INTRODUCTION TO THE GUIDE

December 2017 marked the fortieth year of the Foreign Corrupt Practices Act (FCPA). The year that preceded this milestone anniversary reflected the continued ascendance of anti-corruption enforcement in the United States and around the globe.

In the United States, the Department of Justice (DOJ) announced a new FCPA corporate enforcement policy in November 2017, which clarifies the framework the DOJ will use to assess whether corporations under FCPA investigation should receive favorable treatment. The new policy establishes a presumption in favor of a declination of prosecution where a company disclosed corruption problems, cooperated with the DOJ’s investigation, remediated whatever led to the problems, and disgorged any associated profit except in the case of recidivism or those involving severe misconduct. The policy also promises reduced credit in the form of a discounted fine to companies that meet some, but not all, of the prerequisites.

Meanwhile, as the new administration settled in, the DOJ and the Securities and Exchange Commission resolved 13 corporate matters, including declinations of prosecution, and brought several new actions against individuals allegedly involved in misdeeds. Although this represents a drop in the overall number of resolved matters from 2016’s high-water mark, other indicators suggest that FCPA enforcement continues along the same trajectory as under prior administrations—DOJ officials have said as much, and the results bear them out. The monetary penalties accompanying corporate resolutions remained high, spanning between $7 million and $800 million. Likewise, large cases, including those against Rolls-Royce and Telia, reflected the new normal of multinational investigations among many governments and enforcement authorities.

In the United Kingdom, officials at the Serious Fraud Office (SFO) highlighted the UK’s own resolution with Rolls-Royce as an example of their increasingly sophisticated investigation and prosecution of white-collar crime. The SFO also announced four new UK Bribery Act (UKBA) UKBA or bribery investigations that have not yet been charged.

Elsewhere, anti-corruption enforcement has continued to mature. Most significantly, as reflected in several new FCPA cases involving Brazil, the Brazilian authorities have continued their probe into corruption at the state-owned oil company Petróleo Brasileiro S.A. (Petrobras). The trend of adopting and enforcing FCPA-style laws continued with new laws and cases in several countries. And multinational companies are increasingly adopting the International Standard Organization’s anti-bribery standard, meant to create a uniform signal of adequate anti-corruption compliance.

This Guide analyzes these and other significant anti-corruption enforcement and compliance topics. It offers an overview of the FCPA and the UKBA and addresses common questions that a company operating in the international marketplace may have about these laws. Naturally, the information presented here is not legal advice in any specific situation.

If you have any questions about this Guide, or the anti-corruption laws generally, please contact any of the lawyers listed in this publication or in our Investigations, Compliance, and Defense practice group.

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SNAPSHOT OF 2017 ENFORCEMENT ACTIVITY

The following section provides a thumbnail sketch of the DOJ and SEC’s 2017 FCPA enforcement activity, including matters newly brought, unsealed, or resolved in 2017. These matters involved allegations of corruption in most regions around the globe and many industries. Enforcement included several cases brought against individuals and 13 corporate resolutions, including two matters in which the DOJ declined prosecution despite concluding that misconduct occurred.

2017 CORPORATE RESOLUTIONS

This table shows the 13 corporate resolutions that resulted in a monetary penalty. The “global penalty” amount includes all monetary sanctions assessed by US authorities, including any criminal fine, civil penalty, pre-judgment interest, disgorgement, and any amounts offset against penalties paid to foreign authorities. These matters resulted in, all totaled, more than $2.5 billion in monetary penalties, with the average amount just under $200 million.

<table>
<thead>
<tr>
<th>Company</th>
<th>Type of Resolution</th>
<th>FCPA Provisions</th>
<th>Global Penalty (US Penalty)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alere Inc.</td>
<td>SEC Order</td>
<td>Books &amp; records; internal controls</td>
<td>$13,023,885</td>
</tr>
<tr>
<td>Cadbury Limited; Mondelēz International</td>
<td>SEC Order</td>
<td>Books &amp; records; internal controls</td>
<td>$13,000,000</td>
</tr>
<tr>
<td>CDM Smith Inc.</td>
<td>DOJ Declination with Disgorgement</td>
<td>N/A</td>
<td>$4,000,000</td>
</tr>
<tr>
<td>Halliburton Company</td>
<td>SEC Order</td>
<td>Books &amp; records; internal controls</td>
<td>$29,200,000</td>
</tr>
<tr>
<td>JERDS Luxembourg Holding S.A.R.L., Zimmer Biomet, Inc.</td>
<td>DOJ Guilty Plea (JERDS); DPA; SEC Order (Zimmer)</td>
<td>Anti-Bribery; books &amp; records; internal controls (Zimmer); books &amp; records (JERDS)</td>
<td>$30,482,705</td>
</tr>
<tr>
<td>Keppel Offshore Marine Ltd.; Keppel Offshore Marine USA</td>
<td>DOJ DPA (Keppel); Guilty Plea (Keppel USA)</td>
<td>Anti-Bribery</td>
<td>$422,000,000</td>
</tr>
<tr>
<td>Las Vegas Sands Corp.</td>
<td>DOJ NPA</td>
<td>N/A</td>
<td>$6,960,000</td>
</tr>
<tr>
<td>Linde North America Inc.; Linde Gas North America LLC</td>
<td>DOJ Declination with Disgorgement</td>
<td>N/A</td>
<td>$7,800,000</td>
</tr>
<tr>
<td>Orthofix International N.V.</td>
<td>SEC Order</td>
<td>Books &amp; records; internal controls</td>
<td>$6,119,375</td>
</tr>
<tr>
<td>Rolls-Royce plc</td>
<td>DOJ DPA</td>
<td>Anti-Bribery</td>
<td>$800,000,000 ($169,917,710)</td>
</tr>
<tr>
<td>SBM Offshore N.V.; SBM Offshore USA, Inc.</td>
<td>DOJ DPA (SBM); Guilty Plea (SBM USA)</td>
<td>Anti-Bribery</td>
<td>$238,000,000</td>
</tr>
<tr>
<td>Sociedad Quimica y Minera de Chile</td>
<td>DOJ DPA; SEC Order</td>
<td>Books &amp; records; internal controls</td>
<td>$30,000,000</td>
</tr>
<tr>
<td>Telia Company AB; Coscom LLC</td>
<td>DOJ DPA (Telia); Guilty Plea (Coscom); SEC Order (Telia)</td>
<td>Anti-Bribery; internal controls (Telia SEC order only)</td>
<td>$965,000,000 ($463,000,000)</td>
</tr>
</tbody>
</table>

Resolutions Key: “DPA” - deferred prosecution agreement; “NPA” - non-prosecution agreement; “SEC Order” - settled administrative proceeding.
While actions in 2016 involved more misconduct in China and East Asia than any other region, 2017 has included more actions centered on South America, reflecting the continued fallout from the long-running investigation into corruption at the Brazil state-run oil company, Petrobras, as well as investigations into corruption surrounding the Venezuelan oil industry, which has resulted in charges against at least ten individuals.

Enforcement in 2017 covered several major industries, including many of those often considered high-risk. The Energy Sector, including oil and gas extraction, had the highest number of resolutions, a result driven in part by the breadth of the Petrobras probe.
# Table of Contents

FCPA Recent Developments and Trends

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>New DOJ FCPA Corporate Enforcement Policy Credits Disclosure and Cooperation</td>
<td>1</td>
</tr>
<tr>
<td>DOJ Enforcement Activity Reinforces Continued Commitment to FCPA Enforcement</td>
<td>2</td>
</tr>
<tr>
<td>SEC Signals Continued Commitment to FCPA Enforcement, Including Bringing and Resolving Cases Faster</td>
<td>3</td>
</tr>
<tr>
<td>Deputy Attorney General Announces Intent to Revisit Yates Memo</td>
<td>3</td>
</tr>
<tr>
<td>Second Circuit Limits District Courts’ Supervision of Deferred Prosecution Agreements</td>
<td>4</td>
</tr>
<tr>
<td>Allen: Fifth Amendment Prohibits the Use of Compelled Testimony in Cross-Border Prosecutions</td>
<td>5</td>
</tr>
</tbody>
</table>

The Foreign Corrupt Practices Act

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The FCPA’s Anti-Bribery Provisions</td>
<td>7</td>
</tr>
<tr>
<td>Defenses to an Anti-Bribery Prosecution</td>
<td>16</td>
</tr>
<tr>
<td>The FCPA’s Books and Records and Internal Controls Provisions</td>
<td>19</td>
</tr>
<tr>
<td>Resolution of FCPA Investigations</td>
<td>21</td>
</tr>
<tr>
<td>Other Federal Statutes that Apply to Foreign Corruption</td>
<td>29</td>
</tr>
</tbody>
</table>

Recent FCPA Enforcement Actions

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017 FCPA-Related Private Litigation</td>
<td>46</td>
</tr>
<tr>
<td>UK Bribery Act</td>
<td>49</td>
</tr>
<tr>
<td>Statute and Elements of Offences under the UK Bribery Act</td>
<td>49</td>
</tr>
<tr>
<td>Affirmative Defences</td>
<td>55</td>
</tr>
<tr>
<td>Resolution of UKBA Investigations</td>
<td>55</td>
</tr>
<tr>
<td>UK Anti-Corruption Developments</td>
<td>57</td>
</tr>
<tr>
<td>Update on the United Kingdom’s Vote to Leave the European Union</td>
<td>57</td>
</tr>
<tr>
<td>UK Government Consultation on Corporate Liability for Economic Crime</td>
<td>57</td>
</tr>
<tr>
<td>SFO Speeches at 2017 Cambridge Symposium on Economic Crime</td>
<td>58</td>
</tr>
<tr>
<td>Newly Announced Investigations</td>
<td>59</td>
</tr>
</tbody>
</table>

2017 UK Enforcement Activity

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Developments</td>
<td>62</td>
</tr>
<tr>
<td>Map of Our Worldwide Anti-Corruption Representations</td>
<td>65</td>
</tr>
<tr>
<td>Jenner &amp; Block’s Anti-Corruption Experience</td>
<td>65</td>
</tr>
<tr>
<td>Practice Member Listing</td>
<td>67</td>
</tr>
</tbody>
</table>
FCPA RECENT DEVELOPMENTS AND TRENDS

NEW DOJ FCPA CORPORATE ENFORCEMENT POLICY CREDITS DISCLOSURE AND COOPERATION

On November 29, 2017, the DOJ announced a new FCPA corporate enforcement policy, which provides guidance for how it will credit self-disclosure, cooperation, and remediation in resolving corporate FCPA matters. The new policy, which has been inserted into the US Attorney’s Manual as official DOJ policy, draws from the 2016 FCPA pilot program and aims to provide greater certainty to companies that self-disclose wrongdoing and cooperate with DOJ investigations.

Most notably, the new policy creates a “presumption” in favor of declination of prosecution for companies that voluntarily disclose misconduct, cooperates with the DOJ’s investigation, remediates the issues that caused the misconduct, and disgorge any ill-gotten gains. Companies that do not disclose but still cooperate earn mitigation credit in the form of a reduced fine.

The DOJ’s Corporate FCPA Enforcement Policy provides that the DOJ will presumptively decline prosecution, even where misconduct has occurred, if a company voluntarily discloses misconduct, cooperates with the DOJ’s investigation, remediates the issues that caused the misconduct, and disgorge any ill-gotten gains. Companies that do not disclose but still cooperate earn mitigation credit in the form of a reduced fine.

- **Reasonably prompt self-disclosure** of an FCPA violation, made prior to any imminent threat of government investigation or disclosure by a third party;

- **Full cooperation** with the government’s investigation, including providing all relevant facts about individuals involved in the misconduct, agreeing to de-conflict a company’s own internal investigation with the government’s investigation (i.e., complying with the DOJ’s request that companies defer investigative steps, such as interviews of company employees or third parties), attempting to provide relevant evidence located abroad and navigating foreign data-privacy rules, and cooperating “proactively” rather than “reactively”;

- **Remediation** of the conditions that led to the misconduct, including any flaws in the company’s preexisting compliance program and appropriate discipline (including potential termination) of employees involved in the misconduct; and

- **Disgorgement** of any profits resulting from the violation.

This presumption can be overcome only if aggravating factors are present, such as especially serious or pervasive misconduct or a history of similar violations.

The policy recognizes that not all companies will meet the requirements for a declination and describes the circumstances under which more limited mitigation credit, in the form of a reduction of the recommended fine amount, is available. The policy states that if aggravating factors overcome the presumption of a declination but the company otherwise meets all the requirements, the company will still receive a 50-percent discount off the low end of the fine recommended under the Federal Sentencing Guidelines and “generally” not be required to appoint a corporate compliance monitor.
Companies that fully cooperate, remediate, and disgorge profits, but do not self-disclose their misconduct will be entitled to a 25-percent discount from the low end of the guidelines fine range, and companies that cooperate to a lesser degree may still be eligible for a smaller penalty discount.

This policy follows from the FCPA pilot program that had been in place since April 2016. Although the new policy draws much of its language directly from the pilot program, it contains a few notable changes. The “presumption” in favor of declination for companies meeting the policy’s requirement replaces language stating that the DOJ would “consider” a declination. The specified penalty discounts replace language that a company could receive a discount of “up to” those amounts. And the policy specifically notes that lesser credit may be available for those companies that fail to meet its stringent requirements but still cooperate.

Deputy Attorney General Rod Rosenstein, who announced the policy, said that the DOJ intended these changes to “reassure corporations that want to do the right thing.”

For a detailed discussion of the new FCPA enforcement policy, see the Client Alert by Jenner & Block partners David Bitkower, Gayle Littleton, Nicholas Barnaby, and associates Keisha Stanford and Natalie Orpett. The below background section of the Guide also includes a detailed discussion of the DOJ’s views on disclosure, cooperation, and remediation.

DOJ ENFORCEMENT ACTIVITY REINFORCES CONTINUED COMMITMENT TO FCPA ENFORCEMENT

Since the 2016 election, there has been much debate over the current administration’s commitment to FCPA enforcement as compared to that of the Obama and Bush administrations, both of which aggressively enforced the FCPA. The public statements and actions of the DOJ to date suggest that the administration has and will continue to pursue FCPA cases.

Speculation about changes in enforcement priorities have centered on historical statements made by President Trump and other incoming officials, as well as on proclaimed commitments to significantly reduce the size of numerous government agencies with no indication that white-collar law enforcement would be excluded from such reductions. Notably, in May 2012, President Trump described the FCPA as “a horrible law” that “should be changed.” Such comments led some to believe that the new administration might de-prioritize anti-corruption enforcement efforts.

Yet the new FCPA enforcement policy, described above, is largely a continuation of the 2016 FCPA pilot program and reflects continuity rather than wholesale changes. This is consistent with the tone and substance of the public statements by senior law enforcement officials who have stressed that FCPA enforcement would remain a top law enforcement priority. For example, Attorney General Jeff Sessions announced in April 2017 that the DOJ would “continue to strongly enforce the FCPA and other anti-corruption laws,” noting that “[c]ompanies should succeed because they provided superior products and services, not because they have paid off the right people.”

In addition to confirming its commitment to continued FCPA enforcement, the DOJ also has indicated that transnational cooperation to investigate and prosecute corrupt activities will continue. Former Acting Assistant Attorney General for the Criminal Division Ken Blanco stated in July 2017 that “our biggest investigations are increasingly transnational, often involving multiple foreign jurisdictions” and “requiring greater and closer collaboration with our foreign counterparts.”

Continued cooperation across jurisdictions is evident in two of this year’s recent corporate settlements. First, the DOJ and SEC’s resolution with Telia Company AB, resulting in payments by Telia of more than $965 million, involved law enforcement in the United States, Austria, Belgium, Cyprus, France, Ireland, Latvia, Luxembourg, Norway, Switzerland, the Isle of Man, and the United Kingdom. Similarly, the DOJ’s investigation into Rolls-Royce plc involved cooperation between the United States, the United Kingdom’s Serious Fraud Office, and Brazil’s Ministério Público Federal, and resulted in global penalties of more than $800 million.

Although the number of publicly reported resolutions has not matched last year’s record pace, the DOJ has continued to pursue and resolve both corporate and individual cases. The DOJ and SEC have combined to resolve 13 corporate enforcement actions in 2017, including Telia and Rolls-Royce and publicly announced declinations of prosecution.
Likewise, the DOJ has demonstrated continuity in FCPA enforcement through its emphasis on the importance of corporate compliance. In February 2017, the DOJ issued a list of topics and questions it considers when evaluating the effectiveness of corporate compliance. This document, described in detail in the background section below, echoes prior DOJ discussion, emphasizing that an effective compliance program must be risk-based, tailored to a particular company’s business, have the support of management, and incorporate adequate compliance.

For more on the DOJ Fraud Section’s paper on evaluation of compliance programs, please see “DOJ Releases Under-the-Radar Paper on ‘Evaluation of Corporate Compliance Programs,” written by Partner Erin R. Schrantz and Associate Nathaniel K.S. Wackman.

SEC SIGNALS CONTINUED COMMITMENT TO FCPA ENFORCEMENT, INCLUDING BRINGING AND RESOLVING CASES FASTER


After highlighting past SEC FCPA enforcement accomplishments, including the creation of a specialized enforcement unit and over 100 subsequent FCPA actions, Peikin posed himself the question of whether the SEC would “continue to be committed to robust FCPA enforcement.” His response: “My answer to that question is simple: Yes.”

The Supreme Court’s decision in Kokesh rejected the SEC’s position that no limitations period applies to disgorgement, a penalty the SEC often seeks in FCPA cases. The SEC’s co-director of enforcement says that the agency will respond by bringing and resolving FCPA cases more quickly.

Three clear themes emerged from Peikin’s discussion of future FCPA enforcement. First, there will be continued cooperation between the SEC and foreign enforcement authorities. Calling anticorruption enforcement “a team effort,” he noted that over the last fiscal year the SEC relied on the assistance of 19 jurisdictions in FCPA cases, including the recent settlement with Telia, discussed above, that involved cooperation between US, Swedish, Dutch, and Swiss authorities, among others. Peikin praised the strong deterrent message and the efficiencies achieved through such international cooperation and stated that this international cooperation is likely to increase in future years.

Second, Peikin restated the SEC’s commitment to individual accountability, which he described as a “core principle” of its enforcement program. He noted the unique challenges of FCPA enforcement actions against individuals, such as the difficulty of reaching foreign nationals who do not reside in the United States, but stressed that the SEC “will continue to have intense focus on the question of individual responsibility in every FCPA investigation.”

Finally, Peikin described the SEC’s response to the Supreme Court’s decision in Kokesh v. SEC earlier in 2017 that disgorgement, a remedy the SEC often seeks in FCPA cases, is subject to the same general five-year statute of limitations as other SEC claims for monetary penalties. According to Peikin, because FCPA cases often take more time to develop—and because, unlike FCPA matters under investigation by the DOJ, the statute of limitations is not often tolled for SEC enforcement actions—the SEC’s FCPA enforcement actions are particularly likely to be impacted by Kokesh. Peikin underscored the SEC has “no choice but to respond by redoubling our efforts to bring cases as quickly as possible.”

For further information on Kokesh v. SEC, which was briefed and argued in the Supreme Court by Jenner & Block Partner Adam G. Unikowsky, and its potential implications, see Jenner & Block’s Client Alert.

DEPUTY ATTORNEY GENERAL ANNOUNCES INTENT TO REVISIT YATES MEMO

On October 6, 2017 Deputy Attorney General Rod J. Rosenstein delivered a speech at New York University School of Law’s Program on Corporate Compliance and Enforcement, where he announced a comprehensive review of the DOJ’s corporate prosecution policies and programs, including an intent to revisit the September 2015 policy issued by former Deputy Attorney General Yates regarding individual accountability for corporate wrongdoing (“the Yates memo”). That memorandum, among other things, made providing information about the
individuals involved in corporate misconduct a prerequisite for corporations to receive any cooperation credit in negotiating criminal resolutions with the DOJ.

While the specifics of anticipated changes to the Yates memo remain unreported, Rosenstein said that “any adjustments or changes we make will reflect several common themes,” which are:

- “Any changes will reflect [the DOJ’s] resolve to hold individuals accountable for corporate wrongdoing.”
- Any changes “will affirm that the government should not use criminal authority unfairly to extract civil payments.”
- “[A]ny changes will make the policy more clear and concise.”
- Any changes will “reflect input from stakeholders inside and outside the Department of Justice.”

Although there will likely be changes to the detail of the policy articulated in the Yates memo, there is no question that any new policy will continue to emphasize the DOJ’s commitment to prosecute individuals for corporate fraud and corruption. Indeed, a flurry of FCPA cases against individuals underscored this emphasis on individual prosecutions—in November alone, the DOJ announced nine FCPA-related prosecutions of individuals.

Rosenstein added that he aims to “foster[] a culture [within the DOJ] that supports and promotes the investigation and prosecution of individual perpetrators of corporate fraud.” Rosenstein outlined several steps to promote this culture:

- Providing prosecutors with additional training regarding corporate fraud, corporate governance, and how to build and prosecute cases against individuals;
- Establishing a working group, comprised of the Associate Attorney General’s Office, the Criminal Division, the Civil Division, US Attorney’s Offices, and the FBI, among others, to “evaluate and monitor the Department’s long-term effectiveness in promoting individual accountability and deterring fraud”; and
- Reviewing “the Department’s practices concerning corporate monitors, the FCPA Pilot Program, corporate investigation training programs, and the mandate of the Financial Fraud Enforcement Task Force.”

For more on the DOJ’s prosecution of individual defendants for FCPA violations, see the following Client Alert by Partners David Bitkower, Nick Barnaby, Kelly Hagedorn, and Staff Attorney Veronica Lopez.

SECOND CIRCUIT LIMITS DISTRICT COURTS’ SUPERVISION OF DEFERRED PROSECUTION AGREEMENTS

In July 2017, the Second Circuit Court of Appeals issued an important decision in United States v. HSBC, holding that district courts have limited authority to supervise Deferred Prosecution Agreements (DPAs).

Under the terms of a December-2012 DPA entered into to resolve claims that HSBC violated the Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act, HSBC consented to the appointment of a corporate compliance monitor that would, among other things, make periodic reports to the DOJ regarding HSBC’s compliance with the agreement. The court approved the DPA but invoked its supervisory authority to order the parties to file the progress reports with the court.

After the government filed the monitor’s first annual report under seal in April 2015, a non-party petitioned the court to unseal the report, claiming it might be relevant to a complaint he had filed against HSBC with the Consumer Financial Protection Bureau. Over the government’s and HSBC’s objections, the court granted the motion, concluding that the report was a “judicial record” to which there was a right of public access. The government and HSBC appealed the decision.

The appellate court explained that a district court’s authority to supervise a DPA is generally limited to “arraigning the defendant” and “adjudicating motions or disputes as they arise.” By preemptively invoking its supervisory power to monitor the DPA’s implementation, the district court had improperly encroached on the executive branch’s power under the Take Care Clause.
because, absent evidence of bad faith, the DOJ is entitled to “a presumption that it is lawfully discharging its duties.”

The appellate court further reasoned that although the district court must ensure that “the DPA does not represent an improper attempt to circumvent” the Speedy Trial Act, the terms of which have to be waived or suspended during the pendency of the DPA to ensure that the government can still prosecute if the defendant fails to meet its obligations, that law does not authorize a district court to evaluate the substantive merits of a DPA.

HSBC is the second recent opinion overturning a district court’s attempts to supervise a DPA. In an April 2016 decision, United States v. Fokker Services B.V., the D.C. Circuit reversed a district court’s denial of a motion to exclude time from the speedy trial clock, holding that the court did not have the power to deny the motion simply because it disagreed with the prosecution’s exercise of its charging authority.

Together, the cases suggest that district courts cannot invoke their supervisory power to substantively control the terms or administration of a DPA. Limits on a district court’s ability to supervise DPAs help reduce the risk that a court may insert itself into the negotiated agreement between a defendant and the government. By contrast, broad and substantive supervisory authority for a court would make DPAs a comparatively less attractive resolution by reducing the certainty of a negotiated agreement and potentially exposing the details of otherwise confidential corporate compliance efforts to public disclosure.

Nonetheless, district courts’ role in DPAs is not yet fully fleshed out. Other circuits may reach different conclusions. Even under the rules of HSBC and Fokker Services, questions remain, including what constitutes “bad faith” to permit district court supervision and whether the district court could intervene at the conclusion of the DPA period by denying the government’s motion to dismiss the charges or, if the parties agreed to a guilty plea at the end of the DPA, reject the terms of the plea agreement. In addition, if the DPA had provided for regular status reports to the court or other kinds of supervision, it is possible that the court could lawfully exercise oversight at a later stage, avoiding the preemptive intervention rejected in HSBC and Fokker.

For more on the HSBC decision and DPAs, see the Client Alert from Partners David Bitkower and Brandon Fox and Associate Natalie Orpett.

**ALLEN: FIFTH AMENDMENT PROHIBITS THE USE OF COMPELLED TESTIMONY IN CROSS-BORDER PROSECUTIONS**

In a decision that may have broad reaching implications for how US authorities gather evidence in multinational investigations, the Second Circuit Court of Appeals held in *US v. Allen* that the Fifth Amendment prohibits the use of testimony in American criminal proceedings when it was compelled abroad by foreign authorities.

*Allen* arose out of investigations by the DOJ and the UK Financial Conduct Authority (FCA) into manipulation of LIBOR, a benchmark interest rate set by estimates of the cost of interbank borrowing. In 2013, the Dutch bank Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (“Rabobank”), admitted that it submitted LIBOR estimates intended to benefit its traders’ positions rather than reflect actual borrowing costs. The DOJ and FCA’s investigation into Rabobank centered on three London-based employees: Paul Robson, Anthony Allen, and Anthony Conti. Each was separately interviewed by the DOJ.

The FCA has authority to compel witnesses to speak with it, including about their own actions, and did so here. US law, however, prevents US law enforcement from using compelled testimony, including any “derivative use” – i.e., use of the information learned in the course of the interview to develop other evidence. Accordingly, DOJ prosecutors took steps to prevent themselves from learning, and therefore using, information from any interviews compelled by the FCA. For example, DOJ investigators conducted their interviews before the compelled FCA interviews and also set up a wall between the investigations.

Nonetheless, in 2013, when the FCA initiated an enforcement action against Robson, it disclosed to him the relevant evidence against him, including Allen’s and Conti’s compelled testimony. Later, Robson cooperated with the DOJ’s prosecution of Allen and Conti. Information learned from Robson was presented to the grand jury that indicted Allen and Conti, and Robson also testified against them at trial. Allen and Conti were each convicted of wire fraud and bank fraud charges and appealed their convictions.

The Second Circuit reversed the convictions and dismissed the indictment. The court first held that the Fifth Amendment’s prohibition on the use of compelled
testimony still applies even when a foreign sovereign has compelled testimony in accord with its laws. The court found unpersuasive the DOJ’s arguments that this would make multinational investigations too difficult, writing that “[i]f as a consequence of joint investigations with foreign nations we are to hale foreign men and women into the courts of the United States to fend for their liberty we should not do so while denying them the full protection of a ‘trial right’ we regard as ‘fundamental’ and ‘absolute.’”

Second, the court noted that Robson’s statements to the FCA prior to his exposure to the compelled FCA statements of Allen and Conti was “very different” from what he later said at their trial and held the government could not show that the compelled testimony “did not shape, alter, or affect” the government’s evidence.

As noted in the discussion of recent trends at the DOJ, multinational investigations and coordination among multiple enforcement authorities is becoming increasingly common. As the court explained, Allen’s “practical outcome” is that “the risk of error in coordination falls on the US Government (should it seek to prosecute foreign individuals), rather than on the subjects and targets of cross-border investigations.”

At a very basic level, Allen thus provides additional headaches for the prosecution and additional opportunities for the defense in complex cross-border investigations. Among other steps, US authorities may collaborate with (or pressure) foreign authorities to adopt more US-style investigative procedures in multinational investigations or to otherwise defer investigation or enforcement actions, including, where possible, resorting to voluntary requests for testimony rather than compelling it. They may also seek to lock in statements from potential cooperating witnesses earlier, in order to preserve their testimony from later influence by exposure to the compelled testimony of other witnesses. Defense counsel, meanwhile, will want to consider carefully the timing and content of any compelled testimony used against their clients in challenges to the charges brought against them.

Although the full consequences of Allen remain to be seen, its impact is already being felt. In another LIBOR-rigging case, US v. Connolly, involving two former Deutsche Bank traders, the defendants have already successfully moved for a hearing to determine whether the government improperly used compelled testimony. It is virtually certain that more of these challenges will follow, including in FCPA and other corruption cases.
THE FOREIGN CORRUPT PRACTICES ACT

The FCPA includes both direct prohibitions on bribery, known as the “anti-bribery provisions,” and prohibitions on the failure to reflect the true nature of transactions in a company’s accounts, known as the “books and records provisions.” The FCPA also “internal controls” provisions, requiring an issuer to maintain adequate internal controls in order to provide assurance that transactions are properly authorized and accurately recorded. Together, these provisions prohibit both bribery of foreign officials and accounting practices that may conceal such activity. Importantly, however, the books and records and internal controls provisions require a company to accurately account for the disposition of assets, and maintain controls to assure that it can do so, even where no improper payment has been made.

These provisions are broadly worded and subject, in certain instances, to competing interpretations. Case law interpreting these provisions is rare, leaving companies seeking to comply with them to rely on the combination of the few decided cases, DOJ and SEC guidance, and established enforcement practice. While this can be a recipe for confusion, the discussion below is intended to provide a straightforward description of these provisions and answers to the frequently asked questions they prompt.

THE FCPA’S ANTI-BRIBERY PROVISIONS

The FCPA’s anti-bribery provisions prohibit an offer of payment, promise to pay, or authorization of payment, of any money or anything of value to any foreign official, or to any other person (i.e., a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official with corrupt intent for the purposes of influencing an official in order to obtain or retain business, or to direct business to any person.

The FCPA contains certain limitations on who may be prosecuted under this provision and a few substantive affirmative defenses.

These statutory elements, limitations, and defenses are discussed in more detail below.

1. Jurisdiction

FCPA jurisdiction is broad. It extends to all US companies or persons, as well as to foreign companies that are registered with the SEC and foreign companies or persons that act in furtherance of an improper payment or offer while in the United States.

Territorial-based jurisdiction extends to any “issuer,” “domestic concern,” officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or concern, that makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment. 15 U.S.C. § 78dd-1(a); id. § 78dd-2(a). 1 An “issuer” is any company – American or foreign – that either issues securities within the United States or is required to file reports with the SEC. Id. § 78c(a)(8). A “domestic concern” is a US citizen, national, or resident or a corporation or other business entity with its principal place of business in the United States or organized under the laws of the United States. Id. § 78dd-2(h).

1 Interstate commerce includes making use of the mail, telephones, email, and any form of interstate travel. See, e.g., United States v. Brika, 487 F.3d 450, 455 (6th Cir. 2007) (telephone); United States v. Hausmann, 345 F.3d 952, 959 (7th Cir. 2003) (interstate mail and wire communications systems); Doe v. Smith, 429 F.3d 706, 709 (7th Cir. 2005) (email and internet).
Another type of territorial-based jurisdiction extends to foreign citizens and foreign companies (or more specifically, foreign companies that are not issuers) that commit any act in furtherance of an improper payment or offer in the territory of the United States. See 15 U.S.C. § 78dd-3(a).

Finally, the FCPA anti-bribery provisions include an “alternative jurisdiction” that applies, based on US nationality alone, to acts outside the United States in furtherance of an improper payment or offer by any of the following: (1) any issuer organized under the laws of the United States; (2) US persons who are officers, directors, employees, agents, and stockholders of such issuer and are acting on behalf of such issuer; (3) any other corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States; or (4) any other citizen or national of the United States. See 15 U.S.C. § 78dd-1(g); id. § 78dd-2(i). Thus, US companies and citizens are subject to the FCPA regardless of where the act in furtherance of an improper payment or offer takes place, and, if the act takes place overseas, even if no means of interstate commerce is used.

Questions about the scope of jurisdiction often arise in the context of a company’s liability for conduct of foreign subsidiaries. A company can be liable for its subsidiary’s improper payments under two theories: (1) because the parent sufficiently participated in the payment by authorizing the payment or providing funds “knowing” that they would be used for an improper purpose or (2) because the subsidiary’s acts in making the payments can be attributed to the parent under traditional agency principles. The DOJ and the SEC endorsed both theories of parent liability in their 2012 joint Resource Guide to FCPA enforcement. See Department of Justice and SEC, A Resource Guide to the Foreign Corrupt Practices Act (Nov. 14, 2012), at 27-28 (hereinafter “Resource Guide”).

The DOJ and SEC have taken fairly aggressive positions with respect to a parent’s liability for its subsidiary’s actions. In 2013, for example, both agencies reached non-prosecution agreements with Ralph Lauren Corporation for alleged bribes paid by an Argentine subsidiary to expedite customs clearances. The government did not allege actual knowledge or participation by the parent in the subsidiary’s conduct. Rather, liability appeared to be premised on the fact that Ralph Lauren Corporation was the sole owner of the subsidiary and had appointed its general manager.

Moreover, it is important to be aware that a foreign subsidiary may be considered an “agent” of its parent, a situation that could trigger FCPA liability for both the foreign subsidiary and/or the parent corporation. The statute makes “agents” of issuers as well as “agents” of domestic concerns subject to the FCPA. In addition, under US common law principles of vicarious liability, a corporation can be held liable for the conduct of its agent. For example, in 2014, the SEC held Alcoa Inc. (Alcoa) liable for alleged improper payments by its subsidiaries, despite making “no findings that an officer, director or employee of Alcoa knowingly engaged in the bribe scheme.” In re Alcoa Inc., Securities Exchange Act Release No. 71261 (Jan. 9, 2014). Rather, the SEC’s finding of liability was based on the level of control Alcoa exercised over its subsidiaries, including its appointment of key leadership for the subsidiaries, its development of business and financial goals for them, and its coordination of legal, audit, and compliance functions. This approach is consistent with the statement in the Resource Guide that “[t]he fundamental characteristic of agency is control.” Resource Guide at 27.

FAQ 1: Who is subject to the FCPA?

Potentially anyone. The anti-bribery provisions identify three classes of possible offenders: “issuers,” 15 U.S.C. § 78dd-1; “domestic concerns,” id. § 78dd-2; and all other persons, id. § 78dd-3. An “issuer” is any company that issues securities within the United States or files reports with the SEC. A “domestic concern” is a US citizen, national, or resident or a business entity that either has its principal place of business in the United States or is organized under US law. The third, catch-all section applies to everyone else (which generally means foreign non-issuers, including non-US nationals), if acting within the territory of the United States.

Liability under the books and records and internal controls provisions is limited to issuers, although individuals can be held liable under traditional vicarious liability principles for violations of the books and records provisions.
A company may also be held liable for or suffer other consequences from the prior illegal acts of a company that it acquires or with which it becomes associated as the result of a merger. In a 2014 Opinion Release, the DOJ made clear that a mere act of acquisition cannot create liability where none existed before. The DOJ explained that a US company that wished to acquire a foreign target would not be liable for that target’s past extraterritorial conduct because the prior conduct had no connection to the United States, putting it beyond US jurisdiction in the first place. See Opinion Release14-02. But where potential liability existed prior to an acquisition, the acquiring company can be held liable for the past conduct of its acquisition.

The DOJ and SEC devote substantial space to this topic in their Resource Guide, in which they explain that actions against the acquiring or successor company are generally reserved for cases “involving egregious or sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.” Resource Guide at 28; see, e.g., SEC v. Alliance One Int’l, Inc., No. 1:10-cv-01319 (D.D.C. Aug. 6, 2010) ($19.5 million in penalties and disgorgement paid by successor company and foreign subsidiaries). They are less likely to take action against an acquiring company where an acquiring company discovered and quickly remediated violations. Resource Guide at 29. Consequently, the Resource Guide recommends that companies conduct extensive due diligence prior to acquisition and quickly integrate the target company into the parent’s compliance program and internal controls. See Resource Guide at 28. February 2017 Guidance from the DOJ echoed this recommendation. Fraud Section, Department of Justice, Evaluation of Corporate Compliance Programs, Feb. 2017.

A conspiracy charge may also provide for means of expanding FCPA jurisdiction. In an August-2015 decision, the district court in United States v. Hoskins, No. 12CR238 (JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015), held that a person who is not himself subject to the FCPA cannot be charged as a co-conspirator or an accomplice to an FCPA violation. In Hoskins, the government alleged that, from 2002 through 2009, Alstom Power, Inc. (Alstom US), a company headquartered in Connecticut, was engaged in a bribery scheme to secure a $118-million project to build power stations for Indonesia’s state-owned and state-controlled electricity company. From 2001 through 2004, defendant Lawrence Hoskins, a UK national, was employed by Alstom UK, a British company, and assigned to work for Alstom Resource Management SA, a French company, in issuers concerning conformance of their conduct” with the FCPA. The opinion releases are available on the Department’s website.

FAQ 2: Can the US government prosecute foreign companies under the FCPA?

Yes. Foreign companies that issue securities in the United States or that are required to file reports with the SEC are considered “issuers” and are treated just as any US issuer would be. Prosecution of foreign companies has been a growing enforcement trend. To date, eight of the top 10 largest FCPA enforcement actions, measured by dollar volume of total penalties and disgorgements, have been brought against foreign companies.

Furthermore, even non-issuer foreign companies and individuals are subject to the FCPA if they commit any act in furtherance of an improper payment while within the territory of the United States. The DOJ has advanced aggressive theories to support jurisdiction over such defendants. For example, in the 2003 Syncor Taiwan matter, the DOJ asserted jurisdiction over a foreign non-issuer company based on one of its officers sending an email while in the United States that contained a budget referring to the improper payments, thereby committing a relevant act “while in . . . the United States.” But in 2011, a federal court rejected an even more aggressive theory that a British national had acted within the United States when he mailed from London to the United States a purchase agreement related to an alleged bribery scheme. Finding no conduct within the United States under these circumstances, the court dismissed a substantive FCPA count against the British defendant. See United States v. Patel, No. 1:09-cr-00335 (D.D.C. July 7, 2011). Likewise, in 2015, a federal court held that a foreign defendant not otherwise subject to the FCPA cannot be charged with conspiracy to violate the FCPA. See United States v. Hoskins, No. 12CR238 (JBA), 2015 WL 4774918 (D. Conn. Aug. 13, 2015) (pending interlocutory appeal before the Second Circuit).

2 Under 15 U.S.C. § 78dd-1(e), the attorney general is obligated to have in place an opinion procedure by which the DOJ provides “responses to specific inquiries by issuers concerning conformance of their conduct” with the FCPA. The opinion releases are available on the Department’s website.
France. The government claimed that Hoskins participated in the bribery scheme by approving and authorizing payments to individuals hired to pay bribes to Indonesian officials in order to influence the award of the power stations contract. The government alleged multiple theories of jurisdiction over Hoskins, who is not American and did not act within the United States. Among other theories of jurisdiction, the government alleged that even if Hoskins was not an agent of Alstom US, he conspired with others to violate the FCPA. The district court rejected that argument, reasoning that "where Congress chooses to exclude a class of individuals from liability under a statute, ‘the Executive [may not] . . . override the Congressional intent not to prosecute’" those parties by charging them for conspiracy to violate that statute. 2015 WL 4774918, at *4. This decision is now on interlocutory appeal before the Second Circuit.

While the ultimate fallout from Hoskins remains unknown, the district court opinion suggests that there may be a limit on the use of federal conspiracy charges to expand the scope of FCPA prosecutions.

2. Corrupt Intent

The FCPA requires that the pertinent acts be committed "corruptly." The Act’s legislative history reflects that the payments "must be intended to induce the recipient to misuse his official position." H.R. Rep. No. 95-640, at 8 (1977). "An act is 'corruptly' done if done voluntarily 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." United States v. Liebo, 923 F.2d 1308, 1312 (8th Cir. 1991); see also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int’l B.V. v. Schreiber, 327 F.3d 173, 181-83 (2d Cir. 2003) (a "bad or wrongful purpose and an intent to influence a foreign official to misuse his official position" satisfy this element).

In United States v. Kozeny, 582 F. Supp. 2d 535 (S.D.N.Y. 2008), a federal district court considered whether a defendant may obtain a jury instruction that corrupt intent could be absent because the bribe was the result of extortion. The court agreed that "true extortion" can be a viable defense to an FCPA charge and held that, where a defendant presents sufficient evidence on that point, the court should instruct the jury as to what constitutes true extortion such that a defendant cannot be found to have the requisite corrupt intent. In Opinion Release 08-02, the DOJ advised a company regarding the post-acquisition due diligence required on a target company when pre-acquisition due diligence could not be undertaken. The DOJ permitted a "grace period" for the acquiring company to identify and disclose potential risk areas and required a complex and far-reaching internal investigation. The DOJ also indicated that it still would hold the company liable for both ongoing violations by the target company not uncovered during the first 180 days of due diligence and for prior violations by the target company disclosed to the DOJ to the extent that such violations were not "investigated to conclusion within one year of closing."
made to an official ‘to keep an oil rig from being dynamited’ . . . .” Kozeny, 582 F. Supp. 2d at 539.

3. Anything of Value

In analyzing whether something of value has been offered to a foreign official, the courts have looked not only to objective value but also to “the value the [official] subjectively attaches to the items received.” United States v. Gorman, 807 F.2d 1299, 1305 (6th Cir. 1986). Things of value under the statute include both tangible and intangible objects. See, e.g., United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979). In addition to cash and cash equivalents (e.g., stock, stock options), things of value in the FCPA context have included: travel and entertainment (e.g., 2013 DOJ Diebold matter); charitable contributions (e.g., 2004 SEC Schering-Plough matter); college scholarships (e.g., 1993 DOJ McDade prosecution); the services of a prostitute (e.g., the DOJ Girard and Marmolejo matters); offers of future employment (e.g., the DOJ Girard matter); and offers of employment to friends and family of an official (e.g., the 2016 DOJ and SEC JP Morgan Chase matter).

FAQ 4: Can a company make a charitable contribution at the request of a foreign official?

Yes, but it should be very careful when doing so. Past enforcement actions (including the 2016 Nu Skin Enterprises matter) have relied on such contributions as evidence of an improper payment. Still, the DOJ and SEC have recognized that bona fide charitable contributions are permissible.

At a minimum, companies should conduct due diligence into the charity, take care to document the purpose of the donation, and evaluate whether the circumstances suggest the contribution will go to the charity and not to any government official.

Charitable contributions raise a particularly difficult issue. The DOJ and the SEC have both advised that legitimate charitable donations do not violate the FCPA. See Resource Guide at 19; see also Opinion Release 10-02 (declining to take enforcement action where requestor undertook adequate due diligence of recipient and imposed significant controls on the grant); and Opinion Release 97-02 (declining to take enforcement action where facts demonstrated that donation would be given directly to a government entity – “and not to any foreign government official” – for the purpose of building a school). Yet enforcement practice reflects that the government will closely scrutinize donations made to charitable organizations or for educational purposes to ensure that any officials requesting donations, or otherwise associated with the donees, have no possible role in reviewing matters for, or providing preferential treatment to, the donating business. For example, in 2012, the SEC brought an FCPA enforcement action against Eli Lilly & Co., alleging that a subsidiary of the pharmaceutical company made $39,000 in donations to a Polish charity. The SEC claimed the donation had been made at the request of a government official who had influence over pharmaceutical purchases in Poland.

In 2015, the SEC’s then-director of enforcement, Andrew Ceresney, emphasized that the SEC interprets the phrase “anything of value” broadly, viewing it as reaching any action taken with the intent to influence a foreign official in his or her official actions or obtain an improper benefit from the official.

4. Authorization of Unlawful Payments

The FCPA prohibits not only the making, but also the “authorization,” of any payment or giving of anything of value to a foreign official. 15 U.S.C. § 78dd-1(a).

The FCPA does not define the term “authorization,” and as with many aspects of the statute, the case law is undeveloped. The legislative history makes clear that authorization can be implicit or explicit. See H.R. Rep. 95-640 (Sept. 28, 1977) (“[I]n the majority of bribery cases . . . some responsible official or employee of the US parent
company had knowledge of the bribery and either explicitly or implicitly approved the practice . . . [S]uch persons could be prosecuted."); see also Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 414, 98th Cong., 1st Sess. (1983) at 38 (Memorandum from Deputy Attorney General Edward C. Schmults) (describing standard for implicit authorization under the FCPA, noting that one may implicitly authorize a corrupt payment merely by pursuing a course of conduct that conveys an intent that an illicit payment be made).

Note that it is not necessary that a company affirmatively authorize improper payments by its agents, vendors, distributors, or subcontractors in order for liability to attach. Simple knowledge of such payments will suffice, and, critically, knowledge is defined broadly enough to include even well-founded suspicions as described in the next subsection.

Certain factual situations raise unique questions about the “authorization” of a third-party improper payment. For example, distributors typically purchase goods and re-sell them to other end-users rather than facilitating a company’s direct sales as an agent or representative. Because of this distinction, any illegal payments a distributor makes after taking title to the goods generally cannot be attributed to the original seller, absent a prior specific conspiratorial agreement to make the payment or an ongoing relationship between the seller and the distributor in which the seller knowingly benefits from the illicit activity. For example, in Opinion Release 87-01, the DOJ took no action on a US company’s sale of a product to a foreign company that planned to resell the product to its government on terms to be negotiated. The US company represented that it was not aware of any illegal payment plans.

Nevertheless, distributor relationships are not immune to risk. Where a company is aware or reasonably suspects that its distributor is offering or making improper payments to government officials, the company can be liable for the distributor’s actions. For example, in 2013, Weatherford International settled charges that stemmed in part from a distributor arrangement. The government alleged that Weatherford offered up to $15 million in “volume discounts” to a distributor in an unnamed Middle Eastern country, believing that the discounts would be used to pay illegal bribes to employees of the national oil company.

FAQ 6: What provisions should an agreement with a third party contain to minimize risk?

An agreement should take into account the specific circumstances of any relationship, but as a general matter, a company entering into an agreement with a foreign representative should consider the elements outlined in the DOJ’s Opinion Release 81-01, its most comprehensive pronouncement on the subject:

1. Payments be made (a) by check or bank transfer, (b) to the foreign representative by name, (c) at its business address in-country (or where services were rendered), and (d) upon the written instructions of the foreign representative;

2. A representation of the representative’s familiarity with and commitment to adhere to the FCPA, including a requirement for the representative to notify the company of any request it receives for improper payments;

3. A representation that no member of the entity is a government official, an official of a political party, a candidate for political office, a consultant to a government official or affiliated with a government official;

4. The agreement is lawful in the foreign country;

5. Any assignment by the representative of any right, obligation, and/or services to be performed under the agreement must be approved in writing by the company;

6. The company can terminate the agreement where the representative has violated any of its provisions;

7. The company is permitted to disclose the agreement, including to the foreign government;

8. Adequate controls over reimbursable expenses, including potentially audit rights; and

9. A representation that the representative is well-established with sufficient resources to perform the work. The agreement should also refer to the company’s selection criteria for representatives, such as: years in operation; size and adequacy of support staff; business outlook; reputation; professional and/or technical expertise; and familiarity with and willingness to adhere to the FCPA. See Opinion Release 97-01 (documenting depth of due diligence).

In addition to those anti-bribery focused provisions, DOJ and SEC enforcement actions have emphasized that an agreement with a foreign representative should also include specific detail about the services that the representative should provide.
In addition, foreign governments often require that a US contractor hire a local entity to do some portion of the work on a contract.

A company should carefully monitor and document such arrangements because a corrupt subcontractor easily could pad its subcontract price to include improper payments. A US company, as the original source for those payments, therefore may be liable if some portion is subsequently offered or paid to a foreign official. Accordingly, margins should be reasonable.

5. Knowing

In addition to prohibiting “authorizing” payments by a third party, the FCPA prohibits the provision of something of value to a third party while knowing that the third party will in turn provide it to a government official. The statute defines the term “knowing” broadly. Knowledge of a relevant circumstance exists “if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.” 15 U.S.C. § 78dd-1(f)(2)(B). Willful blindness to circumstances indicating a high probability of unlawful activity will satisfy the knowledge requirement.

Accordingly, while one might believe that it is safest to know as little as possible about what service partners and third parties do with the payments they receive, exactly the opposite is true. Companies therefore should be alert to possible warning signs, such as, for example, when a government official directs the use of a specific third party; where a provider’s services are unclear or ill-defined; or where payments are made through non-traditional channels. Under the FCPA liability framework, US companies should closely monitor and document their third-party relationships to ensure that they are not viewed as taking a “head in the sand” approach should payments ultimately be redirected to government officials.

6. Offers or Promises

The statute prohibits not only improper payments but offers or promises to make such payments; thus, the payment need not actually be made in order for a violation to occur.

FAQ 7: If necessary, how should a company make an overseas payment?

Ideally, by wire transfer to a business partner’s bank account in its home country or the location where the work was done. The DOJ and SEC insist on visibility and transparency in payments made to agents and other business partners abroad. Therefore, wire transfers are preferable to checks because they provide proof that funds were sent to an agent’s primary business account. If checks are used, they should be retained to show the place of deposit. Companies should ensure that payments to business partners are accurately recorded in their books, and domestic parents should require their subsidiaries to follow US accounting rules regarding business expenditures.

7. Foreign Official

Under the FCPA, related case law, and DOJ and SEC guidance, the term “foreign official” includes elected and appointed government officials; officials of international organizations such as the International Monetary Fund, the World Bank, and the Red Cross; and employees of any “government instrumentality,” which can include state-owned enterprises that provide what might otherwise be thought of as commercial services. The FCPA also defines “foreign official” as including “any person acting in an official capacity” on behalf of a foreign government. Finally, the FCPA’s anti-bribery provision also extends to foreign political parties and candidates for foreign political office.

In a 2014 decision, the Eleventh Circuit focused on two critical features to determine whether a state-affiliated entity qualifies as a “government instrumentality”: (1) government control and (2) public function. United States v. Esquenazi, 752 F.3d 912 (11th Cir.), cert. denied, 135 S. Ct. 293 (2014). Assessing either of the features is a fact-intensive exercise, but the court identified several factors that will often affect the analysis.

Regarding government control, the court considered a non-exhaustive list of six factors: (1) the foreign government’s formal designation of the entity; (2) whether the government had a majority ownership interest; (3) the government’s authority to appoint or remove the entity’s principals; (4) the extent to which the entity’s profits are returned to the public treasury; (5) whether the entity would perform at a loss absent government subsidies; and (6) the length of time that the other factors indicated government control.
With respect to whether a state-affiliated entity performs a public function, the court considered these non-exhaustive factors: (1) whether the entity enjoys a monopoly over its goods or services; (2) the extent of government subsidies for the entity; (3) whether the entity’s goods and services are available to the public at large; and (4) whether the public and government perceive the entity as performing a governmental function.


Members of royal families also present particular difficulty. Often, such individuals have no official role in government but occupy important ceremonial roles and wield significant influence.  In Opinion Release 12-01, the DOJ set out the following factors for assessing whether a royal is a foreign official:  (1) the degree of control or influence the individual has over the levers of governmental power, execution, administration, finances, and the like; (2) whether the foreign government characterizes the individual as having governmental power; and (3) whether and under what circumstances the individual may act on behalf of, or bind, a government. Applying these factors, the DOJ concluded that the royal family member at issue in Opinion Release 12-01 was not a foreign official because he had no official or unofficial role in his country’s government and no authority to bind the relevant governmental decision makers.

Thus, consultants and unofficial advisors to government officials, or others outside the formal government apparatus, may be deemed to be government officials under certain circumstances, particularly where they have decision-making authority or significant influence with respect to governmental actions. For example, in the 2006 *Statoil ASA* matter, Statoil was charged with making improper payments to the president of the National Iranian Oil Company. The DOJ did not allege, however, that this position made him a foreign official, arguing instead that he was an “advisor to the Iranian Oil Minister” and a “very important guest”; that his family “controlled all contract awards within oil and gas in Iran”; and that Statoil had tested his influence by having him send a message back to Statoil through the Iranian Oil Minister.
8. Improper Purpose

A promise, payment, or offer to a foreign official must be given for one of four purposes in order to violate the FCPA: (1) to influence any act or decision of such foreign official in his official capacity; (2) to induce such foreign official to do or omit to do any act in violation of the lawful duty of such official; (3) to secure any improper advantage; or (4) to induce such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

These purposes encompass nearly every act a foreign official might take that could benefit the party making the promise, payment, or offer. The first applies when the foreign official has some sort of discretion within the laws of the pertinent foreign country and the promise, payment, or offer was made in order to influence the exercise of that discretion. The second comes into play when a foreign official breaks the laws of the pertinent foreign country. The third purpose, “securing any improper advantage,” broadly concerns “something to which the company concerned was not clearly entitled, [such as] an operating permit for a factory which fails to meet the statutory requirements.” United States v. Kay, 359 F.3d 738, 754 (5th Cir. 2004) (Kay I). An advantage that was not readily available to other competitors and that was secured by a payment could be deemed to fall within the scope of this provision. See id. at 750-55. The fourth purpose focuses on the foreign official’s use of his or her influence within the foreign government.

For example, in the 2006 Statoil ASA matter, US authorities brought an enforcement action against a foreign oil company that entered into a $15 million consulting agreement with an Iranian official, the purpose of which was to induce the official to use his influence to assist the company in obtaining a contract.

9. To Obtain or Retain Business

The leading case on this issue is Kay I, in which the Fifth Circuit held that this statutory requirement was satisfied by payments designed “to secure illegally reduced customs and tax liability” because lower tax payments would “more generally help[ ] a domestic payor obtain or retain business for some person in a foreign country.” Kay I, 359 F.3d at 756. Thus, the “obtain or retain business” provision will be read broadly.

10. Use of Interstate Commerce in Furtherance of an Unlawful Payment

The FCPA’s anti-bribery provisions require a nexus between an issuer’s or a domestic concern’s use of interstate commerce and the unlawful payment.3 In most cases this requirement is easily met – for example, by email or telephonic communications relating to the payments, or by the wiring of money or other payment mechanisms. Importantly, the DOJ reads the provision as encompassing a much broader range of circumstances. An example is the 2008 AGA Medical Corporation matter,

FAQ 9: Can a US company do business with an entity in which a foreign official is a participant?

Yes, but it should exercise great care in doing so. A US company does not violate the FCPA merely by doing business with an entity in which a foreign official is a passive owner. In general, to avoid violating the FCPA, a foreign official’s participation in such an entity should be legal under the laws of the official’s country and transparent to the official’s government, and the official should not participate in any decision or transaction involving the US company.

The DOJ has issued a number of opinion releases addressing this issue. For example, in Opinion Release 08-01, the DOJ took no enforcement action where a US company entered into a joint venture with an entity in which a foreign official was a principal, because the US company had (1) conducted extensive due diligence and made disclosures; (2) obtained representations and warranties that its joint-venture partner had not violated and would not violate anti-corruption laws; and (3) retained a broad contractual right to terminate the joint venture agreement in the event of a violation of anti-corruption laws. Upon similar prophylactic measures, the DOJ took no action when a US firm sought to establish an agency agreement with a foreign company whose principals were related to and managed the affairs of a foreign country’s head of state. See Opinion Release 84-01.

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3 If the person or entity is a not a US person or issuer, the interstate commerce nexus is unnecessary. Rather, such a defendant can be liable for any act within the United States in furtherance of an unlawful payment.
which involved the payment of improper “commissions” to doctors and patent agents in China in connection with sales of and patent approvals for certain medical devices. While the charging documents described email communications relating to the payments, the DOJ also alleged that shipping the products to China qualified as the use of interstate commerce in furtherance of the unlawful payment. More recently, a federal district court held that even email sent and received in foreign locations may satisfy the interstate commerce requirement if the messages were routed through US-based servers. SEC v. Straub, 921 F. Supp. 2d 244, 262-64 (S.D.N.Y. 2013).

DEFENSES TO AN ANTI-BRIBERY PROSECUTION

The breadth of the FCPA is reinforced by the relatively narrow nature of the exceptions and affirmative defenses to liability. Kay I, 359 F.3d at 756 (“Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, 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.”). The recognized statutory exceptions and defenses are:

- **Facilitating Payments**: The FCPA does not apply to any payment to secure the performance of a routine governmental action.

- **Lawful under Local Law**: It is an affirmative defense that an action is permitted by the law of the official’s country. This defense applies only to formal law, not the local custom.

- **Reasonable and Bona Fide Expenses**: It is an affirmative defense that an expense was a reasonable and bona fide business expense, such as reasonable travel for a product demonstration.

1. **Facilitating Payments**

The FCPA does not apply “to any facilitating payment or expediting payment to a foreign official, political party, or party official, the purpose of which is to expedite or to secure the performance of a routine governmental action.” 15 U.S.C. § 78dd-1(b). This so-called “facilitating” or “grease” payment exception is meant to cover routine, nondiscretionary “ministerial activities performed by mid- or low-level foreign functionaries,” see Kay I, 359 F.3d at 750-51, such as:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

- Processing governmental papers;

- Providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods;

- Providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; or

- Actions of a similar nature so long as the official’s decision does not involve whether, or on what terms, to award new business to or to continue business with a particular party.

FAQ 10: Does the FCPA forbid corrupt payments to obtain a business advantage, such as a lower tax rate or customs duty?

Yes. The FCPA forbids corrupt payments to influence foreign officials to use their positions to assist “in obtaining or retaining business.” This prohibition is not limited to commercial transactions between a US company and a foreign government, such as the award or renewal of contracts. After a lengthy analysis of the statute’s legislative history, the Fifth Circuit reasoned in Kay I, 359 F.3d at 748, that the FCPA prohibits payments “intended to assist the payor” either directly or indirectly in obtaining or retaining business, and that it “encompass[es] the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states.” The court thus concluded that payments to Haitian officials to understate quantities of imported grain so as reduce import taxes violated the FCPA. See id.

15 U.S.C. § 78dd-1(f). By carving out these narrow categories of payments for “routine government action” from the FCPA’s coverage, Congress sought to differentiate between those acts “that induce an official to act ‘corruptly,’ i.e., actions requiring him ‘to misuse his official position’ and his discretionary authority,” and those
acts that are “essentially ministerial [and] merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.” Kay I, 359 F.3d at 747.

Those who seek to justify a payment under the “facilitating payment” exception should focus on the purpose of the payment and whether the official in question must exercise any discretion or judgment in deciding whether to take the requested action. A payment that convinces an official to bestow his good graces upon a company is suspect, whereas a payment that merely expedites a routine action to which the company is otherwise entitled is less problematic. Companies that permit such payments should ensure that they are reviewed and approved in advance by in-house or other counsel and that they are recorded properly in their books and records.

In their Resource Guide, the DOJ and SEC emphasize that the size of a payment is not determinative of whether it qualifies for the facilitating payment exception. See Resource Guide at 25. For example, in a 2009 matter brought against oilfield company Helmerich & Payne, Inc., the DOJ cited a series of infrequent payments to Venezuelan customs officials, each of which was less than $2,000 and which, together, totaled only $7,000. In that case, however, the payments were allegedly made to avoid customs regulations and inspections rather than to obtain routine, non-discretionary action. The Resource Guide, however, also notes that especially large payments are less likely to be true facilitating payments. Resource Guide at 25.

Even if a payment arguably fits within the exception for facilitating payments, issuers must be careful to ensure the transactions are properly recorded as such. In the 2014 Layne Christensen matter, the SEC faulted the company for some payments as small as $4 where the payments were mischaracterized as “honoraries,” “commissions,” and “service fees,” leading to books and records violations. In re Layne Christensen, Securities Exchange Act Release No. 73437 (Oct. 27, 2014).

Finally, it should be noted that the UK Bribery Act of 2010 does not contain a facilitating payments exception as described in detail below. The scope of the UK Bribery Act is quite broad, covering not only UK concerns but any companies conducting business in the United Kingdom, even where the charged conduct occurred elsewhere.

FAQ 11: May a company sponsor an educational trip for a foreign official or provide other hospitality?

Yes, but only under strict conditions. The FCPA itself provides an affirmative defense for “reasonable and bona fide expenditures, such as travel and lodging expenses” when directly connected with a legitimate promotion or product demonstration, or when a required part of contract performance.

Nevertheless, expenses should be reasonable, relate to legitimate educational or training needs, and not suggest an attempt to induce favorable treatment with regard to the company’s business. Indeed, both the DOJ and SEC have brought actions related to travel and entertainment expenses that have not met these guidelines.

2. Lawful under Local Law

Under the FCPA, it is an affirmative defense that “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.” 15 U.S.C. § 78dd-1(c)(1). Note that the payments must be legal under the written laws or regulations of the foreign country and that such authorization must be express. While a country’s laws may acknowledge the existence of certain payments – for example, by making provision in the tax code for how to treat them – this defense requires something much more: an explicit authorization for the payment itself.

Kozeny addressed the scope of this affirmative defense. In that case, the defendant was alleged to have paid bribes in Azerbaijan related to obtaining business with SOCAR, the state oil company. The defendant argued that the alleged payments were legal under local law because he had reported the payments to Azeri authorities, and under Azeri law, the payor of a bribe is relieved from punishment if he makes such a report. See 582 F. Supp. 2d at 538. The court disagreed, concluding that the Azeri legal provision may waive punishment but does not render the payment itself lawful. "[T]here is no immunity from prosecution under the FCPA if a person could not have been prosecuted in the foreign country due to a technicality.” Id. at 539.
3. Promotional Expenses

It is an affirmative defense that the payment or thing of value "was a reasonable and bona fide expenditure, such as travel and lodging expenses . . . and was directly related to . . . the promotion, demonstration, or explanation of products or services; or . . . the execution or performance of a contract . . . " 15 U.S.C. § 78dd-1(c)(2). This provision creates a limited exception for expenses associated with ordinary product demonstration and testing by companies seeking government contracts or for ongoing inspections related to the execution of such a contract.

The DOJ Opinion Releases on this subject make clear that any expenditures must be closely tailored to the payor's legitimate goals. For example, in connection with a product demonstration, the host may pay for foreign officials' non-extravagant travel, lodging, and meals. See also Opinion Release 82-01 (approved reasonable travel, meals, and entertainment); Opinion Release 81-02 (approved provision of product samples to government officials for testing and quality assurance); Opinion Release 83-02 (approved travel and entertainment expenses for official's wife) (note, however, that more recent enforcement actions suggest that companies should not pay any expenses for an official's family); Opinion Release 85-01 (approved payment of travel period closely related to the length of time required to demonstrate the product); Opinion Release 07-02 (approving expenses paid directly to providers for domestic air travel and other expenses of delegation of six junior to mid-level foreign officials for educational program at company's US headquarters); Opinion Release 07-01 (approving domestic expenses for a four-day trip by a six-person delegation of the government of an Asian country).

The DOJ's Opinion Releases also permit some digression for the officials' entertainment so long as they do not resemble added "perks" for the officials. It must be clear from the overall expense plan that the trip is for the purposes outlined in the statute and that the vast majority of expenses are advancing those ends. In Opinion Release 07-02, for example, the DOJ approved payment for a modest four-hour city sightseeing tour for the six visiting foreign officials. In general, airfare should be economy class, but business class travel may be appropriate for higher-ranking officials. See Opinion Releases 07-02, 12-02. Finally, although there may be situations in which an official's family members may be included, that is rarely appropriate and should be probably avoided. See Opinion Release 83-02 (approving payment of less than $5,000 to pay for the wife of a foreign official to travel with the official while in the United States visiting company sites).

The body of guidance from Opinion Releases and enforcement actions surrounding educational trips provide a sound framework to consider gifts and hospitality generally. Hospitality and gifts may be extended if they are reasonable, have a sound business purpose, and are not intended to influence a government official to use his authority improperly to the business advantage of the company. These common-sense guidelines dictate that reasonable entertainment expenses (e.g., meals) are usually acceptable if connected to conducting business. Similarly, low-value tangible gifts (e.g., marketing items with company logos, such as pens, caps, cups, and shirts) may be given, provided such gifts are acceptable under the applicable government rules of the official's home country and are permitted by the US company's ethics policies. The DOJ and SEC have advised that “[i]tems of nominal value” are less likely to curry improper influence, while “[t]he larger or more extravagant the gift . . . the more likely it was given with an improper influence.” Resource Guide at 15.

FAQ 12: Is having an adequate compliance program a defense to corporate criminal liability for the actions of an employee violating company policy?

No. The DOJ and SEC take the position that, under principles of agency law, any action taken to benefit the company, even if also taken to benefit an employee and even if against company policy, can be attributed to the company.

While there is no formal defense for having an adequate (or superlative) compliance program (as there is under the UK Bribery Act, see below), DOJ and SEC guidance provides that the effectiveness of a company’s pre-existing compliance program may be a factor in making charging decisions or assessing the amount of a potential monetary sanction.
Vegas and Disneyland, entertainment, and gifts to Chinese and Indonesian officials. Similarly, in 2014 the SEC charged that Bruker Corporation provided a series of non-business and leisure side-trips to Chinese officials at state-owned enterprises.

THE FCPA’S BOOKS AND RECORDS AND INTERNAL CONTROLS PROVISIONS

The books and records provisions of the FCPA work in tandem with the anti-bribery provisions. They require public companies to account accurately for and report expenditures, as well as to maintain accurate records to support accounting entries and expenditures. The internal control provisions require that an issuer devise and maintain internal controls that allow for this accurate record keeping.

These provisions apply regardless of whether any improper payments have been made and have been used as the basis for liability by the DOJ and SEC in matters where they have not (and arguably could not have) brought anti-bribery charges.

1. Substantive Requirements

The books and records and internal controls provisions require that an issuer:

A. Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

B. Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(i.) transactions are executed in accordance with management’s general or specific authorization;

(ii.) transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;

(iii.) access to assets is permitted only in accordance with management’s general or specific authorization; and

(iv.) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. § 78m(b)(2). These provisions make clear that issuers must compile records in accordance with generally accepted accounting standards. These requirements are not based on any sense of “materiality” as that term is generally used in securities laws. Rather, the requirement is grounded in the concept of reasonableness and accuracy – what a business manager would reasonably want and expect in the day-to-day operation of a business.

Knowing violation of the books and records or internal controls requirements can trigger both civil and criminal liability. See 15 U.S.C. § 78m(b)(5); 15 U.S.C. § 78m(b)(4).

Because liability under the books and records or internal controls provisions does not depend on an improper payment, these provisions may be, and often are, used to sanction a company in cases involving suspected improper payments in which, for whatever reason, the government is unable to prove, or chooses not to pursue, an anti-bribery charge. For example, the SEC brought a settled civil enforcement action against Oracle Corporation where an Indian subsidiary of Oracle created slush funds for the purpose of paying future bribes to foreign government officials even though there were no bribes offered or currently contemplated. Companies should avoid all arrangements that cannot be or are not openly recorded in the books.

Indeed, recent enforcement actions have reflected how the enforcement agencies use the books and records provision to reach accounting misconduct associated with corrupt conduct outside the FCPA’s reach. In a landmark 2012 case, the SEC brought charges against FalconStor Software, Inc. related to bribes paid to private sector employees of a J.P. Morgan Chase subsidiary in exchange for lucrative contracts. According to the SEC, the bribes were inaccurately recorded in FalconStor’s books as “compensation,” “sales promotion,” and “entertainment” expenses. The SEC charged FalconStor
under the FCPA’s books and records provision for failing to accurately record the expenses associated with the bribes on the company’s books and records. FalconStor agreed to pay $2.9 million to settle the charges.

Three years later, the SEC brought charges against Goodyear Tire & Rubber Company for violating the FCPA’s books and records provision by paying more than $3.2 million in bribes to government officials and employees of private companies. These bribes were falsely recorded in the books and records of Goodyear’s subsidiaries as legitimate business expenses. Goodyear agreed to pay more than $16 million to settle the SEC’s charges.

Goodyear and FalconStor both involved allegations of the failure to properly record payments associated with commercial bribery rather than official corruption. The SEC went one step further in the 2015 Polycom matter. There, the SEC applied the FCPA’s books and records provision to the accounting of benefits paid to a company’s own employee. The SEC alleged that Polycom’s former CEO used almost $200,000 of company money to pay for personal meals, entertainment, travel, and gifts, and Polycom falsely recorded these personal expenses as business expenses in its books and records.

The theory of liability pursued by the SEC in these matters continues to potentially expand the scope of conduct subject to scrutiny under the FCPA’s books and records provisions. These resolutions also highlight certain inadequate expense reporting processes – i.e., Polycom allowed its CEO to approve his own expenses and to book and charge airline flights without providing any description of their purpose – of which companies may want to take note and ensure the robustness of their own internal controls in the area of expense reporting.

In the 2016 LATAM Airlines matter, the DOJ brought criminal books and records charges against LATAM (the successor to LAN Airlines) based on underlying conduct that arguably did not involve official corruption. In that case, as described in further detail below, a South American airline entered into a sham consulting contract with a government official. Rather than perform services under the contract, the official paid a portion of the contract’s proceeds to union officials in order to induce the union to acquiesce to more favorable terms in negotiations with the airline. The applicability of the anti-bribery provisions in these circumstances, where the official is making a corrupt payment and may not be acting in his official capacity, is not clear. Yet the DOJ brought criminal charges under the books and records and internal controls provisions in light of the fact that the sham consultant agreement and associated payments were not accurately recorded.

2. Applicability

The books and records and internal controls provisions apply only to issuers – that is, entities that have a class of securities registered pursuant to 15 U.S.C. § 78l and entities that are required to file reports with the SEC pursuant to 15 U.S.C. § 78o(d). See 15 U.S.C. § 78m(b)(2).

FAQ 13: Can an individual be prosecuted for conduct prohibited under the books and records or internal controls provisions?

Yes. By their terms, the books and records and internal controls provisions apply to issuers only. But natural persons can be subject to criminal or civil liability as aiders and abettors; for causing an issuer’s books and records violations; and for knowingly falsifying books and records or circumventing or failing to implement adequate internal controls. They also can be subject to civil liability as control persons. In recent years, the DOJ and SEC have brought several cases against individuals under the books and records provisions.

There is no “jurisdictional” requirement for civil liability for failure to maintain adequate books and records or internal controls pursuant to 15 U.S.C. § 78m(b)(2). Any “issuer” within the meaning of the statute must comply with the statute’s requirements to maintain accurate books and records and adequate internal controls, wherever the books and records may be kept.

Where a subsidiary’s financial results are consolidated with a parent issuer’s financial statements, the FCPA’s requirements have been found to apply to books and records or internal control deficiencies occurring at the subsidiary. Thus, inaccurate books and records or internal control failures at the subsidiary level can trigger civil liability for the parent issuer without any US nexus (beyond issuer status of the parent). See SEC v. Hohol, 2:14-CV-00041(RTR) (E.D. Wis. Jan. 14, 2014). Even where an issuer owns 50 percent or less of the voting power of a subsidiary, it must make “good faith” efforts to “use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a
system of internal accounting controls consistent with the FCPA. 15 U.S.C. § 78m(b)(6).

But the jurisdictional limits of this section have not been fully tested in the courts; thus, for example, it is not entirely clear whether it would apply to a foreign nonissuer defendant who acts entirely outside the United States to knowingly falsify an issuer's books and records. The government is likely to argue, however, that a US prosecution of such conduct would fall within established principles of extraterritorial jurisdiction, insofar as Congress clearly intended this provision to have extraterritorial reach and that the conduct at issue inherently has an impact on the United States (or the US securities market) because it involves the books and records of an issuer. See, e.g., SEC v. Panalpina, Inc., 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010) (settled enforcement action against a foreign company that paid bribes for issuers and provided inaccurate invoices to support the improper payments).

The DOJ relied on the criminal prohibition on circumventing internal accounting controls and falsifying books to bring criminal charges against Siemens AG, a foreign issuer directly subject to this provision. Specifically, Siemens AG pleaded guilty to failing to address internal controls and books and records problems in the face of information that it had grave issues with its internal controls and with accuracy in books and records as a result of its ongoing engagement in bribery. No US jurisdictional nexus was alleged. In addition, one of Siemens AG’s foreign subsidiaries, Siemens Argentina, pleaded guilty to conspiracy to knowingly falsifying and causing to be falsified the books and records of an issuer (i.e., of its parent corporation, Siemens AG), in violation of 18 U.S.C. § 371 (the conspiracy statute). To satisfy the jurisdictional requirements of a conspiracy charge, the DOJ alleged two meetings in the United States and a bank transfer of bribe funds that went through a US correspondent bank account. See, e.g., United States v. MacAllister, 160 F.3d 1304, 1307 (11th Cir. 1998) (the United States may prosecute an extraterritorial conspiracy if there is an overt act within the United States in furtherance of the conspiracy).

By their terms, books and records and internal controls provisions apply only to issuers – and not individuals - but individuals have been charged with either criminal or civil violations of the books and records or internal controls provisions in a number of recent cases under various theories of vicarious liability such as aiding and abetting. Individuals also can be subject to civil liability as control persons. For example, in 2012, a former managing director of Morgan Stanley pleaded guilty to conspiracy to circumvent internal controls in connection with a scheme to bribe a Chinese official. In 2011, the former CEO of Innospec, Inc. was charged civilly with aiding and abetting violations of the books and records and internal controls provisions, circumventing internal controls, falsifying books and records, making false statements to accountants, and signing false certifications. And in 2009, two executives of Nature’s Sunshine Products were charged civilly, as control persons of the company, with violations of the books and records and internal controls provisions.

RESOLUTION OF FCPA INVESTIGATIONS

Government investigations into suspected corporate FCPA violations typically result in either a negotiated resolution between the enforcement agency and the company under investigation or a decision by the agency not to take action, often called a “declination” in cases where the enforcement agency has determined there was a violation of the law. A corporation, like an individual, could exercise its trial rights and put the government to its burden of proof, but corporations have rarely done so.

Any resolution of a potential violation other than a declination typically carries a hefty fine or civil penalty, in addition to the extensive costs associated with conducting an internal investigation and/or defending against government inquiries, harm to reputation, imposition of a compliance program meeting specific requirements (or a compliance monitor overseeing a company’s FCPA compliance program for a term of

FAQ 14: Who enforces the FCPA?

The DOJ and SEC have joint enforcement responsibility.

- The DOJ has all criminal enforcement responsibilities for violations of the anti-bribery and books and records provisions of the FCPA.
- The SEC has civil enforcement responsibility for violations of the anti-bribery provisions committed by issuers (or agents of issuers, including individuals) and violations of the books and records provisions.
years); and the risk of imprisonment. Depending on the circumstances, resolutions of investigations may also carry collateral consequences for the company.

The DOJ and SEC have both asserted in speeches and other public pronouncements that voluntary disclosure and cooperation with the government’s investigation receive significant weight in their determination of an appropriate resolution. The DOJ has formally adopted principles related to such mitigation credit in its November 2017 FCPA Enforcement Policy.

1. DOJ FCPA Corporate Enforcement Policy

The DOJ’s corporate enforcement policy, announced in November 2017, describes the conditions under which the DOJ will confer favorable credit during the negotiation of a corporate resolution of an alleged FCPA violation.

Under the policy, the DOJ will apply a “presumption” that it will decline prosecution of any company that voluntarily discloses an FCPA violation, fully cooperates with the DOJ’s investigation, remediates the violation, and disgorges any profits from the corruption. As discussed in detail in the below sections, the policy defines the DOJ’s expectations in each of these areas, including providing a definition of cooperation that is expressly more stringent than what the DOJ requires to provide cooperation credit in other non-FCPA enforcement situations. The presumption can be rebutted by aggravating circumstances, including severe misconduct, knowledge or involvement of senior management, or recidivism on the part of the violating company.

The enforcement policy also provides for limited credit in situations where a company does not qualify for a declination under the policy. Where aggravating circumstances make a declination inappropriate but a company otherwise meets the disclosure, cooperation, and remediation requirements, the policy provides that the company will receive a 50 percent reduction off the bottom end of the fine range recommended under the federal sentencing guidelines and that the DOJ generally will not require the appointment of a corporate monitor.

Where a company does not voluntarily disclose, but meets the DOJ’s cooperation and remediation expectations, a company is entitled to a 25 percent reduction off of the bottom end of the guidelines fine range. Even where a company fails to meet the policy’s heightened cooperation requirements, the policy provides that the DOJ may consider providing a lesser reduction so long as the company meets the DOJ’s baseline cooperation requirements.

The FCPA corporate enforcement policy, like the 2016 FCPA pilot program on which it is based, is intended to encourage corporate self-disclosure and cooperation by making the benefits of such conduct transparent. Skeptics may suggest that the significant charging discretion possessed by prosecutors could blunt the effect of the DOJ’s quantification of cooperation credit and related guidance in the enforcement policy. The federal sentencing guidelines ranges form the basis of any federal criminal fine from which a reduction under the enforcement policy will be calculated. The guidelines ranges are calculated based on scope of the wrongdoing and the facts and circumstances of a case, both of which may be subject to interpretation in any given case. In practice, this means that in some cases DOJ’s discretion over the scope and factual basis of a disposition could be more important than the promised “discount” under the policy. To use an extreme example, a prosecutor seeking a $10 million fine could resolve the case based on conduct supporting a fine of that size. Or, if a company is due a 50 percent discount under the enforcement policy, the prosecutor could seek resolution of the case based on broader or more severe conduct that supports a $20 million fine. Even if that fine is reduced to $10 million by the discount, the result would be the same regardless of the cooperation credit. While prosecutors will rightly note that they are bound by law, what the evidence shows, and a company’s willingness to resolve a case in a negotiated manner, skeptics could equally insist that companies often have little choice but to seek a negotiated resolution and that the constraints of the new enforcement policy still leaves significant play in the joints as the resulting fine amount.

2. Types of Negotiated Resolutions

Broadly speaking, there are three ways that the government will resolve an FCPA investigation with a company through a negotiated resolution: (1) a non-prosecution agreement (NPA); (2) a deferred prosecution agreement (DPA); or (3) a negotiated entry of a judgment against the company, either a guilty plea for a criminal charge or, in a civil case, an administrative cease-and-desist order or entry of a civil injunctive order.
The basics of a non-prosecution and deferred prosecution agreement are the same in both civil and criminal contexts. An NPA is a letter agreement between the government and the defendant. As part of the NPA, the defendant corporation typically must agree not to contest the relevant facts, waive the statute of limitations, and agree to certain compliance undertakings for a specific period, usually two to three years. In exchange, the government agrees not to pursue charges if the company completes the undertakings and commits no additional wrongdoing during the NPA’s term.

A DPA operates much the same as an NPA, except that in a DPA the government files the agreement with a court along with formal charges against the corporation, and the case is stayed for the duration of the DPA. Generally, the DOJ and SEC reserve NPAs for cases involving less egregious conduct, though there is little practical difference between the two types of resolutions. Both carry the critical advantage that they avoid a final judgment entered against the company of an FCPA violation.

In some cases, the agreement will require certain remediation, including improvements to a company’s internal controls or the appointment of an independent compliance monitor, at the company’s expense, for some period of time (typically two or three years). The independent monitor is charged with making recommendations for FCPA compliance with which the company generally must comply and with reporting the state of the company’s compliance to the government. An independent monitor can be an expensive and burdensome proposition for a company subject to it. In other cases, the government will refrain from imposing an outside compliance monitor, but will require a company to self-review and self-report on its FCPA compliance for a period of time after a settlement, typically for two or three years.

The SEC has required reporting obligations in some of its negotiated resolutions rather than an appointed monitor. While different in scope from an independent monitor, this “monitor-light” requirement may nevertheless impose a significant burden. It sacrifices a measure of independence, requiring a company to provide the SEC with a detailed description of its compliance program. The review and preparation associated with the written reports likely will require a significant expenditure of corporate resources. More importantly, this new remedial measure imposes an affirmative duty to disclose both actual violations as well as any “credible evidence” of a potential FCPA violation.

Another important factor in negotiated resolutions is which entity takes the charge. Companies have typically sought to have the subsidiary that was directly involved in the misconduct, rather than the parent company, formally enter into the settlement. In other cases, parent companies have entered into a less severe resolution than a subsidiary, e.g., a parent agreeing to a DPA while the subsidiary pleads guilty, or a subsidiary entering into a settlement while the parent is not charged at all. For example, in the 2014 investigation of Hewlett-Packard’s operations in Russia, Poland, and Mexico, the foreign subsidiaries each entered into settlements with the DOJ, while the parent company agreed to undertakings with the DOJ as part of its subsidiaries’ settlements (and settled a related matter with the SEC), but entered into no criminal deal of its own.

Such resolutions can reflect a compromise of sorts between the enforcement authorities’ aggressive approach to vicarious liability through subsidiaries and corporate parent companies’ insistence that they should not be responsible for the actions of rogue individuals at foreign subsidiaries.

3. Declinations

A declination is a decision by the enforcement authority to forgo charges notwithstanding a finding that misconduct occurred. In general, the DOJ will decline to prosecute an FCPA matter if the facts and the law will not support a

FAQ 15: Under what circumstances will the DOJ or SEC decline to take enforcement action despite finding that misconduct occurred?

Declination decisions are highly fact-specific. The DOJ’s corporate FCPA enforcement policy states that the DOJ will decline prosecution where a company voluntarily discloses misconduct, cooperates with the investigation, remediates the issues that led to the misconduct, and disgorges any ill-gotten profits, except in cases with aggravating circumstances, such as widespread misconduct or recidivism.

The SEC has issued no comparable policy, but available guidance suggests that it will similarly take disclosure, cooperation, remediation, and the severity of the conduct into account.

As detailed above, the DOJ’s Corporate Enforcement Program defines the circumstances under which the DOJ will decline prosecution even if it has found otherwise prosecutable FCPA-related misconduct: a company that self-discloses the misconduct; cooperates with the investigation; remediates the circumstances that led to the violation; and agrees to disgorge ill-gotten gains will presumptively receive a declination that can be rebutted only if aggravating circumstances, such as widespread or severe misconduct, or recidivism, is present. Because this type of resolution requires the company to pay money to the SEC or DOJ, some commentators consider it to be a fourth form of negotiated resolution rather than a pure “declination.”

The SEC does not have any comparable policy, but the SEC and DOJ provided some guidance on circumstances that may lead to a declaration in the 2012 Resource Guide. The agencies offered six anonymized examples of past declinations. The examples shared several common features that largely track the commonalities among the recent declination letters:

- Either a voluntary disclosure or the provision of the results of an internal investigation to the government;
- Prompt and thorough internal investigations;
- Cooperation with the government’s investigation; and
- Significant remedial action, such as improved training and internal controls and termination of employees and business partners involved in wrongdoing.

Other factors included the small size of improper payments and potential profits and the strength of the company’s preexisting compliance program. See Resource Guide at 77-79.

4. Penalties

For individuals, the penalties for a criminal violation of the FCPA include imprisonment. Individuals may be sentenced to up to five years’ incarceration per violation. See 15 U.S.C. §§ 78ff(c)(1), 78dd-2(g), 78dd-3(e); 18 U.S.C. § 3571.

Violations of the FCPA’s provisions also can result in significant monetary penalties for both corporations and individuals. In particular, both the DOJ and SEC can and do regularly seek monetary sanctions, in the form of criminal fines or civil penalties respectively, on companies resolving alleged violations of the FCPA. As a practical matter, monetary sanctions typically range from the tens of millions to hundreds of millions of dollars, with the largest criminal fine ever paid to US authorities topping out at more than $700 million in the 2013 Alstom settlement. The year 2016 set a new record for the largest global settlement, with Brazilian company Odebrecht agreeing to pay a criminal fine expected to amount to $2.6 billion, split among US, Brazilian, and Swiss authorities.

These large monetary penalties flow from the statutory language that authorize the fines and civil penalties and the federal sentencing guidelines, which provide non-binding recommendations about the amount of a criminal fine based on various factors relating to the offense. The maximum statutory penalties per violation of the anti-bribery provisions are a $2,000,000 criminal fine and a $16,000 civil penalty for a corporate entity. For individuals, the maximum criminal fine per violation is $250,000, and the maximum civil penalty per violation is $16,000. Because these fine amounts are per violation and many payment schemes can involve multiple technical violations, in practice the government has significant discretion in setting the fine amount and the fine amount is subject to negotiation. In addition, a criminal fine of up to twice the gross amount of pecuniary gain may be levied under the Alternative Fines Statute and federal sentencing guidelines.

4 This penalty requires a “willful” violation. The Fifth Circuit has held that this element requires only that the defendant “acted intentionally, and not by accident or mistake” and

“with the knowledge that he was doing a 'bad' act under the general rules of law.” United States v. Kay, 513 F.3d 432, 447-48 (5th Cir. 2007).
FAQ 16: How are monetary FCPA penalties calculated?

The statute provides specific maximum penalty amounts per violation: $2,000,000 criminal fine and a $16,000 civil penalty for a corporate entity. In addition, a criminal fine of up to twice the gross pecuniary gain may be levied under the Alternative Fines Statute.

As a practical matter, the fact that each violation may be a separate basis for a fine gives the enforcement agencies wide discretion in setting the amount of a monetary sanction. In many corporate settlements, the final amount paid is subject to negotiation between the settling defendant and the enforcing agency.

The amount of a criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the federal sentencing guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes. The guidelines contain a formula for calculating a corporation’s criminal fine that takes into account the nature of the crime, the amount of benefit obtained, and culpability factors such as the size of the organization, the company’s policies, and involvement of senior management.

In many cases, following negotiation, a settling defendant will receive a “discount” off the DOJ’s calculation of the recommended guidelines range. The DOJ’s corporate enforcement policy is intended to make this discount process transparent and predictable by specifying the conditions that will lead to a reduction in penalty.

The SEC has not provided formal guidance regarding the amount of a monetary penalty in any given case. In addition, the SEC often seeks disgorgement of ill-gotten gains.

There are three tiers of civil penalties for violations of the books and records provisions, depending on a series of aggravating factors. The penalties range from $7,500 to $160,000 per violation for individuals and $75,000 to $775,000 (these were adjusted for inflation in 2013) per violation for corporate entities or may be calculated based upon the gross amount of the pecuniary gain. In addition, the SEC typically seeks disgorgement of any ill-gotten gains. Violations of the books and records provisions are civil violations unless they are committed willfully, in which case they are punishable as criminal offenses. Criminal violations carry maximum penalties of a $25 million fine per violation for entities and a $5 million fine per violation and 20 years’ incarceration for natural persons.

5. Other Collateral Consequences

The resolution of an FCPA investigation can also trigger collateral consequences outside the four corners of the settlement. These consequences are most likely to flow from a guilty plea or acknowledgment of criminal misconduct. For example, a criminal conviction may raise the possibility of suspension and debarment from participating in government contracts. As reflected in the section below discussing Private Litigation, FCPA settlements may also draw collateral lawsuits relating to the alleged misconduct.

A company considering a resolution of an FCPA investigation should carefully identify and analyze potential collateral consequences prior to entering into the agreement.

6. Cooperation, Voluntary Disclosure, and Remediation

In the context of the FCPA (and other corporate crime), the DOJ and SEC view “voluntary disclosure” as meaning a timely disclosure to the government of misconduct. To receive full credit, the government has stressed that a disclosure must both be made soon after the company discovers the wrongdoing and must not be delayed until the government’s own discovery of the wrongdoing is otherwise imminent. In such circumstances, the DOJ or SEC may not view the disclosure as voluntary.

The DOJ and SEC encourage companies to come forward with violations of the FCPA and promise leniency in exchange. They write in the Resource Guide, for example, that they "place a high premium on self-reporting, along with cooperation and remedial

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5 The values of all SEC penalties are subject to periodic adjustments to the civil penalties became effective March 5, 2013. See Securities & Exchange Comm’n, Adjustments to Civil Monetary Penalty Amounts, 78 Fed. Reg. 14179 (Mar. 5, 2013).
efforts, in determining the appropriate resolution of FCPA matters.” Resource Guide at 54.

In recent enforcement actions and other public statements, both the DOJ and SEC emphasized the credit they gave to companies that self-disclosed their misconduct; conversely, they also pointed out that companies that did not self-disclose would receive harsher penalties and, at least with the SEC, may lose the ability to earn any cooperation credit.

Recent DOJ guidance and corporate enforcement policy appear to reflect an effort to further quantify the potential benefits in cooperation, disclosure, and remediation: if a company meets certain requirements in all three categories, the DOJ will decline prosecution or grant a 50 percent reduction off the bottom-end of the DOJ’s calculation of the federal sentencing guidelines range. If a company cooperates and remediates but fails to self-disclose, the DOJ will grant a 25 percent reduction.

Our analysis of recent FCPA settlements with both the DOJ and the SEC confirm that there is an observable reduction in the monetary penalty for corporations that are given full disclosure credit compared to companies engaged in similar conduct that are not given that credit.

Nonetheless, the rewards of voluntary disclosure in the FCPA context are not as clear-cut as those under certain other programs, such as the DOJ Antitrust Division’s amnesty program, which can confer amnesty on a company that is “first in” to report participation in illegal antitrust activity.

Whether voluntary disclosure is advisable in any given situation is highly fact-specific. As noted above, self-reporting companies likely receive some additional benefit, but often it is not clear how much. A company that makes a voluntary disclosure is more likely to obtain a deferred or non-prosecution agreement than a company that does not disclose. But there may be many circumstances in which such an agreement will not be afforded even though there has been a disclosure. And, while preferable to a guilty plea, deferred or non-prosecution agreements do not provide ironclad insulation against future criminal prosecution. Indeed, a 2008 FCPA prosecution came about because the company – Aibel Group Ltd. – was found to have violated an earlier FCPA deferred prosecution agreement from 2004. Furthermore, voluntary disclosure does not guarantee protection against substantial monetary penalties.

FAQ 17: Are there benefits to voluntary disclosure?

Yes, but the extent of the benefits is highly fact-specific. The DOJ and SEC encourage companies to make voluntary disclosures of wrongdoing and promise that such self-reporting will be rewarded with a lesser penalty. Our analysis of recent settlements reflects that there has been an observable benefit to self-disclosure, though the extent of the benefit is difficult to quantify as many other factors may affect the ultimate size of a penalty and the nature of any resolution.

The benefits to voluntary disclosure must be weighed against the potential downsides to disclosure, including possible public disclosure of an ongoing investigation and the possibility of additional investigation directed by the government following any disclosure.

There can also be significant additional downsides to voluntary disclosures. First, they frequently result in potential FCPA violations becoming public before they are resolved, often through SEC filings that are reported in the press. Such publicity can lead to shareholder suits and reputational damage. Second, self-reporting can increase a company’s legal costs a result of the ensuing DOJ or SEC investigation into the disclosed misconduct.

The DOJ and SEC typically require additional investigation in the wake of a disclosure, sometimes encompassing business units or geographic areas well beyond those involved in the potential violations initially identified and disclosed. Indeed, in its 2014 settlement with Bruker Corporation, the SEC specifically cited, as an example of the company’s cooperation, the fact that it had expanded the scope of its internal investigation at the agency’s request. Because disclosure typically will not be rewarded without cooperation with the following investigation, a decision to voluntarily disclosure should be made in light of the potential costs associated with cooperation.

Cooperation, like voluntary disclosure, entails promised benefits along with significant potential costs. As with voluntary disclosure, the DOJ and the SEC have extolled the virtues of cooperation and emphasized that it can play an important factor in a favorable resolution. Indeed, many corporate resolutions attribute a modest fine amount in part to the defendant’s cooperation. Our analysis of past DOJ resolutions likewise confirms that there is some benefit in that companies who received formal cooperation credit
under the federal sentencing guidelines often receive a further “discount” below the recommended fine.

Of course, the potential benefits of cooperation must be weighed against the related drawbacks. First, cooperation can be costly. The DOJ and SEC have set a high bar for cooperation in FCPA cases, frequently citing cooperation as including resource-heavy undertakings, such as creating topical collection of documents, providing translation of foreign language document, making internationally based witnesses available, and providing real-time updates to the government. The DOJ’s new FCPA corporate enforcement policy explicitly recognizes that these expectations exceed the cooperation DOJ ordinarily requires of corporate defendants in order to receive cooperation credit in other matters.

Second, cooperation can enhance the disruptive impact of the investigation. Especially since the Yates Memo re-emphasized the DOJ’s focus on individual criminal liability, the DOJ (and to a lesser extent the SEC) have made identifying individual wrongdoers and developing evidence against them explicit requirements of cooperation. While in some circumstances, a company may feel victimized by a perpetrator of misconduct and be perfectly willing to aggressively assist in her prosecution, there are other circumstances where a company may have legitimate concerns about developing evidence for the prosecution of its employees. Individual employees also may be less willing to cooperate in an internal investigation knowing that it is undertaken in part with the purpose of identifying evidence to prosecute a fellow employee.

Third, cooperation can also entail risk in waiving attorney-client privilege or work product protections over an internal investigation and the materials generated during it. Although both the DOJ and SEC insist that they will not ask companies to waive privilege, both often make requests that could risk a waiver if not handled carefully, such as requests for witness interview downloads or attribution of facts to specific sources. Moreover, it is the courts, not the DOJ or SEC, that will decide whether a company’s cooperation waived privilege in the context of potential collateral litigation.

Notwithstanding the above risks, however, most companies have found that once FCPA-related misconduct comes to the attention of authorities, they have little choice but to attempt to cooperate to the government’s satisfaction. The length of and disruption caused by an investigation conducted entirely by the

FAQ 18: What counts as “cooperation” with the government investigation?

There is no magic formula for cooperating, but recent DOJ and SEC pronouncements and resolutions, including the DOJ FCPA corporate enforcement program, identify a number of concrete steps a company under investigation can take for which the government may give cooperation credit:

- Timely self-reporting of misconduct;
- Providing real-time reports about findings of the company’s internal investigation, including making proactive (rather than reactive) disclosures to the government;
- Making overseas witnesses available;
- Attributing facts to specific sources, if consistent with the attorney-client privilege;
- Voluntarily producing relevant documents;
- Translating foreign-language documents;
- Providing topical collections of documents;
- Preparing and producing factual chronologies;
- Conducting voluntary risk assessments or reviews of other areas of the company’s business;
- Assisting the government in overcoming challenges posed by foreign data privacy laws and blocking statutes;
- Providing evidence regarding the individuals involved in the misconduct; and
- Providing all known facts relevant to potential third-party criminal activity.

The DOJ’s FCPA corporate enforcement policy reflects that these expectations for cooperation exceed the requirements provided for corporate cooperation credit in other criminal matters.

Beyond the FCPA realm, the DOJ has also announced a general policy that providing relevant information about the individuals involved in misconduct is a prerequisite to receiving any cooperation credit.
government without a company’s assistance, along with
the draconian penalties available to the government
where a resolution is not the product of cooperation or
negotiation, are typically more than sufficient motivation
for a company to choose the cooperation path instead.

As with cooperation, adequately remediating an FCPA
violation can be a difficult endeavor. In settlement
papers that have discussed remediation, the DOJ and
SEC have each commended companies that have
improved their compliance programs and taken
appropriate steps to discipline the employees involved in
the misconduct. But what constitutes adequate
remediation is highly case-specific.

As the DOJ’s 2016 settlement with Embraer shows, the
DOJ can have very specific actions in mind when the time
comes for rewarding remedial measures. In announcing
the Embraer settlement, the DOJ acknowledged that the
company had disciplined several employees, but faulted
the company for incomplete remediation because it failed
to discipline a senior executive who was aware of bribery
discussions over email and was responsible for overseeing
the employees involved in those discussions. As a result,
the DOJ gave Embraer only partial credit for remediation.

Although the DOJ and SEC have made clear that an
adequate compliance program must be tailored to the
company’s specific circumstances and risks, recent
statements has further described their expectations as to
an effective compliance regime.

The Resource Guide identifies five “hallmarks” of an
effective FCPA compliance regime:

- Commitment from senior management and a
clearly articulated policy against corruption;
- Code of conduct, policies, and procedures that
clearly prohibit corruption;
- Responsibility invested in an executive with
adequate “oversight, autonomy, and resources”;
- A risk-based approach; and
- Training and other communication sufficient to
ensure knowledge of the policy.

FAQ 19: What counts as “remediation” of a violation or
potential violation of the FCPA?

The DOJ has identified a number of factors as relevant
to its assessment of remedial actions, including many
that are focused on ongoing compliance, including
whether the company:

- Demonstrated thorough analysis of the root
cause of the misconduct;
- Has an established culture of compliance,
including an awareness among employees that
criminal conduct is not tolerated;
- Dedicates sufficient resources to
compliance, including maintaining
experienced and adequately compensated
compliance personnel;
- Performs an effective risk assessment
and tailors its compliance program based
on the assessment;
- Performs regular audits of its
compliance function;
- Performs regular audits of its
compliance function;
- Maintains an independent compliance function;
- Performs an effective risk assessment
and tailors its compliance program based
on the assessment;
- Performs regular audits of its
compliance function;
- Maintains an independent compliance function;
In February 2017, the DOJ Fraud Section, which is the DOJ component responsible for FCPA enforcement, provided further information on how it will evaluate the effectiveness of a compliance program. The Fraud Section released a paper reiterating that the assessment of a corporate compliance program is highly individualized and depends on a company’s particular activities and risk profile, but identifying 11 categories of questions that it will ask when evaluating a company’s compliance program:

1. Analysis and remediation of underlying conduct, including the company’s root cause analysis of the misconduct, prior indications of the misconduct, and remediation;

2. Involvement of senior and middle management in encouraging or discouraging the type of misconduct that occurred, and demonstrating commitment to compliance;

3. Autonomy and resources of the compliance department, including the compliance function’s stature within the company, the experience and qualifications of compliance personnel, and the funding and resources of the compliance department;

4. Strength of the company’s compliance policies and procedures, including the company’s process for designing and implementing new policies;

5. Methodology and effectiveness of the company’s risk assessment process;

6. Compliance training and communication, including the provision of tailored training for high-risk and control employees, whether the training has been offered in the form and language appropriate for the audience, and the resources that are available to employees to provide guidance to employees regarding compliance policies;

7. Effectiveness of the company’s reporting mechanism and the scope and effectiveness of compliance-related investigations;

8. Disciplinary actions taken in response to misconduct, including whether managers were held accountable for misconduct that occurred under their supervision, and the way that the company incentivizes compliance;

9. Continuous improvement, periodic testing, and review, including internal audit’s work and the company’s use of control testing;

10. Management of third-party risks, including due diligence performed on third parties to identify red flags; and

11. Risks related to M&A activities, including whether misconduct was identified during the pre-M&A due diligence process and how the company’s compliance function has been integrated into the M&A process.

OTHER FEDERAL STATUTES THAT APPLY TO FOREIGN CORRUPTION

A number of other federal criminal statutes can apply to foreign bribery:

- **Money Laundering Statutes.** The federal money laundering statutes make it a felony to conduct a financial transaction knowing that the funds are the proceeds of “specified unlawful activity.” 18 U.S.C. § 1956(a)(1). The term “specified unlawful activity” expressly includes “any felony violation of the Foreign Corrupt Practices Act.” Id. § 1956(c)(7)(D). Accordingly, financial transactions that involve the proceeds of an FCPA violation (e.g., profits derived from an illicit payment) or improper payments to an agent that aid or abet money-laundering activities under 18 U.S.C. § 2, may give rise to criminal liability beyond that imposed by the FCPA itself.

- **Mail and Wire Fraud.** The DOJ also has used the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to prosecute foreign bribery. These statutes are extremely broad and can apply in...
certain circumstances to conduct not reached by the FCPA.

- **The Travel Act.** The Travel Act, 18 U.S.C. § 1952, prohibits the use of foreign travel or the instruments of interstate commerce to further “unlawful activity,” including activity made criminal by the state in which the offense was committed. Because many states prohibit commercial bribery, the Travel Act, unlike the FCPA, often reaches foreign commercial bribery.

Several 2017 developments reflect the scope of US anti-corruption enforcement relying on statutes other than the FCPA.

**FIFA Trials.** On May 27, 2015, US authorities unsealed indictments against nine FIFA officials and five executives on charges of conspiracy, racketeering, wire fraud, and money laundering conspiracy, on the same day that seven of the officials were dramatically arrested in Zurich. A second indictment followed in December 2015. Thus far, the United States has charged more than 40 individuals and 23 of the defendants have pleaded guilty and two convicted.

Recent months have brought both the first sentence and the trials of the FIFA action. In October 2017, Hector Trujillo, a former judge and secretary of the Guatemalan football federation, was sentenced to eight months in prison and ordered to pay $415,000 in restitution to the Guatemalan soccer federation. In a five-week trial concluding December 14, 2017, three of the defendants, the former president of the Brazil football association, José Maria Marin; the former president of the South America football confederation (CONMEBOL) and former head of the Paraguayan football association, Juan Ángel Napout; and the former president of the Peru football association and former member of FIFA’s development committee, Manuel Burga, were tried for their involvement in the scheme. The jury found Napout and Marin guilty and acquitted Burga.

**Mahmoud Thiam.** In May 2017, the former minister of Mines and Geology of the Republic of Guinea, Mahmoud Thiam, was convicted in the Southern District of New York of one count of transacting in criminally derived property and one count of money laundering. These offenses were related to $8,500,000 in bribes that Thiam accepted from executives at China Sonangol International Limited and China International Fund, SA. At the time, Thiam was the Minister of Mines and Geology. Executives made the payments in exchange for Thiam influencing the Guinean government’s decision to enter into mining rights agreements with these companies and their subsidiaries. Thiam then transferred $3,900,000 to the United States, concealing the bribery by falsely claiming that he was a consultant and that the money was from selling land prior to his time in his government role. After being found guilty at trial, Thiam was sentenced to seven years in prison in August.

**Heon-Cheol Chi.** Several months after Thiam’s conviction, in July 2017, the former director of South Korea’s Earthquake Research Center, Heon-Cheol Chi, was convicted in the Central District of California of one count of transacting in criminally derived proceeds. Chi was charged with laundering proceeds of bribery—a violation of South Korea’s bribery law—received from two seismological companies, Guralp Systems Ltd. and Kinemetrics. The government demonstrated at trial that, in exchange for more than $1 million in bribes, Chi advocated that the Korea Institute of Geoscience and Mineral Resources (KIGAM) purchase and use equipment from these companies, and also provided “market intelligence and inside information” to these companies. At Chi’s request, the companies submitted the payments to his personal bank account in California. Chi then transferred some of the money to an investment account in New York City and spent some of the remaining money in South Korea. In October, Chi was sentenced to 14 months in prison.

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**FAQ 21: Can a US company engage in foreign bribery if it does not involve the bribing of a foreign official?**

No. Although that conduct is not prohibited by the FCPA, other federal criminal statutes, including the Travel Act and the mail and wire fraud statutes, likely would apply to it. The 2015 FIFA indictments for corrupt payments involving the international soccer organization show that US law enforcement can and will use other federal criminal statutes to investigate and prosecute alleged international wrongdoing, such as commercial bribery, outside the reach of the FCPA.
RECENT FCPA ENFORCEMENT ACTIONS

The summaries below, presented in alphabetical order, describe select significant events in FCPA enforcement matters in 2017. Although not discussed, there are several other pending enforcement actions that we are tracking for new or significant developments.

ALERE INC.
Securities and Exchange Commission
Settled Administrative Proceeding
September 28, 2017

Nature of Conduct: According to the SEC’s order, Alere, which manufactures and sells diagnostic tests for infectious disease, cardiometabolic disease, and toxicology, mischaracterized payments made through a subsidiary to a Colombian government official between 2011 and 2013. Alere’s subsidiary in India also allegedly failed to properly record payments made by a distributor to local governmental officials in order to induce the government to order more testing kits.

Amount of Alleged Improper Payments: According to the SEC, improper payments of about $275,000 were made in Colombia, and without specifying the dollar amount it said that commissions were paid amounting to four percent of Alere sales in India.

Benefit Obtained: According to the SEC, Alere’s profits from the sales associated with the improper offers and payments totaled approximately $3.3 million.

Type of Resolution and Sanction: The SEC’s Order finds that Alere violated the FCPA’s books and records and internal control provisions. Without admitting or denying the findings, Alere consented to the entry of the order and agreed to pay a civil monetary penalty of $9,200,000, disgorgement of $3,328,689, and prejudgment interest of $495,196.

Of Note: In April 2017, during the ongoing FCPA investigation of Alere, Abbott Laboratories acquired Alere. Reports suggest that the fact of an investigation reduced the acquisition price.

Additionally, the SEC alleges that between 2011 and 2016, Alere engaged in the improper premature recognition of revenue from subsidiaries in, among other locations, South Korea, Israel, South Africa, Ireland, and China in its financial statements filed with the Commission.

FERNANDO ARDILA RUEDA
CHARLES BEECH III
JUAN JOSE HERNANDEZ-COMERMA
ROBERTO ENRIQUE RINCON FERNANDEZ
ABRAHAM JOSE SHIERA BASTIDAS
Department of Justice
Guilty Pleas
March 22, 2016 (Shiera)
June 16, 2016 (Rincon)
January 10, 2017 (Hernandez-Comerma and Beech)
October 11, 2017 (Ardila)

Indictment
August 24, 2017 (Ardila)

Nature of Conduct: According to the DOJ, Fernando Ardila Rueda (Ardila), Charles Beech III, and Jose Hernandez-Comerma conspired to pay bribes and other things of value to officials at the Venezuela state-owned
energy company, Petroleos de Venezuela S.A. (PDVSA). The bribes were paid to benefit the energy companies owned by Ardila’s co-conspirators, Abraham Jose Shiera Bastidas (Shiera) and Roberto Enrique Rincon Fernandez (Rincon). During the periods in which they offered bribes and provided entertainment to the PDVSA officials, Ardila and Hernandez each held senior sales or management positions at companies owned by Shiera. Beech also concealed the payments of the bribes through the use of fictitious transaction records.

**Amount of Alleged Improper Payments:** Bribes to PDVSA officials were based on a percentage of the value of contracts the officials helped award to the companies, as well as meals and entertainment. In one instance, Ardila transferred $40,000 to a bank account in the name of a relative of a PDVSA official. Hernandez made approximately $40,000 in improper payments, including payments of more than $15,000 for hotel and entertainment costs.

The substantive elements of the FCPA’s anti-bribery provisions are:
- An offer, payment, promise to pay, or authorization of payment of any money or anything of value;
- To any foreign official or to any other person (a third party) while knowing that any portion of the thing of value will be offered, given or promised, directly or indirectly, to a foreign official;
- Corruptly;
- For purposes of influencing an official's act or decision; and
- In order to obtain or retain business or to direct business to any person.

**Benefit Obtained:** Placement on PDVSA bidding panels, as well as new and retained business with PDVSA, for Shiera’s and Rincon’s companies.

**Type of Resolution and Sanction:** In 2017, Ardila, Beech, and Hernandez each pleaded guilty to FCPA anti-bribery charges. In 2016, Shiera also pleaded guilty to FCPA anti-bribery charges. Also in 2016, Rincon pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provisions, to one count of violating the FCPA’s anti-bribery provisions, and to one count of making false statements on his 2010 federal income tax return. Sentencing for Ardila, Beech, Hernandez, Rincon, and Shiera is expected in 2018.

**Of Note:** Including Ardila, Beech, Hernandez, Rincon, and Shiera, a total of ten individuals have pleaded guilty and are pending sentencing as part of a broader, ongoing DOJ investigation into bribery at PDVSA.

**JOSEPH BAPTISTE**  
Department of Justice  
Indictment  
October 4, 2017

**Nature of Conduct:** Joseph Baptiste, a retired US Army colonel, was indicted for his alleged role in a foreign bribery and money laundering scheme in connection with a planned $84 million port development project in Haiti. The indictment alleges that, in 2014 and 2015, Baptiste solicited bribes from undercover FBI agents in Boston who posed as potential investors in the development project, including the construction of a cement factory. During a recorded meeting at a Boston-area hotel, Baptiste told the agents that 5 percent of the cost of the factory would need to be paid to Haitian officials to secure the project, and that he would conceal the bribe payments from these investors to Haitian officials by funneling their money through a non-profit entity that he controlled and which purported to help the Haitian poor.

**Amount of Alleged Improper Payments:** The indictment does not specify any improper payments.

**Benefit Obtained:** The indictment alleges that Baptiste intended to obtain the Haitian officials’ help in securing the project’s authorization.

**Type of Resolution:** Unresolved. The DOJ charged that Baptiste conspired to violate the FCPA’s anti-bribery provisions, as well as commit money laundering and Travel Act violations.

**Of Note:** The indictment alleges that Baptiste did not, in fact, use the money he obtained from the undercover agents to bribe the Haitian officials. Instead, he used it for personal purposes. However, the indictment alleges that he planned on seeking more money from the undercover agents to use as bribes.
**CADBURY LIMITED/MONDELĒZ INTERNATIONAL**

*Securities and Exchange Commission*

*Settled Administrative Proceeding*

*January 6, 2017*

**Nature of Conduct:** Cadbury India, a subsidiary of Cadbury Limited, a UK-based confectionary and snack beverage company, allegedly made illicit payments to obtain government licenses and approvals for a chocolate factory in Baddi, Himachal Pradesh, India. Cadbury India allegedly failed to conduct appropriate due diligence or monitor the activities of its local agent in India and did not accurately and fairly reflect the nature of the services rendered by the agent on the subsidiary’s books and records. The improperly recorded books and records were consolidated into the books and records of Cadbury and of Mondelēz International after Mondelēz acquired Cadbury. Cadbury also allegedly did not devise and maintain an adequate system of internal accounting controls.

**Amount of Alleged Improper Payments:** According to the SEC, from February 2010 to July 2010, Cadbury India paid the Indian agent $90,666.

**Benefit Obtained:** Cadbury India obtained certain licenses and approvals for a unit of its factory, including a de-amalgamation approval to designate the property as legally distinct from that of the existing manufacturing facility.

**Type of Resolution:** The SEC’s order found that Cadbury violated the FCPA’s books and records and internal controls provisions. The order also found that Mondelēz, which acquired Cadbury while the scheme was being carried out, was responsible for Cadbury’s violations as an acquiring entity. Without admitting or denying the findings in the order, Mondelēz and Cadbury consented to the entry of the order and agreed to pay a $13 million civil penalty for FCPA violations.

**Of Note:** The SEC’s emphasis on Mondelēz’s acquisition in its order underscores the importance of potential post-acquisition liability for acts of an acquired company. This is also another in a long line of cases where the SEC order describes allegations that potentially violated the FCPA’s anti-bribery provisions, but settled solely on the basis of the FCPA’s accounting provisions.

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**CDM SMITH INC.**

*Department of Justice*

*Declination*

*June 21, 2017*

**Nature of Conduct:** According to a DOJ letter announcing that it was declining prosecution of CDM Smith Inc. (CDM), from approximately 2011 to 2015, CDM paid bribes to officials in India for infrastructure contracts. Specifically, employees of CDM, as well as employees of its wholly owned subsidiary in India (CDM India) paid bribes to officials in India’s state-owned highway management agency in order to receive highway construction and design contracts. The bribes were paid through fraudulent subcontractors and were generally 2-4 percent of the contract price. In addition, CDM paid approximately $25,000 to local officials in the Indian state of Goa for a water project contract. All senior management at CDM were allegedly aware of the bribes and approved or participated in the misconduct.

**Amount of Alleged Improper Payments:** Approximately $1.18 million in bribes to government officials in India.

**Benefit obtained:** Approximately $4 million in net profits from the contracts that CDM received on account of the bribes.

**Type of Resolution:** Declination of prosecution under the FCPA pilot program. As part of the declination resolution, CDM agreed to disgorge approximately $4 million.

**Of Note:** This matter is one of two declinations the DOJ made under the FCPA pilot program in 2017. According to the DOJ’s letter announcing the declination, CDM met the requirements for a declination: CDM made a timely and voluntary self-disclosure; performed a thorough and comprehensive investigation; cooperated fully in the matter; and remediated fully, including by terminating all employees it identified as involved in the misconduct.

The conduct acknowledged in this declination, which included involvement and knowledge of senior company officials, is among the more severe conduct to date for which the DOJ has declined prosecution.

The company’s decision to terminate culpable employees may have proved decisive in achieving this favorable disposition. In contrast, in 2016, LATAM Airlines Group S.A., a commercial airline company based in Chile, failed to discipline in any way the employees responsible for the
criminal conduct. As a result, the company paid a penalty within the Federal Sentencing Guidelines range instead of receiving a discount off the bottom of the range.

MICHAEL L. COHEN  
VANJA BAROS  
SAMIUL MEBIAME  
Department of Justice  
Guilty Plea (Mebiame)  
December 9, 2016

Sentencing  
May 23, 2017

Securities and Exchange Commission  
Complaint (Cohen and Baros)  
January 26, 2017

Nature of Conduct: According to the SEC’s complaint, Michael L. Cohen and Vanja Baros, each an official in the European division of their employer, caused millions of dollars of bribes to be paid to government officials in several African countries, including Chad, Niger, Guinea, and the Democratic Republic of the Congo (DRC). The complaint alleges that Cohen and Baros were masterminds of the scheme, which used agents and partners to make payments to government officials in exchange for facilitating transactions with their governments.

According to facts acknowledged as part of his guilty plea, Samuel Mebiame was a consultant for a mining company owned by a joint venture that was owned in part by Cohen and Baros’s employer. Mebiame conspired with others at the joint venture to pay bribes, usually through intermediaries, to government officials in Chad and Niger.

Amount of Alleged Improper Payments: The complaint charges that Cohen and Baros participated in the payment of tens of millions of dollars of bribes.

Benefit Obtained: Transactions with several African governments.

Type of Resolution: Unresolved as to Cohen and Baros.

Samuel Mebiame pleaded guilty on December 9, 2016 to conspiring to make corrupt payments to government officials in violation of the FCPA’s anti-bribery provision. On May 23, 2017, Mebiame was sentenced to 24 months in prison.

Of Note: The SEC’s complaint alleges that Cohen and Baros purposefully omitted facts about the alleged corrupt transactions from communications with management at their employer in order to conceal the true corrupt nature of the transactions.

While sentencing Mebiame, the sentencing judge stated, “it’s time for people who are responsible for this kind of behavior to be held accountable; not just one person, but everybody.”

DMITRY FIRTASH  
Department of Justice  
Approval of Extradition Request February 21, 2017  
Motion to Dismiss May 9, 2017

Nature of Conduct: According to an indictment unsealed in April 2014 against Dmitry Firtash and five co-defendants, Firtash was the leader of a scheme to pay $18.5 million in bribes to Indian officials for titanium mining rights. Although all of the FCPA defendants are foreign nationals, they allegedly used US financial institutions to transmit funds and traveled to Seattle, Washington and Greensboro, North Carolina, for the purpose of advancing the conspiracy.

Amount of Alleged Improper Payments: At least $18.5 million.

Type of Resolution: Unresolved. Firtash’s extradition to the United States was approved by an Austrian court in February 2017. In August, another Austrian court declined a competing extradition request from Spain, clearing the way for extradition to the United States.

Meanwhile, in May 2017, Firtash’s legal team filed a motion to dismiss, arguing that the FCPA did not apply to purely foreign conduct by foreign defendants, that the venue was not proper, and that the due process clause prevents the extra-territorial enforcement of criminal law sought by the DOJ. That motion is pending.

Of Note: Firtash’s connections to Paul Manafort, the former campaign chairman for President Trump indicted in October 2017, have added to the media intrigue around Firtash’s case. Firtash and Manafort were involved in a failed multi-million dollar deal to buy a New York hotel together in 2008.
CHEIKH GADIO
PATRICK HO
Department of Justice
Criminal Complaint
November 20, 2017

Nature of Conduct: According to the DOJ’s complaint, Patrick Ho, the head of an NGO based in Hong Kong and Virginia, bribed and made corrupt offers to officials in Chad and Uganda in exchange for securing contracts for the Shanghai-based CEFC China Energy Company. Ho allegedly paid Cheikh Gadio, the former Senegal Foreign Minister, to serve as an intermediary in the scheme.

Amount of Alleged Improper Payments: Ho allegedly paid $400,000 to Gadio, $500,000 to Uganda’s minister of foreign affairs, and offered $2,000,000 to the President of Chad.

Benefit Obtained: According to the DOJ, the President of Chad gave CEFC an opportunity to obtain oil rights in that country without facing international competition.

Type of Resolution and Sanction: Unresolved. The DOJ’s complaint alleged that Ho and Gadio violated and conspired to violate the FCPA’s anti-bribery provisions.

Of Note: DOJ has jurisdiction over both defendants due to their contacts with the United States: the payments to Gadio and Uganda’s foreign minister used the New York financial system, Ho and Gadio allegedly hatched their scheme while in the halls of the United Nations in New York, and both men were arrested in New York.

HALLIBURTON COMPANY
JEANNOT LORENZ
Securities and Exchange Commission
Settled Administrative Proceeding
July 27, 2017

Nature of Conduct: According to the SEC’s order, officials at Angola’s state oil company Sonangol advised Halliburton management in 2008 that it was required to partner with more local Angolan-owned businesses to satisfy local content regulations for foreign firms operating in Angola. Halliburton tasked a former vice president, Jeannot Lorenz, to spearhead these efforts. When a new round of oil projects came up for bid, Lorenz began a lengthy effort to retain a local Angolan company owned by a former Halliburton employee who was a friend and neighbor of the Sonangol official who would ultimately approve the award of the contracts.

According to the SEC, the engagement of the local firms had several procedural irregularities that reflected a lack of effective internal controls. Lorenz allegedly backed into a list of contract services rather than first determining the services and then selecting an appropriate supplier. Lorenz also failed to conduct competitive bidding or substantiate the need for a single source of supply, and he avoided an internal accounting control that required contracts of more than $10,000 in countries like Angola with high corruption risks to be reviewed and approved by a special committee within Halliburton.

Amount of Alleged Improper Payments: No allegations of corrupt payments. According to the SEC, Halliburton improperly outsourced more than $13 million worth of business to a local Angolan company of which $3.7 million was actually paid to the local Angolan firm during the relevant period.

Benefit Obtained: According to the SEC, Halliburton profited by approximately $14 million from the award of seven lucrative subcontracts to Halliburton.

Type of Resolution and Sanction: The SEC’s order finds that Halliburton violated the FCPA’s books and records and internal controls provisions, and that Lorenz caused the violation. Without admitting or denying the findings, Halliburton and Lorenz consented to the entry of the order. Halliburton agreed to pay $29.2 million, consisting of $14 million in disgorgement plus $1.2 million in prejudgment interest and a $14 million civil penalty. Halliburton must retain an independent compliance consultant for 18 months to review and evaluate its anti-corruption policies and procedures, particularly in regard to local content obligations for business operations in Africa.

Lorenz agreed to pay a $75,000 civil penalty.

Of Note: According to a Halliburton press release, the investigation began after an anonymous allegation was made in December 2010, eventually leading Halliburton to report the allegation to the DOJ. The DOJ closed its investigation without taking any action.
Nature of Conduct: The DOJ charged Dmitrij Harder, the former owner and president of Chestnut Consulting Group Inc. and Chestnut Consulting Group Co. (Chestnut Group), with violations of the FCPA and the Travel Act as a result of bribes allegedly paid to a senior banker in the United Kingdom’s Natural Resources Group of the European Bank for Reconstruction and Development (EBRD). As described in the DOJ press release accompanying the sealed plea agreement, Harder admitted that, between 2007 and 2009, he “engaged in a scheme to pay approximately $3.5 million in bribes to an EBRD official to corruptly influence the official’s actions on applications for EBRD financing submitted by the Chestnut Group’s clients and to influence the official to direct business to the Chestnut Group.” The Chestnut Group earned approximately $8 million in “success fees” as a result of EBRD’s approval of its clients’ applications.

Amount of Alleged Improper Payments: $3.5 million.

Benefit Obtained: $8 million in “success fees.”

Type of Resolution: On July 18, 2017, Harder was sentenced to 60 months of imprisonment.

Of Note: First, the EBRD is based in the United Kingdom, which is not generally considered a high-corruption risk country. Second, the indictment relies on the “public international organization” prong of the FCPA’s “foreign official” element, which is infrequently alleged. Harder had argued, in a motion to dismiss, that EBRD was not a public international organization under the FCPA. However, the court rejected the argument, finding that the indictment contained sufficient facts for a jury to determine that EBRD qualifies as a public international organization within the meaning of the FCPA.

Professional service providers such as lawyers and consultants can be the source of significant corruption risk. Although such service providers are often thought of as lower risk than other third parties, they have often been the focus of FCPA investigations.

Nature of Conduct: On December 27, 2016, charges were unsealed against Ernesto Hernandez-Montemayor, Ramiro Ascencio Nevarez, Victor Hugo Valdez Pinon, Kamta Ramnarine, Douglas Ray, and Daniel Perez in connection with schemes to bribe Mexican state government officials, including Hernandez-Montemayor and Nevarez. According to the indictments and plea agreements, between 2006 and 2016, Ray conspired with Valdez and others, including Ramnarine and Perez, to bribe Mexican state officials in order to secure parts and servicing contracts with Mexican government-owned customers of an unnamed Texas-based aviation company.

Amount of Alleged Improper Payments: Approximately $2 million in bribe payments to Mexican officials.

Benefit Obtained: Aviation maintenance, repair, and overhaul contracts from a Mexican state government.

Type of Resolution: Guilty Pleas. Ray and Valdez Pinon pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provision and conspiracy to commit wire fraud. Ramnarine and Perez pleaded guilty to conspiring to violate the FCPA’s anti-bribery provision. Hernandez-Montemayor and Nevarez, both of whom were previously officials of Mexican state-owned entities, pleaded guilty to one count of conspiracy to commit money laundering.

For his part in the conspiracy, Hernandez-Montemayor was sentenced to 24 months’ imprisonment and one year of supervised release upon completion of the prison term. He also stipulated to forfeit over $2 million.

Perez was sentenced to three years’ probation.

Of Note: At this point, although senior officials from the aviation company have been charged in the scheme, the DOJ has not charged the aviation company itself.

While the DOJ’s position is that the FCPA only criminalizes payment of bribes to foreign public officials, and does not criminalize a foreign public official’s receipt of a bribe, as it did here, the DOJ will charge foreign officials who engage in financial transactions with the bribe money they receive with money laundering.
JERDS LUXEMBOURG HOLDING S.AR.L.
ZIMMER BIOMET INC.
Department of Justice
Deferred Prosecution Agreement (Zimmer Biomet) Guilty Plea (JERDS)
January 12, 2017
Securities and Exchange Commission
Settled Administrative Proceeding (Zimmer Biomet)
January 12, 2017

Nature of Conduct: In 2012, Biomet, Inc. (a predecessor of Zimmer Biomet Holdings, Inc. (Biomet)) entered into a deferred prosecution agreement (DPA) with the DOJ and consented to the entry of an SEC administrative order to resolve allegations that it and its subsidiaries made improper payments to doctors at public hospitals in Brazil, China, and Argentina.

In 2017, Biomet acknowledged that it and its subsidiaries engaged in continued corrupt conduct in Brazil and Mexico in violation of the 2012 agreement. In Brazil, Biomet allegedly used a Brazilian distributor to pay bribes to public health care providers to use Biomet’s products, including after Biomet entered into the 2012 agreements with the DOJ and SEC. In connection with the 2012 settlement, Biomet told the US government that it had terminated its relationship with the Brazilian distributor in 2008. Nonetheless, from 2009 until 2013, Biomet allowed another of the Brazilian distributor’s companies to be its authorized distributor. Although senior Biomet employees were aware of the continuing relationship and potential bribes, they did not address it. In fact, a recommendation in a draft audit report that the new authorized distributor be fully separated from the prohibited distributor was removed from the final report by a member of Biomet’s legal team.

In Mexico, Biomet’s indirect subsidiary, Biomet 3i Mexico SA de CV (Biomet 3i), used a third party customs broker and subagents to bribe Mexican customs officials to allow the smuggling of unregistered and mislabeled dental products into Mexico, in violation of Mexican law, including after the 2012 settlement agreements. From 2010 to 2013, Biomet 3i recorded payments to the subagents as payments to the broker despite knowing that at least part of the payments would be paid to customs officials. In addition, Biomet 3i did not have a written contract with the customs broker or its subagents and did not receive anti-corruption representation from them, even though they were providing services in a high-risk country. JERDS Luxembourg Holding S.AR.L. (JERDS) became the parent company of Biomet 3i in 2012, and the disguised payments by Biomet 3i were incorporated into JERDS’s books and records.

Amount of Alleged Improper Payments: The amount paid to the Brazilian distributor is not specified. Biomet 3i allegedly paid approximately $980,774 to the customs broker knowing that at least part would be passed onto customs officials.

Benefit obtained: The amount gained is not specified, but the SEC’s disgorgement claim of $5.82 million is meant to reflect the amount of pecuniary gain from the misconduct.

Type of Resolution: Biomet entered into a DPA with the DOJ for violations of the DOJ’s anti-bribery, books and records, and internal controls provisions, and agreed to pay a fine of more than $17.46 million. Biomet also consented to the entry of a new SEC order finding violations of the FCPA’s anti-bribery, books and records, and internal controls provisions, and agreed to pay disgorgement of $5.82 million, $702,705 in pre-judgment interest, and a $6.5 million civil penalty. In both agreements, Biomet also agreed to retain an independent compliance monitor for a three-year term.

In addition, JERDS pleaded guilty to a violation of the FCPA’s books and records provision. According to the DOJ, approximately $4.8 million of the $17.46 million fine against Biomet was due to JERDS’s conduct. In light of Biomet’s DPA with the DOJ, however, the DOJ agreed that no penalty would be imposed directly on JERDS and the penalty paid by Biomet would be credited to any penalty imposed on JERDS.

Of Note: As part of the 2012 settlement agreements with the DOJ and SEC, Biomet agreed to retain an independent compliance monitor for an initial term of 18 months. The DOJ extended that term to three years, and then to four, due to allegations of bribery in Brazil and Mexico and because the monitor could not certify that Biomet’s compliance program met the standards of the JERDS highlights the potential for successor liability for FCPA violations that occurred at an acquired company prior to acquisition. The DOJ and SEC 2012 joint FCPA guidance emphasized appropriate due diligence during acquisitions as an important factor in considering whether a successor company would be charged.
agreement. At the end of the fourth year, the monitor again could not certify that Biomet’s compliance program met the standards of the agreements.

In 2015, Zimmer Holdings Inc. acquired Biomet and assumed its obligations under the 2012 agreements. In the current DPA, Zimmer Biomet did not receive voluntary disclosure credit because Biomet’s 2012 agreements required it to disclose the conduct.

Likewise, although JERDS did not acquire Biomet 3i until 2012, and Biomet 3i no longer sells products and is in the process of winding down, JERDS became responsible for Biomet 3i’s prior conduct.

The criminal fine imposed as a result of an FCPA violation is ostensibly based on a calculation of the recommended fine under the Federal Sentencing Guidelines, which provide federal courts with non-binding guidance governing criminal penalties arising from federal crimes, including criminal fines for corporate offenders.

In many FCPA settlements, the amount paid is subject to negotiation and often is below the recommended sentencing guidelines range. DOJ resolutions in 2017 have often included explicit discussion of the amount of the “discount” off the guidelines in the resolution penalty amount, tying that discount to specific factors such as a company’s cooperation. The DOJ’s Corporate Enforcement policy is intended to formalize the process for such discounts.

KEPPEL OFFSHORE & MARINE LTD.  
KEPPEL OFFSHORE & MARINE USA INC.  
JEFFREY CHOW  
Department of Justice  
Deferred Prosecution Agreement (Keppel Offshore & Marine Ltd.)  
Guilty Plea (Keppel Offshore & Marine USA Inc.)  
December 22, 2017  
Guilty Plea (Chow)  
August 29, 2017 (Unsealed December 22, 2017)

Nature of Conduct: Singapore-based Keppel Offshore & Marine Ltd. (Keppel) and its US-based subsidiary, Keppel Offshore & Marine USA (Keppel USA), paid approximately $55 million in bribes to Brazilian officials in order to obtain 13 contracts with the Brazilian state-owned oil company Petrobras and another Brazilian entity. The scheme lasted from at least 2001 through 2014 and involved bribes paid to officials at Petrobras and within Brazil’s then-governing political party. The payments were disguised as legitimate consulting payments to an intermediary who in fact passed the payments on to the officials.

Chow, who was a senior lawyer in Keppel’s legal department, drafted the contract with the intermediary used to conceal the improper payments, understanding the true purpose of the agreement and payments.

Amount of Alleged Improper Payments: Approximately $55 million.

Benefit Obtained: Keppel obtained 13 contracts through the bribery scheme that earned it $351.8 million.

Type of Resolution: Keppel entered into a deferred prosecution agreement to resolve charges that it conspired to violate the FCPA’s anti-bribery provisions. Keppel USA pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provisions. As part of these agreements, Keppel and Keppel USA agreed to a total fine amount of over $422 million, including a $4 million fine for Keppel USA.

Chow pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provisions.

Of Note: The fine amount reflects a 25 percent reduction from the Federal Sentencing Guidelines range, recognizing Keppel’s cooperation with the DOJ’s investigation and its remediation. The DOJ noted that Keppel’s “extensive remedial measures,” included terminating and disciplining employees involved in the misconduct, imposing millions of dollars of financial sanctions on certain disciplined employees, and improving its internal controls and compliance system. The DOJ determined that the improvements to its compliance program made the imposition of a monitor unnecessary.

Keppel’s deferred prosecution agreement notes that although Keppel disclosed the potential corruption, it was not credited because DOJ had already been aware of the allegations.

Keppel also resolved corruption charges in Singapore and Brazil relating to the same conduct. Keppel and Keppel USA’s total payment will be offset against payments made to Brazilian and Singaporean
authorities, with Brazil receiving $211,108,490, equal to 50 percent of the total criminal penalty, and Singapore receiving up to $105,554,245, equal to 25 percent of the total criminal penalty.

Chow’s guilty plea reflects that FCPA exposure encompasses anyone, including in-house lawyers, who helps authorize or conceal improper payments.

Jeffrey Chow, a Keppel in-house lawyer, pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions for his role in drafting a contract that helped conceal improper payments.

LAS VEGAS SANDS CORP.
Department of Justice
Non-Prosecution Agreement
January 17, 2017

Nature of Conduct: According to the non-prosecution agreement with the DOJ, the Nevada-based Las Vegas Sands Corp. (Sands) entered into contracts with and made payments to a consultant in China that allegedly “had no discernible legitimate business purpose.” This consultant was a former Chinese government official who advertised his political connections as his primary qualification.

According to the agreement, when confronted with red flags, Sands did not implement controls to mitigate the risks of violations, including due diligence of the consultant’s companies, demands for appropriate documentation and justification for payments, or additional audits.

Amount of Alleged Improper Payments: From 2006 through 2009, Sands paid more than $5.7 million to the consultant without a discernible legitimate business purpose.

Benefit obtained: Unknown.

Type of Resolution: Sands entered into a non-prosecution agreement with the DOJ and agreed to pay a criminal penalty of $6.96 million. Sands also agreed to make specific enhancements to its compliance program and internal controls, including revamping the functions and retaining new leaders. In addition, in 2016, Sands settled a related administrative proceeding with the SEC for substantially overlapping conduct and agreed to pay a civil penalty of approximately $7 million. As part of that resolution, Sands retained an independent compliance consultant, and Sands agreed to submit copies of all reports of the independent compliance consultant to the Fraud Section.

Of Note: Sands received a 25 percent reduction off the bottom of the Federal Sentencing Guidelines fine range, due in part to its full cooperation in the investigation and full remediation. In agreeing to this discount, the DOJ balanced those mitigating factors against the nature of the offense, including that senior executives did not implement adequate internal controls under the circumstances.

LINDE NORTH AMERICA INC.
LINDE GAS NORTH AMERICA LLC
Department of Justice
Declination of Prosecution
June 16, 2017

Nature of Conduct: The DOJ’s letter announcing the decision to decline prosecution of Linde North America Inc. and Linde Gas North America LLC (collectively “Linde”) noted that Linde made payments to high-level officials of the National High Technology Center (NHTC) of the Republic of Georgia, a state-owned and controlled entity. Executives at the Linde subsidiary agreed to share profits from the sale of boron gas with officials at the NHTC in return for those officials’ assistance in purchasing assets and equipment used to produce boron gas. To execute that agreement, the Linde subsidiary’s executives and the NHTC officials formed new entities with cross-ownership and profit sharing.

Amount of Alleged Improper Payments: The NHTC officials owned 51 percent of an entity created to execute the agreement and received approximately 75 percent of the estimated $7.8 million in profits.

Benefit obtained: Linde, either directly or through its subsidiary, received approximately $7.8 million in profits due to the conduct.

Type of Resolution: Declination under the FCPA pilot program. As part of the declination resolution, Linde agreed to disgorge $7.8 million in profits. In addition, Linde agreed to forfeit approximately $3.4 million in proceeds that were still owed to the NHTC officials when Linde discovered the scheme.
Of Note: This is one of two publicly announced declinations pursuant to the 2016 FCPA pilot program. The DOJ explained that Linde satisfied the requirements of the FCPA pilot program: Linde made a timely and voluntary self-disclosure of the matter to the DOJ; conducted a proactive, thorough, and comprehensive investigation; cooperated fully in the DOJ’s investigation, including providing the DOJ with all relevant facts known to it about the individuals involved; enhanced its compliance program and internal controls; and fully remediated. Remediation included terminating or taking disciplinary action against the employees it found to be involved in the misconduct.

NG LAP SENG
JEFF C. YIN
Department of Justice
Conviction (Ng)
July 27, 2017

Nature of Conduct: The DOJ alleged that Ng Lap Seng (Ng), the head of a real estate development firm in Macau, China, and Jeff C. Yin, Seng’s assistant, conspired to pay bribes to the Permanent Representative to the UN for Antigua and Barbuda, and 68th President of the UN General Assembly (UNGA), John W. Ashe, and the deputy ambassador from the Dominican Republic, Francis Lorenzo. According to the DOJ, Ng funded a New York organization called South-South News, which purported to be a media platform to promote stories to advance the UN’s Millennium Development Goals but in actuality was a vehicle used to pay bribes to Lorenzo and Ashe.

The payments to Ashe and Lorenzo included cash, payments to family members, and payments to one or more third-parties to cover personal expenses.

Amount of Alleged Improper Payments: Not specified.

Benefit Obtained: Ng sought to obtain formal UN support for a conference center in Macau, China that Ng hoped to build. To that end, Lorenzo and Ashe submitted an official document to the UN Secretary General which claimed there was a need to build the Macau conference center. Ng also obtained a UN forum in Macau, co-hosted by his development company.

Type of Resolution and Sanction: Following a four-week trial, a jury convicted Ng on July 27, 2017 of two counts of violating the FCPA’s anti-bribery provisions, one count of conspiracy to pay bribes and gratuities and to violate the FCPA’s anti-bribery provisions, one count of paying bribes and gratuities, one count of money laundering, and one count of conspiracy to defraud the United States. He has not yet been sentenced.

Of Note: Ng’s conviction is the first time in several years that the DOJ has prevailed in a contested FCPA proceeding.

ORTHOFIX INTERNATIONAL N.V.
Securities and Exchange Commission
Settled Administrative Proceeding
January 18, 2017

Nature of Conduct: According to the SEC, Orthofix International, a medical device company organized under the laws of Curaçao and headquartered in Texas, through its wholly-owned Brazilian subsidiary, Orthofix do Brasil LTDA, used improper payments to induce doctors under government employment to use Orthofix products. From at least 2011 to 2013, senior personnel at Orthofix do Brasil worked with third-party commercial representatives and distributors to undertake at least four improper payment schemes to increase sales by Orthofix International. As part of these schemes, Orthofix caused improper payments to be made to doctors employed at government-owned hospitals to induce them to use Orthofix’s products. Fake invoices for purported services that were never actually provided were used to conceal the corrupt payments.

Amount of Alleged Improper Payments: According to the SEC, from at least 2011 to 2013, various commissions and payments were made to doctors under different schemes. The total amount of the payments is not revealed in the SEC order.
Benefit Obtained: Orthofix’s profits as a result of the improper payment schemes were approximately $2,928,000.

Type of Resolution: The SEC’s order found that Orthofix violated the FCPA’s internal controls and books and records provisions. Without admitting or denying the findings in the Commission’s order, the company agreed to pay disgorgement of $2,928,000, prejudgment interest of $263,375, and a civil money penalty of $2,928,000. Orthofix agreed to retain an independent compliance consultant for one year to review and test its FCPA compliance program.

Of Note: The SEC’s order noted Orthofix’s cooperation and remediation as a factor in its settlement. In the company’s own announcement of the agreement, it stated that the DOJ had decided to take no further action regarding the conduct covered in the settlement with the SEC. Orthofix had previously entered into a DPA with the DOJ in 2012 for FCPA violations in Mexico.

In a separate order issued the same day by the SEC, Orthofix International agreed to admit wrongdoing and pay an $8.25 million civil penalty to settle charges that it improperly booked revenue in certain instances that caused the company to materially misstate certain financial statements from at least 2011 to the first quarter of 2013.

AMADEUS RICHERS
Department of Justice
Plea Agreement
July 19, 2017

Nature of Conduct: According to the DOJ, Amadeus Richers, the former general manager of Miami-based Cinergy Telecommunications Inc. and its related company, Uniplex Telecommunications Inc., and his co-conspirators paid approximately $3 million in bribes, between 2001 and 2004, to foreign officials employed by Les Telecommunications d’Haiti S.A.M. (Haiti Teleco), the state-owned and state-controlled telecommunications company in Haiti, and to an official in the executive branch of the Haitian government. The co-conspirators funneled some money through third-party intermediaries, while other money was paid directly to officials or relatives of officials.

Amount of Alleged Improper Payments: Approximately $3 million.

Benefit Obtained: A favorable contract and favorable treatment in connection with a contract with Haiti Teleco.

Type of Resolution and Sanction: Richers pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions and the wire fraud statute on July 19, 2017 and was sentenced on September 20, 2017 to time served, with three years of supervised release.

Of Note: Richers was the ninth defendant to plead guilty or be convicted in the Haiti Teleco case. Another defendant, Joel Esquenazi, the former President of Terra Telecommunications Corp., was convicted of conspiracy to violate the FCPA and other FCPA and money laundering counts, and was sentenced to 15 years in prison for his role in the case—the longest ever FCPA-related prison sentence.

ROLLS-ROYCE PLC
Department of Justice
Deferred Prosecution Agreement (Rolls-Royce PLC)
December 20, 2016 (unsealed January 17, 2017)
Criminal Information (Keith Barnett)
December 20, 2016 (unsealed November 7, 2017)
Criminal Information (Andreas Kohler)
June 6, 2017 (unsealed November 7, 2017)
Criminal Information (Aloysius Zuurhout)
June 9, 2017 (unsealed November 7, 2017)
Criminal Information (James Finley)
July 21, 2017 (unsealed November 7, 2017)
Indictment (Petros Contoguris)
October 12, 2017 (unsealed November 7, 2017)

Nature of Conduct: According to the DOJ, from 2000 to 2013, RRESI, a US-based subsidiary of the UK company Rolls-Royce plc, paid commissions knowing they would be used to bribe foreign officials in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, Iraq, and other countries. The foreign officials provided confidential information and awarded contracts to RRESI and affiliated entities. For example, the company made $11 million in commission payments in Thailand, which led to seven contracts for RRESI.

On November 7, 2017, the DOJ unsealed charges against five individuals alleging that Rolls-Royce’s former intermediary in Kazakhstan, Petros Contoguris, and former employees at Rolls-Royce and a German engineering firm, Technical Advisor, devised a scheme to violate the FCPA’s anti-bribery provision. According to the DOJ, Rolls-Royce would pay kickbacks to Technical Advisor and bribes to a
foreign official, and disguise the payments as commissions to Contoguris’s company. The other four individuals involved in the scheme include former Technical Advisor executive, Andreas Kohler, former Rolls-Royce senior executive James Finley, and former Rolls-Royce employees, Keith Barnett and Aloysius Zuurhout.

Amount of Alleged Improper Payments: More than $35 million to foreign officials in various countries.

Benefit Obtained: Rolls-Royce obtained and retained numerous lucrative contracts in countries around the world.

Type of Resolution: Rolls-Royce entered into a DPA with the DOJ for conspiracy to violate the FCPA’s anti-bribery provisions. The company also settled with enforcement agencies in the United Kingdom and Brazil. It paid a total of $800 million to the three countries. The United States credited Rolls-Royce with a portion of the penalty it paid to Brazil because the conduct in both resolutions overlapped; Rolls-Royce ultimately paid nearly $170 million to the United States.

Contoguris, the Kazakhstan intermediary, pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provisions, seven counts of violating the FCPA’s anti-bribery provisions, one count of conspiracy to launder money, and ten counts of money laundering. Finley, the former Rolls-Royce senior executive, pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provision, and one count of violating the FCPA’s anti-bribery provision. Kohler, the Technical Advisor’s executive, and former Rolls-Royce employees Barnett and Zuurhout each pleaded guilty to one count of conspiracy to violate the FCPA’s anti-bribery provision.

Of Note: Rolls-Royce’s global resolution with authorities in the United States, United Kingdom, and Brazil continues the recent trend of US law enforcement working with anti-corruption offices in other countries to investigate and resolve bribery charges. In particular, this is an example of “offsetting” part of the penalty the company paid to Brazil when calculating the penalty owed to the United States. (The conduct for which Rolls-Royce settled in the United Kingdom involved related but different facts.) The DOJ noted that the resolution took into account that the company did not voluntarily disclose, but did cooperate with the investigation; the company has taken significant remedial measures; and the company paid significant fines to the United Kingdom and Brazil.

SANG WOO, JOO HYUN BAHN, BAN KI SANG
Department of Justice
Criminal Complaint
January 10, 2017

Nature of Conduct: According to the criminal complaints, Sang Woo, Joo Hyun Bhan, and Ban Ki Sang allegedly conspired to pay bribes through a third-party intermediary to a foreign official of a Middle Eastern country to induce that country to purchase a commercial building in Hanoi, Vietnam for its sovereign wealth fund. The conspirators attempted to sell the building for approximately $800 million, as well as obtain a $500,000 loan to pay further bribes to the foreign official. The scheme was not successful, in part because the intermediary did not have a relationship with the foreign official and was actually taking the intended bribes for himself.

The Criminal Complaint against Sang Woo and his alleged co-conspirators highlights that interactions with sovereign wealth funds are a source of potential corruption risk.

Amount of Alleged Improper Payments: The co-conspirators allegedly paid $2.5 million in bribes to the intermediary, intending that bribes be paid to the Middle Eastern foreign official.

Benefit Obtained: The conspirators stood to earn a portion of the commission on the sale of the property.

Type of Resolution: Unresolved.
Of Note: The intermediary, Malcolm Harris, was also charged as part of the conspiracy and pleaded guilty to wire fraud and money laundering charges arising from the scheme.

SBM OFFSHORE N.V.
SBM OFFSHORE USA INC.
ANTHONY MACE
ROBERT ZUBIATE
Department of Justice
Guilty Plea (Zubiate)
November 6, 2017
Guilty Plea (Mace)
November 9, 2017
Guilty Plea (SBM Offshore USA Inc.)
November 29, 2017
Deferred Prosecution Agreement (SBM Offshore N.V.)
November 29, 2017

Nature of Conduct: According to the DPA with the DOJ, from about 1996 through 2012, executives at Dutch oil and gas services company SBM Offshore N.V. (SBM) and its subsidiary, SBM Offshore USA Inc. (SBM USA), bribed officials at three state-owned oil companies: Brazil’s Petrobras, Angola’s Sonangol, and Equatorial Guinea’s GEPetrol. Anthony Mace admitted that after he became SBM CEO in 2008, he joined the bribery conspiracy and authorized payments while deliberately avoiding learning that those payments were bribes. Likewise, SBM Sales and Marketing Executive Robert Zubiate admitted that he used a third-party agent to pay bribes to foreign officials at Petrobras. He also admitted to participating in a kickback scheme with the bribe-paying intermediary whereby Zubiate received at least $5,500,000.

Amount of Alleged Improper Payments: In total, SBM paid more than $180 million to intermediaries who in turn bribed foreign officials on SBM’s behalf. Mace admitted to personally authorizing over $16 million in payments to five different officials of African and South American state-owned oil companies.

Benefit Obtained: According to the guilty pleas, SBM made these payments to foreign officials in exchange for assistance in winning bids for SBM for equipment and projects and for official inaction when it suited SBM’s business interests.

Type of Resolution and Sanction: Mace, Zubiate, and SBM USA all pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA. Mace is scheduled to be sentenced on February 8, 2018, and Zubiate is scheduled to be sentenced on January 31, 2018.

SBM entered into a deferred prosecution agreement in connection with a criminal information charging the company of one count of conspiracy to violate the anti-bribery provisions of the FCPA. As part of its deferred prosecution agreement, SBM agreed to pay $238,000,000 to the United States, including a $500,000 criminal fine and a $13,200,000 criminal forfeiture for SBM USA.

Of Note: The DOJ announced that SBM’s penalties represented a 25 percent reduction from the bottom of the sentencing guidelines range. The DOJ determined that penalty based on a number of factors, including that SBM brought the corrupt conduct to its attention, though failed to provide a complete disclosure for about a year; SBM cooperated with the DOJ’s investigation; and SBM undertook “significant” remedial measures, including taking disciplinary action against employees and implementing a new system of internal controls to mitigate corruption and compliance risks. In addition to paying these DOJ sanctions, SBM also paid $240 million to the Dutch Public Prosecutor’s Office in 2014 in penalties and disgorged profits from related conduct.

SOCIEDAD QUIMICA Y MINERA DE CHILE
Department of Justice
Deferred Prosecution Agreement
January 13, 2017

Securities and Exchange Commission
Settled Administrative Proceeding
January 13, 2017

Nature of Conduct: According to the DPA with the DOJ and the SEC Order, the Chilean-based chemicals and mining company Sociedad Quimica y Minera de Chile (SQM) made approximately $15 million in improper
payments to five Chilean politicians and other politically exposed persons (PEPs) from 2008 to 2015. A senior executive at SQM, who was also one of the executives responsible for implementing SQM’s internal controls, directed that the payments be made from the CEO’s discretionary fund to the PEPs. Some SQM employees assisted the executive in creating the fictitious contracts and invoices, and SQM did not verify that services were actually rendered, that there was evidence that services were rendered, or that the payments were reasonably priced and proper. Some of the improper payments were falsely recorded in SQM’s books and records.

Even after an internal audit in 2014 recommended to the board of directors that SQM terminate any active contracts with six of the vendors identified as high-risk, SQM continued to make payments to them, and to the PEPs, for another six months.

**Amount of Alleged Improper Payments:** Approximately $15 million in payments to Chilean PEPs and those connected to them.

**Benefit Obtained:** Unknown.

**Type of Resolution:** SQM entered into a DPA with the DOJ for violating the FCPA’s books and records and internal controls provisions and agreed to pay a criminal fine of more than $15 million. Also on January 13, 2017, the SEC issued an administrative order finding that SQM violated the FCPA’s books and records and internal control provisions. Without admitting or denying the order’s allegations, SQM consented to its entry and agreed to pay a $15 million penalty. As part of both agreements, SQM agreed to retain an independent compliance monitor for two years and to self-report to the SEC and DOJ for one year after the monitor’s term is complete.

In several 2017 resolutions, the DOJ identified facts where senior-level personnel had knowledge of the misconduct and failed to act to prevent it or adequately ensure that their company’s internal controls stopped the misconduct. This was an important factor contributing to the size of the monetary penalty paid.

**Of Note:** The DOJ noted that SQM received a 25 percent reduction off the bottom of the Federal Sentencing Guidelines range because SQM conducted a thorough internal investigation, cooperated with the DOJ’s investigation, and implemented substantial remediation.

In addition, SQM self-reported the potential violations to the SEC and fully cooperated with its investigation.

SQM’s remediation followed from its internal investigation, launched after a 2015 inquiry from Chilean tax authorities. As a result of that investigation, SQM fired the senior executive involved in the misconduct, created a separate compliance and risk management department, and took other remediation measures.

According to the DOJ, an independent monitor was necessary despite SQM’s enhancements to its compliance program because the new program was recently established and had not yet been tested. However, SQM’s enhancements to its compliance program contributed to the DOJ agreeing to a two-year, rather than a three-year, term for the monitor. The DOJ also took into consideration that SQM’s size and risk profile are such that an independent monitor should not need more than two years to test its compliance program.

**COLIN STEVEN**
*Department of Justice*
*Guilty Plea*
*December 27, 2017*

**Nature of Conduct:** Colin Steven, a former sales and marketing executive at the aviation company Embraer S.A., paid a $1.5 million bribe to a foreign official to win a contract with the Saudi Arabian government. The official also helped ensure that the contract was more lucrative by including new rather than used aircrafts. The payments were disguised as legitimate commissions paid to a South African company that was owned in part by a personal friend of Steven. As part of the scheme, Steven received a kickback payment from the intermediary.

**Amount of Alleged Improper Payments:** $1.5 million.

**Benefit Obtained:** Steven’s employer won a contract valued at approximately $93 million.

**Type of Resolution:** Steven pleaded guilty to one count of violating the FCPA’s anti-bribery provisions, one count of conspiracy to violate the FCPA’s anti-bribery provisions, one count of wire fraud, one count of conspiracy to commit wire fraud, one count of money laundering, one count of conspiracy to launder money, and one count of making false statements.
Of Note: During the course of the investigation into the misconduct, Steven lied to US enforcement about the kickback he received.

Steven’s guilty plea follows the DOJ’s 2016 deferred prosecution agreement with Embraer that involved allegations of corrupt payments in several countries, including Saudi Arabia, and resulted in a $205 million global penalty amount.

TELIA COMPANY AB  
COSCOM LLC  
Department of Justice  
Deferred Prosecution Agreement (Telia Company)  
Guilty Plea (Coscom)  
September 21, 2017

Securities and Exchange Commission  
Settled Administrative Proceeding  
September 21, 2017

Nature of Conduct: As part of their resolutions, Telia and Coscom admitted to bribing an Uzbek government official, who was a close relative of the President of Uzbekistan and had influence over the governmental body that regulated Uzbekistan’s telecommunications industry. The companies structured and concealed the bribes through multiple payments between 2007 and 2010, including to a shell company that members of Telia and Coscom management knew was beneficially owned by the Uzbek government official. Even after Swedish authorities began a criminal investigation and Telia started an internal investigation, members of Telia and Coscom management considered making an additional bribe payment to an Uzbek official in late 2012.

Amount of Alleged Improper Payments: According to the DPA, Telia and Coscom admitted to paying more than $331 million in bribes to an Uzbek government official.

Benefit Obtained: Telia acquired access to the Uzbek market and made approximately $457 million from its Uzbek telecommunications operations. Coscom acquired valuable telecommunications assets and permission to continue operating in Uzbekistan.

Type of Resolution: As part of a global resolution with the DOJ, SEC, and Dutch and Swedish law enforcement, Telia agreed to pay more than $965 million to resolve charges that conspired to violate the FCPA’s anti-bribery provisions. Pursuant to its DPA with the DOJ for conspiracy to violate the FCPA’s anti-bribery provisions, Telia agreed to pay criminal penalties of $548 million, including a $500,000 criminal fine and $40 million in criminal forfeiture. Under its settlement with the SEC, Telia consented to the entry of an SEC finding that Telia violated the FCPA’s anti-bribery and internal controls provisions agreed to pay $457 million in disgorgement of profits and prejudgment interest. However, the DOJ and SEC agreed to credit certain payments made by Telia to Swedish and Dutch authorities as part of a joint settlement.

Coscom pleaded guilty to conspiracy to violate the FCPA’s anti-bribery provisions.

Of Note: The global resolution of this action is the second such global resolution resulting from the investigation of a global bribery scheme of government officials in Uzbekistan. Last year, VimpelCom agreed to pay $765 million to resolve similar allegations with the DOJ, SEC, and Dutch authorities regarding officials in Uzbekistan.

According to the DOJ, the DOJ’s portion of the penalty reflected a 25 percent reduction from the bottom of the applicable sentencing range. The DOJ noted Telia’s cooperation with the DOJ’s investigation and extensive remedial measures, including the termination of certain members of Telia’s Board of Directors. The companies did not receive more mitigation credit because they did not voluntarily self-disclose their misconduct to the DOJ.

Although the settlements with Telia and VimpelCom both included significant fines for similar conduct, they had an important difference: Telia, unlike VimpelCom, did not have a compliance monitor imposed. According to the DPA, this reflects the DOJ’s assessment of Telia’s remediation and the state of its compliance program.
2017 FCPA-RELATED PRIVATE LITIGATION

Below are summaries of key developments from 2017 in FCPA-related suits brought by private litigants.

SHAREHOLDER LITIGATION

IN RE BANCO BRADESCO S.A. SECURITIES LITIGATION (S.D.N.Y.)

Partial Grant Motion to Dismiss
September 29, 2017

After a multi-year investigation by Brazilian tax authorities resulting in the indictment of several senior executives at Brazilian bank Bradesco for violating Brazilian anti-corruption laws, class action plaintiffs brought suit alleging that Bradesco and senior executives violated US securities laws by making false statements about and failing to disclose this widespread corporate bribery of Brazilian tax officials. Defendants moved to dismiss plaintiff’s amended complaint at the end of 2016. On September 29, 2017, the court decided that plaintiff adequately alleged some, but not all, of the asserted bribery schemes, and that certain claims for false and misleading statements survived against Bradesco and certain executives.

IN RE PETROBRAS SECURITIES LITIGATION (S.D.N.Y. AND 2D CIR.)

Class Certification Decision
July 7, 2017

Petition for Certiorari Filed
November 1, 2017

Class action plaintiffs alleged that Brazilian state-owned oil company Petróleo Brasileiro S.A. (Petrobras) and related entities violated US and Brazilian securities laws by making false statements about and failing to disclose a multi-year, multi-billion dollar bribery and money-laundering scheme. After dismissing some of the plaintiffs’ claims in 2015, the district court certified two classes in February 2016. Petrobras’s interlocutory appeal of the class certification was heard in November 2016.

The prospect of private litigation presents a potential collateral consequence that companies should analyze in considering whether, when, and how to make a disclosure of a potential FCPA violation public. Private plaintiffs have brought suit regarding alleged FCPA violations on a number of theories, including shareholder derivative suits alleging that management allowed the misconduct to occur, as well as suits alleging that management knowingly failed to disclose the misconduct.

In July 2017, the Second Circuit held that both classes were sufficiently ascertainable as required for certification, but reversed the district court’s holding regarding the predominance requirement of class certification for both classes and remanded for the district court to determine whether proof of domestic purchase represented a common question with respect to class members or whether there is a need for individual inquiries to determine liability regarding certain transactions, which would defeat certification. The Second Circuit affirmed the district court’s findings regarding plaintiffs’ presumption of reliance under the “fraud on the market” theory. Petrobras filed a petition for a writ of certiorari in the United States Supreme Court on November 1, 2017, appealing the Second Circuit decision regarding the ascertainability requirement and reliance. The class action is stayed pending the Supreme Court’s disposition of the appeal.

In January 2018, the parties reached a settlement in principle of $2.95 billion. Approval of the settlement is pending with the court as of the date of publication.
DEAN MAGRO, ET AL. V. FREEPORT-MCMORAN INCORPORATED, ET AL. (D. ARIZ.)

Motion to Dismiss
June 28, 2017

Shareholders filed an amended complaint in this securities fraud class action against Freeport-McMoRan Inc. and several senior executives, alleging that the international mining company failed to disclose potential FCPA violations in connection with its attempts to secure mining contracts in Indonesia. According to the complaint, Freeport’s stock price decreased, resulting in significant shareholder losses, following the public revelation of this alleged misconduct. The suit does not allege that the SEC or DOJ have investigated or are actively investigating Freeport for the alleged FCPA violations. Defendants filed a motion to dismiss, which was fully briefed as of June 28, 2017 and remains pending.

MANIDHAR KUKKADAPU, ET AL. V. EMBRAER S.A., ET AL. (S.D.N.Y.)

Motion to Dismiss
August 24, 2017

Following Embraer’s settlements with the DOJ and SEC for FCPA violations, plaintiffs brought a securities fraud class action alleging that the company failed to disclose the misconduct that led to these settlements. In their amended complaint, the plaintiffs alleged that the company made materially false and misleading disclosures throughout the class period by failing to accurately describe many of the company’s actions. As a result, plaintiffs alleged, share prices decreased significantly once the truth regarding the bribery scheme was revealed. Defendants filed a motion to dismiss, which was fully briefed as of August 24, 2017 and remains pending.

CITY OF PONTIAC GENERAL EMPLOYEES’ RETIREMENT SYSTEM V. WAL-MART, INC. AND MICHAEL T. DUKE (W.D. ARK.)

Plaintiffs Obtain Discovery
May 5 and 11, 2017

Denial Partial Motion to Dismiss
September 29, 2017

Plaintiffs won significant discovery disputes in the FCPA-related securities fraud class action against Wal-Mart, Inc. and certain former executives. The suit alleged that the defendants made misleading statements about the company’s ongoing commitment to ethics and integrity despite paying millions of dollars in bribes to Mexican officials to secure benefits for the company.

The plaintiffs obtained discovery related to Wal-Mart’s internal investigation in two important orders by the court. First, on May 5, 2017, the court held that the findings of Wal-Mart’s internal investigator, who collected facts and conducted internal employee interviews, were not protected by the attorney-client privilege or the work-product doctrine because Wal-Mart could not show that the investigator was a lawyer, that his findings were reported to Wal-Mart’s counsel, or that his reports were prepared in anticipation of litigation. The court held that plaintiffs could depose the investigator and discover the investigator’s documents, including action plans, interview reports, and investigative reports. Second, on May 11, 2017, the court denied Wal-Mart’s request for a protective order barring the deposition of Wal-Mart’s president and chief executive officer, C. Douglas McMillon, explaining that McMillon’s familiarity with the investigation and the disclosures at issues in the case made him a relevant witness.

In addition, on September 29, 2017, the court denied defendants’ motion to dismiss plaintiff’s claim for losses sustained by the company. The court held that defendants’ argument prematurely forces plaintiff to elect one of two alternative methods of calculating damages, neither of which are precluded under the PSLRA. Defendants have moved to certify an order for interlocutory appeal on the court’s decision. The suit remains pending.

Plaintiffs in shareholder suits related to alleged FCPA violations have often sought access to documents and materials collected in the course of internal investigations or produced to regulators during FCPA investigations. In the Wal-Mart case in 2017, the court permitted discovery of the results of an internal investigation after concluding that it was not conducted under the attorney-client privilege.
RECOVERY SUIT
THE LOUIS BERGER GROUP INC. AND BERGER HOLDINGS INC. V. RICHARD J. HIRSCH AND THE LOUIS BERGER GROUP INC. AND BERGER HOLDINGS INC. V. JAMES ANDREW MCCLUNG (N.J. SUPER. CT. LAW DIV.)
Stipulated Dismissal
June 1, 2017
Following a 2015 FCPA settlement with the DOJ after an investigation into FCPA violations, Louis Berger Group Inc. and Berger Holdings Inc. (collectively Berger) separately sued two former senior officers—Richard Hirsch and James McClung—to recover damages resulting, in part, from their admitted approval of numerous bribes to foreign government officials in India, Indonesia, and Vietnam that led to the DOJ enforcement action. The parties settled and voluntarily dismissed the suit against Hirsch in August 2016. On June 1, 2017, the court entered a stipulation of dismissal, concluding the case against McClung.

RETALIATION
WADLER V. BIO-RAD LABORATORIES, INC. (N.D. CAL.)
Jury Verdict
February 6, 2017
Appeal Filed
June 7, 2017
Sanford Wadler, the former general counsel of California-based life sciences company Bio-Rad Laboratories, Inc. (Bio-Rad), won his suit against Bio-Rad and the members of its board of directors for retaliation in violation of the Sarbanes-Oxley and Dodd-Frank Acts. Wadler alleged that, following Bio-Rad’s $55 million settlement with the federal government regarding FCPA violations in Russia, Thailand and Vietnam, Bio-Rad fired Wadler for investigating and reporting his discovery that kickbacks were also paid to Chinese government entities in exchange for business. In the course of litigation, the SEC has repeatedly supported Wadler by arguing that the Dodd-Frank Act protects not only whistleblowers who bring concerns to the government, but also those who raise concerns within the company and by filing an amicus curiae brief supporting Wadler’s position that he may use otherwise privileged information at trial. On February 6, 2017, after only three hours of deliberation, the jury found that Bio-Rad wrongfully terminated Wadler, awarding Wadler nearly $8 million: $2.96 million in back wages and $5 million in punitive damages. Bio-Rad appealed the verdict on June 7, 2017 and the appeal is still pending.

DEFAMATION
ALEJANDRO YEATTS V. ZIMMER BIOMET HOLDINGS, INC. (N.D. IND.)
Amended Complaint
May 1, 2017
On April 17, 2017, the court dismissed former Zimmer Biomet Holdings, Inc. (Biomet) executive Alejandro Yeatts’s claims for intentional and negligent infliction of emotional distress, but concluded that Yeatts alleged sufficient facts to support his defamation claim arising out of Biomet’s alleged continuation of its corrupt activities in Brazil. These activities (along with continued corrupt activities in Mexico) led to Biomet’s settlements with the DOJ and SEC in January 2017. In his May 1, 2017 Amended Complaint pursuing that defamation claim, Yeatts alleged that the company misled the DOJ in connection with its 2012 DPA by inaccurately stating that the company had terminated its relationship with certain Brazilian distributors when, in fact, the company continued using the distributors via four newly formed intermediary distributors. Yeatts alleged that, after Biomet’s deceit was exposed, the company defamed Yeatts by using him “as an unwitting dupe” and therefore repeatedly included Yeatts’s name in a published list of persons who undermined the company’s efforts to comply with anti-corruption efforts.
UK BRIBERY ACT

STATUTE AND ELEMENTS OF OFFENCES UNDER THE UK BRIBERY ACT

The UK Bribery Act (UKBA or the Act) includes four principal offences: (1) bribing another person; (2) being bribed; (3) bribing a foreign public official; and (4) failure to prevent bribery. The statute also places certain limitations on who may be charged and sets forth penalties for violations.

This section first explains the background of the UKBA, then takes the reader through the definitions necessary to understand the statute, and finally describes the elements of the offences under the Act in detail. As with the FCPA, the UKBA is broadly worded and there continues to be almost no case law interpreting its provisions. In contrast to the FCPA, there remains little enforcement practice or formal guidance to fill out the meaning of the statute. In many cases, there will be little if any concrete guidance about the likely application of the UKBA and companies potentially subject to its jurisdiction must tread carefully to ensure compliance.

1. Background

The UKBA was passed on 8 April 2010. It came into force on 1 July 2011 and applies to conduct that occurred on or after that date. Even though we are now six years on from the commencement date, there have been only a small number of cases brought under the UKBA, and most of those have not been contested. Guidance from the courts on the interpretation of the UKBA is therefore very scant.

The UKBA is essentially a codifying statute. Most of the offences “created” by the UKBA existed previously, but in disparate and archaic forms. The UKBA was intended to simplify the outdated language and arrange the offences into one statutory location.

The UKBA did, however, create a new offence, the corporate offence of failing to prevent bribery (section 7). This offence is discussed in more detail below.

FAQ 22: What are the important differences between the FCPA and UKBA?

Setting aside the differences based on jurisdiction, there are two critical differences between the UKBA and the FCPA. First, the UKBA criminalizes commercial bribery as well as bribery of government officials. Second, under the UKBA, an adequate compliance programme is an affirmative defence against the crime of failure to prevent bribery.

2. Definitions

The UKBA uses a number of specific terms, which it defines and of which it provides examples to assist the reader with understanding how the offences should be construed.

Function or activity to which the bribe relates (section 3)

The offences in the UKBA refer to “relevant functions or activities.” A function or activity is relevant for the purposes of the UKBA if the function or activity is one of the following:

- it is of a public nature;
- it is connected with a business;
- it is performed in the course of a person’s employment; or
- it is performed by or on behalf of a body of persons (whether corporate or unincorporated).
The function or activity must also meet one or more of the following conditions:

- a person performing the function or activity is expected to perform it in good faith;
- a person performing the function or activity is expected to perform it impartially; or
- a person performing the function or activity is in a position of trust by virtue of performing it.

A function or activity is a relevant function or activity even if it has no connection with the United Kingdom and is performed in a country or territory outside the United Kingdom.

Essentially, all functions or activities of a commercial or public nature are relevant for the purposes of the UKBA. The Act would cover actions of public servants, employees, contractors, agents, and most other types of business or governmental relationships.

**Improper performance to which bribe relates (section 4)**

A relevant function or activity is performed improperly if it is performed in breach of a relevant expectation such as the performance of the function in good faith or with impartiality. A relevant function is also to be treated as being performed improperly if there is a failure to perform the function or activity and that failure itself is a breach of a relevant expectation.

**Expectation test (section 5)**

Where the UKBA refers to “expectations,” the test for that expectation is what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

Where the conduct concerned is to be performed outside of the United Kingdom and is not subject to the law of any part of the United Kingdom, any local custom or practice will be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned. In this regard, written law means law contained in a written constitution, or provision made by or under legislation, which is applicable to the country or territory concerned. Written law may also mean any judicial decision which is applicable as law and is evidenced in published written sources.

**3. Offences under the UKBA**

There are four main offences under the UKBA:

- Bribing another person (section 1);
- Being bribed (section 2);
- Bribing a Foreign Public Official (FPO) (section 6); and
- Failing to prevent bribery (section 7).

**Jurisdictional reach (section 12)**

Any offence committed under section 1, 2, or 6 that occurs within the United Kingdom is subject to the jurisdiction of the UKBA, irrespective of the nationality of the individual committing the offence.

To the extent that acts potentially constituting offences under sections 1, 2, or 6 take place outside of the United Kingdom, the UKBA applies if and to the extent that the individual alleged to have undertaken those acts has a “close connection” with the United Kingdom. This essentially means British citizens or other individuals who have some type of British nationality, or who are ordinarily resident in the United Kingdom. In relation to corporate entities, this means bodies incorporated under the law of any part of the United Kingdom or Scottish partnerships.

In relation to section 7, any organisation that is a “relevant commercial organisation” under the Act, i.e., it is either a British incorporated entity or an overseas incorporated entity that carries out a business or part of a business in the United Kingdom, is subject to section 7 of the UKBA regardless of the location of the alleged bribery.

**4. Elements of Offences**

For ease of reading, we use the language of the UKBA when discussing bribers (P) and recipients or intended recipients of bribes (R). In relation to the section 7 offence of failing to prevent bribery, which is a corporate offence, we use “C” as shorthand for the corporate entity, and “A” for its associated persons, as does the UKBA.
**Bribing another person (section 1)**

The UKBA provides that bribing another person is an offence. As discussed above, this offence applies to commercial bribery as well as to bribery of government officials. The UKBA details two cases of bribery, which it criminalizes:

- **Case One** is where P offers, promises or gives a financial or other advantage to another person and P intends the advantage either to induce a person to perform improperly a relevant function or activity or to reward a person for the improper performance of such a function or activity;

- **Case Two** is where P offers, promises or gives a financial or other advantage to another person and P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In relation to Case One, it is irrelevant whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

In both cases it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

**FAQ 23: Is a non-UK company subject to the UKBA?**

Yes, depending on the circumstances. Where the alleged misconduct occurred within the United Kingdom, the conduct is subject to the UKBA.

Further, for the corporate offence of Failure to Prevent Bribery, the UKBA applies to all acts of a “relevant commercial organisation,” which includes both a British incorporated entity and any company that “carries on a business or part of a business” in the United Kingdom.

There is no case law that interprets “carries on a business” and its broad wording suggests that it may apply to any organisation that does business in the United Kingdom.

The offence is deliberately widely drawn and covers both the actual payment of bribes, as well as offers (genuine or otherwise) of payment of bribes. It covers payment or offers both before and after the corrupt action contemplated.

The corrupt action never needs to take place, nor does the recipient or intended recipient of the bribe have to accept the bribe and/or intend to take the corrupt action that P desires.

This offence can be committed by a commercial organisation as well as by individuals. The general English criminal law of identification would apply in this instance. The prosecution would have to show that an individual who can be identified as the directing mind and will of the organisation had committed the offence, and that in committing the offence, he or she had been acting on behalf of the organisation. It is this requirement to prove guilt on the part of a senior individual within the organisation that is the primary reason for the comparatively low rate of corporate prosecutions in the United Kingdom.

Under general principles of English criminal law, corporate criminal liability is more limited than under US criminal law. Corporate liability for bribing, being bribed, and bribing a Foreign Public Official under the UKBA requires two elements:

- A person who can be identified as the directing mind and will of the organisation committed the offence
- That person was acting on behalf of the corporation when committing the offence

Section 7 of the UKBA expands corporate liability for bribery offences with the crime of Failing to Prevent Bribery, which applies when any person associated with a corporation commits bribery on behalf of the corporation, regardless of whether the associated person can be identified as directing the mind and will of the organisation.
**Being bribed (section 2)**

The UKBA provides four ways in which a person can be guilty of an offence of being bribed:

1) Where R requests, agrees to receive or accept a financial or other advantage intending that, as a consequence, a relevant function or activity should be performed improperly (whether by R or by another person);

2) Where R requests, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity;

3) Where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity;

4) Where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R or by another person at R’s request or with R’s assent or acquiescence.

As with the section 1 offence, the section 2 offence is intended to be very wide. The four cases detailed are intended to cover all conceivable permutations of requesting or accepting bribes.

In all cases, it is irrelevant whether R requests, agrees to receive or accept (or is to request, agree to receive, or accept) the advantage directly or through a third party nor whether the advantage is (or is to be) for the benefit of R or another person.

In cases 2 to 4, it is irrelevant whether R knows or believes that the performance of the function or activity is improper.

In case 4, where a person other than R is performing the function or activity, it is irrelevant whether that person knows or believes that the performance of the function or activity is improper.

This offence can be committed by a commercial organisation as well as by individuals.

**Bribery of FPOs (section 6)**

Under the UKBA, a person who bribes an FPO is guilty of an offence if it is P’s intention to influence the FPO in the FPO’s capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business.

P bribes the FPO if, and only if:

A. directly or through a third party, P offers, promises or gives any financial or other advantage;
   (i.) to the FPO; or
   (ii.) to another person at the FPO’s request or with the FPO’s assent or acquiescence; and

B. the FPO is neither permitted nor required by the written law applicable to the FPO to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

References in the UKBA to “influencing the FPO in his or her capacity as a foreign public official” mean influencing the FPO in the performance of his or her functions as such an official, which includes:

- any omission to exercise those functions; and
- any use of the FPO’s position as such an official even if not within the FPO’s authority.

**Who is an FPO?**

An FPO is an individual who:

A. holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside of the United Kingdom (or any sub-division of such a country or a territory);

B. exercises a public function;
   (i.) for or on behalf of a country or territory outside of the United Kingdom; or
   (ii.) for any public agency or public enterprise of that country or territory; or
C. is an official or agent of a public international organisation.

**What is a public international organisation?**

A. public international organisation is an organisation whose members are any of the following:

(i.) countries or territories;
(ii.) governments of countries or territories;
(iii.) other public international organisations; or
(iv.) a mixture of any of the above.

**FAQ 24: What is the offence of failure to prevent bribery and does it differ from a bribery offence under the UKBA?**

The so-called “section 7” offence of failure to prevent bribery applies to “commercial organisations,” i.e. corporations, where a person or other corporation that performs services on behalf of the defendant commercial organisation bribes another person intending to obtain or retain business or a commercial advantage for the defendant commercial organisation.

The purpose of the offence is to broaden corporate liability under the UKBA beyond liability for actions taken by people who can be identified as the directing will or mind of the company, the traditional test for corporate criminal liability under English common law.

Unlike the substantive bribery offences, the section 7 failure to prevent bribery offence applies only to corporations and includes an affirmative defence for maintaining adequate procedures designed to prevent bribery being committed on the corporation’s behalf. The offences do not differ with respect to penalties, which are unlimited fines, confiscation, and compensation.

**Written law applicable**

The written law applicable to the FPO is:

A. where the performance of the functions of the FPO which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom;

B. where paragraph (A) does not apply and the FPO is an official or agent of a public international organisation, the applicable written rules of that organisation; or

C. where paragraphs (A) and (B) do not apply, the law of the country or territory in relation to which the FPO is a foreign public official so far as that law is contained in:

(i.) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or

(ii.) any judicial decision which is so applicable and is evidenced in published written sources.

The definition of bribery of an FPO provided by the UKBA is not entirely straightforward. However, as with the other offences under the UKBA, the intention is to create a wide offence that covers what would ordinarily be thought of as bribery of an FPO to induce or reward corrupt behavior.

This offence can be committed by a commercial organisation as well as by individuals.

**Failure of commercial organisations to prevent bribery (section 7)**

The only section of the Act that was truly a new addition to the law of the United Kingdom is the so-called “section 7” offence, which expands the law of corporate criminal responsibility in this sphere.

The offence is drafted as follows:

A “relevant commercial organisation” (C) is guilty of an offence under this section if a person (A) associated with C bribes another person intending:

A. to obtain or retain business for C; or

B. to obtain or retain advantage in the conduct of business for C.
Who is an “associated person”?

The UKBA (in section 8) defines an associated person as someone who performs services for or on behalf of C. The capacity in which A performed services for or on behalf of C is irrelevant, as is the legal nature of the relationship. The UKBA provides three examples of an associated person: an employee, an agent or a subsidiary. The UKBA expressly states that the question of whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

However, if A is an employee of C, it will be presumed that A is a person performing services for or on behalf of C, unless it can be shown to the contrary.

It is necessary for the authorities to demonstrate that:

- A is or would be guilty under section 1 (bribing another person) or section 6 (bribery of an FPO), whether or not A has been prosecuted for such an offence; or
- A would be guilty of such an offence if the Act was applicable to him or her.

FAQ 25: Can a corporation be liable for acts of third parties under the UKBA?

Yes, section 7 of the UKBA applies to the actions of any persons “associated with” a corporation, including any third party that acts on behalf of the corporation. Under the Act, the third party could include an individual or another corporation performing services on behalf of the company.

What is a “relevant commercial organisation”?

The Act defines a “relevant commercial organisation” to which section 7 applies as:

- a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere); or
- any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom; or
- a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether within the United Kingdom or elsewhere); or
- any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.

Penalties (section 11)

An individual who is found guilty of an offence under section 1 (bribing another person), section 2 (being bribed), or section 6 (bribing an FPO) is liable to a maximum term of imprisonment of 10 years. He or she may also face an unlimited fine, or both imprisonment and a fine.

A commercial organisation guilty of an offence under sections 1, 2, or 6 is liable to an unlimited fine. Similarly, any commercial organisation guilty of a section 7 offence is liable to an unlimited fine.

Although the maximum fine can be unlimited, to date the fines imposed under the UKBA have typically been much smaller than fines handed out by the US authorities in FCPA matters, with the notable exception of the Rolls-Royce case, discussed in more detail below.

The fines for violations of the UKBA are unlimited.

In practice, fines in the UK follow from the Sentencing Guidelines that govern punishment of corporate crime. The Sentencing Council for England and Wales publishes these Guidelines for the sentencing of offenders convicted of committing offences of fraud, bribery, and money laundering. These Guidelines identify a number of factors that must be considered by judges when arriving at an appropriate level of fine. These include (but are not limited to):

- The level of culpability;
- The amount of harm done;
- Previous convictions;
• Level of cooperation with the authorities;
• Attempts to conceal the wrongdoing; and
• Whether there has been a change in management and/or the compliance programme since the offending was uncovered.

Under the Guidelines, a fine can be adjusted upward to ensure that it removes all gain obtained by the offending; punishes the corporate entity; and ensures the appropriate level of deterrence. The Guidelines are clear that there should be a “real economic impact,” to bring home to management and shareholders the need to operate within the law. The fine can be so large as to put the company out of business if that is deemed the most appropriate outcome, as recognised in the DPA entered into by XYZ Ltd., in which the SFO cited the company’s cooperation as a key factor for its decision not to press the court for such a fine.

FAQ 26: Are fines the only penalties that a corporation must consider in assessing exposure under the UKBA?

No. The United Kingdom has strict laws around the confiscation of proceeds of crime as set out in the Proceeds of Crime Act 2002, which may result in the disgorgement of any proceeds that prosecutors can demonstrate are associated with a violation of the UKBA. In addition, a court sentencing a corporation for a violation of the UKBA will consider whether it is appropriate to order the payment of compensation to victims under the Powers of Criminal Courts (Sentencing) Act 2000.

In addition, the general law on confiscation of the proceeds of crime as set out in the Proceeds of Crime Act 2002 will also apply, as will the law on compensation of victims as set out in section 130 of the Powers of Criminal Courts (Sentencing) Act of 2000.

Liability of senior officers (section 14)

As we set out above, the general English law of corporate identification will apply to determine whether corporate entities committed the offences under sections 1, 2, or 6. In addition, where the prosecution can prove a criminal offence on the part of the company, and a senior officer of the company (who must have a “close connection” to the United Kingdom) has consented or connived in the commission of the offence, that senior officer, as well as the company, is guilty of the offence and liable to be proceeded against and punished accordingly. This is the case even if the senior officer did not him or herself pay or receive a bribe.

AFFIRMATIVE DEFENCES

It is a defence to a failure to prevent bribery charge under section 7 for a relevant commercial organisation to show that it has adequate procedures in place designed to prevent persons associated with it from committing bribery offences.

The Ministry of Justice has, as required by section 9 of the UKBA, published guidance for commercial organisations as to the procedures that ought to be put in place to prevent persons associated with the commercial organisations from committing bribery. It has yet to be tested, but in theory, if a commercial organisation complies with the guidance, it ought to have a defence to any allegation of a section 7 offence.

Aside from the defence under section 7, i.e., that the relevant commercial organisation had in place adequate procedures designed to prevent bribery, there are very few affirmative defences under the UKBA. Those that do exist (section 13) relate to the proper exercise of any function of a member of the intelligence services or the armed forces when engaged in active service. These defences do not apply to commercial organisations.

RESOLUTION OF UKBA INVESTIGATIONS

There are a number of ways in which criminal investigations, including those relating to allegations of infringements of the UKBA, can be resolved.

1. Charge

A criminal charge begins the legal process. The Code for Crown Prosecutors provides a two-stage test for whether an accused should be charged with a criminal offence. First, a prosecutor must be satisfied that there is sufficient evidence against the accused for there to be a realistic prospect of conviction. Second, the prosecutor must also be satisfied that the prosecution is in the public interest. There are a number of factors that are listed in the Code to determine the public interest.

Once charged, the accused must decide whether to plead guilty or not.
2. **Guilty plea**

If a defendant pleads guilty at the earliest available opportunity, he will, according to the Sentencing Guidelines, receive a reduction in any sentence of one third. A sliding scale is then applied to the reduction given, reducing to a one tenth discount if the defendant pleads guilty at the door of the court or after the trial has begun.

3. **Not guilty plea**

If a defendant pleads not guilty, a full criminal trial will ensue. The offences under sections 1, 2, and 6 of the UKBA can be tried in either the Magistrates’ Court or the Crown Court, depending on the severity of the offence. The Crown Court has greater sentencing powers than the Magistrates’ Court, but it is possible to be convicted by magistrates and referred to the Crown Court for sentencing, if the magistrates consider that their powers are insufficient. The section 7 offence can only be tried in the Crown Court.

4. **Deferred prosecution agreement (DPA)**

DPAs were introduced in February 2014 through Schedule 17 of the Crime and Courts Act 2013. They are intended to allow a corporate offender to make reparations for criminal conduct, without a criminal conviction (and its attendant consequences) being imposed. DPAs are concluded subject to the supervision of a judge, who must be satisfied that the DPA is in the interests of justices and its terms are fair, reasonable, and proportionate.

A code of practice setting out when and how prosecutors will use DPAs. Only four have so far been concluded (Rolls-Royce, Standard Bank, and XYZ Ltd. in corruption matters and Tesco Stores Ltd., an accounting matter), and the jurisprudence is still developing.

It is a discretionary matter as to whether a corporate offender will be invited to negotiate a DPA with the prosecutor – and it is for the prosecutor, not the company, to seek to initiate those discussions. However, the code of practice does provide some guidance on what factors the prosecutor will consider when deciding whether to initiate DPA discussions.

Generally, the corporate offender will need to have self-reported the alleged criminal conduct, and will need to cooperate fully with the investigation. A DPA will be more likely if a company has no previous convictions, has already implemented a full compliance programme, or the criminal conduct occurred long in the past and/or was the result of rogue activities by employees.

The 2017 Rolls-Royce DPA did not stem from a self-disclosure of misconduct, but officials stated that the company’s extraordinary cooperation with the government’s investigation played a part in the nature of the resolution.

5. **Civil recovery**

Prosecuting authorities have the power under the Proceeds of Crime Act 2002 to decline to bring criminal charges, but instead to bring an action in the civil courts to recover the proceeds of alleged criminal activity. The previous Director of the SFO made use of these powers on occasion, most notably in 2012 against the parent company of Mabey & Johnson Ltd.

The SFO’s current public position is that it will continue to make use of civil recovery orders as an alternative to criminal charges under the right circumstances. However, the SFO has focused on bringing criminal charges, and it has not sought civil recovery since the advent of the DPA in 2014.

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**FAQ 27: Who enforces the UKBA?**

The United Kingdom’s Serious Fraud Office (SFO) enforces the UKBA. In 2014, the United Kingdom adopted a new framework for corporate bribery prosecutions and, in 2014, the SFO secured its first corporate conviction for a UKBA violation. In 2015 and 2016, the SFO reached its first two deferred prosecution agreements with corporate defendants.
UK ANTI-CORRUPTION DEVELOPMENTS

UPDATE ON THE UNITED KINGDOM’S VOTE TO LEAVE THE EUROPEAN UNION

In June 2016, the United Kingdom voted in a referendum to leave the European Union (EU). The UK government has now designated March 29, 2019 as the date on which the United Kingdom will leave the EU, but uncertainty continues to shroud the legal and logistical arrangements for the country’s exit.

In March 2017, the Organisation for Economic Co-operation and Development (OECD) published a report on the United Kingdom’s implementation of the OECD Anti-Bribery Convention. The report noted that while the United Kingdom was currently at the forefront of global anti-bribery efforts, leaving the EU could result in a strain on public resources available to UK law enforcement authorities to maintain this status. It warned that a post-EU economic downturn could also lead to increased pressure from business groups to weaken the United Kingdom’s anti-bribery legislation or its enforcement in order to attract business to the United Kingdom. Despite the OECD’s concerns, to date there has been no indication that the United Kingdom’s commitment to anti-bribery enforcement will change, the details of how that occurs after Brexit are not yet knowable.

Still, until the legal means of the United Kingdom’s withdrawal are finalized over the next year, the enforcement fallout from the decision to leave the EU will remain unknown. The government’s EU Withdrawal Bill transfers EU law into domestic UK law, but leaves significant open questions as it contains provisions that may allow laws to be amended by the Government without the scrutiny of Parliament. Likewise, negotiations with the 27 other EU Member States as to the terms of the United Kingdom’s exit are ongoing and leave open questions about the United Kingdom’s access to and participation in European criminal enforcement resources.

The enforcement fallout from the United Kingdom’s decision to leave the EU – known as “Brexit” – continues to be unknown. Although there is no indication that the United Kingdom’s commitment to anti-corruption enforcement will change, the details of how that occurs after Brexit are not yet knowable.

Over the next year, negotiations with the EU and the completion of the EU Withdrawal Bill, which is the legislative means by which the United Kingdom’s withdrawal from the EU will be effected, will advance and should provide a clearer outlook.

UK GOVERNMENT CONSULTATION ON CORPORATE LIABILITY FOR ECONOMIC CRIME

The UK government is in the process of examining the case for reform of the law on corporate liability for economic crime such as money laundering, fraud and false accounting. Between January and March 2017, the UK government issued a Call for Evidence in relation to the reform of the common law which governs criminal corporate liability for most crimes, known as the “identification” doctrine. The doctrine dictates that a commercial organization can only be held liable for criminal conduct if it can be shown that the directing mind and will of the organization was party to or aware of the criminal conduct carried out on the organization’s behalf.

This doctrine has a number of disadvantages for law enforcement agencies:

- It can be very difficult to meet the evidential threshold in the context of prosecutions of
international organizations with complex management structures;

• It can encourage companies to decentralize responsibility in order to avoid liability;

• It creates an imbalance in enforcement practices, with smaller companies more liable to face prosecution than larger ones; and

• It results in a situation where other countries, with different laws on corporate criminal liability, may be in a better position to prosecute economic crimes which take place in the United Kingdom. Ultimately, this could undermine the public’s confidence in the United Kingdom’s criminal justice system.

The Call for Evidence suggests a number of ways to mitigate or resolve the issues created by the identification doctrine in the prosecution of economic crimes:

• By amending the identification doctrine via statute to widen the range of individuals who can be regarded as the directing mind of an organization.

• The creation of a strict liability offence based on the principles of vicarious liability (similar to US law).

• The creation of an offence of “failure to prevent economic crime”. An organization could be held liable for an offence akin to a breach of statutory duty where it failed to ensure that economic crime was not perpetrated on its behalf.

This model has been adopted into two significant pieces of UK legislation to date. Section 7 of the UKBA 2010 created a statutory corporate criminal strict liability offence for failing to prevent bribery. Sections 45 and 46 of the new Criminal Finances Act 2017 created two similar offences in relation to failing to prevent the facilitation of tax evasion. These offences create a responsibility for an organization to make sure that offences are not committed on its behalf.

In addition, these offences make having reasonable and adequate procedures a complete defense, creating an incentive for organizations to place the prevention of economic crime at the heart of their governance regime.

The responses to the Call for Evidence are currently being analyzed, and will be used to inform the government’s future decisions on whether and how to reform the law on corporate criminal liability. The tone of the Call for Evidence suggests a healthy appetite for expanding the types of economic crime which are governed by “failure to prevent” offences as a means of engendering greater corporate responsibility for combating this issue.

SFO SPEECHES AT 2017 CAMBRIDGE SYMPOSIUM ON ECONOMIC CRIME

Both David Green (the director of the SFO) and Alun Milford (the SFO’s general counsel) gave speeches at this year’s Cambridge Symposium on Economic Crime. The themes that emerged are set out below.

The SFO has had a successful year: in the preceding 12 months, £640 million in financial penalties and costs were levied against defendants in SFO matters – the majority of which came from the Rolls-Royce DPA described below. Apparently responding to the threat from the current Prime Minister to amalgamate the SFO with the National Crime Agency, Green asserted that the SFO provided the UK public with good value for money – in the period since April 2014 the SFO made a net contribution to the Exchequer of £460 million, equivalent to £1 million per member of SFO staff.

The Rolls-Royce DPA, and its effect on the SFO’s attitude to DPAs more generally: over £500 million in penalties came from Rolls-Royce, which entered into a DPA in January 2017. The company benefited from a 50 percent discount on the penalty calculation, equivalent to a year’s profit for the company, on account of its remarkable level of cooperation with the SFO, demonstrating the financial benefits to cooperating with the SFO.

The SFO’s approach to self-reporting has not shifted in light of the Rolls-Royce case. DPAs are pragmatic devices aimed at incentivizing openness leading to the uncovering of crimes and allowing companies to account for those crimes without punishing innocent parties. The high level of cooperation which Rolls-Royce subsequently provided to the SFO exposed a far greater level of misconduct than may have come to light without the company’s cooperation. The court was asked to consider this cooperation when assessing whether a DPA was in the interests of justice and companies should not expect to receive an offer of a DPA by “doing nothing, waiting for a phone call from the SFO and then going through the motions.” In addition to early and full cooperation,
companies interested in achieving a DPA must commit to reform, including through the removal of senior managers. Companies considered by the SFO and the court as likely reoffenders should not expect an offer of a DPA.

There is also a continued focus on individual prosecutions: agreeing to a DPA with a corporate suspect enables the SFO to focus resources on individuals, who – in a parallel with the position of the US prosecutors set out in the Yates Memo – should not expect to be excused from culpability because the company has paid a fine.

Witness accounts: in the Standard Bank case, the first in which a DPA was used, the SFO accepted summary witness accounts from the company in lieu of transcripts. The SFO’s position is that this issue would be assessed on a case-by-case basis and that it should not be assumed that summaries will always be acceptable. For example, in the Rolls-Royce matter, the SFO agreed to receive memoranda for historic interviews, but insisted upon future employee interviews being audio recorded.

NEWLY ANNOUNCED INVESTIGATIONS

The SFO also announced or confirmed the existence of several corruption investigations, further reflecting the United Kingdom’s ongoing anti-corruption enforcement efforts.

AMEC FOSTER WHEELER PLC. The SFO announced in July 2017 that it had opened an investigation into Amec Foster Wheeler Plc (as well as any predecessor companies owning or controlling the Foster Wheeler business, along with its subsidiaries, company officers, employees, and agents) concerning suspected bribery, corruption, and related offences. The investigation into Amec Foster Wheeler concerns suspected bribery and corruption, as well as the company’s use of third parties in the past. The firm said that it would cooperate fully with the investigation.

RIO TINTO GROUP. In July 2017, the SFO also launched an investigation into the Rio Tinto group - as well as its employees and others associated with it - concerning suspected corruption in relation to Rio Tinto’s conduct of business in the Republic of Guinea. In November 2016, the group revealed that it had self-reported to regulators in both the United Kingdom and United States in relation to certain consultancy payments made in connection with the Simandou iron ore project in the Republic of Guinea (which it sold in October 2016 to a Chinese company). The payments apparently came to light through emails which referred to payments amounting to over £8m, for which there could be no legitimate explanation. The group announced that it would “fully cooperate” with the SFO and any other regulatory authorities during the investigation.

BRITISH AMERICAN TOBACCO P.L.C. The SFO announced on 1 August 2017 that it had launched an investigation into suspected bribery and corruption committed in the conduct of business by British American Tobacco plc (along with its subsidiaries and associated persons). The company is alleged to have paid bribes to various public officials in East Africa, in order to influence regional regulations concerning the control of tobacco, as well as for information to give it a competitive advantage. The allegations were originally uncovered by the BBC in 2015 through a whistle blower who had previously worked for the firm. British American Tobacco has confirmed that it has been investigating the suspicions and would cooperate fully with the SFO during the investigation.
F.H. BERTLING LTD, ROBERT MCNALLY, GEORGINA AYRES, GIUSEPPE MORREALE, STEPHEN EMLER, CHRISTOPHER LANE, PETER SMITH  
Serious Fraud Office  
Criminal Convictions and Criminal Charges  
September 26, 2017 (Convictions) May 2, 2017 (Charges)  

Nature of Conduct: On 2 May 2017 the SFO charged F.H. Bertling Ltd (a logistics and freight operations company) and four individuals with one count of conspiracy to give or accept corrupt payments, contrary to the Prevention of Corruption Act 1906 (PCA) and the Criminal Law Act 1977 (CLA). The SFO has alleged that Robert McNally, Georgina Ayres, Giuseppe Morreale, Stephen Emler and the company itself conspired together and with others to give or accept corrupt payments. In addition, two further individuals (Christopher Lane and Peter Smith) have also been charged with separate counts of conspiracy to give or accept corrupt payments. The payments in question were allegedly made or received in order to help the company in being awarded or retaining supply contracts for freight forwarding services in relation to a North Sea oil exploration project known as Jasmine. The alleged misconduct took place between January 2010 and May 2013.

In addition, on 26 September 2017 the SFO announced that six former and current employees as well as the company itself had also been convicted of conspiracy to give or accept corrupt payments in relation to additional set of charges (announced in July 2016) concerning alleged corruption which took place between January 2005 and December 2006. This misconduct related to the making of corrupt payments to an agent of the Angolan state oil company Sonangol in order to further the company’s business opportunities in the country, and specifically in relation to the award of a $20 million contract. All of the individuals had pleaded guilty to the charges except one, who was acquitted on 21 September 2017.

Amount of Alleged Improper Payment: Not stated.

Benefit Obtained: Award or retention of contracts by F.H. Bertling Ltd for the supply of freight forwarding services in relation to an oil exploration project, as well as in relation to business opportunities in Angola.

Type of Resolution: None as yet in relation to the Jasmine exploration project. Criminal convictions in respect of the Sonangol corruption. Three individuals have each been sentenced in respect of that conviction to a period of imprisonment of 20 months, suspended for two years. In addition, each received a fine of £20,000 and were disqualified as company directors for a period of five years. One of the defendants is now deceased. The other two individual defendants and the company will be sentenced following the conclusion of the trial relating to the Jasmine exploration project.

Of Note: The company has now faced two sets of charges recently brought by the SFO against it and a number of related individuals. Both sets of charges were brought under the PCA (as well as the CLA), which was replaced by the UKBA and has now been repealed as regards conduct dating after 1 July 2011.

ROLLS-ROYCE PLC  
Serious Fraud Office  
Deferred Prosecution Agreement  
January 16, 2017  

Nature of Conduct: The alleged misconduct involved bribery and corruption committed by several of the company’s subsidiaries in seven jurisdictions over a 24-year period. The misconduct included: agreements to make corrupt payments; concealment or obfuscation of the use of intermediaries; failing to prevent bribery by
employees or intermediaries; and failure to prevent the provision by its employees of inducements which constituted bribery. The conduct dates back to 1989, and involves two of Rolls-Royce’s subsidiaries associated with its defence, energy, and civil businesses. The illegal activities took place in Nigeria, Indonesia, Russia, Thailand, India, China, and Malaysia.

**Amount of Alleged Improper Payment:** Not stated.

**Benefit Obtained:** Contracts in a number of foreign jurisdictions.

**Type of Resolution:** Deferred Prosecution Agreement (DPA) with the SFO. Under a global agreement involving authorities in the United States and Brazil in addition to the United Kingdom, Rolls-Royce Plc agreed to pay a total of approximately £671 million to the SFO, DOJ, and the Brazilian Ministério Público Federal (MPF).

**Of Note:** This was the highest penalty ever imposed under a DPA (this being only the third DPA used in the United Kingdom), and for the first time, the penalty imposed in the United Kingdom was significantly higher than that imposed by the DOJ. By securing this settlement, the company reduced the financial penalty it would have had imposed after a conviction by 50 percent. It is noteworthy that a DPA was even available to Rolls-Royce, given (1) that the conduct was not self-reported to the SFO (which is a prescribed step for the SFO to consider a DPA, save in exceptional circumstances), and (2), the extremely serious nature of the allegations. According to SFO officials, which was confirmed by the Court, the company’s ability to secure the DPA was a result of the company’s very high level of cooperation maintained throughout the SFO’s investigation.

Concerns over Rolls-Royce’s potential corrupt conduct first surfaced in 2012 as a result of internet articles. The SFO requested information from Rolls-Royce in response, and the company immediately launched an internal investigation, which marked the start of a lengthy and highly cooperative process. By way of example, Rolls-Royce conducted 229 internal interviews and reviewed over 250 of its third party relationships during the course of the four-year investigation.

The SFO also provided assistance to the DOJ in connection with its prosecution of James Finley, Keith Barnett, Louis Zuurhout, Andreas Kohler and Petros Contoguris described above.

ZIAD AKLE, BASIL AL JARAH, SAMAN AHSANI, PAUL BOND, STEPHEN WHITELEY

**Serious Fraud Office**

**Criminal Charges**

November 16 and 30, 2017

**Nature of Conduct:** According to the allegations, several individuals conspired to steer contracts in Iraq to the Dutch company SBM Offshore. Ziad Akle, a territory manager covering Iraq for SBM Offshore’s agent, and Basil Al Jarah, a local Iraq partner, conspired with officials from SBM Offshore Paul Bond and Stephen Whiteley to make corrupt payments as part of the scheme. A fifth individual, Saman Ahsani, also allegedly participated in the conspiracy.

**Amount of Alleged Improper Payment:** Not stated.

**Benefit Obtained:** In relation to the charges brought against award of contracts in Iraq to SBM Offshore.

**Type of Resolution:** Unresolved. Akle, Al Jarah, Bond and Whiteley have been charged with conspiracy to make corrupt payments contrary to section (1) of the Criminal Law Act 1977 and section 1 of the Prevention of Corruption Act 1906, in relation to allegations of misconduct which allegedly took place between June 2005 and August 2011. Ahsani is facing extradition.

**Of Note:** SBM Offshore resolved related charges in the United States in November 2017.
INTERNATIONAL DEVELOPMENTS

INTERNATIONAL

ISO 37001 Standard Continues to Make an Impact on the Global Compliance Community

The International Organization for Standardization announced the ISO 37001 Standard in October 2016. As discussed in greater detail in Jenner & Block’s Business Guide to Anti-Corruption Laws 2017 and 2017 Mid-Year Update, that standard sets forth the best practices and provided guidance for anti-bribery compliance programs. If widely used, the standard could become an accepted indicator of an adequate compliance program. Since the Standard’s introduction, four companies have secured certification and at least one local regulator has issued anti-bribery guidance that mirrors the standard’s requirements. As the ISO 37001 standard continues to make inroads among the global compliance community, however, some skeptics have criticized it as insufficiently rigorous to improve anti-bribery compliance.

Throughout 2017, several prominent companies have recognized or adopted the standard. In July 2017, Alstom, the French multinational rail-transportation corporation, obtained certification from the French member body of the ISO, AFNOR (the Association Française de Normalisation). Alstom won certification after a three-month audit of its anti-bribery systems and related policies. Alstom’s certification comes amid ongoing UK investigation into it for alleged corruption and two years after it pleaded guilty and paid more than $772 million to resolve charges it violated the FCPA’s anti-bribery provisions. Alstom joins Italian companies ENI and Terna, as well as the UAE-based Bosch Middle East, in receiving ISO 37001 certification. Microsoft and Wal-Mart announced their intention to seek certification as well, suggesting that more companies may soon follow suit.

In addition, regulators in three countries have recognized or adopted the standard. In the first half of 2017, Singapore adopted the standard and announced plans to implement an accreditation program, and Peru adopted a translated version of the standard as a voluntary guideline. In June 2017 a local Chinese regulator in the Shenzhen Municipality published anti-bribery guidance modeled after the ISO standard. That guidance does not mandate the participation of any Chinese company, but emphasizes internal audit and internal controls for preventing commercial bribery and encourages employees to escalate instances of bribery whenever observed.

Despite these recent successes for the ISO 37001 standard, some observers have expressed skepticism of the standard’s usefulness. Notably, Hui Chen, the former compliance counsel expert at the DOJ’s Fraud Section, has commented that no evidence supports the conclusion that becoming ISO 37001-certified actually reduces the instances of bribery. She suggested that a more rigorous, statistics-driven development process would have been a more effective means of ensuring that the standard minimizes corrupt behavior as it purports to.

World Bank Sanctions Decisions Again Emphasize Importance of Cooperating with Misconduct Investigations

Since Jenner & Block’s Business Guide to Anti-Corruption Laws Mid-Year Update in July 2017, the World Bank’s Sanctions Board has issued four enforcement decisions, bringing the total in 2017 to nine. In each case, the Board debarred parties for a set period of time from participating in projects financed by the World Bank. In two of these cases, the Board handed down debarments with conditional release—providing for a lifting of sanctions only if the guilty entity accepts and implements an effective compliance program.
A Sanctions Board decision handed down on July 21, 2017 provides an example of a case in which the Board issued a conditional debarment. In that decision, the Board found that a Mumbai company, Olive Health Care, and one of its managers, Jay Modi, falsified documents and evidence in order to win a $1.9 million contract to provide vitamin supplements through the Bangladesh Health Sector Development Program and debarred the company for ten and a half years and Modi for seven and a half years. In announcing these sanctions, the Board noted the respondents’ cooperation as a positive factor in determining the length of debarment. In particular, the Board concluded that Modi deserved “proportionately greater mitigation” because of the greater extent of his cooperation, which the Board described as Modi giving “specific descriptions of his personal participation in the misconduct.” The Board’s reasoning reflects an intent to reward with some leniency parties that admit their wrongdoing and cooperate with investigations into their conduct.

In contrast, the Board found another individual’s conduct insufficient to warrant mitigation despite some degree of cooperation. In that case, the respondent, Syed Asif Raza, falsely represented his qualifications in an application to be a Project Officer on a World Bank-funded initiative focused on revitalizing crisis-affected areas in Pakistan. During the subsequent investigation, the respondent agreed to be interviewed, but then gave conflicting statements and ultimately “failed to show the type of candor and cooperation as would warrant mitigation.” Though the Board judged his misconduct to be less severe than Modi’s—as evidenced by Raza’s lesser sanction of two years’ debarment— Raza’s uncooperativeness precluded any mitigation of his sanction.

Recent Global Trend of Improving Anti-Corruption Laws and Enforcement Continued Throughout 2017

2017 witnessed the continued development of significant anti-corruption laws around the globe, trending toward an international consensus. Several of the countries that have improved their anti-bribery legislation or enforcement are signatories to the Organisation for Economic Co-operation and Development’s Convention on Combatting Bribery, and their continued improvements may reflect the obligations under that convention, which entered into force in 1999. The trend reflects three themes: new anti-corruption laws, increased enforcement, and laws on domestic corruption that are impacting international enforcement.

In recent years, several countries have adopted or improved anti-corruption laws. Australia criminalized deliberately or recklessly falsifying accounting records, and in 2017 further proposed creating two new offenses: failing to prevent bribery and recklessly bribing a foreign official. France created a new crime for seeking to improperly influence foreign officials and mandated compliance programs for larger corporations. Thailand criminalized the bribing of Thai and foreign officials as well as of international organization workers.

Additional countries have improved enforcement to strengthen the effect of their existing anti-corruption laws. Early in 2017 Spanish prosecutors won their first convictions under Spain’s anti-corruption law enacted in 2000. The Indian Supreme Court recently ordered implementation of a 2014 anti-corruption law that has languished since its passage.

Beyond empowering foreign nations to crack down on corruption within their borders, these laws – including those focused on domestic corruption - also pave the way for expansive improved enforcement of international corruption laws. In Brazil’s Operation Car Wash, for example, a domestic investigation led to not only domestic convictions but to FCPA resolutions in the United States as a result of coordination between Brazil and the US, including in the massive 2016 Oderbrecht S.A. resolution and several other cases resolved in 2017.

BRAZIL

Brazil’s Large Scale Anti-Corruption Investigation Continues

The fallout continues from Operation Car Wash, a massive corruption investigation in Brazil that initially focused on the state oil company Petrobras and has expanded to politicians and private contractors alike. Indeed, the operation has expanded far enough to net convictions outside of Brazil as well. For example, in November 2017, the US DOJ, working in concert with Brazil’s Public Prosecutor’s Office, secured two FCPA convictions for bribes paid to officials at Petrobras and elsewhere. In that case, two former executives of Dutch oil and gas services company SBM pleaded guilty to violating the FCPA by orchestrating over $16 million in bribe payments to officials at Petrobras and two other state-owned oil companies in South America and Africa.
In Brazil, Judge Sergio Moro oversees the operation and has explained that one reason for its success has been prosecutors’ use of plea bargaining to convince some defendants to cooperate. Plea bargaining became more powerful in Brazil in 2013, when the country passed a new law empowering prosecutors to decline prosecution of certain charges in exchange for witness testimony. For example, after prosecutors expanded their investigation to include members of current Brazilian President Michel Temer’s cabinet as well as executives at JBS, the world’s largest meatpacking company, the brothers who own JBS agreed to testify in exchange for immunity.

In testimony given by Joesley Batista as part of his plea deal, Batista informed prosecutors that he secretly recorded President Temer discussing hush money payments to Eduardo Cunha, a former politician who is currently serving a prison sentence for corruption and money laundering discovered as part of Operation Car Wash. Based in part on this testimony, Temer was charged in September 2017 with obstruction of justice and racketeering. The Chief Prosecutor Rodrigo Janot claims that President Temer “acted as leader of a criminal organization” made up of senior members of his Brazilian Democratic Movement Party. According to prosecutors’ allegations, Temer and his party have received about $190 million in bribes since he took over from his predecessor Dilma Rousseff after her impeachment last year.

Despite these charges, however, Temer avoided facing criminal trial when Brazil’s lower house of Congress—the Chamber of Deputies—voted against allowing the charges to proceed to trial. This marks the second time Temer has avoided trial on corruption charges; in August 2017, the Chamber of Deputies prevented a separate bribery charge against Temer from proceeding.
JENNER & BLOCK’S ANTI-CORRUPTION EXPERIENCE

Jenner & Block has a leading FCPA and anti-corruption practice representing global companies in all phases of compliance with the FCPA, the UK Bribery Act, and other anti-corruption laws, from internal investigations and negotiations with the United States and other governments to development of internal controls, training, and compliance counseling. We offer clients a wealth of experience, with two former US Attorneys, the former Associate Attorney General (the third-ranking official in the US Department of Justice), the former Principal Deputy Assistant Attorney General of the Criminal Division, former criminal division and assistant United States attorneys from jurisdictions throughout the country, the former Associate Director of the SEC’s Division of Enforcement, and other former SEC enforcement attorneys. As a group, our lawyers have represented many dozens of companies in FCPA and anti-corruption matters of all types.

The hallmark of a strong anti-corruption practice is helping clients stay out of trouble in the first place. Our lawyers have developed anti-corruption compliance programs for major multinational companies across numerous sectors of the economy, including, among others, defense, financial institutions, oil and gas, media, government contractors of all kinds, and retail establishments. We have provided training to tens of thousands of corporate personnel as well as smaller businesses with fewer than 500 employees. Our FCPA team also brings to the table a nuanced understanding of the intersections of the FCPA with federal securities laws, Sarbanes-Oxley, Dodd-Frank, export control laws, government contracting obligations, and other anti-corruption laws, including the UK Bribery Act.

When issues arise, our clients benefit from Jenner & Block’s world-class reputation and skill in conducting internal investigations. Our range and depth of experience enables us to conduct internal investigations with care and rigor, ensuring that our clients have obtained the material facts and that the investigation will withstand the strictest of scrutiny by government enforcement agencies.
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