The Foreign Corrupt Practices Act:
A Practical Discussion of the Law and Compliance Programs for California Business Attorneys, Part I

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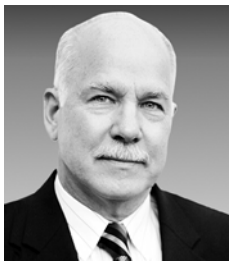

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INTRODUCTION

The Foreign Corrupt Practices Act (FCPA), codified at 15 USC §§78m(a), (b)(2), 78dd–1—78dd–3, and 78ff, is a federal law that impacts California businesses in two important ways: It makes it a crime to bribe foreign government officials, and it requires public companies to maintain accurate books and records and a system of internal accounting controls. Although these requirements may sound simple, companies often have trouble complying with them in practice. This article is intended to provide an overview of the FCPA for California business lawyers who are advising California companies that export or otherwise do business outside the United States.

The FCPA affects every California company that does cross-border business. In general, business people are well aware of what behavior constitutes corruption and understand when a payment to a government employee constitutes a bribe. In some situations, U.S. business people doing business in foreign countries say they fear that activities that might be acceptable in commercial dealings with private companies in the U.S. may be crimes if the counterpart is a foreign government official. Business people frequently complain that they have to pay bribes in some countries because it is expected—a part of the local culture—and everybody does it. Indeed, many Americans question the basic premise of the FCPA: Why should the U.S. make it a crime and prosecute U.S. companies and business people for bribing foreigners in transactions that take place in foreign countries?

This article examines the historical background of the FCPA and provides an overview of what the law contains and how it is interpreted. It then discusses how companies can set up compliance programs prudently to reduce or eliminate the risks of FCPA liability.

CALIFORNIA COMPANIES' INCREASING FCPA EXPOSURE

California companies are increasingly doing business outside the U.S. The U.S. portion of the overall world economy has been shrinking for decades. The U.S. economy will continue to grow, but many other countries will grow faster; thus, over time, the U.S. will have a smaller and smaller percentage of the world economy. California businesses that desire to expand will increasingly need look to export markets and business opportunities outside the U.S. Economic pressures will make it necessary for California companies that are already doing cross-border business to increase that business and for companies that have never ventured to do business outside of the U.S. to take on international business activities.

California companies have been at the forefront of U.S. companies doing business with Latin America, Canada, and Asia. Exports of merchandise and services to foreign countries account for more than 11 percent of California's economy—$230 billion of California's $1.9 trillion economy. See O'Connell, *Jerry Brown's Challenge: Promoting California's Interests in a Global Economy*, Sacramento Bee, Dec. 29, 2010, available at http://www.csub.edu/Rush-a/Jerry_Brown's_challenge.htm. California accounts for about 11 percent of total U.S. merchandise exports and roughly 16 percent of U.S. services exports. See O'Connell, *What does California Export?* Sacramento Bee, Apr. 17, 2011 (hereafter referred to as "O'Connell Article"), available at http://www.sacbee.com/2011/04/17/3556660/what-does-california-really-export.html#ixzz1WAgISkCw. Despite the high profile of agriculture in the Golden State, agricultural products account for less than 9 percent of California's foreign sales. In 2008, California's total merchandise export trade was $144.8 billion, and $12.9 billion of that was agricultural products. See O'Connell Article. Computers and electronics are California's largest export sector, accounting for 30 percent of the state's exports in 2010. See http://www.calchamber/international/trade/pages/tradestatistics.aspx. Estimates are that California service exports may amount to another $86 billion per year. See O'Connell Article. High technology, agriculture, motion pictures, music, chemicals, pharmaceuticals, medical equipment, scientific equipment, and machinery are all important parts of the California export economy.

California companies that are starting or expanding international operations are likely to seek advice from the lawyers who currently advise them concerning their domestic operations. Advising companies on international transactions involves a number of differences from domestic corporate practice, and there can be unexpected pitfalls. This article is intended to give California business practitioners an introduction to one of the potential pitfalls—the FCPA. Complying with the FCPA adds another dimension to the decision to do business internationally, and lawyers need to be aware of this law when advising clients venturing overseas.

Many American business people believe a company cannot do business in some parts of the world without paying bribes. There are stories of shakedowns by policemen, rigged bids for infrastructure projects, kickbacks into offshore bank accounts, and companies being directed to use agents whose only purpose is take a cut and funnel bribes to foreign government officials. These stories are based on fact. Corruption, bribery, kickbacks, slush funds, and falsification of company records to hide illegal payments are common in international business. Counsel can get a good idea of how widespread corruption is in governments around the world by perusing the Corruption Perception Index (CPI), available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010, published annually by Transparency International, an international nonprofit organization dedicated to reducing corruption around the world. The CPI is a useful tool for assessing the risk of corruption in the nations where a company is doing business and is generally accurate. American lawyers who consider China, India, and Mexico to be countries with extremely corrupt governments where bribes are required may be surprised to see that China and India are in the middle of the pack and Mexico has become substantially more corrupt only in the past 3 years. Government corruption in these countries is moderate in comparison with the levels in Russia, Iraq, and Venezuela.

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Most business people and lawyers understand that corruption, bribery, and payments to influence decisions of employees of state and local governments are crimes under California law. See Pen C §§67–68, 73, 85–86, 92–93. Most should also be aware that California law criminalizes commercial corruption. Under state law, bribes and kickbacks paid to influence employees of private businesses are illegal in California. Pen C §641.3. This California state law prohibiting commercial corruption has an important tie-in to the FCPA. The FCPA applies only to bribery of foreign government officials, but the California law against private bribery can be used by the U.S. Department of Justice (DOJ) to bring a federal case for private corruption under the Travel Act (18 USC §1952). See, *e.g., U.S. v Control Components, Inc*. (CD Cal, July 24, 2009, No. SA CR NO.09-162), available at http://www.justice.gov/criminal/fraud/fcpa/cases/control-components.html.

The FCPA is a criminal law that makes it a felony for U.S. citizens and companies to bribe foreign government officials. California businesses must therefore tread a dangerous path: On one side, some of their managers and employees may believe that bribery is required to gain or maintain business operations in some countries; on the other side, making such payments is a felony in the U.S. and also may be a serious crime under the law of the country where the bribe is paid. Compliance with a law prohibiting bribery should be intuitive and easy, *i.e.*, institute and enforce a strict corporate policy that instructs all company employees not to bribe anyone. That is a good place to start.

HISTORY AND DEVELOPMENT OF THE FCPA

Why Is Foreign Bribery a Crime Under U.S. Law?

The FCPA was enacted in the aftermath of two major political scandals of the early 1970s: Watergate and the Lockheed bribery of the prime minister of Japan. The process that resulted in the FCPA started during the Ford administration, and the law was signed during the Carter administration in 1977. Members of Congress and the U.S. Securities and Exchange Commission (SEC) were aghast when the scandals revealed that U.S. companies were routinely creating slush funds and other off-book transactions to disguise bribery and political payments. The SEC announced an amnesty and more than 400 companies came forward and disclosed evidence of over $350 million in off-book transactions and foreign bribes. At the time, bribing foreign governments and politicians was not illegal under U.S. law, so U.S. companies could write off foreign bribes as business expenses on their tax returns. See H Rep No. 95–640, 95th Cong, 1st Sess (1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

What may have upset Congress the most was that the companies recognized that the bribes they were paying were unethical and that the payments violated the laws of the countries where they were made. This recognition led most of the companies to falsify their business records knowingly and to miscategorize bribes so that they would appear to be legitimate business expenses. Fake corporate records, however, are an elemental threat to the U.S. economy and the U.S. capital markets, which are based on the premise of transparency and accurate reporting of profits and losses. If management of U.S. public corporations can falsify company records to conceal their activities, the investing public will be unable to properly assess the company's financial results and share value.

Congress drafted the FCPA to approach corruption in international business in a two-pronged manner. First, the FCPA outlaws payments, both direct and through other persons, that constitute bribery of a foreign official. See 15 USC §§78dd–1—78dd–3. Importantly, the law also targets false or misleading books and records and the lack of corporate accounting controls that allow bribery by corporations to be perpetrated and concealed. See 15 USC §§78m(b), 78ff. This second feature became increasingly important as FCPA enforcement efforts progressed, because cases in the second category are prosecuted as civil rather than criminal matters and are therefore subject to a lesser burden of proof. It is much easier to demonstrate by a preponderance of the evidence that a company falsified books and records or did not have an adequate system of controls than it is to prove beyond a reasonable doubt that a corrupt payment was made. As a result, most FCPA cases have been decided on books and records violations. Many company internal investigations find clear evidence of false or inaccurate records and lack or failure of controls, while evidence of bribery is murky and often subject to reasonable doubt. The FCPA is very broadly worded, so that books and records violations need not pertain to payments to foreign officials or even to the company's business operations outside the U.S.

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The FCPA became law in 1977. At first, there was fear that the far-reaching law would make it unprofitable for U.S. companies to continue to do international business. How could U.S. companies win against their French, Japanese, British, and German competitors when those companies could pay bribes and deduct them as legitimate business expenses while U.S.

companies risked federal prosecution for the same conduct? This fear was quickly put to rest, however. During the rest of the 1970s and throughout the 1980s and the 1990s, the DOJ and the SEC made only minimal efforts to enforce the FCPA. Despite the target-rich environment presented by U.S. multinational companies that continued to engage in bribery, the DOJ and the SEC launched only a handful of investigations and brought only a token number of enforcement actions each year from 1977 through 2001. Most of these cases were settled by agreement, so there were very few decisions by the federal courts interpreting the law. For 25 years, U.S. companies remained complacent and their FCPA compliance programs were rare and sketchy.

OECD Convention

During the 1980s and 1990s, although prosecutions were few, the U.S. government actively pursued corruption in international business. Its efforts focused on the critical issue of leveling the playing field with other nations whose companies operated internationally. Successive administrations recognized that there was legitimacy in the protests of U.S. companies that they would be disadvantaged as long as their international competitors could pay bribes with no legal repercussions. From the mid-1980s, the U.S. acted in concert with the Organization of Economic Cooperation and Development (OECD) to develop a baseline on business bribery of foreign government officials for the developed international trading nations. The result was the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, executed November 21, 1997, available at http://www.oecd.org/document/21/0,3746,en_2649_34859_2017813_1_1_1_1,00.html.

Usually referred to as the "OECD Convention," this seminal treaty was executed by the 29 OECD member countries in 1997; since then, 9 other countries have signed on. Each member country is obligated to enact its own domestic law criminalizing bribery in international business and providing for cooperation with the authorities of other member states in investigations. The treaty is slightly broader than the FCPA; the U.S. ratified the OCED Convention in 1998 and amended the FCPA to comply with its treaty obligation. There were several substantial changes: Jurisdiction over both U.S. and foreign persons was expanded, the definition of a "foreign official" was expanded to include employees of public international organizations (15 USC §§78dd–1(f)(1)(A), 78dd–2(h)(2)(A), 78dd–3(f)(2)(A)) and the concept of a payment made for the quid pro quo purpose of "securing any improper advantage" (15 USC §§78dd–1(a)(1)(A), (a)(2)(A), (a)(3)(A); 78dd–2(a)(1)(A), (a)(2)(A), (a)(3)(A); 78dd–3(a)(1)(A), (a)(2)(A), (a)(3)(A)) was added to the FCPA.

During the late 1990s, the OECD countries went through the process of enacting their own laws, all of which contain prohibitions on bribery in international business that are similar, and in some cases stronger, than those in the FCPA. One of the last of the OECD countries to take seriously its treaty obligation to enact a new law was the U.K., which finally instituted its Bribery Act in July 2011. See http://www.legislation.gov.uk/ukpga/2010/23/contents. The U.K. law is more strict than the FCPA in most respects, and may be the most clear and far-reaching national law criminalizing bribery in international business.

By 2011, many of the signatory countries began to enforce the laws enacted under the OECD Convention. The U.S. is without a doubt the clear leader in enforcement actions. Germany and the U.K. have brought actions and are investigating a number of cases, and Korea, Japan, Italy, Denmark, and Australia are all becoming active against companies and individuals for paying bribes in international business. See Trace Global Enforcement Report 2011, available at http://www.prnewswire.com/news-releases/trace-releases-2011-global-enforcement-report-on-bribery-127825238.html. Almost all of these actions have taken place in the last 5 years. Nonetheless, nearly half of the OECD Convention countries have never brought a single case.

The international playing field has been further leveled in the past decade by the passage of the United Nations Convention Against Corruption (UNCAC), a treaty that has now been ratified by 154 countries, available at http://www.unodc.org/unodc/en/treaties/CAC/index.html. Like the OECD Convention, the UNCAC obligates member

countries to enact domestic laws criminalizing corruption in international business and to cooperate with other countries to investigate cases of bribery. The OECD Convention and the UNCAC demonstrate an international movement to criminalize and prosecute bribery in international business. The United States has been the principal leader in this major change in international jurisprudence.

Bush Administration
Increase in FCPA Enforcement

From 1977 to 2001, the DOJ and the SEC brought, on average, roughly two FCPA enforcement actions against companies and individuals per year. Shearman & Sterling, FCPA Digest, Jan. 2011, available at http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf. In 2007 alone, the two agencies brought a total of 38 actions; in 2008, they brought 33. This rapid move toward more aggressive enforcement under the Bush administration is the reason why the FCPA has suddenly become meaningful to California businesses and their lawyers. The rapid increase in prosecutions has slowed under the Obama administration, but the overall number of cases is still rising year by year. It appears that the U.S. government has moved permanently out of a period of very lax enforcement and now has the capacity to bring 30 to 50 FCPA actions against companies and individuals every year. There has been speculation that the rapid increase in FCPA cases during the Bush years was a result of the compliance requirements of the Sarbanes Oxley Act (Pub L 107–204, 116 Stat 745). Enhanced corporate compliance programs uncovered FCPA violations, which the corporate compliance process could no longer allow to be ignored. Whatever the cause, the Bush administration supercharged FCPA enforcement.

Beginning in 2002, the DOJ and the SEC put increasing resources on FCPA enforcement and the number of investigations and prosecutions ramped up year by year. See Palazzolo & Rubenfeld, *U.S. Probes Oracle Dealings*, Wall Street Journal, Aug. 31, 2011, available at http://online.wsj.com/article/SB10001424053111903352704576540841634820096.html?mod=WSJ_hp_LEFTWhatsNewsCollection. Experienced international business lawyers were not surprised that increased efforts by the government resulted in increased prosecutions. The level of bribery was considered to be very high in many industries, including oil, gas, and other extractive industries; defense; freight forwarding; pharmaceuticals; and medical devices. In countries such as Russia and other former Soviet republics, Pakistan, and Vietnam, and in entire regions such as the Middle East and Africa, government officials were notorious for routinely requiring bribes to be paid in most business sectors. In many companies, local country corruption had been a “dirty little secret” that local company management kept and U.S. management did not ask about. Once the DOJ started committing resources to enforcing the FCPA, uncovering bribery, false books and records, and lax corporate controls was a certain result.

FCPA actions brought by the DOJ and SEC from 2004 through the first half of 2011 show the upward trend.

Year	Actions by DOJ	Actions by SEC
2004	2	3
2005	7	5
2006	7	8
2007	18	20
2008	20	13
2009	26	14
2010	48	26

2011, to 6/30/11	8	9

Source for numbers: Gibson Dunn 2011 Mid-Year FCPA Update, available at http://www.gibsondunn.com/publications/Pages/2011Mid-YearFCPAUpdate.aspx.

The emphasis on FCPA enforcement by the Bush administration may have also been the result of another insidious implication of corruption in international business—that corruption facilitates international terrorism. Corrupt government officials who receive payments from U.S. companies doing multinational business may also be amenable to receiving bribes, kickbacks, and "gifts" from their own citizens, international criminals, and terrorists. Terrorists rely on corrupt government officials to accept cash and allow operatives to move across borders, obtain and ship arms, move money, and to live securely. Bush administration officials watched with dismay as billions of U.S. government dollars simply disappeared in Iraq during the conflict. Hundreds of millions more taxpayer dollars have been lost to corruption in Afghanistan. Many people in the U.S. military and government were confronted with blatant, large-scale corruption and bribery and witnessed unprecedented loss of U.S. money through corruption. As a consequence, FCPA enforcement efforts were stepped up. See Riechmann & Lardner, *U.S.: $360M lost to corruption in Afghanistan*, Army Times, Aug 16, 2011, available at http://www.armytimes.com/news/2011/08/ap-360-million-lost-to-corruption-in-afghanistan-081611/; Lardner, Panel: Widespread waste, fraud in war spending, Army Times, Aug 31, 2011, available at http://www.armytimes.com/news/2011/08/ap-panel-says-widespread-waste-fraud-war-spending-083111/; Former U.S. official claims Iraq corruption sham (AFP, May 12, 2008, available at http://afp.google.com/article/ALeqM5h4_OyYvDRJHshsncU4AkDoez37LA.

The Obama administration inherited the larger, better financed, more experienced, and more successful FCPA teams at the DOJ, SEC, and FBI. Although the agencies do not publish figures on their on-going investigations, anecdotally the DOJ and SEC were thought to have had 10 to 15 FCPA investigations in progress per year in the early 2000s, and by 2009, approximately 150 open investigations. The amount of corruption in international business has not decreased, and according to data from Transparency International, corruption seems to be increasing in many countries. See http://www.transparency.org/policy_research/surveys_indices/gcb/2010.

California business lawyers should recognize that FCPA enforcement is not likely to return to the ineffective levels of the 1990s. In this era of budget cuts, DOJ and SEC resources for FCPA work are likely to be capped, but enforcement should continue with 40 or 50 cases brought each year. The risk that a California company's international activities could be investigated or prosecuted is very real.

FOREIGN CORRUPT PRACTICES ACT BASICS

What Business Conduct May Be a Crime Under the FCPA?

It is important to understand what the FCPA prohibits and what a company needs to do to avoid violating the law—or to deal with violations that occur despite its reasonable efforts to prevent them. As a first step, a company should honestly assess the risk that its business could be involved in international bribery and put in place a compliance program that is capable of reducing that risk.

The FCPA has 3 basic parts:

- A prohibition on bribery of foreign officials (15 USC §§78dd–1—78dd–3);
- A requirement that companies maintain accurate books and records (15 USC §78m(b)(2)(A)); and

- A requirement that companies devise and maintain a system of internal accounting controls (15 USC §78m(b)(2)(B)).

The bribery prohibition applies to all U.S. companies and individuals and also encompasses many non-U.S. companies and individuals. See 15 USC §§78dd–1—78dd–3. The books and records and internal accounting controls sections apply to "issuers," *i.e.*, companies listed on U.S. stock exchanges or otherwise required to report to the SEC. See 15 USC §§78m, 78dd–1(a). It is of course good business practice for all companies, both large and small, to keep accurate books and records and have a system of accounting controls, regardless of whether they are SEC-reporting companies.

As an overview, counsel should keep several points in mind:

- FCPA jurisdiction is extremely broad.
- The FCPA applies only to bribe payers, not bribe takers.
- The FCPA applies only to bribery of government officials, not private corruption. See 15 USC §§78dd–1—78dd–3.
- There are no de minimis or materiality exclusions.
- There is both corporate and individual criminal and civil liability. See 15 USC §§78dd–1—78dd–3, 78ff; 18 USC §3571.
- The financial penalties for violations of the books and records provisions are higher than those for bribery. See 15 USC §78ff.
- The DOJ, SEC, and FBI are each involved and have teams of FCPA specialists.
- A large majority of cases against corporations are settled before going to trial.
- A majority of cases involve vicarious liability for the acts of agents, distributors, and other intermediaries on behalf of U.S. companies.

California business lawyers should recognize that FCPA enforcement is not likely to return to the ineffective levels of the 1990s.

Bribery Prohibition

The FCPA is complex, and there is a gloss of DOJ interpretation, but in essence the bribery prohibition states that it is unlawful for any U.S. company or anyone connected with a U.S. company to (15 USC §§78dd–1(a), 78dd–2(a)):

(1) offer, give, pay, promise to give or pay, or authorize the giving or payment of anything of value, directly or indirectly,

(2) to any foreign official

(3) with corrupt intent

(4) to obtain or retain business or secure an improper advantage.

Offer, Give, Pay, Promise to Give or Pay, or Authorize the Giving or Payment of, Anything of Value

The word "offer" in the first element of the crime of bribery means that the crime is complete once an offer is made. No money or item of value actually needs to change hands for criminal liability to arise.

Offers or payments may be made directly to a foreign official or to anyone else with knowledge that it will be passed on to a foreign official. See 15 USC §§78dd–1(a)(3), 78dd–2(a)(3), 78dd–3(a)(3). As discussed below, "knowledge" in this context is the most attenuated type of constructive knowledge. See 15 USC §§78dd–1(f)(3), 78dd–2(f)(3), 78dd–3(f)(3). If a company cannot make a payment directly, no one can make it for the company. If company employees attempt to hide an indirect payment through creative accounting, the company will

violate the books and records or internal controls provisions discussed below, as well as the bribery prohibition.

"Anything of value" in 15 USC §78dd–1(a) means just that. The traditional briefcase full of cash is still used, but bribe payers and receivers are often highly sophisticated business people who come up with many ways to transfer value yet keep the act hidden. Methods to get something of value to a government official as a quid pro quo include transfers of tangible and intangible property, expensive gifts to the official or his family members, lavish entertainment, payments to other people the foreign official would normally make himself (*e.g.*, tuition for his children, rent for his relatives), expenses for personal travel, loans, providing information, or doing favors to enhance an official's reputation or standing (*e.g.*, donations to a charity favored by the official). Moreover, the FCPA has no de minimis exception. Very small amounts paid with the intent to influence are actionable, and most bribes are small. Data show that the majority of bribes being paid in Russia, Brazil, China, and India are under $5000, and a large percentage are under $1000. See https://www.traceinternational.org/news/BRIBElineData.asp. If an official asks for it, it is of value. If a company offers it and the official keeps it, it is of value.

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To Any Foreign (Government) Official

The second element of the crime is that the offer or payment must be made to a foreign official. See 15 USC §§78dd–1(a), 78dd–2(a), 78dd–3(a). "Foreign official" is defined very broadly in the FCPA and interpreted even more broadly by the DOJ and SEC. It includes all levels of government employees, and all employees of "instrumentalities," which include state-owned or state-controlled companies. See 15 USC §§78d–1(f)(1)(A), 78dd–2(h)(2)(A), 78dd–3(f)(2)(A). Examples of foreign officials that may not be obvious to Americans are professors and other employees of state universities and doctors and other employees of national health systems. The scope of the definition has been argued in cases, but in the real world sophisticated business people nearly always understand when they are dealing with government employees—and if they do not, they can easily find out. As a practical matter, if a company employee cannot determine whether a person is a foreign official, the safest course is simply not to offer that person any type of payment or other value at all.

If employees report that they are having a hard time determining whether someone they are dealing with is a government official, they should follow a simple rule: assume everyone is a government official until proven otherwise. Such a rule places the burden on employees in the field to learn whom they are dealing with. "Know your customer" is a good business practice. In a countries such as China, Vietnam, Russia, or other former Soviet republics, where there is a high level of government corruption and also a high level of private commercial corruption, U.S. companies may simply decide to treat all customers, both government and private, alike.

The definition of foreign official also includes foreign political parties, party officials, foreign political candidates, and employees of public international organizations such as the United Nations or the World Bank. See 15 USC §§78d–1(f)(1), 78dd–2(h)(2), 78dd–3(f)(2). Significantly, the definition also includes any person, if the person making the offer or payment "knows"—under the FCPA's expansive definition "knowledge"—that that person will pass the payment on to a government official. See 15 USC §§78dd–1(a)(3), 78dd–2(a)(3), 78dd–3(a)(3).

Note that the FCPA requires that the payment be made to a government official. See 15 USC §§78dd–1(a)(1), 78dd–2(a)(1), 78dd–3(a)(1). There may be situations in which an official is arranging for a payment to be made to a government agency but is not benefitting personally from the payment. That type of payment may not be a violation of the FCPA bribery provisions. If the

company believes that the payment is to a government agency, the payment should be carefully documented, official receipts should be obtained, and the matter should be discussed with counsel. If the company hides the payment, the company will violate the FCPA books and records requirements discussed below.

With Corrupt Intent

The third element of the crime, corrupt intent, is almost never an issue. In practice, it means intent to influence an act or decision of a foreign official in his or her official capacity. See 15 USC §§78dd–1(a)(1)(A)(i), 78dd–2(a)(1)(A)(i), 78dd–3(a)(1)(A)(i). Corrupt intent is inferred from actions such as falsifying documents that indicate that the people involved knew they were doing something wrong. If a company spends time and money to transfer something of value to a government official, it is usually obvious that the transfer was intended to influence the official.

To Obtain or Retain Business or to Secure Any Improper Advantage

The fourth element of the crime of bribery is that the purpose of the offer or payment must be to obtain or retain business or to direct business to any person. See 15 USC §§78dd–1(a)(1), 78dd–2(a)(1), 78dd–3(a)(1). When the FCPA was amended in 1998 under the OECD Convention, the concept of "any improper advantage" was added to describe the quid pro quo. In practice, this means that anything that helps a company's business or reduces its cost in any way can meet the business-purpose test. A bribe paid to falsely classify goods in order to secure lower customs fees has the effect of lowering the company's overall cost of doing business in that country, thus helping it obtain or retain business, and likely giving it an improper advantage over other companies that are paying the proper fees. See *U.S. v Kay* (5th Cir 2004) 359 F3d 738.

Books and Records Requirement

The books and records requirement applies to "issuers," *i.e.*, companies with stock registered with the SEC or that are required to file reports with the SEC. See 15 USC §78dd–1(a). This definition includes foreign companies that list their stock or have American Depositary Receipts on U.S. stock exchanges. The wording of the statute is deceptively simple (15 USC §78m(b)(2)(A)):

> Every issuer . . . shall make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer.

In practice, this simple sentence means that if a company has any records that are not accurate or that falsely characterize transactions, there has been an FCPA violation. The premise behind this requirement is that companies will falsify their records to hide bribery and corrupt payments. Counsel should be aware, however, that this part of the FCPA applies to any records of a corporation that is an "issuer," even if there is no connection to foreign bribery and even if the records do not relate to business outside the U.S. See *In re Playboy Enterprises, Inc.* (Securities Exchange Act Release, Aug 13, 1980, No. 17059) 1980 SEC Lexis 911.

Most FCPA cases involve books and records violations, because it is easier for internal and external investigators to find documentary evidence of inaccurate books and records and because most books and records cases are brought as civil cases, in which the government's burden of proof is a preponderance of the evidence. Bribery cases are criminal matters and therefore require proof beyond a reasonable doubt.

Internal Corporate Accounting Controls

The FCPA requirement for internal corporate accounting controls also applies only to "issuers," not to all companies. Individual persons may also be liable if they had responsibility for the company's system of controls but did not set it up or maintain it properly. See SEC Charges Nature's Sunshine Products, Inc. With Making Illegal Foreign Payments (SEC Litigation Release No. 21162, July 31, 2009) available at http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.

The law provides that (15 USC §78(b)(2)(B)):

> Every issuer shall . . . devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that —
>
> (i) transactions are executed in accordance with management's general or specific authorization;
>
> (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and (II) to maintain accountability for assets;
>
> (iii) access to assets permitted only in accordance with management's general or specific authorization; and
>
> (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

False, misleading, insufficient, or inaccurate records may be made in companies for many reasons. Mistakes are covered up, documents are backdated, costs are shifted to other accounts with available money, single transactions are broken into multiple parts to circumvent spending authority rules, and illegal payments or facilitating payments are recorded as other types of legitimate business expenses. Many of these discrepancies pass normal audits and financial processes, but if necessary they can be uncovered by careful forensic accounting investigations.

A sufficient system of controls needs to take into account the reasons and methods that employees use to create false or inaccurate records and devise ways to prevent them from doing so. That is good business practice for any company. The SEC has brought cases against both companies and individual employees based solely on internal controls violations. Internal controls cases are brought as civil cases, in which the government's burden of proof is a preponderance of the evidence. Defense is therefore more difficult.

Books and records issues and internal controls issues each arise in cases and investigations involving corporate gifts, meals, entertainment, and travel expenses for government officials. Because the FCPA makes every transfer of anything of value to or for a foreign official a potential violation unless there is a legitimate business purpose (see 15 USC §§78dd–1(b)–(c), 78dd–2(b)–(c), 78dd–3(b)–(c)), every company should have clear rules and systems for accounting for these types of expenses. Although that should be a matter of common sense, in case after case even major companies have had trouble keeping accurate records of these types of expenses and reigning in managers who exceed the limits and provide lavish or inappropriate gifts and entertainment. The gifts, meals, and entertainment issue arises in many cases because it is easy for investigators to find evidence that the company had no rules in this regard or that the rules it had were neglected or easily circumvented.

Because the FCPA makes every transfer of anything of value to or for a foreign official a potential violation unless there is a legitimate business purpose . . . , every company should have clear rules and systems for accounting for these types of expenses.

Most U.S. business people understand that there are rules governing what government officials in the U.S. can accept as gifts, meals, or entertainment. Outside the U.S., however, company employees often do not take the time to learn what a governmental official is permitted to accept under local law or even to learn the rules of their own company. U.S. companies operating internationally should provide adequate training for their employees and should institute controls to ensure the accuracy of their books and records. Poor recordkeeping in the international context does not necessarily constitute a violation of the FCPA, but it will make an investigation much more time-consuming and expensive and a defense unnecessarily difficult.

Jurisdiction and Statute of Limitations

Jurisdiction in FCPA cases is both national and territorial. In civil FCPA cases, jurisdiction is based on minimum contacts. See *International Shoe Co. v Washington* (1945) 326 US 310, 316, 90 L Ed 95, 102, 66 S Ct 154. In criminal bribery cases, the DOJ will assert jurisdiction anywhere in the world over U.S. individuals, U.S. companies, employees and agents of U.S. companies, and any foreign national who commits an act in U.S. territory in furtherance of bribery. See, *e.g., U.S. v Innospec Inc*. (D DC, Mar. 17, 2010, No. 1:10-cr-00061-ESH) available at http://www.justice.gov/criminal/pr/documents/03-18-10innospec-information.pdf. That contact with the U.S. may be very minimal; use of e-mail or other telecommunications, or use of the U.S. banking system to clear dollar-denominated funds, will suffice. See SEC Charges Technip with FCPA Violations (SEC News Release, June 28, 2010), available at http://www.sec.gov/news/press/2010/2010-110.htm; Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (DOJ News Release, July 7, 2010), available at http://www.justice.gov/opa/pr/2010/July/10-crm-780.html.

In practice, jurisdiction does not seem to be much of an issue. The DOJ and SEC may start an investigation based on any connection to the U.S. or U.S. commerce. Companies rarely contest jurisdiction, although individuals who are not U.S. citizens but who are facing jail time typically do. If U.S. authorities do not have jurisdiction, they may collaborate with prosecutors in other countries who do.

The statute of limitations for FCPA violations is 5 years, but the period can be extended for an additional 3 years by the government if the extension is needed to obtain evidence overseas. See 18 USC §§3282, 3292. In many cases the government will approach a company under investigation and request a written waiver of the statute of limitations to allow the government to continue its investigation. In order for a company to receive credit and reduced penalties under the federal sentencing guidelines (available at http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm), it must cooperate with the DOJ. Most companies therefore usually agree to waive the statute, because the government would likely file an action just before the statute ran if the company did not waive it. Many published FCPA case decisions concern conduct that occurred more than 5 years earlier (see, *e.g.*, SEC Charges Nature's Sunshine Products, Inc. With Making Illegal Foreign Payments (SEC Litigation Release No. 21162, July 31, 2009), available at http://www.sec.gov/litigation/litreleases/2009/lr21162.htm; *U.S. v Kozeny* (SD NY 2007) 493 F Supp 2d 693), which is another reason why good company recordkeeping is essential.

Affirmative Defenses

The FCPA provides two affirmative defenses (15 USC §§78dd–1(c), 78dd–2(c), 78dd–3(c)):

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

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

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

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

The first of the affirmative defenses listed above is an illusion. It has never been successfully used in a case. To this author's knowledge, no country has written law that permits bribes, even small bribes, to be paid to its government officials.

The second is a very important defense. Companies should be careful to ensure, and to document clearly, that all expenditures related to government officials are for reasonable, bona fide business purposes. Tracking and recording such business expenditures should be a key part of a company's system of internal accounting controls. Failing to maintain records, or

maintaining sloppy records, concerning payments to or on behalf of foreign officials is a primary way for companies to violate the FCPA.

Given the possibility of alternative penalties and disgorgement of profits, fines for FCPA violations can be extremely high for corporations and may be crippling for individuals.

The "Facilitating Payments" Exception

There is an exception for so-called "facilitating payments" made to secure routine government action. The anti-bribery provisions do not apply (15 USC §§78dd–1(b), 78dd–2(b), 78dd–3(b))

> to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official.

A facilitating payment is, in effect, a small bribe paid to influence a government official to perform a routine government action. The facilitating-payment exception in the FCPA derives from complaints by U.S. companies that it is necessary for their business to pay small bribes ("grease" payments) to government officials in some countries to avoid delays in certain government processes. The exception exists because strict compliance with the bribery laws of other countries could be inconvenient and costly for U.S. businesses. See H Rep No. 95–640, 95th Cong, 1st Sess (1977), available at http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf. The U.K. and many other OECD countries do not include a facilitating-payments exception in their anti-bribery laws.

Despite the existence of this exception, many U.S. companies have anti-corruption policies prohibiting employees from making facilitating payments. This is usually because:

(1) Facilitating payments are bribes and, although common, are generally illegal in the country where made. Allowing facilitating payments in effect grants employees permission to break the law in countries where a company does business.

(2) The phrase "facilitating payment" is a defined term in the FCPA, with a special meaning in the law. All bribes, large and small, are made to facilitate business. It is dangerous for a company to allow employees in the field make legal decisions regarding whether a specific payment intended to influence a government official is a facilitating payment or a bribe.

(3) Facilitating payments are transactions and must be recorded accurately on the company's books and records, *e.g.:* "A facilitating payment of $25.00, paid on June 8, 2011, to Sam Smith of the Customs Department of Australia, to provide expedited clearance for products." Such an accurate record, however, may constitute written proof that the company intentionally violated the law of the country where the payment was made. Alternatively, failing to keep such a record or falsifying the record to conceal the true nature of the payment will violate the FCPA.

(4) Facilitating payments may violate a company's written ethical standards. Many U.S. companies commit to conduct their business "in accordance with the highest standards of ethical conduct." Payments made directly to government employees in return for favors may violate such a nebulous standard.

When assessing a company's FCPA risk, it is important for counsel to ask whether the company makes facilitating payments and to determine what the company thinks that this means, *i.e.*, what they are paying, what they are getting in return, and how they record the payments.

Penalties

Penalties for violating the FCPA depend on whether the violation is charged as a criminal or civil matter. Given the possibility of alternative penalties and disgorgement of profits, fines for FCPA violations can be extremely high for corporations and may be crippling for individuals. Note, however, that there is no private right of action under the FCPA.

The criminal penalties are as follows:

- Penalties for criminal bribery (see 15 USC §§78dd–2(g)(2), 78dd–3(e)(2); 18 USC §3571):
  - Individuals: $250,000 or 5 years' imprisonment, or both;
  - Corporations: $2 million.
- Penalties for criminal books and records or internal controls violations (see 15 USC §§78ff(a)):
  - Individuals: $5 million or 20 years' imprisonment or both;
  - Corporations: $25 million per violation.
- Alternative criminal penalties (see 18 USC §3571):
  - Forfeiture of property traceable to the violation;
  - Two times the amount of the victim's loss or the defendant's benefit (the company's profit from transactions related to the bribe).

See also Federal Sentencing Guidelines Manual §2C1.1, available at http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm.

Criminal fines imposed on individuals may not be paid by the individual's employer (15 USC §78dd–2(g)(3)), and unlawful payments may not be deducted as business expenses (IRC §162(c)(1)). As a result, if the payments were mischaracterized and deducted when made several years earlier, tax returns for the relevant years must be amended and tax penalties may be assessed.

Civil penalties for FCPA violations are as follows:

- Civil penalties for willful violation of bribery prohibitions:
  - $10,000 per act (15 USC §§78dd–2(g)(1), 78dd–3(e)(1), 78ff(c)).
  - In SEC enforcement actions, $500,000 per act (15 USC §§78u(d)(3)(B)(iii), 78u–2(b)(3)).
- Other civil penalties that may be assessed include (see, *e.g.*, 15 USC §§78u—78u–3; 48 CFR ch 1):
  - Disgorgement of all profits from the transactions;
  - Suspension from federal procurement programs and, potentially, debarment from all federal business;
  - Suspension or ineligibility for export licenses;
  - Injunctions;
  - Imposition of a corporate monitor (see *U.S. v Alcatel-Lucent, S.A* (SD Fla, Feb. 22, 2011, No. 10-20907) Deferred Prosecution Agreement, Attachment C, available at http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/02-22-11alcatel-dpa.pdf);
  - If criminal violations are found, arrest and prosecution of company managers and employees.
  - Civil fines may also be assessed against company managers and employees.

In addition to penalties, the cost of an FCPA internal investigation, including attorney and auditor fees, can be extremely expensive and often exceeds the amount of the penalties. Investigations are also extremely disruptive to a company's operations and require a lot of time and resources. The company under investigation will also have the additional expense of implementing in an urgent manner an effective FCPA compliance program, which might have prevented the violation from happening had it been in place earlier.

Below are the current top ten fines that have been imposed by the U.S. government in FCPA cases. Note that nine of the ten are not U.S. companies and that all of these fines were levied within the past 3 years.

Company	Year	Amount
Siemens (Germany)	2008	$800 million
KBR/Halliburton (USA)	2009	$579 million

BAE (UK)	2010	$400 million
Snamprogetti/ENI (Holland/Italy)	2010	$365 million
Technip S.A. (France)	2010	$338 million
JGC Corporation (Japan)	2011	$218.8 million
Daimler AG (Germany)	2010	$185 million
Alcatel-Lucent (France)	2010	$137 million
Panlpina (Switzerland)	2010	$82 million
Johnson & Johnson (USA)	2011	$70 million

Source for numbers: http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html.

Although these numbers are shocking in size, the companies listed are all extremely large with billions of dollars in international business. Counsel representing smaller companies should be mindful that a lengthy and costly investigation and fine of even $1 million can be devastating to a smaller company and to the individuals involved. See, *e.g.*, *US wins corporate conviction in bribery-act trial*, Int'l Bus. Times, May 16, 2011, available at http://www.ibtimes.com/articles/146442/20110516/us-wins-corporate-conviction-in-bribery-act-trial.htm. See also http://www.justice.gov/criminal/fraud/fcpa/cases/greeng.html.

Related Offenses

When the DOJ or SEC brings a case, the agency usually includes counts for other crimes or violations in addition to the FCPA violation. The most widely used are the following.

Money Laundering

Bribe money usually has to be laundered, so money laundering counts are routinely included with allegations of FCPA violations. The anti-money-laundering laws are strict and carry penalties that are harsher than those of the FCPA. See 18 USC §1956. Money laundering claims may also be made against the bribe takers.

Conspiracy

Bribery generally involves two or more parties acting in concert, which would constitute a conspiracy. Such concerted action may often have the effect of extending the statute of limitations.

Commercial Corruption Claims Under the Travel Act

As discussed above, the Travel Act (18 USC §1952) can be used to include allegations of commercial corruption in FCPA cases. Commercial corruption and government corruption often go hand in hand. When a company employee arranges with an employee of a distributor to pay a bribe to a government employee, both of the employees will often receive a share as kickbacks. Commercial kickbacks and private company pay-to-play payments are common in many countries and industries. When a company finds evidence of government corruption, it is prudent to expand the investigation to include a search for evidence of commercial corruption, including investigating the company's own employees to determine whether they are taking kickbacks. If commercial corruption is found, it may be a red flag for government corruption.

Burden of Proof

The burden of proof in civil FCPA cases is a major reason why nearly all FCPA cases against companies are settled. Books and records and internal controls cases are usually brought as civil

cases, in which the burden of proof is only a preponderance of the evidence. Not only is the burden of proof in these cases more favorable to the government, the evidence is usually easier to find and interpret. If the evidence is insufficient to ensure a criminal conviction, the government can bring the case as a civil matter based on either books and records or internal controls, or both.

Bribery cases are criminal matters and the DOJ must prove its case beyond a reasonable doubt. Even though this is a more difficult standard for the government to meet, a criminal conviction may subject a company to potential loss of federal contracts, debarrment from business with the federal government, denial of export licenses, and other consequences that could have a devastating adverse impact on the company's business and share price. Moreover, juries generally disapprove of corporate bribery of government officials, even foreign government officials, and are likely to punish bribe payers. Companies are therefore also motivated to settle criminal cases.

Books and records and internal controls cases are usually brought as civil cases, in which the burden of proof is only a preponderance of the evidence.

Individual Liability

Beginning in about 2007, the DOJ announced publicly that it planned to bring more actions against individuals for FCPA violations. The DOJ's rationale was that business people would not take the FCPA seriously unless they saw their peers being indicted, going to jail, paying large fines, or incurring high attorney fees to defend federal criminal or civil charges. See *Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007*, 22 Corporate Crime Reporter 36(1) (Sept. 16, 2008), available at http://www.corporatecrimereporter.com/mendelsohn091608.htm. There were a few FCPA cases against individuals before 2007, but since then the number of combined DOJ and SEC cases against individuals has increased significantly. In 2005, 8 individuals were charged; in 2006, the number was 9; in 2007, the number increased to 17, and in 2008, there were 16. In 2009, 42 individuals were charged; in 2010, the number dropped to 17. Urofsky, *Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act* (July 2011), available at http://www.shearman.com/files/Publication/12c8f077-57d6-44b7-99fd-deb0b7e16d01/Presentation/PublicationAttachment/ffcd1214-71db-4cab-a507-926e866ef4de/FCPA-071511-July%202011-Trends-Patterns.pdf. Based on these figures, it is probable that individual employees and managers who are responsible for FCPA violations in their companies will be also charged once the company is charged. Often, a company will report the individuals and provide documentary evidence against them as part of its settlement with the DOJ or SEC.

Red Flags

In the FCPA context, a "red flag" is a warning sign that an employee, partner, or other person may have engaged, is currently engaging, or may be about to engage in corrupt activity. See, *e.g.*, *Foreign Corrupt Practices Act Antibribery Provisions*, available at http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf; *Schlumberger's Signing Bonus*, available at http://www.fcpablog.com/blog/2010/10/11/schlumbergers-signing-bonus.html. A red flag is any information or conduct that would make a reasonable person suspicious that a violation of law or company policy may be occurring. A red flag does not constitute proof of a violation, but it indicates that something unusual is going on, which should be examined.

Many red flags involve suspicious statements or actions by a company's agents, distributors, or other business partners. Employees should be trained to report red flags even without supporting documents or other hard evidence. Ignoring red flags can be very dangerous. The existence of one or more red flags that are not investigated may indicate that company employees knew that potential violations by the company's business partners were taking place. Failing to investigate

and determine the facts underlying red flags is, in effect, ignoring signs of corruption; it can be the basis of a prosecution and conviction based on the company's vicarious liability for the acts of its business partner.

It is important for counsel and the client company to understand the likely red flags in the client's industry and the countries where it does business. Training on red flags should be a key part of the company's employee training program. There are many sources containing long lists of FCPA red flags that the company and its counsel can use for guidance. See, *e.g.*, Brown, *Identification of "Red Flags" for Possible Violations of Key U.S. Laws for Companies Operating Overseas*, available at http://www.corporate complianceinsights.com/2010/red-flags-fcpa-violations-compliance-risk-overseas-operations.

"Knowledge," The FCPA's Special Definition

The term "knowledge" under the FCPA has a special definition, as follows (15 USC §§78dd–1(f)(2), 78dd–2(h)(3), 78dd–3(f)(3)):

> (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
>
> (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.
>
> (B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

In other words, knowledge under the FCPA will be imputed.

Consider the follow example: A company employee has been having difficulty closing a $1 million deal with a government purchaser and does not understand why the official is holding out. A local lawyer approaches the employee and tells him, "I can close your deal. I have a long history with the purchasing officer; we went to school together and used to work together in the same agency. He told me you were having trouble and asked me to see if I could help you negotiate. I think I can get the deal at your price, but you will need to give me a $75,000 fee in advance to negotiate the deal for you." Should the employee "hire" the local lawyer as the company's intermediary? This fact pattern is a clear red flag. If in fact the payment is made and the lawyer passed any of the money to the government official, the company would have an extremely difficult time showing that it did not believe that there was a high probability that bribery was occurring or that it did not "know" (within the meaning of the FCPA) that bribery was taking place.

A further conundrum is how to document the payments. Should the company mischaracterize the payment to the lawyer as legal fees or consultant fees and risk a books and records violation? Of course, the answer is no.

FCPA ENFORCEMENT AGENCIES

The DOJ has primary responsibility for criminal enforcement actions, including bribery violations. The DOJ has a core of FCPA-specialist prosecutors in Washington, D.C., and uses U.S. attorneys around the country to augment its efforts.

The SEC takes the lead on civil enforcement actions and on books and records and internal controls matters. The SEC has recently established an FCPA unit staffed with dedicated specialists. The unit has an office in San Francisco that concentrates on FCPA matters in California and Asia.

The Federal Bureau of Investigation (FBI) is part of the DOJ and is involved in FCPA investigations. It also has a dedicated FCPA team of a dozen agents with special training. In addition, many other FBI agents have received FCPA investigation training and are involved in

investigations around the world. The FBI conducts investigations outside the U.S. and has agents stationed in many embassies and other agents on assignment in foreign countries.

Whistleblowers may now be compensated for providing evidence of FCPA violations under the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Most FCPA investigations of corporations are carried out and paid for by the companies that are subject to governmental investigations. The company hires outside counsel and auditors to conduct an independent internal investigation of allegations that indicate an FCPA violation may have occurred. An investigation done solely by in-house counsel and auditors may be viewed by the DOJ and SEC as lacking sufficient independence to be trustworthy. The outside counsel are usually one of the few law firms with established FCPA credentials, and at least some of the lawyers involved will be former U.S attorneys. Large accounting firms may also be engaged to undertake forensic investigations. FCPA investigations are usually extremely expensive, but a company can work closely with counsel to keep costs as low as possible. Counsel prepares an investigation plan and executes the investigation in a thorough and independent manner—a manner that he or she can be relatively sure will be acceptable to the DOJ. Counsel periodically reports to the DOJ, and the DOJ meets with counsel and reviews the conduct and results of the investigation.

All three agencies have close contacts with their counterparts in other countries and confer and coordinate with them as needed. This type of close cooperation by prosecutors and investigators of various nations is a relatively new phenomenon and allows them to take quick coordinated action. It is not uncommon for FCPA cases to be brought concurrently with other corruption prosecutions under the laws and in the courts of multiple countries. There is no concept of double jeopardy when the authorities of different nations are conducting prosecutions, even though each authority may be prosecuting the same company for the same conduct.

WHISTLEBLOWERS

In late 2011, FCPA enforcement entered uncharted territory. Whistleblowers may now be compensated for providing evidence of FCPA violations under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) (Pub L 111–203, §922, 124 Stat 1376 (15 USC §78u–6; 18 USC §1514A)). The new whistleblower provisions may significantly increase the number of FCPA cases because, for the first time, persons who provide the government with the first credible evidence of an FCPA violation are eligible to receive a part, ranging from 10 to 30 percent, of the penalties assessed as compensation. See 15 USC §78u–6(b)(1). Given the amount of the penalties for FCPA violations, whistleblower payments in some cases could be in the millions or even tens of millions of dollars. The SEC has set up a hotline for whistleblowers, and is rumored to be receiving one FCPA-related call a day.

THE FUTURE

In 2011, there have been congressional hearings to review whether FCPA enforcement has become too strict. The U.S. Chamber of Commerce has been the leading advocate for changes to the FCPA, and the package of changes that it is advocating would have the effect of making enforcement by the DOJ and SEC significantly more difficult. Some of the proposed changes have a reasonable basis and represent areas in which it would be helpful to companies and individuals for the DOJ and SEC to issue guidelines. There have been calls for the DOJ to issue better guidance for many years, but it has been reluctant to do so. However, the potential for imminent congressional action may prompt the DOJ to move in order to avoid uncertain

amendments to the law. Everyone involved agrees that the U.S. should have a strict law against bribery of foreign officials; the argument is about the level of enforcement.

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The second and final installment of this article will appear in the next issue of the California Business Law Practitioner. It will address FCPA compliance programs for California businesses.