical effect is a much lower standard for an entity than an individual.

No one person within an entity necessarily must have the requisite knowledge. Nor is there a requirement that there exist knowledge on the part of senior members of management. Regardless of how disparate the knowledge may be within an entity, the collective knowledge of officers, employees, and agents of an entity acting within the scope of their employment can serve as the basis for establishing knowledge under U.S. law.[167] In short, it is the sum of the knowledge of an entity's officers, directors, employees, and agents, when acting within the scope of their employment or responsibilities, which establishes knowledge on the part of an entity.

The legal standard for establishing knowledge on the part of an entity differs among countries. On a relative basis, in the United States the threshold is very low for an entity. In addition to issuers, this low threshold extends to

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violations. *In re BellSouth Corp*., *supra* note 117. The SEC alleged that it "knew or should have known that the attorney lacked sufficient experience or training to enable him properly to opine on the matter." *Id*. *See also Lucent Technologies, Inc., supra* note 148.

[166]An entity is often referred to as a "juridical person" in the context of statutes, regulations, legal texts, and other forms of legal literature. It is a general reference to a legal entity, which includes but is not limited to a corporation, limited liability company, partnership, joint venture, or non-profit organization.

[167]*E.g., United States v. Bank of New England*, N.A., 821 F. 2d 844 (1st Cir. 1987).

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privately-held companies, limited liability companies, partnerships, and any other form of legal entity.

The low threshold for establishing knowledge on the part of an entity is a critical factor in determining an entity's potential exposure. Actions on the part of isolated members of management or on the part of low-level employees can expose an entity to liability under the anti-bribery or the accounting and record-keeping provisions. It is an even more likely prospect that an entity will be exposed to liability because of one of its agents engaging in prohibited conduct in the course of acting on its behalf.

2. Vicarious liability under the anti-bribery provisions

The anti-bribery provisions specifically address the issue of vicarious liability of third parties. Offers or payments are expressly prohibited to "any person, while knowing that all or a portion of such money or things of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign official political party or official thereof, or to any candidate for foreign political office."[168] These third-party payment provisions apply to anyone in the United States or abroad who acts on behalf of an individual or entity subject to the terms of the anti-bribery provisions.

In general, an inducer can be liable under the anti-bribery provisions with regard to improper offers or payments made by or through a third party to obtain or retain business when any of the following occur:

- Anything of value is offered or paid to a third party knowing that all or a portion of such value is or will be offered, given, or promised, directly or indirectly, to a foreign official;[169] or

- A third party is authorized to offer or pay anything of value to a foreign official.[170]

In terms of the basis for vicarious liability under the anti-bribery provisions, no fundamental difference exists between criminal and civil enforcement actions. To the extent a difference exists, it is in the elevation of the standard of proof from a preponderance of evidence in a civil context to beyond a reasonable doubt in a criminal context.

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[168] 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3) (2009).
[169] *Id.*
[170] *Id.,* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).

a. Requisite knowledge

Activity prohibited by the anti-bribery provisions may not be undertaken in an indirect or circuitous manner.[171] Promising or providing benefits to a third party is prohibited when the offeror knows that the benefits will be passed on by the third party to a foreign official.[172] An individual or entity is responsible for the conduct of a third party when the individual or entity "knew" that the money or thing of value given to the third party would be used, directly or indirectly, to make an improper payment.[173] Even if the third party is, for example, a foreign affiliate not subject to the anti-bribery provisions, a U.S. parent entity may be liable if it participates in, directs, authorizes, or acquiesces to the prohibited conduct.

b. Substantially certain

When an individual or entity "is aware of a high probability of the existence of" activity prohibited by the anti-bribery provisions but does not have actual knowledge of the circumstance, the individual or entity is nonetheless deemed to "know" of the existence of the circumstance.[174] An individual or entity is deemed to have the requisite knowledge of an activity by a third party if the individual or entity (1) "is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur" or (2) "has a firm belief that such circumstance exists or that such result is substantially certain to occur."[175] An individual or entity is also deemed to have the requisite knowledge if the individual or entity is aware of the "high probability" of a circumstance that is required for a violation of the anti-bribery provisions.[176]

Knowledge can be established under the anti-bribery provisions when it appears that the act is made with conscious disregard of or willful blindness to the evident purpose of the offer or payment.[177] Failing to learn the purpose of the

[171] *See id.,* §§ 78dd-1(a)(3), -2(a)(3), -3(a)(3).
[172] *Id.*
[173] *Id.,*§§ 78dd-1(a)(3); -2(a)(3); -3(a)(3).
[174] *Id.,* §§ 78dd-1(f)(2)(B); -2(h)(3)(B); -3(f)(3)(B).
[175] *Id.,* §§ 78dd-1(f)(2)(A); -2(h)(3)(A); -3(f)(3)(A).
[176] *Id.,* §§ 78dd-1(f)(2)(B); -2(h)(3)(B); -3(f)(3)(B). In ruling on the admissibility of evidence in a motion *in limine*, the court in *United States v. Kozeny*, 643 F. Supp. 2d 415, 440 (S.D.N.Y. 2009), found "[t]hat Azerbaijan was known to be a corrupt nation, that the post-Communist privatization processes in other countries have been tainted by corrupt practices, that SOCAR was a strategic asset of Azerbaijan, and the Kozeny was notorious as the 'Pirate of Prague' makes it probable that Bourke was aware that Azeri officials were being bribed in order to ensure the privatization of SOCAR".
[177] *Id.,* at 417-18. "The modern conscious avoidance doctrine . . . is that '[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person

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offer or payment through negligence does not constitute a conscious disregard or willful blindness.[178] This behaviour is not the equivalent of recklessness.[179] There must be "an awareness of a high probability of the existence of the circumstance."[180] A "'defendant must be shown to have decided not to learn the key fact.'"[181]

"[K]nowledge of a fact may be inferred where the defendant has notice of the high probability of the existence of the fact and has failed to establish an honest, contrary disbelief."[182] The inference cannot be overcome by "deliberate avoidance of knowledge," "willful blindness," or "conscious disregard" of the "required circumstance or result."[183]

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is aware of a high probability of its existence, unless he actually believes that it does not exist.'" *United States v. Nektalov*, 461 F.3d 309, 314 (2d Cir. 2006) (quoting *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969)).

[178]The legislative history of the 1988 amendments to the FCPA clearly state that "'simple negligence' or 'mere foolishness' should not be the basis for liability." H.R. CONF. REP. No. 576, 100th Cong., 2d Sess. 919 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1949. *See Nektalov,* 461 F.3d at 315 (holding that it is "essential to the concept of conscious avoidance[ ] that the defendant must be shown to have decided not to learn the key fact, not merely to have failed to learn it through negligence."). *See also United States v. Abreu*, 342 F.3d 183, 188 (2d Cir. 2003) (rejecting argument "premised on the common misconception that the conscious avoidance theory allows the prosecution to establish knowledge by proving only that the defendant should have known of a certain fact, even if he did not actually know it"); *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000) (conscious avoidance cannot be established when the factual context should have apprised the defendant of the unlawful nature of his conduct and have instead required that the defendant have been shown to have decided not to learn the key fact).

[179]H.R. CONF. REP. No. 576, *supra* note 178, at 920. The Conferees quoted from *United States v. Jacobs*, 475 F.2d 270, 287 n.37 (2d Cir. 1973), in explaining the understanding that was reached with respect to knowledge:

> "Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is the fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his eyes to what otherwise would have been obvious to him. *Thus, if you find that a defendant acted with reckless disregard of whether the bills were stolen and with a conscious purpose to avoid learning the truth, the requirement of knowledge would be satisfied unless the defendant actually believed they were not stolen."*

H.R. CONF. REP. No. 576, *supra* note 178, at 920 (emphasis in Conference Report).

[180]*Id.*

[181]*Nektalov,* 461 F.3d at 315.

[182]H.R. CONF. REP. No. 576, *supra* note 178, at 921.

[183]*Id.* (citing *United States v. Marique Aribizo*, 833 F.2d 244, 249 (10th Cir. 1987) (deliberate avoidance of knowledge); *United States v. Kaplan*, 832 F. 2d 676, 682 (1st Cir. 1987) (willful blindness)).

c. 1988 Amendments

Through the 1988 amendments to the FCPA, the U.S. Congress removed the possibility that negligence could be a basis for criminal liability under the anti-bribery provisions. However, the U.S. Congress still made it clear with the adoption of the following language that the knowledge standard did not necessarily require actual knowledge:

> (2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if –
> (i) such person is aware that such person is engaging in such conduct, that such circumstances exists or that such result is substantially certain to occur; or
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.[184]

When knowledge of the existence of a particular circumstance is required for an offense, knowledge can be established if an individual or entity is aware of a high probability of the existence of such circumstances unless the individual or entity actually believes that the circumstance does not exist. The U.S. Congress intended that the knowledge standard continue to apply to situations where there was a conscious disregard, willful blindness, or deliberate ignorance of circumstances that should alert one to the likelihood of a violation of the anti-bribery provisions.[185]

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[184] 15 U.S.C. §§ 78dd-1(f)(2)(B); -2(h)(3)(B); -3(f)(3)(B) (2009).

[185] "The Conferees intend that the requisite 'state of mind' for this category of offense include a 'conscious purpose to avoid learning the truth." . . . Thus, the "knowing" standard adopted covers both prohibited actions that are taken with 'actual knowledge' of intended results, as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act. H.R. CONF. REP. NO. 576, *supra* note 179, at 919-20 (citation omitted to *United States v. Jacobs*, 475 F.2d 270, 277-80 (2d Cir. 1973)). ". . . [T]he Conferees also agree that the so-called "head-in-the-sand" problem – variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance" – should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation." H.R. CONF. REP. NO. 576, *supra* note 179, at 920. The Conferees noted their agreement "with the reasoning found in such decisions as *United States v. Jewell,* 532 F.2d 679 (9th Cir. 1976); *United States v. Bright,* 517 F.2d 584 (2d Cir. 1975); *United States v. Jacobs,* 470 F.2d 270, 287 n.37 (2d Cir.), *cert. denied sub nom. Lavelle v. United States,* 414 U.S. 821 (1973). *See also* H. REP. NO. 96-1396, 96th Cong., 1st Sess. 35 (1980)." *Id.* "As such, it covers any instance where "any

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The U.S. Congress intended that the "knowing" standard be consistent with the knowledge standard for criminal liability as developed by existing case law for other criminal statutes. Knowledge is imputed under the anti-bribery provisions to an individual who or an entity which consciously disregards or deliberately ignores circumstances that should reasonably have alerted the individual or entity to a high probability of a violation. Actual knowledge is not required of an improper inducement being passed on to a foreign official. Circumstances may otherwise suggest that such an inducement was made or is likely to take place.

The requirement of only an awareness of a high probability of prohibited conduct,[186] combined with the imputation of knowledge to one who consciously disregards or deliberately ignores information, creates a standard of knowledge considerably lower than actual knowledge. One can be deemed to have knowledge that a payment or offer to a third party will result in an improper payment if one consciously disregards or deliberately ignores information indicating a high probability that a third party would make an improper inducement.

d. Authorization

The anti-bribery provisions not only prohibit an improper inducement to a foreign official, they also prohibit the "authorization" of an improper inducement to be made by another.[187] This includes, among others, sales representatives, consultants, and foreign subsidiaries. For example, the anti-bribery provisions apply in situations where an individual or entity "authorizes" a controlled foreign subsidiary to make an improper inducement.

The standard for authorization is not defined in the anti-bribery provisions. Yet the legislative history makes clear that authorization can be either

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reasonable person would have realized" the existence of the circumstances or result and the defendant has "consciously chose[n] not to ask about what he had 'reason to believe' he would discover, . . . " H.R. CONF. REP. NO. 576, *supra* note 179, at 921 (citation omitted to *United States v. Picciandra,* 788 F.2d 39, 46 (1st Cir. 1986)). In terms of how the anti-bribery provisions have been enforced, there is little practical difference between the current "knowledge" standard and the "reason to know" standard that existed prior to the adoption of the 1988 amendments. Although the 1988 amendments eliminated the possibility that negligence might be a basis for liability under the anti-bribery provisions, negligence on the part of an individual or entity was never employed as a basis for prosecution. But the definition of "knowing" under the anti-bribery provisions continued to be expansive. The 1988 amendments did not alter the necessity under the "reason to know" standard to follow up on red flags or evidence of possible wrongdoing that may come to the attention of an individual or entity.

[186] 15 U.S.C. §§ 78dd-1(f)(2)(B), -2(h)(3)(B), -3(f)(3)(B) (2009).

[187] *Id.,* §§ 78dd-1(a), -2(a), -3(a).

explicit or implicit. To "authorize" appears to mean the giving of approval or direction to carry out the conduct. Authorization in the form of acquiescence or direction can be implicit and can be derived from a course of conduct that conveys an intent that an improper inducement can be made. Implicit authorization occurs when an individual or entity makes a payment to an agent "knowing" that all or a part may be used in violation of the anti-bribery provisions. In interpreting whether there may have been an authorization, all of the surrounding circumstances must be taken into consideration.

Authorization may also entail knowing acquiescence or tacit approval by individuals or entities that could have prevented the conduct that led to the making of an improper inducement. Ratification of conduct that leads to the making of improper inducements can also serve as a basis for vicarious liability. Depending upon the nature of the relationship between the individual or entity and the third party, and the surrounding circumstances, acquiescence can constitute authorization. For example, conscious acquiescence to a series of unauthorized acts could be found to constitute authorization to engage in similar acts in the future.

e. Control

Unless they are issuers subject to the FCPA, the anti-bribery provisions do not generally apply to foreign entities. This even includes controlled foreign entities of U.S. entities that are subject to the FCPA. By itself, an improper inducement made by a foreign entity is not a violation of the anti-bribery provisions unless an act in furtherance of the improper inducement takes place within the territory of the United States. For this same reason, officers, directors, employees, and agents of foreign entities are also not subject to the anti-bribery provisions if these individuals or entities are neither domestic concerns nor issuers. However, an issuer or a domestic concern can be vicariously liable for the conduct of its foreign subsidiary if it, in some way, directs, authorizes, or knowingly acquiesces to prohibited conduct on the part of the foreign subsidiary.

Under the anti-bribery provisions, whether an entity owns less than a controlling interest in a foreign affiliate is not determinative for establishing vicarious liability for the actions taken on the part of the foreign affiliate. The distinction between a controlled and noncontrolled affiliate relates only to the likelihood that an entity is apt to have knowledge of the prohibited conduct and to have been in a position to have authorized or acquiesced to it. Where the entity has a controlling interest, and is actively involved in the management of the affiliate, it is more likely to become aware of the prohibited conduct. In such a circumstance, if the parent fails to take immediate action to repudiate the

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prohibited conduct, the failure may be construed as an implicit authorization of the prohibited conduct.

f. Controlling interest

If a foreign entity is deemed to be an agent of an individual or entity subject to the anti-bribery provisions, the individual or entity may also be vicariously liable for improper inducements by the foreign entity. Knowledge would still be required on the part of the principal. But common-law agency principles will be critical in determining whether an individual or entity has a legal right or effective ability to control the acts of its agent. Effective or practical control is the overriding factor in determining whether an agency relationship exists, as opposed to technical legal considerations.

An individual or entity that learns that a controlled foreign entity may have made an improper inducement has the same responsibilities as an individual or entity learning of improper inducements by the individual's or entity's employees. The questionable conduct must be repudiated and strong measures taken to prevent its recurrence. An internal investigation, disciplinary action, and improved procedures addressing the underlying problem should be expected. Absent a response that would be viewed by enforcement officials as effective, the controlling entity, and the personnel of that entity who may have interacted with the foreign entity, could be charged with ratifying the prohibited conduct.

g. Noncontrolling interest

The issues are more complicated if an entity subject to the anti-bribery provisions holds a minority interest in a foreign entity. An entity with a noncontrolling interest may become aware of the improper conduct on the part of its foreign entity. This is more likely to occur if the individual or entity represented on the board of directors of the entity is involved in the operations or activities of the entity. However, the extent of an individual's or entity's controlling interest may bear on whether there was authorization.

If an individual or entity does not have a controlling interest and does not have significant influence over the management or operations of a foreign affiliate, it is less likely that the individual or entity would be found to have implicitly authorized or ratified the prohibited conduct. This is particularly so if it can be shown that an individual or entity took all reasonable steps to prevent or discourage the prohibited conduct.

3. Other forms of vicarious liability

Individuals and entities may also be secondarily liable under the federal conspiracy and aiding and abetting statutes for violations of the anti-bribery or the accounting and record-keeping provisions. In both instances, an individual or entity need not directly violate any of the provisions of the FCPA. Instead, the individual's or entity's knowledge coupled with either a conspiratorial agreement or actions that aid or abet a violation may lead to criminal liability in connection with prohibited conduct on the part of a third party.

a. Conspiracy

Except for foreign officials, persons not otherwise liable under the FCPA can be prosecuted for conspiring to violate the FCPA.[188] A conspiracy is established when two or more persons combine or agree to violate a federal statute.[189] If one member takes an act in furtherance of the conspiracy before the other indicates withdrawal from the conspiracy, both can be held criminally liable for having entered into the conspiracy.[190]

When a conspiracy to violate the FCPA is involved, no offer or payment needs to be made, no record needs to be falsified, and no system of internal controls need to be circumvented. It also does not matter that a co-conspirator is a citizen of a foreign nation and beyond the territorial jurisdiction of the United States.[191] It is the agreement to violate the anti-bribery provisions or the accounting and record-keeping provisions that serves as the basis for the criminal

[188] *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991). However, foreign officials as recipients of the improper inducements cannot be prosecuted. *Id. See also United States v. Tannenbaum*, No. 97-4441 Plea Agreement (S.D.N.Y., filed Aug. 4, 1998), *reprinted in* 4 FCPA REP. 699.583 (2d ed. 2009) (Tannenbaum pled guilty to conspiracy to violate the anti-bribery provisions as part of a scheme to bribe an undercover agent posing as an Argentine procurement officer).

[189] *E.g., United States v. Jenkins*, 78 F.2d 1283, 1287 (8th Cir. 1996). The agreement need not be formal. *United States v. Jackson*, 345 F.3d 638, 648 (8th Cir. 2003) (citation omitted). Rather, "a tacit understanding is sufficient, and can be proved by direct or circumstantial evidence." *Id.* (citation omitted). "Although not sufficient by itself, association or acquaintance among the [alleged conspirators] supports an inference of conspiracy." *Id.* (quoting *United States v. Sparks*, 949 F.2d 1023, 1027 (8th Cir. 1991)).

[190] 18 U.S.C. § 371 (2009).

[191] *E.g. Woitte v. United States*, 19 F.2d 506, 508 (9th Cir. 1927), *cert. denied,* 48 S. Ct. 84, 275 U.S. 545, 72 L. Ed. 416 (1927).

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charge.[192] The only additional requirement is that there exists an overt act by one of the coconspirators in furtherance of the conspiracy to violate the FCPA.

b. Aiding and abetting

Vicarious liability can also arise out of an individual's or entity's involvement as an accomplice under the federal aiding and abetting statute.[193] An aider and abettor can be subject to a statutory violation even if that individual or entity cannot be charged directly with violating the statute.[194] The prosecution of an aider and abettor is also not barred when the principal has been acquitted.[195]

To be liable as an aider and abettor, an individual or entity must act with intent that the offense be committed. An individual or entity need not actually violate the anti-bribery or the accounting and record-keeping provisions. It is the conduct on the part of an individual or entity to assist another party's violation that serves as the basis for liability as an accomplice.

As a result, a foreign entity that may not be directly subject to the anti-bribery provisions may be exposed to liability as an aider and abettor of an individual or entity subject to the anti-bribery provisions. Similarly, an individual or entity not otherwise subject to the accounting and record-keeping provisions may be exposed to liability under those same provisions as an aider or abettor of an individual or entity subject to the accounting and record-keeping provisions.

4. Vicarious liability under the accounting and record-keeping provisions

Similar to the anti-bribery provisions, vicarious liability exists for violations of the accounting and record-keeping provisions. However, unlike the anti-bribery provisions, vicarious liability for civil violations of the accounting and record-keeping provisions can be more easily established. In a civil enforcement context,

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[192]*See, e.g.,* York Int'l Corp. *supra* note 134 (conspiracy to commit violate record-keeping provisions in violation of 15 U.S.F. §§ 78m(6)(2)(A), 78m(b)(5), and 78ff, and wire fraud in violation of 18 U.S.C. § 1343).

[193]18 U.S.C. § 2 (2009). Based upon the holding in *Castle*, *supra* note 188, the recipient of the improper inducements cannot be prosecuted as an accomplice.

[194]*E.g., Coffin v. United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895); *In re* Nofziger, 956 F.2d 287, 290 (D.C. Cir. 1992); *United States v. Smith*, 891 F.2d 793, 710-11 (9th Cir. 1989), *cert. denied,* 498 U.S. 811, 111 S. Ct. 46, 112 L. Ed. 2d 23 (1990); *United States v. Standefer*, 610 F.2d 1076, 1085 (3d Cir. 1979) (*en banc*), *aff'd,* 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980); *United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966), *cert. denied,* 385 U.S. 1002, 87 S. Ct. 705, 17 L. Ed. 2d 542 (1967). *See also States v. Snyder*, 14 F. 554, 556 (C.C.D. Minn. 1882).

[195]*Standefer,* 610 F.2d at 1088-89.

issuers may be held strictly liable for the actions of controlled subsidiaries or foreign affiliates for violations of the accounting and record-keeping provisions.

a. Criminal liability

Criminal liability may be established where an individual or entity subject to the accounting and record-keeping provisions knowingly circumvents or fails to implement a system of internal controls or knowingly falsifies any book, record, or account.[196] For criminal liability to be imposed for acts of third parties, an individual or entity must have knowledge that the third party intends to circumvent or has circumvented the internal controls or intends to falsify or has falsified books and records. As with the anti-bribery provisions and many other federal criminal statutes, proof of deliberate ignorance or knowing disregard can establish the requisite knowledge, especially when an individual or entity becomes aware of the existence of questionable circumstances.

b. Aiding and abetting

An individual or entity can also, as third parties, be found vicariously liable in a civil context for aiding and abetting a violation of the accounting and record-keeping provisions.[197] However, unlike the strict liability of an individual or entity directly subject to the accounting and record-keeping provisions, an individual or entity, in their capacity as third parties, must "knowingly provide substantial assistance" to be liable as an aider and abettor.[198]

F. Deferred Prosecution and Non-Prosecution Agreements

Increasingly, when entities are subject to criminal prosecution, cases are resolved through deferred prosecution or non-prosecution agreements. A deferred

[196] *Id.,* §§ 78m(b)(4)-(5).
[197] 15 U.S.C. § 78t(e) (2009).
[198] *Id.* Exchange Act Section 20(e) provides that "any person that knowingly provides substantial assistance to another person in violation of a provision of [the Exchange Act], shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided." To prove aiding and abetting liability, the SEC must prove (1) a securities law violation by the primary wrongdoer; (2) the aider and abettor's knowledge of the violation; and (3) that the aider and abettor substantially assisted in the violation. *See Sec. & Exch. Comm'n v. Pimco Advisors Fund Mgmt, LLC*, 341 F. Supp. 2d 454, 467-68 (S.D.N.Y. 2004). *See also Sec. & Exch. Comm'n v. Stanard*, 2009 WL 196023, at *31 (W.D.N.Y., filed Jan. 27, 2009).

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prosecution agreement is filed with the court where the charges are filed.[199] A non-prosecution agreement does not entail the filing of formal charges.[200] Instead, the agreement is maintained by the parties and not filed with the court.[201] Deferred and non-prosecution agreements represent a "middle ground" between the Justice Department declining prosecution and bringing charges against an entity.[202]

The Justice Department takes the position that particularly where the "collateral consequences of an [entity's] conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism."[203] The conditions associated with non-prosecution and deferred prosecution agreements can be expected to be onerous and costly for an entity. Yet the advantages of each almost always outweigh the disadvantages.

By entering into a deferred prosecution or non-prosecution agreement, an entity limits its exposure and brings to an end the disruptions and uncertainties associated with an investigation. Significantly, by entering into a deferred prosecution or non-prosecution agreement, an entity enhances its ability to reach a global resolution that may avoid debarment and other adverse consequences associated with entering a plea or being subjected to drawn out criminal proceedings.[204]

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[199] USAM 9 Criminal Resource Manual § 163, n.2 (2009). In 2010, the SEC announced that it would adopt a practice of using deferred prosecution and non-prosecution agreements similar to that followed by the Justice Department. SEC Press Release 2010-6, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), available at <http://www.sec.gov/news/press/2010/2010-6.htm> Many, if not most, of the factors considered by the Justice Department can be expected to be followed by the SEC.

[200] *Id.*

[201] *Id.*

[202] USAM, *supra* note 45, at 9-28.200.

[203] *Id.,* 9-28.1000.

[204] An entity found to be in violation of the anti-bribery provisions or the record-keeping provisions, whether by conviction or the entry of a civil judgment, can be subject to debarment from contracting with the U.S. government and from seeking various forms of governmental assistance. 48 C.F.R. § 9.406-2. A suspension or debarment extends to all of the units of an entity. *Id.*, §§ 9.406-1(b) and 9.407-1(c). Under some circumstances, suspension of the right to do business with the U.S. government can take place even before any charges are brought. *Id.*, § 9.407-1(b)(1). A suspension may be imposed on the "basis of adequate evidence." *Id.* In certain situations, misconduct on the part of an officer, director, employee, stockholder, or any other individual associated with an entity can be imputed to that entity for purposes of a debarment. *Id.,* § 9.406-5(a). Similarly, misconduct on the part of a partner to a joint venture or other joint arrangement may be imputed in certain instances. *Id.,* § 9.406-5(c). Suspension and disbarment as a result of a violation of the anti-bribery provisions of the FCPA or other anti-bribery

In most instances, a failure to abide by a deferred prosecution or non-prosecution agreement allows the Justice Department, in its sole discretion, to file charges against the entity.[205] By entering into the agreement, an entity, in effect, admits to the charges. Typically, an entity admits to a statement of facts that is part of the agreement and agrees not to dispute or contradict the statement of facts. As a result, the Justice Department is not required to go to trial to prove the charges at a later point in time.

Many deferred prosecution or non-prosecution agreements require an independent monitor to be retained.[206] A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the deferred prosecution or non-prosecution agreement.[207] It is not to further "punitive goals."[208] A monitor's duties are to be no broader than necessary and should be tailored to the particular situation.[209]

Deferred prosecution and non-prosecution agreements are designed to reduce the recurrence of the conduct that served as the basis for the action taken by the Justice Department.[210] While learning about and understanding past misconduct may be required,[211] "[a] monitor's primary role is to evaluate whether [an entity] has both adopted and effectively implemented ethics and compliance

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legislation adopted by another country is not limited to a specific program or agency or a particular country. The suspension or debarment applies to all government contracting. *Id.,* §§ 9.406-1(b) and 9.407-1(d). Some agencies, such as the Overseas Private Investment Corporation and the Commodity Credit Corporation, have disbarment provisions tied specifically to the FCPA. *E.g.*, 7 C.F.R. § 1493.270. The collateral consequences can be expected to extend to multilateral lending institutions and potentially other governmental agencies in other parts of the world.

Of particular significance is the EU Public Procurement Directive. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public services contracts, Ricital 1, OJ L 134, 30.2004, pp. 114-240. Among its provisions is the requirement that "any candidate or tenderer" be "excluded from participation in a public contract" for being the subject of conviction by final judgment of crimes involving corruption, participation in a criminal organization, or money laundering. *Id.,* at art. 45. The potential impact of a conviction for a violation of anti-bribery prohibitions holds the prospect of excluding an individual or entity from participating in public procurements in each of the EU member countries.

[205]In *United States v. Aibel Group Ltd.,* CR H-07-005 (LNH), Plea Agreement, ¶ 20 (S.D. Tex., filed Nov. 21, 2008), a deferred prosecution agreement was withdrawn by the Justice Department for the entity's failure to abide by the terms of the deferred prosecution agreement.

[206]The Justice Department takes the position that "[a] monitor should only be used where appropriate given the facts and circumstances of a particular matter." USAM 9 Criminal Resource Manual, *supra* note 202, at § 163.

[207]*Id.*

[208]*Id.*

[209]*Id.*

[210]*Id.*

[211]*Id.* Yet this does not include investigating historical misconduct. *Id.*

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programs to address and reduce the risk of recurrence of the [entity's] misconduct."[212] Effective implementation is an important as the design and scope of a compliance program. Without effective implementation, a well-designed compliance program is virtually meaningless.

G. International Cooperation

In the early 1970s, the international community began a serious examination of the incidence and consequences of corrupt practices in the conduct of international business. The United Nations, the Organization for Economic Co-operation and Development (OECD), and the International Chamber of Commerce were among the leaders of these efforts. Much of the impetus came from revelations involving the foreign activities of U.S. companies. There was also considerable prompting by the United States for other nations to follow its lead in prohibiting the payment of bribes to foreign officials.

These initial efforts led in various international fora to the creation of "soft" law consisting of model laws, codes of conduct, and policy statements. However, other than what already existed in the United States in the form of the FCPA, no domestic legislation was adopted and enforced by any other country. Also, enforcement mechanisms were not put in place and sanctions were not imposed for an entity's failure to abide by announced codes of conduct. New policies were also not prompted by these initiatives.

The momentum associated with the promising efforts of the 1970s ultimately subsided. However, in the 1990s, a multitude of factors, including the end of the Cold War, scandals in Europe, the Asian financial crisis, and the U.S. initiative prompted by the legislation associated with the 1988 amendments to the FCPA,[213] spawned a resurgence of international activity.

The resurgence of activity in the 1990s was reflected in a host of initiatives. At first, much of the resurgence followed the pattern of the 1970s when policies were enunciated and positions were taken without sanctions for a failure to carry out the commitments made. In time, this resurgence led to a rather dramatic evolution from "soft" to "hard" law. Foremost in this evolution were the efforts of the OECD but the OECD was not alone. Among others, the

[212] *Id.*

[213] H.R. CONF. REP. No. 576, *supra* note 178, at 924. The 1988 amendments to the FCPA specifically called for the President of the United States to pursue an international agreement with member countries of the OECD "to govern acts prohibited by the FCPA." *Id.*

Organization of America States, the Council of Europe, the African Union, the United Nations, and the World Bank adopted significant measures.

These developments continued to evolve and have now become so widespread that it can be stated unequivocally that international legal norms now prohibit the making of improper inducements to foreign officials. Most developed countries have implemented legislation prohibiting their nationals from making improper inducements to foreign officials. Virtually all other countries are parties to international conventions prohibiting improper inducements to foreign officials. It is only a matter of time before most of the world will have adopted domestic legislation similar in nature to the FCPA's anti-bribery provisions.

From an enforcement perspective, the most immediate impact of the new international norms will be from the provisions of the anti-bribery conventions requiring cooperation and mutual legal assistance. Historically, many U.S. prosecutions under the anti-bribery provisions of the FCPA were hindered if not entirely precluded due to legal impediments to securing evidence from abroad. Bank secrecy laws in many countries also posed a serious impediment. Still another impediment was the requirement in many jurisdictions that there be dual criminality before evidence or assistance could be provided. Under dual criminality, the provision of evidence or assistance to another country is limited to situations where the conduct being investigated or for which charges are brought could be subject to prosecution in the country receiving the request.

Bank secrecy, dual criminality, and other impediments to securing evidence and cooperation are being eliminated as a direct result of these international developments. Parties to these anti-bribery conventions will also have the opportunity to secure evidence and other assistance to aid their ability to prosecute individuals and entities subject to their jurisdiction for violations of domestic legislation prohibiting improper inducements to foreign officials.

The enhanced ability to obtain evidence and to secure cooperation means, over time, a much broader net for prosecutors in the United States and elsewhere.[214] However, another result of these anti-bribery conventions is the upsurge in prosecutions under the anti-bribery provisions of the FCPA. Indeed, countries that were previously limited as to what they could do in terms of

[214]As was amply demonstrated by the resolution of issues arising out of the investigations of Siemens AG, the entanglements and exposure can be almost endless. In addition to the massive costs associated with the investigation by and ultimate resolution with U.S. enforcement authorities, Siemens AG was also the subject of an investigation by German authorities, and the World Bank, *Siemens Settles with World Bank on Bribes,* WALL ST.J. July 3, 2009, B1. Even with a costly resolution of the investigations conducted by U.S. and German authorities and the World Bank, Siemens still faces investigations in other countries. *E.g., Siemens Settles with World Bank on Bribes.*

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providing assistance have now moved to the forefront in bringing evidence of FCPA violations to the attention of U.S. enforcement officials. This upsurge in enforcement activity can be expected to grow.

H. Two Recent Case Studies

A number of FCPA cases have been brought in recent years that relate in various ways to Africa. Of these cases, two are significant in demonstrating the manner and means by which these enforcement efforts are becoming increasingly significant with respect to Africa and the oil industry in Nigeria. In essence, the Justice Department and SEC have used their tremendous leverage over entities to hold them vicariously liable for the conduct of those acting on their behalf.

1. Willbros

Willbros Group Inc. ("Willbros Group") is a Panamanian company that is listed on the New York Stock Exchange.[215] It provides construction, engineering and other services in the oil and gas industry.[216] Willbros International Inc. ("Willbros International") is the wholly-owned Panamanian subsidiary through which Willbros Group conducts its international operations.[217] During the period for which charges were brought, the United States was the principal place of business for both Willbros Group and Willbros International.[218]

a. The scheme

The principal focus of the enforcement actions against Willbros Group and Willbros International arose out of their business activities in Nigeria.[219] In 2003

[215] *United States v. Willbros Group, Inc.*, Information No. H-08-CR-00287 (S.D. Tex., filed May 14, 2008), ¶ 6.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] Additional claims in this case are based on payments to officials of the state-owned oil company PetroEcuador and its subsidiary PetroComercial, to assist with obtaining and retaining business associated with the Santo Domingo project, involving the rehabilitation of sixteen kilometers of gas pipeline in Ecuador. In late 2003 to early 2004, Willbros Group and Willbros International agreed to make payments of at least $300,000 to officials of PetroEcuador and PetroComercial. *Id.*, ¶ 39-41. The SEC alleged that Willbros Group was involved in a scheme to minimize its Bolivian subsidiary's value-added tax (VAT) obligations to the Bolivian government through the use of fictitious invoices generated by an outside consultant. *Sec. & Exch. Comm'n v. Willbros Group, Inc.*, Complaint, Case No. 08-CV-01494 (S.D. Tex., filed May 14, 2008), ¶¶ 43-50. These

Willbros Group sought work valued at $387 million on a major engineering, procurement, and construction (EPC) gas pipeline known as the Eastern Gas Gathering System (EGGS). To obtain this contract, payments and promises were made to pay more than $6.3 million to officials of the Nigerian National Petroleum Corporation and National Petroleum Investment Management Service, a senior official in the executive branch of the Nigerian federal government, officials of the multinational oil company serving as the operator of the EGGS joint venture, and a political party in Nigeria. To facilitate these arrangements, a sham agreement was entered into with an outside consultant for which payments would be made at three percent of the contract revenues for certain projects, including the EGGS project. Payments to that consultant were then channeled to these officials.

As a result of an internal investigation begun in 2005, the consultancy arrangement was terminated.[220] Nevertheless, because they were concerned that the failure to make additional payments to government officials would cause an interruption in the company's Nigerian business, employees of Willbros International orchestrated a series of loans from sources outside the company as well as from a petty cash account in Nigeria. The proceeds from the loans were funneled through a second consultant to Nigerian officials. As part of the scheme, Willbros International employees fabricated invoices and inflated forecasts and budgets to procure cash from the company's headquarters in the United States. Agreement was also reached to make improper payments to assist with obtaining business in Nigeria's offshore fields.[221] In addition, in order to make improper payments to Nigerian tax and court officials, a scheme was devised by which fictitious invoices for non-existent vendors were created or acquired in order to obtain funding from the company's offices in the United States.[222]

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invoices would create for Willbros Group an offset to the VAT it had received from its customers and, in turn, reduce the VAT owed to the Bolivian government. This scheme resulted in underpayments to the government, and inflated the company's net income by approximately 6.4 percent in fiscal year 2003 and earnings per share by $0.03 for both fiscal year 2003 and the first three quarters of 2004. In 2005, as a result of findings during its internal investigation, Willbros Group restated previously issued financial statements. As a result, the SEC alleged that Willbros Group registration statements included material misrepresentations.

[220]*Id.,* ¶¶ 28-36.

[221]*Id*., ¶¶ 37-38.

[222]*Sec. & Exch. Comm'n v. Willbros Group, Inc*., *supra* note 219, at ¶¶ 34-37.

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b. The entities

Even though Willbros Group and Willbros International were Panamanian entities, jurisdiction over Willbros Group was based on its status as an issuer.[223] For Willbros International, by having its headquarters in the United States, it was a domestic concern subject to U.S. jurisdiction.[224] Both Willbros Group and Willbros International were charged with conspiring with themselves and each other to violate the anti-bribery and record-keeping provisions of the FCPA.[225] They were also charged with substantive violations of the anti-bribery provisions.[226] Willbros Group and Willbros International became vicariously liable as entities due to the knowledge on the part of an individual who was an officer and agent of both entities.[227] He was aware of the use of intermediaries to facilitate the improper payments to government officials, officials of a parastatal, and officials of a political party.[228]

Significantly, Willbros Group alone was charged with substantive violations of the record-keeping provisions for the falsification of records by officers and employees of Willbros International, its foreign subsidiary.[229] The SEC's complaint was limited to Willbros Group and employees of Willbros International for violations of the anti-bribery and accounting and record-keeping provisions.[230] In both instances, Willbros Group was held vicariously liable for the conduct of others. Willbros International's culpability for violating the record-keeping provisions was based on its status as a co-conspirator.

In addition to paying substantial fines, Willbros Group and Willbros International entered into a deferred prosecution agreement. The Justice Department agreed to defer prosecution of these companies for three years and the companies agreed to retain for a period of three years an independent compliance monitor to assess the company's implementation of and compliance with new internal policies and procedures. Of significance, the monitoring extended beyond the FCPA to other anti-corruption laws.[231]

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[223] *Willbros Group, Inc*., Information , *supra* note 215, at ¶ 6.
[224] *Id.*
[225] *Id.,* ¶ 22.
[226] *Id.,* ¶¶ 43-48.
[227] *Id*., ¶ 12.
[228] *Id.,* ¶¶ 13, 16, 20.
[229] *Id*., ¶¶ 22, 45-53.
[230] *Sec. & Exch. Comm'n v. Willbros Group, Inc*., *supra* note 219, at ¶¶ 34-37.
[231] *United States v. Willbros Group, Inc*., Deferred Prosecution Agreement, Case No. H-08-CR-00287 (S.D. Tex., filed May 14, 2008), ¶ 10.

c. Individuals

Three former employees of Willbros International ultimately entered guilty pleas for their role. The former employee of Willbros Group was charged and remains a fugitive. All four are U.S. citizens. In the charges brought by the SEC,[232] four former employees of Willbros International, the foreign subsidiary of Willbros Group, were charged with violating the anti-bribery and record-keeping provisions. Of import, one of the employees was a Canadian citizen who, except for his status as an employee of Willbros International, would not have been subject to the FCPA. He was charged with aiding and abetting a violation of the anti-bribery and accounting and record-keeping provisions.[233]

2. Halliburton/KBR

In 1998, Halliburton Company, a publicly-traded energy-services company based in Houston and Dubai, acquired Dresser Industries, Inc., which included a subsidiary, The M.W. Kellogg Company (Kellogg). Kellogg was later combined with Halliburton's subsidiary Brown & Root, Inc. to form Kellogg, Brown & Root, LLC (KBR). KBR also became a wholly-owned subsidiary of KBR, Inc. In 2009, Halliburton, KBR, Inc., and KBR reached resolution with the Justice Department and SEC relative to ongoing investigations concerning violations of the FCPA.[234]

a. The Scheme

KBR and its predecessor companies were part of a joint venture in Nigeria to design, build, and expand liquefied natural gas (LNG) facilities.[235] The joint venture's profits, revenues, and expenses were shared equally among the four joint venture partners. The joint venture's steering committee was composed of high-level executives from each of the four member companies.[236] The steering committee made major decisions on behalf of the joint venture, including whether to hire agents to assist the joint venture in winning contracts, who to hire as agents, and how much to pay the agents. The joint venture operated through three

[232] *Sec. & Exch. Comm'n v. Willbros Group, Inc*., *supra* note 219, at ¶¶ 9-12.
[233] *Id*., ¶¶ 74, 77.
[234] U.S. Dep't of Justice Press Release, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), available at <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>
[235] *United States v. Kellogg Brown & Root LLC*, Information, Criminal No. H-09-071 (S.D. Tex., filed Feb. 6, 2009), at ¶ 2.
[236] *Id*., at ¶ 4.

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Portuguese special-purpose corporations, including a corporation used to enter into consulting agreements with joint venture agents.[237] KBR held its interest in that corporation indirectly and avoided placing U.S. citizens on the corporation's board of managers "as part of KBR's intentional efforts to insulate itself from FCPA liability for bribery of Nigerian government officials through the joint venture agents."[238]

Two agents hired by the joint venture were used a vehicle to pay bribes to Nigerian government officials and employees of the government-owned entity responsible for awarding LNG contracts.[239] The first agent was a citizen of the United Kingdom who used a Gibraltar-based consulting company as a vehicle to enter into agent contracts and to receive payments from the joint venture.[240] The second agent was a global trading company headquartered in Tokyo which was hired by the joint venture to help it obtain business in Nigeria, including by paying bribes to Nigerian officials.[241]

b. The entities

In the complaint filed by the SEC, it was alleged that Halliburton, as the parent company of the KBR entities, failed to devise adequate FCPA internal controls relating to foreign sales agents and failed to maintain and enforce even the internal controls it had.[242] During the relevant time period, KBR's board of directors consisted solely of senior Halliburton officials.[243] The senior Halliburton officials hired and replaced KBR's senior officials, determined salaries, and set performance goals. Halliburton consolidated KBR's financial statements into its own and all of KBR's profits flowed directly to Halliburton.[244] The statements were reported to investors as Halliburton profits and KBR's CEO, Albert Jackson Stanley, discussed the Nigerian LNG projects with senior Halliburton officials, who were aware of the joint venture's use of the U.K. agent.[245]

Halliburton's legal department's due diligence investigation of the U.K. agent was inadequate because Halliburton's policies did not require a specific description of the agent's duties and because the agent did not agree to any

[237] *Id*., at ¶ 9.
[238] *Id.*
[239] *Id*., at ¶¶ 10-12.
[240] *Id*., at ¶¶ 10-11.
[241] *Id*., at ¶ 12.
[242] *Sec. & Exch. Comm'n v. Halliburton Co*., Complaint, at ¶¶ 51-52, Case No. 4:09-399 (S.D. Tex., filed Feb. 11, 2009).
[243] *Id*., at ¶ 30.
[244] *Id*.
[245] *Id*.

accounting or audit of fees received.[247] Halliburton and KBR attorneys never learned the identity of the owners of the Gibraltar-based consulting company used by the U.K. agent and failed to check all of the agent's references, some of which turned out to be false.[248] Halliburton approved the use of the U.K. agent even though a senior Halliburton legal officer knew that the due diligence investigation had failed to uncover "significant information" about the agent and even though other Halliburton and KBR officials failed to ask questions or undertake an independent review.[249] As to the Japanese agent, Halliburton conducted no due diligence.[250] Halliburton's policies and procedures were deficient in failing to adequately test the characterization of the underlying contracts.[251] The payments to the U.K. and Japanese agents were falsely characterized as legitimate "consulting" or "services" fees in numerous Halliburton and KBR records.[252]

The SEC charged KBR, Inc. with acting as an agent of Halliburton in violating the anti-bribery provisions,[253] aiding and abetting Halliburton's violations of the accounting and record-keeping provisions,[254] and violating the accounting and record-keeping provisions.[255] In its capacity as what was, in large part, a successor entity, Halliburton was only charged with violating the FCPA's accounting and record-keeping provisions.[256]

Halliburton and KBR, Inc. reached a settlement with the SEC.[257] KBR entered a plea to the criminal charges and agreed to a monitor for a period of three years.[258] In addition, all three of the other entities to the joint venture ultimately were charged. Technip S.A., was a global engineering, construction, and services company based in Paris with ADRs traded on the New York Stock Exchange. It was charged with one count of conspiracy to violate the FCPA and one count of violating the FCPA and subsequently entered into a deferred prosecution agreement.[259] It has also settled charges with the SEC where it was alleged that it

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[247]*Id*., at ¶ 31.
[248]*Id*., at ¶ 32.
[249]*Id*., at ¶¶ 33, 35.
[250]*Id*., at ¶ 36.
[251]*Id.*
[252]*Id*., at ¶ 37.
[253]*Id*., at ¶ 41.
[254]*Id*., at ¶ 49.
[255]*Id*., at ¶ 52.
[256]*Id*., at ¶ 45.
[257]U.S. Dep't of Justice Press Release, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine, *supra* note 234.
[258]*Id.*
[259]U.S. Dep't of Justice Press Release, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>.

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violated the anti-bribery and accounting and record-keeping provisions of the FCPA.[260]

A Dutch company, Snamprogetti Netherlands B.V. (Snamprogetti), was a third member of the joint venture that was charged.[261] Even though it was not subject to the anti-bribery provisions of the FCPA due to its status as being a foreign company and not an issuer, it was charged as an accomplice with one count of conspiracy and one count of aiding and abetting a violation of the anti-bribery provisions of the FCPA.[262] It paid a large fine and entered into a deferred prosecution agreement.[263] In addition, Snamprogetti and its former parent, ENI, S.p.A. ("ENI"), also reached a settlement of a related civil complaint filed by the SEC charging "Snamprogetti with violating the FCPA's anti-bribery provisions, falsifying books and records, and circumventing internal controls and charging ENI with violating the FCPA's books and records and internal controls provisions. As part of that settlement, Snamprogetti and ENI agreed jointly to pay $125 million in disgorgement of profits relating to those violations."[264] ENI was an issuer with common stock and ADRs listed in the United States.[265] In acting as an agent of ENI in using the mails or other means or instrumentality of interstate commerce in furtherance of the unlawful activity, Snamprogetti subjected itself to the jurisdiction of the FCPA for substantive violations of the anti-bribery and record-keeping provisions of the FCPA.[266]

A Japanese engineering and construction company headquartered in Yokohama, Japan, JGT Corporation was the fourth members to the joint venture.[267] Like, Snamprogetti, JGT was also a foreign company not subject to the FCPA, it was charged as an accomplice with one count of conspiracy and one count of aiding and abetting a violation of the anti-bribery provisions of the FCPA.[268] It also entered into a deferred prosecution agreement and paid a large fine.[269]

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[260] *Id.*

[261] U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), *available at* http://www.fbi.gov/houston/press-releases/2010/ho070710.htm.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Sec. & Exch. Comm'n v. ENI, S.p.A. and Snamprogetti Netherlands B.V.,* Civil Action No. 4:10-cv-2414, Complaint, at ¶ 7 (July 7, 2010).

[266] *Id*., at ¶¶ 33, 39-41.

[267] U.S. Dep't of Justice Press Release, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), available at <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html>.

[268] *Id.*

[269] *Id.*

c. Individuals

Several of the individuals have also been charged and entered into plea agreements with the Justice Department.[270] Two individuals, who are U.K. citizens, were charged in their capacity as agents of an entity or individual subject to the terms of the anti-bribery provisions.[271] Each individual has since been extradited to the United States and entered guilty pleas to conspiracy to violate the FCPA in one instance and conspiring to violate and violating the FCPA in another instance.[272]

III. CONCLUSION

In combination with emerging efforts throughout much of the developed world to deter the supply-side component of corruption, a heightened focus by U.S. enforcement officials on enforcing all aspects of the FCPA will increasingly have a deterrent impact on entities seeking to do business in Africa. The manner by which the Justice Department and the SEC rely upon various forms of leverage to make it far more difficult for entities subject to their jurisdiction to fail to comply with the anti-bribery mandate of the FCPA. By exercising their tremendous leverage over the conduct of entities, U.S. enforcement officials have dramatically increased the potency of their anti-bribery efforts.

[270]U.S. Dep't of Justice Press Release, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty, *supra* note 266.
[271]*United States v. Kessler*, Indictment, Criminal No. H-09-098, at ¶¶ 5, 11 (S.D. Tex., filed Feb. 17, 2009).
[272]U.S. Dep't of Justice Press Release, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty, *supra* note 266.

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