THE U.S. FCPA IN 2006: INCREASED ENFORCEMENT, ALTERNATIVE DISPOSITIONS, COMPLIANCE MONITORS, AND OTHER DEVELOPMENTS*

*Homer E. Moyer, Jr., James G. Tillen, and J. Matteson Ellis***

I. Summary of the FCPA ... 113.001
II. FCPA Background ... 113.003
III. Perennial Issues under the FCPA ... 113.004
IV. High-Risk Transactions under the FCPA ... 113.012
V. Internationalized Standards ... 113.015
Appendix — Recent FCPA Developments ... 113.018
VI. Recent Cases and Opinion Releases ... 113.018
VII. Compliance Obligations ... 113.025

In the last five years, FCPA enforcement and practice have undergone rapid change. Escalating U.S. enforcement has produced more FCPA cases than ever before. Many prosecutions have been substantively and jurisdictionally aggressive, and penalties have generally become more severe. Compliance standards continue to be ratcheted up, and Sarbanes-Oxley has sharply increased involuntary "voluntary" disclosures. Key substantive issues nonetheless remain unresolved as FCPA jurisprudence continues to be sparse.

Internationally — following nearly two decades in which the unilateral U.S. FCPA set the only standards against bribery of foreign government officials — transnational norms have been embraced in a succession of international conventions. Two landmark conventions appeared in quick succession in the late 1990s, and a U.N. convention that is the most ambitious of all entered into force in 2005. Ratification and implementation of international conventions have followed in more than 90 countries thus far, although enforcement by signatories has to date been generally lethargic.

I. Summary of the FCPA

The U.S. Foreign Corrupt Practices Act ("FCPA") criminalizes the bribery of foreign officials anywhere in the world for the purpose of influencing an official decision to obtain a business benefit. It also requires companies with publicly-traded stock in the United States to meet certain standards regarding their accounting practices, books and records, and internal controls.

A. Scope

The FCPA contains both antibribery and accounting provisions. The antibribery provisions prohibit the payment of a bribe, or anything of value, to "foreign officials," broadly defined. The accounting provisions, which require accurate books and records and effective internal controls, are designed to eliminate slush funds and off-book transactions that facilitate bribery. The accounting provisions apply only to "issuers." *Id.* § 78m(b).

The antibribery provisions apply to three types of covered persons: (1) "issuers" of certain types of securities regulated by the Securities and Exchange Commission ("SEC") (15 U.S.C. § 78dd-1(a)) anywhere in the world; (2) "domestic concerns," which in essence includes all U.S. individuals and business entities (15 U.S.C. § 78dd-2(a)) anywhere in the world; and (3) "any

* *Copyright September 2006, Homer E. Moyer, Jr., James G. Tillen, and J. Matteson Ellis. All rights reserved. Reprinted with permission.* *The authors wish to acknowledge and thank John E. Davis, Kathryn Cameron Atkinson, and Leigh A. Bacon of Miller & Chevalier Chartered for their contributions to the text and appendix of this chapter.*

** *Homer E. Moyer, Jr., James G. Tillen, and J. Matteson Ellis are three of a number of lawyers at the Washington, D.C., law firm of Miller & Chevalier who specialize in FCPA and anticorruption work..*

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

person" that performs an act in furtherance of a prohibited act in U.S. territory (15 U.S.C. § 78dd-3).

B. Elements

A violation of the antibribery provisions may be parsed into nine separate elements:

1. a U.S. "issuer" (registered or reporting), or "domestic concern" (U.S. citizen, national, or resident, or a company incorporated or headquartered in the United States) — including its officers, directors, employees, and agents or shareholders acting on its behalf, or "any person";
2. commits an act with the required territorial nexus or nationality;
3. in furtherance of;
4. a payment, offer, promise to pay, or authorization of a payment, promise, or offer;
5. of money or anything of value;
6. to (a) any foreign official, (b) any foreign political party or party official, (c) any candidate for foreign political office, or (d) any other person while "knowing" that the payment or promise to pay will be passed on to one of the above;
7. "corruptly";
8. for the purpose of (a) influencing an official act or decision of that person, (b) inducing that person to do or omit to do any act in violation of his or her lawful duty, (c) inducing that person to use his influence with a foreign government to affect or influence any government act or decision, or (d) securing any improper advantage;
9. in order to obtain or retain business, or direct business to any person.

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

A company can be liable under the FCPA not only for making improper payments, but also for making an offer or promise to pay, even if it does not actually make a payment. Moreover, a company may be liable for payments by a local agent if the company authorizes the payment or if it "knew" the illicit payment would be made. A company is deemed to have knowledge if it is aware of, but consciously disregards, a "high probability" that such a payment or offer will be made. 15 U.S.C. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), and 78dd-3(f)(3)(B).

C. Exceptions and Affirmative Defenses

The FCPA provides an exception for so-called "facilitating" or "grease" payments to low-level employees who perform "routine governmental action." 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b).

In addition, the 1988 amendments added two affirmative defenses: the first for payments permitted by the written laws of the foreign official's country (15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)); the second is for certain "reasonable and bona fide" business expenses -- for example, payments made to reimburse foreign officials for expenses associated with visits to product demonstrations or tours of company facilities (*Id.* §§ 78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2)).

D. Penalties

The FCPA provides for both criminal and civil penalties. Criminal penalties for individuals include fines up to $100,000, imprisonment up to five years, or both. Business entities may suffer criminal fines up to $2,000,000 per violation. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), and 78ff(c)(1). Notwithstanding the FCPA's statutory caps for fines, where the offense(s) results in pecuniary gain or loss, a corporation may be fined up to an amount that is the greater of twice the gross gain or twice the gross loss, in accordance with the alternative fine provisions of 18 U.S.C. § 3571(d). The SEC has also on occasion sought penalties of disgorgement.

Under the 1988 amendments, the FCPA provides for civil fines of up to $10,000 against any firm that violates the antibribery provisions of the FCPA, and against any officer, director, employee, or agent of a firm who willfully violates the antibribery provisions of the Act. 18 U.S.C. §§ 78dd-2(g) and 78ff. The Department of Justice ("DOJ") and the SEC may also obtain injunctions to prevent violations of the FCPA. *Id.* §§ 78dd-2(d)(1), 78dd-3(d)(1), and 78u(d)(1).

Since 1987 and 1991, respectively, individual and corporate sentences for violations of the FCPA have been determined in accordance with the Federal Sentencing Guidelines. *See Federal Sentencing Guidelines Manual* § 2B4.1 (1997). Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are now only advisory. In determining a prison term and/or the amount of a fine in a

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

particular case, the Guidelines give guidance on various exacerbating factors including the amount of the bribe, prior convictions, the number of counts charged, and whether high-level corporate officers were involved in the violation. *See id.* §§ 2B4.1; 3D1.4; 4A1.1; 8C2.3 and 8C2.5. Mitigating factors, such as acceptance of responsibility, cooperation with the government's investigation, voluntary disclosure of any violation, and existence of a corporate compliance program, are also taken into account. *See id.* §§ 3E1.1 and 8C2.5. Use of the Federal Sentencing Guidelines has coincided with an increase in the severity of sentences imposed for FCPA violations (including conspiracy to violate the FCPA). The Guidelines also create additional leverage prosecutors can use to force settlement rather than litigating FCPA charges.

Although not punitive per se, the cost of a compliance monitor, increasingly a required element of settlement (*see* Section III. D), can be a substantial additional cost to companies resolving FCPA issues.

As a practical matter, under the Sentencing Guidelines, an FCPA criminal prosecution of any individual for a prohibited payment of any significant amount is likely to result in a sentence of imprisonment.

E. Enforcement

The DOJ has primary responsibility for criminal enforcement of the statute. The SEC has civil enforcement authority and an obvious institutional interest in enforcing the FCPA's accounting provisions. Joint enforcement actions have become more common.

II. FCPA Background

A. Origins

The FCPA was enacted in 1977 to prohibit U.S. companies from bribing foreign government officials in order to obtain or retain business. Its passage came in the wake of revelations that a number of major U.S. corporations had made large payments to foreign officials to secure business. As part of its inquiry into these allegations, the SEC established a voluntary disclosure program, pursuant to which companies that admitted to having made illicit payments in the past would not be prosecuted on the condition that they implemented compliance programs to prevent the payment of future bribes. More than 400 companies, many among the largest companies in the United States, admitted to making illicit payments to foreign government officials and political parties. The aggregate amount of these bribes was reported to exceed $300 million. This revelation of corruption on such a massive scale had the effect of destabilizing a number of foreign governments whose officials were implicated in bribery schemes, including Japan, Italy, and The Netherlands. Against this backdrop, Congress passed the FCPA.

B. The Statute

For over 20 years following enactment of the FCPA in 1977, the United States stood alone in criminalizing the bribery of foreign government officials. Within only a few years of the law's enactment, some in Congress began to express concern about its anti-competitive effects on U.S. companies doing business abroad.

In 1988, the FCPA was amended ostensibly to reduce the burdens on U.S. companies, but the overall thrust of the law remained the same. In particular, the FCPA's vicarious liability standard was changed from "reason to know" to "knowing," although knowledge is defined to include willful blindness. *See* 15 U.S.C. §§ 78dd-1(f)(2)(B) and 78dd-2(h)(3)(B). In addition, two affirmative defenses were created: (a) compliance with the written laws of the foreign official's country (*see id.* §§ 78dd-1(c)(1) and 78dd-2(c)(1)); and (b) reimbursement of government officials for expenses associated with tours of company facilities or product demonstrations (*see id.* §§ 78dd-1(c)(2) and 78dd-2(c)(2)).

The 1988 amendments also redefined the meaning of "facilitating payments" by changing the focus of exemption from the official's status to the purpose of the payment. Payments are now exempted if their purpose is "to expedite or to secure the performance of a routine governmental action." *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

At the end of 1998, the FCPA was amended for the second time in its history to ensure its full conformity with the OECD Convention on Combating Bribery of Foreign Government Officials in International Business Transactions. These amendments did not fundamentally change the Act, but they did expand the scope of the Act over foreign persons as well as acts of U.S. nationals and

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

businesses that occur wholly outside the territory of the United States.

C. Regulatory Implementation and Guidance

Although the FCPA has been in place for more than 29 years, there remains relatively little official guidance or jurisprudence on its provisions.

1. There are no implementing regulations.

2. The 1988 amendments called for the DOJ, after consultation with other agencies and public comment, to determine whether it should issue official guidelines on compliance. 15 U.S.C. § 78dd-2(d). Justice determined that guidelines were not necessary. 55 Fed. Reg. 28694 (July 12, 1990).

3. The DOJ and the Department of Commerce issued a brochure on the FCPA in February 1992, but the brochure itself states that it is limited to a "general description" of the law. In August 1999, the DOJ published a "Lay-Person's Guide to the FCPA Statute," which provides additional general information on the Act. This Guide is available on the DOJ website and is updated periodically.

4. The statute and DOJ regulations establish an opinion procedure under which U.S. companies can seek the Department's views on whether prospective transactions comply with the FCPA. 15 U.S.C. § 78dd-2(e); 28 C.F.R. pt. 80.

5. To date, the DOJ has issued more than 40 opinions, or "review releases" as they previously were known. Although companies look to these opinions for guidance, they are expressly limited to the facts of the transaction at issue and are not legally binding precedent. Moreover, Justice typically does not articulate its analysis of why a particular fact pattern does not constitute a violation.
6. The DOJ has published and periodically updates a list of "red flags" that should alert companies to potential FCPA problems.

7. There have been few judicial opinions on FCPA antibribery issues. A number reflect opinions rendered at different procedural phases of a single matter.

8. There have been a number of indictments and settlement agreements under the FCPA. Like the review releases, they illustrate circumstances that the DOJ views as violations, but do not reflect judicial scrutiny of the statute.

III. Perennial Issues under the FCPA

A number of issues arising under the FCPA confront U.S. businesses that operate internationally. Several of the more noteworthy among these are addressed below.

A. Unresolved Legal Issues

The FCPA bristles with unresolved issues. The general language of the statute, the relative lack of administrative guidance, and the small number of judicial opinions have left a large number of questions unanswered. This dearth of guidance places a premium on, and complicates, careful compliance and counseling efforts. Examples of these questions include:

1. whether the definition of "foreign official" includes employees of enterprises in which a foreign government owns less than a fifty percent interest;
2. whether the imposition of sanctions, including the loss of export privileges and suspension or debarment from government contracting, before conviction of a violation of the statute is constitutional (*see* Section III.F.4);
3. what is the proper reading of the business purpose element of the statute, which was the subject of a recent Fifth Circuit Opinion;
4. whether payments, although large, qualify for the facilitating payments exception if they meet the statutory criteria (*see* Section III. D);
5. what the territorial nexus must be to reach foreign persons, particularly in light of the prosecution in *Syncor*, in which e-mails sent from California to Taiwan were considered a sufficient nexus, and the prosecution in *DPC*, in which a Chinese subsidiary's books and records were sent by e-mail to the California parent company, creating a sufficient nexus;
6. the definition of "improper advantage." The FCPA was amended in 1998 to include payments made

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

for an "improper advantage" in order to comply with the standards of the OECD Convention; and

7. what credit does a company earn for voluntary disclosure, prompt and effective remediation, and cooperation with law enforcement officials (*see* Section III. H)?

B. Third Parties and Vicarious Liability

Hiring local agents or consultants can raise FCPA problems in at least two ways. First, hiring a government official as a consultant may in itself constitute a violation (direct payment). Second, U.S. companies can face FCPA liability based on bribes paid by their agents, if they authorize the payments or consciously disregard a risk that the agent will act improperly (indirect payment).

Some issues to consider:

1. It seems clear that paying a government official to serve as an agent can in some cases constitute a violation of the FCPA. However, some DOJ review releases indicate that hiring a foreign government official as an agent is permissible in certain instances. *See* Review Release Nos. 80-4; 86-1; 94-1.

Where is the dividing line? Does the determination turn on the relationship, or lack thereof, between the agent's official duties and the business the U.S. company seeks to obtain or retain? If so, how closely related can the agent's duties and the business be?

2. One of the DOJ's "red flags" is a request by an agent for an excessive commission. What means can a company use to ensure that an agent's proposed commission is reasonable? Must a company rely on an independent third party to make this determination, or can it do so itself based on its experience in other similar business transactions? *See* Opinion Procedure Release 98-2.

3. Is a member of an extended royal family automatically a "foreign official" for purposes of the FCPA? If not, what degree of relationship or what activities by the royal family member may result in his or her being considered a "foreign official?"

4. Under the 1988 amendments to the FCPA, a U.S. company can be held liable if it makes payments to an agent "knowing" that they will be passed on to a foreign official. A company is deemed to have knowledge if it is aware of, but consciously disregards, a "high probability" that such a payment or offer will be made. 15 U.S.C. §§ 78dd-1(f)(2)(B) and 78dd-2(h)(3)(B). Prior to 1988, the standard was whether a company had "reason to know" whether an agent would make illicit payments.

What is the practical significance of this change? Does Justice view the pre-1988 standard and the post-1988 standard as being different in a practical sense?

C. Hosting and Hospitality

Issues relating to hosting and hospitality — travel, lodging, meals, per diem, entertainment, and gifts — command a disproportionate amount of the time and attention of lawyers and compliance officers concerned with FCPA compliance. Although the questions raised often do not involve dollar value comparable to the cash payments reported in many enforcement actions, questions can come frequently and in endless variations.

Although many types of routine business promotion expenses do not meet all of the elements of an impermissible payment under the FCPA, and notwithstanding that the statute contains an affirmative defense for "reasonable and bona fide" business expenses, the payment of hosting and hospitality expenses may be deemed not to be "reasonable and bona fide" or not directly related to the promotion, demonstration, or explanation of products or services, or not directly related to the execution or performance of a contract with a government entity.

Metcalf & Eddy and, more recently, *ABB Vetco Gray,* underscore that FCPA issues may be raised by a range of hosting and hospitality practices, from including family members to side trips for recreation or entertainment, from country club memberships to pedicures. Although those cases offer little specific guidance on where the lines are to be drawn, they clearly signal potential FCPA problems when hosting or hospitality are excessive or only tangentially related to legitimate business.

Some issues to consider:

1. Is it a safe operating rule of thumb that including family members of government officials creates a

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

risk of an FCPA violation? What are possible exceptions to that general rule?

2. What are reliable benchmarks for permissible per diem payments? Note that government standards did not eliminate adherence to the issue. *See Metcalf & Eddy.* What about non-statutory guidelines of the official's country? Do lump sum per diem payments made in advance present a greater risk than sequential payments? Are per diem payments plus paying for a meal double-dipping?

3. What is the legal relevance of the economic circumstances of the official? Does otherwise reasonable entertainment, per diem, or gifting become illicit if the amounts involved are large in relation to the official's government pay? Does that mean that standards of reasonableness vary from country to country, depending on how well or how poorly the government officials are paid?

4. What is the legal relevance of a country's cultural history of gift-giving? Can a gift of cash be made, as a wedding gift, for example, in a country where that is the tradition? Is the presence on a gift item of the logo of the company giving the gift an absolute defense? Is it a valuable safeguard?

D. Facilitating Payments

As noted above, the FCPA contains an exception for so-called "facilitating" or "grease" payments. The exception, originally for payments to government officials whose duties were ministerial or clerical, was amended in 1988 to apply to gratuities to low-level employees who perform "routine governmental action[s]." *Id.* §§ 78dd-1(b) and 78dd-2(b). These payments — which typically are used to expedite the processing of permits, licenses, or other routine documentation — are not prohibited by the FCPA.

Some issues to consider:

1. What constitutes "routine governmental action?"

2. Is there a maximum amount above which a payment will not be considered a facilitating payment, even if it is to secure "routine governmental action?"

3. Even though facilitating payments fall outside the scope of the FCPA's antibribery provisions, they still must be accurately recorded as "facilitating payments" in corporate books and records.

4. Although not prohibited by the FCPA, local law often prohibits facilitating payments. This exception has been a focus of international criticism of the FCPA in the OECD Convention implementation process.

E. Books and Records

Like the antibribery provisions, the accounting and internal control requirements of the FCPA are enforced by the SEC and the DOJ. Generally, the SEC polices civil violations, and refers criminal, or willful, violations to the DOJ for prosecution. The SEC also has authority to enforce the antibribery provisions against issuers, although it has historically tended to defer to Justice. The *Triton Energy* case involving Indonesia indicated a renewed focus by the SEC on antibribery issues. The SEC also has recently used the accounting provisions to sanction companies involved in bribery payments. A further discussion of recent SEC cases is found in the Appendix.

The record-keeping provisions of the statute require issuers to make and keep books and records, "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." 15 U.S.C. § 78m(b)(2)(A). The records must be kept in "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7).

In addition, the provisions require internal accounting controls that "provide reasonable assurance that ... transactions are executed in accordance with the management's general or specific authorization." 15 U.S.C. § 78m(b)(2)(B)(i). It is important to note that the FCPA requires "reasonable" rather than absolute assurance that accounting controls are adequate. The reasonable assurance requirement applies to all expenditures, rather than just those that would qualify as "material" in an accounting or disclosure context. Although the provisions thus require reporting in greater detail than a "materiality" standard, the FCPA requires "reasonable" rather than absolute assurance that accounting controls are adequate.

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

Unlike the antibribery provisions, the accounting provisions apply only to issuers. DOJ enforcement officials have suggested, however, that the accounting and internal control provisions are essential components to the FCPA compliance programs of ***all*** U.S. companies. The 1999 *Metcalf & Eddy* case presents a noteworthy example of this view being advanced in an enforcement context. While this position likely reflects "best practices" in compliance, the statutory basis for this assertion is unclear.

Under the record-keeping provisions, issuers are not only responsible for ensuring that they comply with the record-keeping requirements of the FCPA, but also must ensure that their wholly or majority-owned affiliates (even if they are neither issuers nor domestic concerns) are in compliance. *See* 15 U.S.C. § 78m(b).

Some issues to consider:

1. How explicitly must permissible facilitating payments be recorded in order to avoid a books and records violation? May they be included in a broader category of smaller, miscellaneous payments? Is the essence of this issue avoiding a misleading characterization rather than explicit use of the statutory term?

2. If a small but improper bribe is accurately recorded as such in a foreign affiliate's books, does the U.S. parent company avoid liability for a books and records violation? To what extent do the strict liability books and records provisions of the FCPA effectively bring foreign affiliates under the FCPA's prohibitions, including the prohibitions against improper payments?

3. Does any improper payment that violates the FCPA also reflect, *ipso facto,* the absence of effective internal controls? Can there exist an internal controls violation in the absence of a books and records violation, or an improper payment violation? Can the government effectively force a foreign affiliate, not covered by the FCPA, to enter into a plea agreement or consent decree, by virtue of the liability of the U.S. parent company. How would a court view such an issue?

F. Related Laws and Sanctions

The FCPA should not be viewed in isolation. FCPA issues increasingly intersect with other areas of law. In some instances, this linkage means that FCPA violations, or even alleged violations, can have broad ramifications.

Export Controls

An FCPA prosecution may have severe repercussions on a company's eligibility for export licenses. A case in point was the State Department's decision to bar issuance of export licenses to a Lockheed subsidiary because of its indictment on FCPA charges. For a company that depends on foreign customers, the effects of losing export privileges often can be more detrimental to the company than the statutory penalties for an FCPA violation.

Conspiracy

A number of reported cases relate not to violations of the FCPA, but rather to conspiracy to violate the FCPA. Charges of conspiracy to violate the FCPA routinely are included in indictments for acts allegedly violative of the FCPA itself, and conspiracy is often the crime for which the defendant ultimately is convicted. Because liability for conspiracy can be established based on evidence of a mere agreement to violate the FCPA and some overt act in furtherance of the agreement, the charge enables prosecutors to prosecute individuals or entities in situations where it might be difficult to prove that all of the elements of an FCPA violation were present. For example, it may be difficult to prove beyond a reasonable doubt that a payment was in fact consummated, particularly when key evidence may be located in a country that is unwilling to assist the U.S. Government in the prosecution.

Local Law of Host Country

FCPA issues are frequently intertwined with local law issues. Acts that violate the FCPA — or that are exempted (*e.g.,* facilitating payments) from the FCPA — may also give rise to civil or criminal liability under the laws of the host country. Conversely, the legality of a transaction under the written laws of a foreign country can provide a basis for asserting an affirmative defense to an alleged FCPA violation. *See* 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1). Although the DOJ does not view this defense as per se exculpatory, a transaction's consistency with local law militates against prosecution and can be invoked as a

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

defense in the event of indictment. Consequently, it often is prudent to seek the advice of local counsel to ensure that a business arrangement conforms with local law prior to going forward with the transaction.

Collateral Sanctions

Violations, or alleged violations, of the FCPA can result in sanctions beyond the civil and criminal penalties provided in the FCPA itself.

— Companies found to violate the FCPA can be barred from participating in procurement by federal government agencies. Merely an indictment for an FCPA violation can result in suspension. *See* 48 C.F.R. § 9.406-2; *Non-Procurement Debarment and Suspension,* 53 Fed. Reg. 19161 (May 26, 1988). If a company is barred or suspended from non-procurement or procurement activities by one agency, it will be similarly excluded by other agencies as well. 48 C.F.R. § 9.405(a).

— FCPA violators can be barred from receiving State Department export licenses, and companies under indictment can be barred from receiving licenses until they are acquitted. 22 C.F.R. §§ 120.1(b) and 120.24(f).

— FCPA violators can also be suspended or barred from programs of the Overseas Private Investment Corporation (22 C.F.R. pt. 709.1) and the Commodity Futures Trading Commission (17 C.F.R. §§ 3.55 and 3.60).

Some issues to consider:

a. Collateral sanctions were imposed on Lockheed by the State Department. Could collateral sanctions pending prosecution have been avoided? If yes, how?

b. What factors will agencies consider in determining whether to bar or suspend companies that have violated the FCPA? What types of investigations, if any, will the agencies undertake?

Private Actions under RICO

Courts have held that there is no private right of action under the FCPA. *See Lamb and Willis v. Phillip Morris, Inc.,* 915 F.2d 1024 (6th Cir. 1990), *cert. denied,* 111 S. Ct. 961 (1991); *J.S. Service Center and Serenco v. General Electric,* 937 F. Supp. 216 (S.D.N.Y. 1996); *see also Lewis v. Sporck,* 612 F. Supp. 1316 (N.D. Cal. 1985) (finding no implied private right of action under accounting provisions of FCPA). However, courts have permitted private rights of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on FCPA violations. *See Environmental Tectonics v. W.S. Kirkpatrick & Co.,* 847 F.2d. 1052 (3d. Cir. 1988), *aff'd,* 493 U.S. 400 (1990). In March 2006, the Government of the Dominican Republic filed suit against AES Corporation alleging, *inter alia,* RICO violations based on FCPA violations. *See Dominican Republic v. AES Corp.,* Civ. Action No. 06CU313 (E.D. Va.). Under a civil RICO theory, private parties can sue for treble damages based on alleged FCPA violations. Although few cases reach a decision, the huge amounts of money at stake under the trebling provisions make RICO a powerful tool in forcing settlements.

The United Nations International Convention against Corruption, which entered into force on December 14, 2005, also provides private rights of action for the victims of corrupt practices. Given the UN Convention's recent entry into force, a body of law with respect to private action has not yet developed.

Some issues to consider:

a. Will RICO suits predicated on alleged FCPA violations increase in the future?

b. What are the views of relevant government agencies on the use of the FCPA as a predicate for RICO suits?

c. Can the cases allowing civil RICO suits based on FCPA violations be squared on a legal basis with those denying private rights of action under the FCPA? Can they be squared on a policy basis?

Money Laundering

U.S. legislation has made "bribery of a public official" a predicate offense for the application of its money laundering legislation for some time. *See* 18 U.S.C. § 1956(c)(7)(D); S. Treaty Doc. 105-43, *Message from*

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

the President of the United States Transmitting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions VIII (1998). In addition to domestic bribery, the Money Laundering Control Act ("MLCA") was amended in 1992 to provide expressly that any felony violation of the FCPA constitutes "unlawful activity" for purposes of MLCA liability. *See* 18 U.S.C. § 1956(c)(7)(D). In 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 amended the MLCA further by adding foreign official bribery itself as a predicate offense, regardless of whether there has been a violation of an FCPA. *See* P.L. No. 107-56, 115 Stat. 272 (2001). Having made foreign corruption a predicate offense, the U.S. government is able to use the proceeds from foreign bribery as the basis for a U.S. money laundering prosecution, provided that those proceeds are laundered in the United States. The money laundering laws thus add a potent enforcement tool for the government in the antibribery arena. Conversely, money-laundering investigations, which are on the rise, may uncover FCPA violations.

Commercial Bribery

The FCPA does not provide for the criminalization of commercial bribery, and the United States lacks a single federal criminal prohibition against commercial bribery otherwise. Enforcement officials, however, often use commercial bribery laws currently in effect in two-thirds of the U.S. states, in conjunction with federal prosecutorial tools such as the mail and wire fraud statutes and the Interstate Travel in Aid of Racketeering ("ITAR") Act, 18 U.S.C. § 1952, to pursue private corruption.

International Trade Law

As the FCPA refers to bribes of foreign officials as "prohibited foreign trade practices," concerns about corruption are periodically raised in the arena of international trade law. Examples include the requirement for the President to report to Congress on countries with procurement-related corruption problems and the activities of the WTO Working Group on Transparency under its Government Procurement Agreement. In light of the extent to which official corruption can be a trade distortion, the likelihood that this issue will be raised in the context of trade rules, possibly at the Doha Round, continues.

G. Rising Compliance Standards

While U.S. companies face new FCPA concerns, the standards for compliance continue to rise. High-profile cases and news stories of corruption in emerging markets have heightened awareness of FCPA issues. Recent prosecutions, such as the *Titan, ABB,* and *Kay and Murphy* cases, arguably have been more far-reaching and have resulted in heavier sanctions against both companies and corporate officers than in the past.

Moreover, after more than twenty-five years under the statute, FCPA compliance programs and other precautionary measures have become commonplace among major corporations. This trend is likely to reinforce rising expectations for corporate compliance among enforcement officials. Trends in corporate management such as benchmarking and use of industry-best practices reinforce the need to employ high compliance standards.

Increased expectations with respect to best practices in corporate compliance have been in evidence over the last 15 years, with a sharp spike in the last three years in particular. Under the federal Sentencing Guidelines, an effective corporate compliance program can be used to mitigate the penalties imposed upon a corporation. The amended Sentencing Guidelines flesh out a number of criteria for evaluating a compliance program and increase the importance of ongoing risk assessments and training, including training of third parties. Whether a compliance program creates a "compliance culture" in a corporation is potentially a more demanding, if more subjective, standard.

Guidance from enforcement officials has made clear that a corporate compliance program is a factor not only in the calculation of what penalties a corporation might face for violations of law, but also in the Government's determination whether to charge the corporation. *See* Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (the "Thompson Memorandum"); Bringing Criminal Charges Against Corporations, June 16, 1999 (the "Holder Memorandum"). In addition, as demonstrated in a paper presented by DOJ attorney Philip Urofsky at the 1999 ACI FCPA Conference and the 1999 consent decree in *Metcalf & Eddy,* and more recently in the 2002 order by the SEC in the *Syncor* case, the 2003 report prepared by Robert Breeden pursuant to an injunction in the WorldCom litigation, and the 2005

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

Titan settlement, officials have increasingly required commitments with respect to compliance in enforcement actions.

For a full discussion of recent developments with respect to compliance standards, see the Appendix.

Some issues to consider:

1. With increased use of compliance programs, will expectations of enforcement officials continue to rise? How is the state of the art changing? What guidance can be drawn from corrective measures imposed by the government in settlement provisions, such as those in the *Titan, Monsanto,* and *Metcalf & Eddy* cases, or from DOJ opinions?

2. Contractual provisions concerning compliance with the FCPA have become commonplace in agreements with overseas agents and consultants. Are the expectations of enforcement officials concerning such precautionary measures rising? Do contractual provisions need to be more detailed than simply stating that an agent agrees to comply with the FCPA?

3. What other precautionary measures should a company take to demonstrate that it has made adequate attempts to ensure FCPA compliance by its agents? Background checks and other due diligence inquiries of prospective agents are becoming routine. To what extent is it necessary for companies to continue to perform such due diligence after an agent has been hired?

4. Companies often find it effective and efficient to centralize compliance functions. Centralizing compliance functions in a single official or office can promote accountability, uniformity across different divisions, the development of expertise, and the accumulation of experience in a single "institutional memory." At the same time, many businesses face competitive pressures to have nimble, decentralized decision-making.

5. How can companies centralize compliance responsibility, yet minimize interference with decentralized business decision-making? How can companies centralize compliance, but ensure that FCPA problems are identified early in a proposed transaction, before large amounts of time and effort are invested?

H. Aggressive Enforcement Climate

The 1990s saw an increase in enforcement activity and the level of penalties, including the first jail terms for individuals. For example, in the infamous prosecution of the Lockheed Corporation for conspiracy to violate the FCPA, the Company was fined $21.8 million and paid an additional $3 million in civil penalties. One of Lockheed's officers instrumental in the conspiracy was sentenced to 18 months imprisonment. Similarly, in connection with the indictment of Herbert Tannenbaum on charges of conspiracy to violate the FCPA, the plea agreement stipulated a sentence including a jail term of 12 to 18 months.

The increase in enforcement activity has accelerated over the past few years. Cases are now often prosecuted jointly by the DOJ and the SEC. *See, e.g., United States v. Monsanto,* Case No. 1:05-CR-00008 (D.D.C. January 6, 2005) and *In the Matter of Monsanto Company,* S.E.C. Admin. Proc. Filing No. 3-11789 (January 6, 2005); *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK, Ltd.,* Case No. 04-CV-279-01 (S.D. Tex. 2004) and *SEC v. ABB, Ltd.* (D.D.C. 2004); *U.S. v. Murphy and Kay,* 200 F. Supp. 2d 681 (S.D. Tex. 2002); and *SEC v. Mattson and Harris,* Civil Action 01-CVH-01-3106 (S.D. TX 2001).

Individuals are increasingly the target of criminal prosecutions and sentenced to jail time. In 1998, David Mead, a former senior executive for Saybolt, was sentenced to four months in prison, four months of home detention, and three years probation for his role in a conspiracy to bribe Panamanian officials. In another case in 2002, Robert King was sentenced to thirty months in prison and a $60,000 fine for his participation in efforts to make payments to Costa Rican officials in exchange for land concessions. In 2005, following a jury trial, two American Rice executives — David Kay, the Vice President of Caribbean Operations, and Douglas Murphy, the President and Chief Executive Officer, — were sentenced to 37 months and 63 months incarceration respectively. Murphy's longer sentence derived from his conviction on an additional obstruction of justice charge.

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

In March 2006, Richard John Novak pleaded guilty to conspiracy and violating the FCPA for payments to foreign diplomats, and has not yet been sentenced for the crimes. Another individual, Faheem Mousa Salam, an employee of a government contractor in Iraq, was arrested this year and recently pleaded guilty to FCPA violations in connection with payments to a senior official of the Iraqi police.

The SEC has also brought civil charges against individuals. For example, in July 2006, four former employees of ABB were charged by the SEC for their involvement in $1 million in bribes paid to Nigerian government officials, and they consented to final judgments with significant monetary penalties.

The Federal Sentencing Guidelines and the alternative fine provisions of 18 U.S.C. § 3571(d) have contributed to the increased severity of penalties. Foreign entities have also increasingly been the subject of enforcement actions, as in the *Baker Hughes, Syncor, ABB,* and *DPC* cases. In ABB, enforcement officials imposed substantial penalties, including disgorgement, even though ABB was acknowledged to have cooperated fully with the government investigation, and its subsidiaries were cited for their "extraordinary disclosure and coordination of the joint investigation."

Heightened enforcement activity may also be attributable to several factors, including the DOJ's expansive interpretation of the FCPA (including its jurisdictional requirements, as shown in the *Baker Hughes* cases) and prosecutions by regional U.S. Attorneys (as in the *Lockheed* and *Saybolt* cases and the Giffen indictment) in addition to, or conjunction with, the DOJ. This aggressive enforcement climate likely will remain a consideration in the conduct of international business transactions for the foreseeable future.

Some issues to consider:

1. In the circumstances what are the factors that enforcement officials use, or should use, in exercising prosecutorial discretion?
2. What are the DOJ's current enforcement priorities?
3. How can companies gauge the extent to which DOJ will consider voluntary disclosure a mitigating factor in deciding whether to prosecute a violation or what penalties to seek?
4. When do agencies other than DOJ and the SEC become involved in investigating alleged FCPA violations?
5. o what extent are FCPA investigations centered in Washington, as opposed to local offices of a U.S. Attorney?
6. What are effective means of terminating an ongoing investigation when elements of the statute arguably have not been met?

I. Independent Compliance Monitors

In numerous recent enforcement actions, the sanctions or settlement terms have included a requirement that the company involved retain an independent compliance expert or monitor for a period of 90 days to three years. Such monitors have been appointed in *DPC, Monsanto, Titan, Schering Plough, Micrus, GE-Invision* and other cases. Enforcement officials have signaled that such compliance monitors may become routine elements of future dispositions.

The practice of appointing monitors, still in its infancy, raises several questions. For example:

1. To what extent are "independent" compliance consultants or monitors truly independent, as contrasted with either a purely private advisor or a deputized enforcement official?
2. Can, or should, monitors serve as neutral intermediaries between a company and the government with respect to the obligations the company has assumed?
3. Does a broad mandatory waiver requirement of attorney-client privilege with the monitor on the part of the company impede a full and uninhibited information flow to the monitor, given the company's concerns on the waiver's implications regarding third-party litigation, and thereby limit the benefit that the monitor can provide to the company?

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

4. While the cost of the monitor is borne by the company, who should manage issues of cost? For example, can a company question the scope of a monitor's document requests or monitoring plans without the risk of being seen as uncooperative?

IV. High-Risk Transactions under the FCPA

FCPA issues arise in many different geographic and substantive contexts. Several of these contexts are considered below.

A. Countries with Significant State Ownership or Control of Enterprises

With new opportunities in communist, transitional, and developing economies have come new FCPA concerns. U.S. businesses are increasingly in the position of dealing with foreign governments, lines between official and non-official status can be blurred, and local laws can change frequently, making compliance difficult. In addition, the shift to a free market is proving socially and economically painful for many transitional economies, raising concerns about the prevalence of corruption. Privatization of state-owned enterprises can raise FCPA issues.

Some issues to consider:

1. The DOJ lists as a "red flag" the fact that the country in which a U.S. company is doing business has traditionally had a bribery problem. Which transitional and developing economies, if any, fall into this category? *See* Transparency International Corruption Perceptions Index 2005 (most corrupt: Bangladesh and Chad; runner-ups: Haiti, Myanmar, Turkmenistan).

2. What level of government ownership or involvement in an enterprise will render its officers "foreign officials" for purposes of the FCPA?

3. In an opinion release, the DOJ considered a director of a state-owned enterprise to be a "foreign official," despite an opinion from a foreign attorney that the director would not be considered a government official under the law of the country in question. The DOJ stated that the foreign attorney's opinion was not dispositive. See Opinion Procedure Release No. 94-1. What is the relevance of local law in determining whether someone is a "foreign official"? What is the significance of an opinion from foreign counsel on this issue?

4. In transitional economies, it can be difficult to determine a market price for certain goods and services. As a result, reliable market-value benchmarks may be difficult to establish. If a company overpays an agent, it runs a risk of having the agent use the excess payments for bribes. If a company overpays a government vendor of goods or services, it risks creating the appearance that the excess amounts are illicit payments.

5. In China, are the officers and employees of most companies "foreign officials" within the meaning of the FCPA? What safeguards are effective in that context?

B. Mergers and Acquisitions

As a result of recent enforcement matters — including a non-FCPA matter where acquirers were held liable for pre-acquisition violations of export controls laws by the acquired entities — companies have expanded M&A due diligence to include reviews of the target company's compliance with the FCPA and other international trade regulatory regimes. To avoid the risk of successor liability, some acquirers have insisted that target companies disclose and resolve FCPA violations uncovered during due diligence with the DOJ and SEC. *See e.g., Syncor, ABB, Titan,* and *Invision*. In such cases, the planned M&A transactions have been put on hold pending investigation of suspected violations and resolution of the issues with the government. As a consequence, one planned acquisition (Titan-Lockheed) was abandoned, at least in part, because of an inability to resolve the issues in a timely fashion.

Among the recent M&A disclosures, the *ABB* matter has attracted particular attention because of the extent of the companies' due diligence review and cooperation with the government. Public documents state that the companies' investigation involved 115 lawyers and 100 forensic accountants conducting reviews in 21 countries. All documents and witness interview memoranda were provided to the DOJ and SEC as they were produced.

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

Despite this unprecedented review and cooperation, ABB paid $16.4 million in fines and disgorgement of allegedly ill-gotten earnings, and the acquired entities were subjected to a strict, government-imposed set of compliance obligations.

The recent series of M&A cases has raised several questions. For example:

1. How much due diligence should a company conduct in order to determine whether the other company complies, and has complied, with FCPA norms?

2. Does "best practices" in an M&A context now include not only pre-acquisition compliance due diligence, but also pre-acquisition voluntary disclosure of potential violations so that they may be resolved before the acquisition is consummated?

3. What is the vicarious liability of the acquiring company after the transaction is complete but before compliance controls are fully implemented?

4. How can safeguards be designed and implemented to respond to red flags that arise in due diligence?

C. Joint Ventures

A U.S. company that enters into a joint venture confronts issues not entirely dissimilar from those presented by a merger with or acquisition of another company. The risk is one of potential liability for the future acts of your joint venture partner.

A U.S. company that has or acquires a majority or controlling interest in a joint venture may be held accountable for acts that a minority joint venture takes in connection with the venture. The premise is that the majority partner can and should control the flow of funds and the actions of minority partners. This then presents a special variant of the vicarious liability risk that the statute presents for any third parties.

If a company subject to the act is a minority partner, the risk of vicarious liability is less, for the obvious reason that a minority partner does not control the venture. If, however, either the venture itself or the majority partner takes actions inconsistent with the FCPA, knowledge of that action presents special issues for the U.S. company and individual U.S. citizens involved in the venture.

Yet another dimension is added when a U.S. company is required under local law to take on an indigenous partner. In some industries and situations, the choice of the partner may be dictated by the host government, hence the term "forced marriages." In those situations, the issues of control and culture may be intensified.

Issues to consider:

1. Should one do due diligence on a local company with which the U.S. company is required to partner under local law? What should the U.S. company do in that situation if due diligence is unfavorable?

2. How best does a U.S. majority joint venture partner ensure that no JV partner is taking actions that could create FCPA liability for the venture or its majority partner? Is contract language enough? Is there a training obligation?

3. What responsibilities does a U.S. minority joint venture partner have to persuade the venture to avoid corrupt payments to officials?

4. Can a U.S. entity be liable for improper payments made by a venture before the U.S. entity became a partner?

5. What happens when a joint venture is established in a country where the identity of an individual as a foreign official is not readily apparent?

6. If the laws of a foreign country require that certain activities be undertaken with a government partner, to what extent will the "local law" defense protect a U.S. company that engages in a business deal with a government entity? Does proposing a joint venture with a foreign government agency raise an FCPA problem if the law of the country does not require government participation?

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

D. Doing Business with Government Officials or Family Members

The FCPA does not categorically prohibit doing business with government officials. At the same time, a business partnership with a government official can be a means for channeling funds to an official. Using such a mechanism to funnel funds unrelated to or disproportionate to normal business profits would presumably create FCPA issues. But normal, arm's length business relationships with officials may not violate the FCPA.

Doing business with family members of government officials raises multiple issues. Two of the most important are whether the relationship with the relative of the official is such that a payment to the relative will be viewed as tantamount to a payment directly to the official and, if not, whether the family relationship increases the risk of a pass-through payment by the relative to the official.

Issues to consider:

1. If a government official's responsibilities are unrelated to a company's business, is that a complete defense to having a business relationship with that official? Might an official use his or her position, even in an unrelated area, to improperly influence a government counterpart whose responsibilities relate directly to the company's business?

2. If you have a partner who is a government official, what safeguards, or combination of safeguards, can best protect the company from the risk of FCPA liability?

3. If a government official is a business partner, but assumes the normal business risks of the venture and receives no more than her pro rata share of the business's profits, is that a defense to an improper payment? Can giving a government official an opportunity to earn a profit through a legitimate business venture be an FCPA violation? Does it matter if the business is a "sure thing"?

4. If a government official-partner is excused from the initial capital contributions required of other partners, but reimburses those amounts out of the profits of the business, if any, has the official received an improper payment or "something of value"?

5. If a partner is a relative of a government official, how distant a relative must the partner be to avoid having money flowing to him viewed as money flowing directly to the related official?

6. When does an official within an entity undergoing privatization cease to be a foreign official for purposes of the FCPA? What concerns, if any, are raised by the official's former government status?

7. If an investment involves the acquisition or purchase of assets or interests in which individual government officials have an interest, do prices charged or paid raise questions of fair market value or valuation of illiquid assets?

E. Foreign Procurement

Because of the values frequently involved, foreign procurement can be susceptible to corrupt influences and may generate FCPA issues. By definition, a company that is making sales to a foreign government will be in contact with foreign officials. In addition, foreign procurement transactions are often heavily regulated by the foreign country, raising special concerns about compliance with local laws. For example, some countries prohibit the involvement of consultants or agents in military procurement. Employing an agent in a military sale in such countries could, in itself, arguably form the basis of an FCPA violation.

Some issues to consider:

1. To what extent does the DOJ place a priority on cases involving foreign sales that are financed by the U.S. government, or in which the U.S. government is otherwise involved?

2. The 1994 Uruguay Round implementing legislation requires that the President report to Congress on countries that fail to adequately address corrupt practices in connection with procurement. Despite the lack of progress in this area on the multilateral negotiation level (for example, at the Doha Minis-

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

terial in November 2001), could the USTR treat failure to prevent bribery as a basis for unilateral trade sanctions under Section 301?

3. Bribes can constitute one dimension of systematic attempts to compromise procurement. State-sponsored espionage in support of a country's companies is a separate but related subject. In 1996, Congress enacted the Economic Espionage Act, which criminalizes state-sponsored economic espionage and the private theft of trade secrets.

4. Is it possible to be prosecuted under U.S. law and World Bank sanctions (*See* Section V. F)?

V. Internationalized Standards

The FCPA has long been intertwined with the issue of multilateral controls on corruption. In hearings on the FCPA legislation in 1977, the sponsor of the measure, Senator Proxmire, maintained that passing the FCPA would give the United States credibility to argue for multilateral controls on corruption.

For years, a recurring complaint of U.S. companies was that the unilateral nature of the FCPA placed U.S. companies at a competitive disadvantage vis-à vis foreign competitors who were not bound by similar restrictions. Multilateral standards have the obvious appeal of equalizing the terms of competition among competitors from countries with differing legal standards and business traditions. Only recently, however, did multilateral initiatives begin to bear fruit and foreshadow a day of uniform international standards.

A. OAS Convention

In a remarkable breakthrough, the Organization of American States ("OAS") successfully negotiated the first international agreement to prohibit foreign bribery. On March 29, 1996, OAS members initialed the Inter-American Convention against Corruption ("IACAC"). The IACAC entered into force on March 6, 1997. The United States deposited its instrument of ratification with the OAS on September 29, 2000. The IACAC entered into force as to the United States on October 29, 2000.

The IACAC requires each signatory country to enact FCPA-type laws criminalizing the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasizing heightened government ethics, improved financial disclosures, and transparent bookkeeping, the Convention facilitates international cooperation in the gathering of evidence.

Ratification of the Convention by the United States required no changes to U.S. law. In connection with U.S. ratification of the OECD Antibribery Convention in 1998, the FCPA was amended in several respects so no further amendments to the FCPA were deemed necessary. The most controversial provision of the OAS Convention for the United States was its illicit enrichment provision; the U.S. ultimately decided to exercise an "opt out" right built into the Convention with respect to this provision because of the constitutional conflict that would arise from implementing its presumption of guilt. This "opt out" is reflected in an understanding that emphasizes that the U.S. uses other means to combat the illicit enrichment of public officials.

In May of 2001, seventeen states parties and three countries that were not then parties to the Convention agreed to the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption. The Committee of Experts held its first meeting on the follow-up mechanism in January of 2002, and it has held several additional meetings since. The first round of the follow-up mechanism focuses on the implementation of measures relating to provisions regarding the standard of conduct for the fulfillment of public functions; systems for registering the income, assets, and liabilities of public officials; participation by civil society; and assistance and cooperation.

Brazil, for some years the only major economic power not a member of the Convention, deposited its instrument of ratification of the OAS Convention on July 24, 2002. A number of other countries also ratified the Convention in 2002 through 2006, including Antigua & Barbuda, Belize, Dominica, Grenada, Haiti, St. Kitts & Nevis, St. Lucia, and Suriname. The OAS Convention now has thirty-three member states.

B. OECD Convention

While bribery issues have been addressed in a number of international fora, the Organization for Economic

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

Cooperation and Development ("OECD") has long been a focal point for efforts to develop multilateral controls. In the 1988 Omnibus Trade and Competitiveness Act, Congress directed the President to attempt to negotiate an agreement on bribery under the auspices of the OECD. In 1997, these efforts finally came to fruition when twenty-eight OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Convention"). The United States ratified the OECD Convention on December 8, 1998. The OECD Convention was ratified by the requisite number of parties and entered into force on February 15, 1999.

With regard to the scope of the Convention's substantive provisions, its text is broader than, or as broad as, the FCPA in some respects, yet narrower in others. For example, the Convention adopts a wider definition of bribery, which prohibits bribes to foreign officials not only to "obtain or retain business" but also to secure any "other improper advantage." "Foreign public official" is defined in a similarly broad manner to include officials in all branches of government as well as state-run enterprises (parastatals), which the Convention's commentary suggests may encompass even private corporations that enjoy competitive advantages due to preferential government treatment. Significantly, the category of bribe-payers under the Convention is even broader than the FCPA in that it covers "any person" within the state's territory, as opposed to merely issuers and domestic concerns. Finally, unlike the FCPA, the text of the Convention provides no affirmative defense or exception for so-called "grease" payments; however, the Convention's commentary suggests that conformity with local law would be considered a defense and that small "facilitating" payments are not prohibited, both of which are consistent with the FCPA.

Conversely, the Convention is narrower than the FCPA in several respects. Most significant among these shortcomings is the Convention's failure to cover bribes to political parties and party officials, despite substantial efforts of the U.S. delegation to include language prohibiting illicit payments to these organizations and individuals. Another noteworthy deficiency is the Convention's failure to eliminate the tax-deductibility of foreign bribes, notwithstanding the OECD's prior recommendation that states cease to recognize such deductions. Nonetheless, upon implementation, the Convention's criminalization of transnational bribery likely will necessitate a concomitant elimination of the deductibility of such payments. In addition, the OECD is continuing to encourage eliminating the deductibility of foreign bribes. To this end, the OECD Committee on Fiscal Affairs actively monitors member states's tax treatment of illicit payments to foreign officials.

With regard to enforcement, states parties to the Convention are bound to provide mutual legal assistance to one another in the investigation and prosecution of offenses within the scope of the Convention. Similarly, such offenses are made extraditable. Penalties for transnational bribery are to be commensurate with those for domestic bribery, and in the case of states that do not recognize corporate criminal liability (*e.g.*, Japan), the Convention requires such states to enact "proportionate and dissuasive non-criminal sanctions." An OECD Working Group monitors state parties' enforcement efforts through a regular reporting and comment process.

The Convention is not self-executing and, therefore, depends upon individual states to enact domestic implementing legislation that proscribes and punishes bribery in international business transactions in a manner consistent with the terms of the Convention. To this end, as noted above, the Convention establishes a working group "to monitor and promote the full implementation of [the] Convention." Moreover, the Convention creates a floor rather than a ceiling in terms of domestic law, such that states parties may adopt legislation stricter than the international minimum standard prescribed by the Convention.

The FCPA already is generally consistent with the terms of the Convention; however, it was necessary to amend the Act in several areas to ensure that it fully conforms with the Convention and mirrors the domestic implementing legislation expected from the other signatories.

Other signatories to the Convention have also undertaken to amend their penal laws to conform to the terms of the Convention. In general, the signatory states intended that their respective legislatures approve implementing legislation before the end of 1998. A number of

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

the signatories, however, were unable to meet that ambitious goal. A number of countries have enacted national legislation implementing the OECD Convention in the past three years, including Turkey in 2003 and Brazil, Chile, and the United Kingdom in 2002. Today, there are a total of 36 parties to the OECD Convention.

C. Council of Europe Convention

Following a series of measures taken since 1996, on November 4, 1998, the 40 Member States of the Council of Europe and eight observer states, including the United States, approved the text of a new multilateral convention — the Criminal Law Convention on Corruption ("COE Convention"). This ambitious new treaty was opened for signature on January 27, 1999, and on that day 21 states signed the convention. The COE Convention entered into force on July 1, 2002. The COE Convention is noteworthy in its coverage of both official and private bribery. The United States signed the COE Convention on October 10, 2000, but has yet to ratify it.

D. United Nations International Convention against Corruption

One hundred and forty countries have signed the United Nations International Convention Against Corruption, which was adopted by the United Nations General Assembly on October 31, 2003. So far, sixty countries are party to the Convention, and it entered into force on December 14, 2005. The Ad Hoc Committee charged with the negotiation of the Convention held its first meeting and considered an initial draft of the Convention in January of 2002. The final negotiating session took place in late September and early October 2003, and work on the draft was completed on October 1, 2003.

The UN Convention addresses seven principal topics: mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards for private companies; mandatory and permissive criminalization obligations, including obligations with respect to public and private sector bribery, trading in influence, and illicit enrichment; private rights of action for the victims of corrupt practices; anti-money laundering measures; cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and asset recovery.

Although U.S. law already includes most of the provisions that the draft UN Convention makes mandatory, the Convention could affect how laws are interpreted in U.S. courts and lead to new legislation and judicial action around the world. The private right of action provisions may lead to an increase in corruption-based private litigation worldwide.

E. African Union Convention on Preventing and Combating Corruption

The African Union Convention was adopted on July 11, 2003. Almost forty countries have signed the Convention, and eleven have ratified it as of August 2006. The Convention will enter into force after fifteen countries have ratified it.

The African Union Convention covers a wide range of offences including bribery (domestic or foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The new Convention guarantees access to information and the participation of civil society and the media in monitoring it. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

F. World Bank Voluntary Disclosure Program

In 2006, the World Bank (the "Bank") established a Voluntary Disclosure Program ("VDP") which allows firms, other entities, and individuals who have engaged in misconduct, such a fraud, corruption, collusion, or coercion, to avoid public debarment by disclosing all past misconduct, adopting a compliance program, retaining a compliance monitor, and ceasing all corrupt practices. The VDP, which has been two years in development under a pilot program, will be administered by the Bank's Department of Institutional Integrity.

All firms, other entities, and individuals not under investigation by the Bank are eligible to participate in the program, so long as they are currently, or have been, a party to or involved with a contract, including the procurement and selection process for a contract, related

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

to a World Bank project. Participation in the program allows parties to avoid penalties under the Bank's regular sanctions procedures in a way that is strictly confidential.

The VDP program is similar in several respects to the SEC's and DOJ's approach to enforcing the FPCA, particularly by encouraging voluntary disclosure of wrongdoing and utilizing compliance monitors in the resolution of violations. An important contrast between the Bank's VDP and the disclosure policies of the SEC and DOJ is that the VDP offers clear and well-defined incentives to disclose violations, whereas a company considering an FCPA disclosure to a U.S. agency is less certain of the benefits that will inure to it as a result of the disclosure.

G. Invoking International Standards

Private parties may invoke these new international standards and the domestic legislation implementing their obligations in international business transactions. First, these standards may be cited to foreign partners as an objective basis to remind them that illicit payments are impermissible under U.S., foreign, and international law. Second, because some foreign persons are reluctant to agree to abide by the FCPA or submit themselves to U.S. jurisdiction, a provision warranting compliance with an international standard may be a more palatable mechanism to address antibribery compliance in documenting transactions. Third, where a company has reason to believe that a competitor from a state party to one (or more) of the antibribery conventions is not adhering to those proscriptions implemented under local law, the aggrieved company now has some means of redress by reporting the offending party to relevant enforcement authorities. Of course, implementation and enforcement by states parties are necessary predicates to meaningful whistle blowing.

APPENDIX

RECENT FCPA DEVELOPMENTS (August 2006)

There have been several recent FCPA enforcement actions, as well as other developments, that are noteworthy additions to FCPA jurisprudence. Aggressive enforcement of the FCPA has continued, driven in part by the general scrutiny of corporate misdeeds. In addition, the Sarbanes-Oxley legislation has led to a greater enforcement focus on companies' internal controls and disclosure obligations. The expectations for corporate compliance efforts have continued to rise, most notably with the revisions to the federal Sentencing Guidelines. Recent enforcement activity and other developments also show an increasing level of international cooperation in anticorruption efforts.

VI. Recent Cases and Opinion Releases

2006

A. *SEC v. John Samson, John G. A. Munro, Ian N. Campbell, and John H. Whelan*

On July 5, 2006, the SEC charged four former employees of subsidiaries of ABB Ltd., John Samson (a former regional sales manager for West Africa), John G.A. Munro (a former senior vice-president of operations), Ian N. Campbell (a former vice-president of finance), and John H. Whelan (a former vice-president of sales), with violating the antibribery provisions and books, records, and internal accounting control provisions of the FCPA. The SEC alleges that these employees offered, approved, and/or paid bribes to Nigerian government officials in an effort to secure a $180 million contract to provide equipment for an oil drilling project in Nigeria's offshore Bonga Oil Field. Without admitting or denying the allegations, Samson, Munro, Campbell, and Whelan consented to final judgments that (1) permanently enjoin each of them from future violations of these provisions; (2) order each to pay a civil monetary penalty ($50,000 as to Samson, and $40,000 each as to Munro, Campbell, and Whelan); and (3) order Samson to pay $64,675 in disgorgement and prejudgment interest.

According to allegations in the complaint, from 1999 to 2001, ABB paid about $1 million in bribes to officials of National Petroleum Investment Management Services ("NAPIMS"), the Nigerian government agency responsible for overseeing oil exploration and production. The SEC claims that a bulk of these illicit payments can be traced to a deal negotiated by Samson to pay six NAPIMS officials a total of $800,000 in bribes. Samson allegedly informed Munro and Campbell of these promised payments, and Munro, at the direction of a now-deceased senior officer, told Campbell and Samson

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

to pay the NAPIMS officials through a local consultant. Campbell allegedly funneled the $800,000 to the consultant using false invoices for "consulting work." The SEC also alleges that Samson received $50,000 in kickbacks from one the NAPIMS officials who received illicit payments, and that he arranged for Whelan to provide $176,000 in cash and other gifts (*e.g.*, lodging and meals) to NAPIMS officials visiting the United States from 1999 to 2001. In return for these illicit payments, ABB allegedly received confidential competitor bid information and favorable consideration of their bid on the Bonga contract, which Nigeria accepted in 2001.

These settlements follow the resolution of a prior enforcement action against ABB and two of its subsidiaries in connection with these and other illicit payments (*SEC v. ABB Ltd.* and *United States. v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK, Ltd.*). In that matter, without admitting or denying the allegations in the SEC's allegations, ABB consented to entry of a final judgment that provided for permanent injunctive relief, ordered ABB to pay $5.9 million in disgorgement and prejudgment interest, and ordered ABB to pay a $10.5 million civil penalty. ABB also agreed to retain an independent monitor to review the company's FCPA compliance policies and procedures. Two ABB subsidiaries each agreed to plead guilty to a two-count felony information charging violation of the antibribery provision of the FCPA, and were each assessed a $5.25 million criminal fine. The SEC's $10.5 million civil fine against the parent was deemed satisfied by the subsidiaries' payment of the criminal fines.

B. *United States v. Steven Lynwood Head*

On June 23, 2006, Steven Head, the former CEO of Titan Africa, pled guilty to one count of falsifying the books and records of an issuer under the FCPA. In January 2001, Head, in his position at Titan, allegedly authorized the payment of $2 million in "advanced social fees" to the President of Benin's reelection campaign in return for a higher management fee on a wireless telephone contract in Benin. The wireless contract had called for Titan to pay certain "social fees" to develop "sectors" in Benin, but those fees were not yet due and the plea agreement states that Head was aware that these payments would not be used for the purposes identified by the contract. The agreement states that Head then submitted an invoice to Titan for these payments that falsely stated that they were for "consulting services."

Head's guilty plea follows the resolution of SEC and DOJ FCPA actions against Titan in 2005 that obligated Titan to pay a disgorgement of $15.5 million along with a $13 million criminal penalty for a total fine of $28.5 million to satisfy the civil and criminal actions (see *Titan* overview below). The DOJ accepted a plea on just one count against Head stemming from this incident and recommended a lower sentence in return for Head's "substantial" assistance in the "investigation and prosecution of others" (Head has not yet been sentenced). This suggests that there are more individual prosecutions of Titan employees yet to come.

C. *In the Matter of Oil States International*

On April 27, 2006, the SEC accepted a settlement offer from Oil States International, a company that provides specialty services to oil and gas drilling and production companies in the United States and around the world, including South America. The SEC had charged Oil States with keeping improper records and failing to implement adequate internal controls to ensure compliance with the FCPA, both violations of the books and records and internal controls provisions of the FCPA. Without admitting or denying the SEC's allegations, Oil States consented to entry of a final judgment that ordered Oil States to cease and desist from violating the FCPA, without any additional penalties. In accepting the settlement, the SEC considered Oil States prompt remedial acts and its cooperation.

The SEC's allegations focused on improper payments that Oil States made through its wholly owned subsidiary, Hydraulic Well Control, LLC ("HWC"). HWC had a branch office in eastern Venezuela that contributed approximately 1% of Oil States' consolidated revenues from 2003 to 2004. In 2000, HWC hired a Venezuelan consultant to interface with employees of Petróleos de Venezuela, S.A. ("PDVSA"), an energy company owned by the government of Venezuela. Specifically, the consultant acted on behalf of HWC to follow up on daily operations in Venezuela, translate information, write up tickets, and submit HWC invoices to PDVSA for payment. The consultant did not solicit business on behalf of HWC, only worked on operational matters, and submit-

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

ted invoices for his services directly to HWC. While HWC had certain FCPA policies in place, it did not provide any formal FCPA training or education to the consultant and did not address compliance with U.S. law in their contract.

In December 2003, the consultant was approached by three PDVSA employees about a "kickback" scheme that involved inflating the consultant's invoices to HWC and kicking back the excess to the PDVSA employees. At the same time, HWC would improperly bill PDVSA for "lost rig time" on jobs (this extra billing would help even the profit margin). The consultant consented because the PDVSA employees had the power to stop or delay HWC's work. The consultant got three HWC Venezuela employees to facilitate the kickbacks and improper billing while the consultant inflated the invoices to HWC for his services and altered other documents to reflect the improper rig time billable to PDVSA. The HWC employees then incorporated these documents into their books and records.

From December 2003 to December 2004, the consultant inflated invoices and made about $348,350 in improper payments to employees of PDVSA. Due to the difficulties in assessing lost rig time and the falsified documentation prepared by the consultant and approved by the HWC and PDVSA employees, it is not possible to quantify the total amount of "lost rig time" paid for by PDVSA.

In August 2004, HWC's vice president of Finance in the U.S. noticed increasing contract labor (including consulting) expenses at HWC Venezuela. The controller at HWC Venezuela told the vice president that the expenses were "gel-related," the vice president made no further inquiries, and the scheme continued.

In December 2004, during a routine review of HWC's results, senior management in the U.S. discovered an unexplained narrowing of their Venezuela subsidiary's profit margins and made an immediate inquiry that uncovered the kickback scheme. HWC reported the matter to Oil States' management, which then reported it to the company's audit committee. An internal investigation uncovered no evidence that HWC or Oil States employees in the U.S. sanctioned the improper payments. Oil States terminated its relationship with the consultant, disciplined the employees responsible for the misconduct (dismissing two of them), corrected its books and records, strengthened its regulatory compliance program, and reimbursed PDVSA for the improper charges. It also voluntarily reported the improper payments to the SEC and the DOJ and cooperated fully with the investigation conducted by the Commission staff.

D. *SEC v. Tyco International Ltd.*

On April 17, 2006, the SEC announced a settlement with Tyco International Ltd. ("Tyco") that resolved FCPA charges and accounting fraud violations arising from activities undertaken during Dennis Kozlowski's tenure as CEO of the company from 1996 to 2002. Pursuant to the settlement, Tyco, without admitting or denying allegations in the SEC complaint, consented to the entry of a final judgment permanently enjoining it from violating certain provisions of the securities laws, including the FCPA, and agreed to pay a $50 million civil penalty and 1 dollar disgorgement.

With respect to the non-FCPA charges, the SEC complaint alleged that during the Kozlowski era, Tyco utilized improper accounting practices and overstated its financial reports by at least one billion dollars. The FCPA antibribery and record-keeping charges related to Tyco affiliates' activities in Brazil and South Korea. According to the SEC complaint, after acquiring a Brazilian engineering company — which Tyco renamed Earth Tech Brasil Ltda. ("Earth Tech") — in 1998, employees in Brazil, with the knowledge and participation of Earth Tech executives in its corporate office in California, paid money and provided entertainment to various Brazilian officials for the purpose of obtaining business relating to the construction and operation of municipal waste and wastewater treatment systems. The SEC noted that approximately 60% of Earth Tech's total contracts in Brazil involved payments to government officials. Earth Tech also allegedly retained lobbyists to make payments to officials. Earth Tech reportedly disguised the payments using false invoices from companies owned by Earth Tech employees and inflated invoices submitted by the lobbyists.

With respect to the activities of Tyco's affiliate in South Korea, Dong Bang Industrial Co., Ltd. ("Dong Bang"), acquired by Tyco in 1999, reportedly made cash payments and provided entertainment to various South

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

Korean officials to obtain contracts on government-controlled projects. The complaint referred to Dong Bang's former President spending $32,000 on entertaining officials in 2001. Allegedly, the payments were facilitated by creating fictitious employees on Dong Bang's books. The complaint stated that payroll disbursements to the fictitious employees were diverted to Dong Bang executives to make cash payments and to entertain South Korean officials.

As with similar enforcement actions, including *ABB, Titan, Syncor,* and *GE-Invision,* the Tyco matter highlights the potential FCPA compliance risks related to mergers and acquisitions. With respect to the acquisition of Earth Tech and Dong Bang, the SEC complaint noted that Tyco acquired the companies "notwithstanding that due diligence for the acquisition[s] revealed that illicit payments to government officials were common" in Brazil and South Korea. According to the complaint, employees at Earth Tech and Dong Bang did not receive adequate post-merger instruction regarding compliance with the FCPA. In addition, the SEC alleged that Tyco did not have a "uniform, company-wide FCPA compliance program in place or a system of internal controls sufficient to detect and prevent FCPA misconduct at its globally dispersed business unit."

In the press release announcing the settlement, the SEC noted that the penalty amount was reviewed and approved by the Commission in light of the considerations set forth in the "Statement of the Securities and Exchange Commission Concerning Financial Penalties." The Statement, issued on January 4, 2006, by a unanimous Commission, highlights not only cooperation and remediation as factors for assessing whether to fine companies, but also focuses on the possible effects of large fines on shareholders. As evident from the press release, the high fine assessed against Tyco likely stems from the billion dollar accounting fraud, with the FCPA violations only a contributing factor. Significantly, the settlement did not require Tyco to retain an independent compliance monitor to review its FCPA program and make recommendations.

E. *United States v. Richard John Novak*

On March 21, 2006, Richard Novak pleaded guilty to conspiracy and violating the FCPA for payments to Liberian diplomats. Mr. Novak worked for internet businesses that sold diplomas from fictitious universities. Mr. Novak paid employees of the Liberian Embassy in Washington, D.C.; the Liberian Embassy in Accra, Ghana; and the Ministry of Education for the Republic of Liberia in Monrovia, Liberia, for certificates of accreditation from Liberia's Board of Education for the fictitious universities created by Mr. Novak and his employers. Mr. Novak has yet to be sentenced.

F. *United States v. Faheem Mousa Salam*

On March 24, 2006, the DOJ announced that Faheem Mousa Salam, an employee of a government contractor working in Iraq, had been arrested in the United States and charged with violating the FCPA. On August 4, 2006, he pleaded guilty. According to the criminal complaint, Mr. Salam offered a senior official with the Iraqi Police a bribe to induce him to purchase a map printer and 1,000 armored vests.

2005

G. *United States v. Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton*

On October 6, 2005, Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton were arrested on a twenty-seven-count indictment stemming from alleged bribing of senior officials from the State Oil Company of the Azerbaijan Republic ("SOCAR"). The individuals are charged both with conspiracy to violate the FCPA, the Travel Act, and various money laundering laws, as well as substantive violations of those laws. Bourke and Pinkerton are also charged with making false statements to the FBI. The indictment seeks, among other things, $174,000,000 in fines and forfeiture.

In the mid-1990s, Kozeny, a businessman, allegedly devised a plan to acquire SOCAR by purchasing a controlling stake in SOCAR at state auctions with state-distributed vouchers that enabled parties to bid for shares in state enterprises. Azeri citizens received these tradeable vouchers for free while foreigners wanting to bid were required to both obtain vouchers (by trading for them) and purchase government-issued "options" to accompany the vouchers. Kozeny, using two offshore companies he created (Oily Rock Ltd. and Minaret Ltd.) had his associate Thomas Farrell begin purchasing both vouchers and options with U.S. currency they flew into Azerbaijan. Alerted to what Kozeny was doing, the Azeri

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

government stepped in and threatened to cancel the vouchers Kozeny had already acquired. At this point it was unclear whether Azerbaijan would privatize SOCAR and, if it did, whether it would allow Kozeny and his group to acquire a controlling stake in the privatized company.

In August 1997, Kozeny and Farrell purportedly agreed to transfer two-thirds of the vouchers and "options" that Oily Rock had acquired to several Azeri government officials and to share with these officials profits arising from the privatization of SOCAR. Kozeny and Farrell also issued one or more of the officials $300 million in Oily Rock stock shares and agreed to purchase future vouchers from individuals designated by a certain state privatization official. In return, the Azeri officials agreed to allow Kozeny and his investment group to continue to purchase sufficient vouchers and options to gain a controlling interest in SOCAR upon its privatization. (These officials included a senior official of the government of Azerbaijan, a senior official of SOCAR, and two senior officials of the Azerbaijan's State Property Committee.) Apparently to promote this agreement, Kozeny and his associates also allegedly provided Azeri government officials with cash payments (over $11 million), luxurious gifts (over $600,000 worth), shopping sprees, and medical treatments.

To finance the project, Kozeny and others recruited investors, including Frederic Bourke, Jr., a friend and businessman; David Pinkerton, managing director of AIG Global Investment Corporation and in charge of AIG's private equity group; and Clayton Lewis, the principal behind Omega Advisors and Pharos Capital Management. Bourke invested approximately $8,000,000 through Blueport International Ltd., Pinkerton invested approximately $15,000,000 on behalf of American International Group, and Lewis invested approximately $151,000,000 on behalf of Omega Advisors, Inc. and its affiliated investment fund, Pharos Capital Management. L.P. Bourke, Pinkerton, and Lewis allegedly made these investments after learning that Kozeny had entered into this corrupt relationship with the Azeri officials and that these officials would benefit financially from the arrangement. This made their investments and the subsequent transfer of the money to Azerbaijan a form of money laundering as well as an FCPA violation. In the end, however, Azerbaijan never privatized SOCAR, and, according to statements issued by Azeri officials after the indictment became public, the Azeri government never intended to privatize it.

Thomas Farrell and Clayton Lewis already pled guilty to related FCPA charges and may be called as witnesses against Kozeny, Bourke, and Pinkerton. Another associate, Hans Bodmer, pled guilty to a money-laundering conspiracy charge. Bodmer, a Swiss lawyer who advised Kozeny, Omega, and several other Kozeny investors, successfully fought the FCPA charges against him. He later pled guilty to a money laundering charge.

Kozeny is currently fighting extradition by the U.S. in the Bahamas. A judge has said she will order extradition unless Kozeny can prove the evidence "worthless." Motions on the extradition have been argued, and the judge will deliver her verdict at a hearing set for September 2006. Kozeny is currently not a U.S. national and is charged in the indictment as an "agent of Oily Rock's and Minaret's co-investors, most of whom were American citizens and 'domestic concerns.' " He has argued that the Inter-American Anti-Corruption Convention does not provide grounds for his extradition to the United States. If he is ultimately extradited, he will likely argue, as Bodmer was successful in doing, that his alleged acts took place before the FCPA was amended in 1998.

H. Plea Agreement for DPC (Tianjin) Co. Ltd.

On June 20, 2005, the Chinese subsidiary of Diagnostic Products Corporation ("DPC"), an LA-based manufacturer of medical diagnostic test systems and test kits, pleaded guilty to the criminal charge of bribery and paid a $2 million fine, based on a DOJ investigation into violations of the antibribery provision of the FCPA. The Chinese subsidiary was also required to hire a compliance monitor for a period of at least three years, with reports issued semiannually. On May 20, 2005, the SEC entered a settlement agreement with DPC, the parent company, requiring DPC to cease and desist the activities in violation of the antibribery, books and records, and internal controls provisions of the FCPA, to disgorge approximately $2 million and interest of $788,000, and to engage a compliance consultant.

In 1991, DPC established a joint venture, DPC Tianjin,

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

in China with the local Chinese government. From 1991 through 2002, DPC Tianjin made "improper commission payments" (generally 3-5%, but reaching as high as 20%) of approximately $1.6 million to doctors and laboratory employees who made purchasing decisions at state-owned hospitals. The payments were made in cash by wire or by mail and were approved, administered, and improperly recorded as sales expenses by management of the Chinese subsidiary. The payments were recorded in DPC Tianjin's books and records as "selling expenses" and were sent by email to the parent company as part of the subsidiary's financial statements. The subsidiary's management knew of, administered, and approved the payments and recorded them improperly as legitimate sales expenses.

In 2002, DPC Tianjin's auditors noticed these payments. DPC Tianjin's management then informed DPC's U.S. management of the payments in a monthly report. DPC ordered these payments to stop, revised its code of ethics and its compliance procedures, and established an FCPA compliance program.

I. *United States v. Robert Thomson and James Reilly*

On May 20, 2005, Robert Thomson, the former president and chief operations officer of HealthSouth Corporation's In-Patient Division, and James Reilly, former HealthSouth Group vice president of legal services, were found not guilty of FCPA violations. Thomson and Reilly had been indicted in July 2004 for violating only the books and records provisions of the FCPA because recording payments under a "sham" consulting contract allegedly concealed the fact that the payments were actually bribes, and Thomson was aware that these payments were bribes. Thomson was also charged with conspiracy to violate the books and records provisions of the FCPA, conspiracy to violate the Travel Act, and Travel Act violations.

Thomson and Reilly had allegedly participated in a bribery scheme to win a services contract with a Saudi hospital. The director general of the Saudi charity running the hospital allegedly solicited a $1 million "finder's fee" in exchange for securing the $10 million, five-year contract for HealthSouth. The government alleged that officers of HealthSouth, including Thomson and Reilly, arranged for the director general to receive a false consulting contract with an Australian affiliate of HealthSouth, although the officers had been specifically advised by counsel that such conduct would be illegal.

In Thomson's trial brief, Thomson's attorneys disagreed with the facts as laid out by the government. Thomson was portrayed as a manager that was conscious of FCPA issues and who sought to avoid any improprieties. His consultation with outside counsel regarding local law was used in his trial defense. The money, which was transferred to the Australian subsidiary and then to the Saudi contact, was meant for, what was believed to be, a legitimate business development deal between the Australian sub and the Saudi contact.

J. *United States v. Titan*

On March 1, 2005, the U.S. government announced that it had reached a settlement with Titan Corporation for civil and criminal violations of the antibribery, books and records, and internal controls provisions of the FCPA. Titan agreed to pay $28.5 million, the largest FCPA penalty to date. The SEC settlement required Titan to pay $15.5 million in disgorgement and interest, a $13 million penalty, and to hire an independent compliance consultant. Under the criminal plea agreement, Titan pleaded guilty to three criminal counts for violation of the FCPA, false books and records, and aiding and assisting in filing a false tax return, and agreed to pay a $13 million penalty. Payment of the criminal penalty satisfied the civil penalty of the same amount above.

In Benin, Titan was developing a telecommunications network. It engaged an agent in Benin, who it knew to be the President's business advisor. According to the plea agreement, Titan paid over $2 million in "social fees" to the presidential re-election campaign through the business advisor in return for receiving a higher management fee for its contract in Benin. A senior U.S. officer in the company expressly authorized expediting the "social payments" and making them directly to the President's business advisor. The payments were used to purchase T-shirts for use in the re-election campaign, among other things. Titan recorded the payments in its books as consultations, travel, and studies "in support of the alleged customs exoneration services."

In addition, Titan was alleged to have committed numerous other violations. First, a senior Titan officer in the U.S. paid an employee of the World Bank $15,000

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

plus expenses in cash to help get local investors for the Benin project. Second, Titan purchased a $1,850 pair of earrings for the Benin President's wife. Third, $14,000 in travel expenses was paid to a Benin official. Fourth, in Nepal, Bangladesh, and Sri Lanka, Titan and/or its local agents falsified commission payments to shield themselves and their local agents from taxes and other scrutiny. Finally, Titan made payments to foreign agents in Taiwan, Thailand, and Denmark without adequate due diligence or controls; for example, payments were made via accounts not located in their respective countries, or by "split payments" to offshore accounts.

Due diligence prior to a Titan/Lockheed merger uncovered the potentially improper payments by Titan business units to consultants in several countries. Although Titan met with U.S. government authorities in an effort to negotiate a resolution to the investigations before the planned merger with Lockheed, the SEC signaled its intention to recommend an FCPA enforcement action against Titan. On June 26, 2004, Lockheed announced the termination of the merger agreement.

The SEC and the DOJ determined that Titan had no system to detect FCPA violations during the period under review. The SEC and DOJ also concluded that, in its 23-year existence, Titan never had an FCPA program. This was true despite the fact that its auditor, Arthur Anderson, noted in 2001 that its books and records were not reliable and that its system was vulnerable to "intentional mistake," "fraud," and "loss of data."

K. *United States v. Micrus Corporation*

Micrus, a California based company that distributes embolic coils in foreign countries, entered into a nonprosecution agreement with the DOJ on February 28, 2005, in which it agreed to a fine of $450,000, to accept responsibility for FCPA violations, to retain an internal compliance monitor, and to continue to cooperate with the DOJ. Micrus was required to maintain the monitor for 36 months during which time the monitor would report on at least a semiannual basis.

Between January 2002 and August 2004, Micrus and Micrus S.A., its Swiss subsidiary, made agreements with doctors in France, Turkey, Spain, and Germany in which the doctors promoted the company's products in exchange for payments, commissions, honoraria, and stock options, totaling approximately $1.4 million. For the purposes of the FCPA violations, the doctors, who worked in government-operated hospitals and bought equipment on behalf of the state-run medical system, were "foreign officials." Of these payments $105,000 "clearly" violated local law and approximately $250,000 lacked the prior approval required under the relevant foreign law. At no time during this period did Micrus have any "internal controls" or an FCPA compliance program.

L. *In the Matter of GE-InVision, Inc.*

InVision, a manufacturer of devices that detect explosives, allegedly made illegal payments to its local distributors or sales agents in China, the Philippines, and Thailand. Its Chinese distributor, acting as an intermediary and with the authorization of a senior sales executive at InVision, made a $95,000 payment to an employee of a Chinese state-owned airport to avoid fees from a delayed delivery. In the Philippines, InVision made a payment of $108,000, authorized by its finance department, to a subcontractor building the baggage carousel in a state-owned airport in order to influence the decision of government officials to buy additional products. InVision became aware of illegal payments that were to be made by its distributor to employees of a Thai state-owned airport. In all three countries, InVision "was aware of a high probability that its foreign sales agents or distributors paid or offered to pay something of value to government officials in order to obtain or retain business."

InVision disclosed the potential violations of the FCPA to the DOJ and SEC after InVision and General Electric announced a proposed merger. The parties agreed that the merger could not go forward until the government investigations were resolved. InVision was charged with violations of the antibribery, record-keeping, and internal controls provisions of the FCPA.

In December 2004, InVision entered a nonprosecution agreement with the DOJ requiring a penalty of $800,000 and that InVision would fully integrate itself into GE's FCPA compliance program. The settlement agreement between the DOJ and InVision also specified that InVision must retain and pay for an outside independent law firm to monitor InVision's compliance with the FCPA and report to the SEC about its findings. The

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

agreement noted that, in determining to accept the offer, the DOJ took into account InVision's cooperation, including the fact that InVision brought the matter to the attention of U.S. government officials.

GE entered into a separate agreement with the DOJ. Under that agreement, GE was exempt from liability for any transaction that occurred before the agreement if it had been disclosed by InVision or GE. The agreement specified that GE be required to integrate InVision into its FCPA compliance program. In addition, GE agreed to affirmatively disclose any violations discovered that would be relevant to the government's investigation.

On February 14, 2005, after the merger between GE and InVision was complete, the SEC announced it had reached a settlement of charges against GE-InVision, the post-merger company. Under the settlement, the SEC issued a cease-and-desist order and GE InVision agreed to disgorge the $589,000 in profits arising from the alleged FCPA violations, to pay prejudgment interest of $28,703.57, and to pay a $500,000 civil penalty.

M. *United States v. Monsanto Co.*

On January 6, 2005, Monsanto entered into a deferred prosecution agreement ("DPA") with the DOJ pursuant to an FCPA investigation. The DOJ had charged Monsanto with violations of the antibribery and books and records provisions. Monsanto agreed to cooperate with the DOJ's investigation for the three-year term of the DPA, adopt additional internal controls, hire an independent compliance expert, and pay a penalty of $1,000,000. Monsanto also settled with the SEC, which had charged Monsanto with violations of the antibribery, books and records, and internal controls provisions of the FCPA. In the settlement, Monsanto agreed to retain an independent consultant to monitor its internal compliance, pay a $500,000 civil penalty, and cease and desist from further violations. The monitor was required to submit a report within sixty days after being retained and Monsanto was required to adopt all recommendations in the report unless "unduly burdensome."

In 2002, a senior Monsanto manager authorized and directed an Indonesian consulting firm to pay a $50,000 bribe to an Indonesian official. The bribe was intended to influence the official to repeal an environmental regulation that was having an adverse effect on Monsanto's business in Indonesia. The senior official did not repeal the regulation. This payment was improperly recorded as "consulting services." The senior Monsanto manager devised a scheme by which payments were hidden in the books and records through the use of false invoices from the consulting company.

In addition, the SEC alleged that Monsanto's Indonesian affiliates made more than $700,000 worth of illicit payments to at least 140 current and former Indonesian government officials and their family members. These funds were derived from a "bogus registration scheme." The largest payment was for the purchase of land and a house built in the name of the wife of a Ministry of Agriculture official.

When Monsanto became aware of the financial irregularities, it began an internal investigation. Upon completing the investigation, Monsanto voluntarily approached and cooperated with U.S. government authorities.

N. DOJ Releases

There have been no DOJ releases since 2004.

VII. Compliance Obligations

A. The Federal Sentencing Guidelines

Effective November 1, 2004, the federal Sentencing Guidelines for organizations ("Guidelines") raised the bar for what is expected in corporate compliance programs. On October 7, 2003, an *ad hoc* advisory group presented a report to the U.S. Sentencing Commission recommending changes to the Sentencing Guidelines provisions governing the definition of effective corporate compliance programs. The U.S. Sentencing Commission published its proposed amendments in December 2003, and the final version of the proposed Amendments was sent to Congress on April 30, 2004.

It should be noted, however, that, following the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines are now only advisory. Nonetheless, the Guidelines still provide guidance in determining a prison term and/or the amount of a fine in a particular case.

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

The most significant change the Guidelines bring is that they encourage organizations to involve the Board of Directors, high-level personnel, and operational personnel in compliance programs. In addition, the Guidelines encourage organizations to use risk assessment in order to design a more effective compliance program. These changes raise the bar for what is necessary to demonstrate in order to be considered to have an effective compliance programs.

The Guidelines continue to set forth seven elements that should be present in an effective compliance program.

— ***Standards and Procedures.*** Under the Guidelines, a corporation must "establish standards and procedures to prevent and detect criminal conduct." USSG § 8B2.1(b)(1).

— ***Compliance Personnel.*** The Guidelines create a presumption that there are three separate levels at which an effective compliance and ethics program must operate: the governing authority, high-level personnel within the organization, and personnel who have operational responsibility for the program. Under the Guidelines, the governing authority of the organization must take an active role in the compliance program. The "governing authority" in most cases will be the Board of Directors or the other highest-level governing body of the organization. The board of directors must be knowledgeable about the compliance program, and must "exercise reasonable oversight" over the program. The board is expected to take steps to ensure that the compliance program is effective. *See* USSG § 8B2.1(b)(2)(A).

— ***Due Care in Granting Authority.*** According to the Guidelines, an organization must "use reasonable efforts" to avoid delegating authority to individuals whom the organization knew or should have known has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program. *See* USSG § 8B2.1(b)(3).

— ***Training.*** The Guidelines require that a compliance and ethics program include a training component. The Guidelines state that persons at all levels of the organization — including the board of directors — should receive information about the compliance and ethics program. In addition, agents of the organization should receive information about the compliance and ethics program, where appropriate. The Guidelines state that these efforts should be undertaken "periodically," highlighting that training is an ongoing process. *See* USSG § 8B2.1(b)(4).

— ***Monitoring, Auditing, and Whistleblower Provisions.*** The Guidelines require monitoring and auditing. In addition, the Guidelines require that an organization periodically evaluate the compliance and ethics program itself to determine whether it is effective. Finally, the Guidelines include a whistleblower provision that requires establishing a mechanism for reporting violations without fear of retaliation. Such a mechanism may include anonymous reporting. *See* USSG § 8B2.1(5).

— ***Enforcement of the Compliance and Ethics Program.*** The Guidelines state that a compliance program shall include incentives for compliance as well as discipline for criminal conduct, or not taking reasonable steps to prevent or detect criminal conduct. *See* USSG § 8B2.1(b)(6).

— ***Remediation.*** If criminal conduct is detected, the organization must take reasonable steps to respond. The response should include any necessary adjustments to the compliance and ethics program to prevent criminal conduct in the future. *See* USSG § 8B2.1(b)(7).

In addition to the seven elements, the proposed Guidelines also include a requirement for periodic risk assessment. Rather than being a separate element, risk assessment should be conducted across each of the seven elements. When conducting risk assessment, the organization is expected to design the elements of the compliance and ethics program so that it is tailored to prevent and detect criminal conduct where it is most likely to occur. For example, operations in countries with a high level of corruption should be audited for corrupt practices more frequently. A company that exports sensitive items

Copyright October 2006 THOMSON/WEST (4 Supp. 117)

and whose staff has a high turnover rate should conduct training on export controls frequently. Through the use of risk assessment, the proposed Guidelines require that a compliance and ethics program not be a cookie-cutter paper program, but instead that it reflect a genuine commitment to compliance and ethics. *See* USSG § 8B2.1(c).

B. *United States v. Metcalf & Eddy*

The FCPA case still cited for elements of an effective compliance program is the December 1999 consent decree settling the case against Metcalf & Eddy, which imposed an aggressive panoply of compliance obligations on the company. The company, although not an "issuer" was required to adhere to books and records and internal control standards as part of its compliance program. *United States v. Metcalf & Eddy,* Civ. No. 1:00cv 12566 (D. Mass. Dec. 14, 1999) (Complaint for Permanent Injunction and Ancillary Relief; Consent and Undertaking of Metcalf & Eddy, Inc.). Such compliance programs have since been required in several cases, including *Titan, Monsanto,* and *GE-Invision.*

The compliance elements that Metcalf & Eddy was required to satisfy include:

— a "clearly articulated" corporate policy;
— assignment of responsibility for compliance to one or more senior company officers;
— establishment of an independent committee to review contracts retaining agents and consultants;
— due diligence procedures for potential agents, consultants, and business partners;
— procedures designed to inhibit discretion of corporate authority to persons at risk of making payments;
— regular training, including training of agents, consultants, and other representatives;
— an effective reporting system for company employees to report possible violations;
— appropriate disciplinary mechanisms for employees violating policies;
— antibribery clauses in all contracts with consultants or business partners, including periodic certifications, prior approval of any subcontractors, and termination clauses for violations;
— books and records and internal accounting requirements identical to requirements imposed on issuers under the Act;
— periodic certifications on FCPA compliance to USAID and other U.S. government entities based on independent outside audits;
— periodic reviews of the compliance program by outside law firms or auditors;
— full disclosure of future and past payments activities to the Department; and
— availability of company directors and officers to law enforcement officials.

Copyright October 2006 THOMSON/WEST (4 Supp. 117)