"Foreign Corrupt Practices Act of 1977"

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THE FOREIGN CORRUPT PRACTICES ACT OF 1977I. INTRODUCTION

In the mid-1970's, the United States Securities and Exchange Commission (the "SEC") prepared a report for presentation to Congress that traced the history of the SEC's discovery of the misuse of corporate funds and the commencement of investigations that revealed that episodes of undisclosed questionable or illegal corporate payments were of epidemic proportions and proved to be a severe breach of the SEC's system of corporate disclosure. The SEC investigations revealed corrupt foreign payments by over 400 U.S. companies involving in excess of $300,000,000 to foreign government officials, politicians and political parties. In light of the appalling results of the investigations, the Senate Committee on Banking, Housing, and Urban Affairs stated that "[m]anagements which resort to corporate bribery and the falsification of records to enhance their business reveal a lack of confidence about themselves."[i] The revelations regarding corrupt payments tarnished the image of American democracy abroad and impaired confidence in the financial integrity of U.S. companies. Congress enacted the Foreign Corrupt Practices Act of 1977 (the "FCPA")[ii] in order to halt corrupt practices and restore public confidence, both at home and abroad, in the integrity of the American business system.[iii]

The FCPA has had an impact on the way U.S. companies conduct their businesses, both domestically and abroad, by subjecting numerous companies that violated the FCPA's provisions to criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting. Additionally, employees and officers of U.S. companies have faced jail time for violations of the FCPA. To avoid such harsh consequences, many U.S. companies have implemented detailed FCPA compliance programs in order to educate, prevent and detect improper payments by employees and agents.

The FCPA affects many different areas of a company's business, including procurement decisions, the structuring of foreign investments and the selection of foreign agents, consultants, representatives and joint venture partners. Accordingly, even before the corporate scandals of 2001-2002, it was imperative that U.S. businesses who operate or seek to operate in foreign countries be familiar with the requirements of the FCPA and the remedial policies and procedures available to avoid FCPA liability. FCPA actions are arising frequently in the merger and acquisition context, where an acquiror uncovers suspect conduct and requires that the target voluntarily report the actions. Moreover, recent cases have indicated that the SEC and the United States Department of Justice (the "DOJ") are taking aggressive action against FCPA violations, which can result in significant fines, penalties and securities law liability.

The following is a summary of the FCPA's anti-bribery and books and records and internal control provisions, together with examples of cases brought under the FCPA and suggestions for compliance thereunder.

II. THE ANTI-BRIBERY PROVISIONS

The anti-bribery provisions of the FCPA prohibit the use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value, directly or indirectly, to government officials, political parties or political party officials in order to obtain or retain business for or with, or direct business to, any person.

A. Who is Subject?
The FCPA makes it illegal for three types of entities and individuals to make improper payments in violation of the anti-bribery provisions, including:

1. any entity which has registered a class of securities in the U.S. or is required to file reports with the SEC (an "Issuer");[iv]
2. any individual who is a citizen, national or resident of the U.S., or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole partnership which has its principal place of business in the

U.S., or which is organized under the laws of a State of the U.S. or a territory, possession, or commonwealth of the U.S. (a “Domestic Concern”);[v] and
3. foreign nationals and foreign concerns who commit an act in violation of the FCPA in the U.S.[vi]

B. What is Prohibited?
The FCPA prohibits any act done “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.”[vii] The prohibition against “giving anything of value” indicates that the FCPA does not contain a *de minimis* exception for nominal payments, thus the gift or promise to give anything could subject a company to FCPA liability. Moreover, the anti-bribery provisions encompass not only actual payments or gifts, but also offers and promises. Thus, acts need not be fully consummated or succeed in producing the intended result to violate the anti-bribery provisions.[viii]

Both direct and indirect payments made through intermediaries with knowledge that the payment, or any portion thereof, will be paid to proscribed persons are prohibited under the FCPA. A payment is made “knowingly” where the person is aware that the person is engaging in the proscribed conduct, that the circumstance exists, or that the result is substantially certain to occur or the person has a firm belief that the circumstance exists or that the result is substantially certain to occur.[ix] The FCPA expressly states that the element of knowledge is established if a person is aware of a high probability of the existence of the circumstance, unless the person actually believes that the circumstance does not exist.[x] However, the legislative history makes it clear that conscious disregard, willful blindness or deliberate ignorance are included in the knowing element.[xi] Otherwise, company officials could take refuge from FCPA liability by turning a blind eye to any action, inaction, language or other “red flag” that should reasonably alert them of the high probability of an FCPA violation.

Intermediaries may include agents, consultants, joint venture partners and other business associates. Due to FCPA liability for third-party payments, companies may face severe consequences unless they conduct thorough due diligence prior to entering into a relationship with any agents, consultants, joint venture partners or other business associates.

The FCPA only prohibits the bribery of the following persons:

The FCPA applies to payments to *any* foreign public official, regardless of rank or position.[xv] However, the distinction between private and public is easily blurred in many emerging markets in which U.S. companies operate, especially in those countries that are undergoing privatization. Additionally, in many countries professionals such as physicians may be employed by the government, and thus payments that would be legal in the United States could be illegal bribes under the FCPA.[xvi] Accordingly, U.S. nationals and concerns must conduct extensive due diligence prior to entering into any business transaction in those markets to ensure exactly who it is that they are working with to gauge the ramifications of their actions under the FCPA.

E. Business Purpose Test

The FCPA prohibits those payments made for any of several purposes “in order to obtain or retain business for or with, or direct business to, any person.”[xvii] This element of the anti-bribery provisions is commonly referred to as the “business purpose test.” The DOJ interprets the “to obtain or retain business” element broadly and the business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality.[xviii]

The purposes set forth in the FCPA include:1. influencing any act or decision of a foreign official in his/her official capacity;
2. inducing a foreign official to do or omit to do any act in violation of the lawful duty of the official;
3. securing any improper advantage; or
4. inducing a foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of the government or instrumentality.[xix]

The legislative history notes that there is no defense for a violation of the anti-bribery provisions where the U.S. concern or national claims that the illegal payment was demanded by the foreign government official because the ultimate decision of whether or not to pay the bribe must be made by the U.S. concern or national.[xx] In other words, the U.S. concern or

national does not have to propose the bribe to a foreign official to be subject to FCPA liability. However, true extortion situations will not be covered by the anti-bribery provisions.[xxi]

F. Nexus with Interstate Commerce

Under the FCPA, Issuers and Domestic Concerns are liable if a prohibited act is accomplished by use of the "mails or any means or instrumentality of interstate commerce."[xxii] Interstate commerce means trade, commerce, transportation, or communications among the several States, or between any foreign country and any State or between any State and place or ship outside thereof and is interpreted broadly to include the intrastate use of telephones, letters sent by regular mail, facsimile transmissions, commercial airlines and wire transfers in furtherance of the prohibited act.[xxiii] In addition to the nexus with interstate commerce basis for jurisdiction, the FCPA provides an alternative basis for jurisdiction for Issuers and Domestic Concerns. Under this alternative basis for jurisdiction, Issuers and Domestic Concerns are prohibited from taking any prohibited actions outside the U.S. irrespective of any nexus with interstate commerce.[xxiv]

Foreign persons and concerns are also liable under the FCPA if a prohibited act is accomplished by use of the U.S. mails or means of interstate commerce, but they are also liable for "any other act" within the U.S.[xxv] The nexus with interstate commerce element applicable to foreign persons and concerns is much broader than the one applicable to Issuers and Domestic Concerns and, therefore, is easier to satisfy in government enforcement actions.

G. Exception for Routine Governmental Action ("Grease Payments")

The FCPA provides an exception to the application of its anti-bribery provisions for "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."[xxvi] The term "routine governmental action" means an "action which is ordinarily and commonly performed by a foreign official in –

1. obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
2. processing governmental papers, such as visas and work orders;
3. providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
4. providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
5. actions of a similar nature."[xxvii]

The term "routine governmental action" expressly excludes "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party."[xxviii] In light of the exception for payments for routine governmental actions, companies should strongly consider—prior to making any payment to any proscribed recipient—whether the amount of the payment is excessive for the routine governmental action and whether the proscribed recipient has discretion or whether the action paid for is routine.

H. Affirmative Defenses

In addition to the exception for facilitating payments, the FCPA provides subject individuals with two affirmative defenses:1. The prohibited action was legal under the written laws and regulations of the proscribed recipient's country; and
2. The payment, gift, offer or promise of anything of value was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of the proscribed recipient 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.[xxix]

To ensure the application of the first affirmative defense, companies should obtain the written opinion of local counsel stating that the payment, gift, offer or promise of anything of value is in fact legal under the written laws of the particular country and maintain a copy of the opinion in the company's due diligence files. Companies may also consider consulting the DOJ Opinion Procedure (discussed below) when attempting to determine the legality of any proposed action under the FCPA. Companies should be conscious of the distinction between those actions that are deemed appropriate under local custom (e.g., giving gifts) and those that are legal under a country's written laws. In practice, local law rarely provides that bribes are legal, so reliance on the first affirmative defense is rare. The second affirmative defense will not be applicable where a payment, gift, offer or promise of anything of value is "corruptly made in return for an official act or omission because it would then not be a bona fide, good faith payment."[xxx] To ensure the application of the second affirmative defense, companies should comprehensively document a business justification for any payment *prior to* its occurrence. Failure to adequately document a justification for any payment could lead to the loss of the affirmative defense because the *company* is required to show that the payment met the affirmative defense elements. The DOJ does not bear the burden to prove that the payment did not constitute the protected types of payments.

I. Penalties and Consequences

Issuers, Domestic Concerns and foreign concerns can face criminal penalties in the form of a fine of up to $2,000,000, while U.S. and foreign nationals who "willfully" violate the anti-bribery provisions of the FCPA are subject to a fine of up to $100,000 and can be imprisoned for up to five (5) years.[xxxi] A person is deemed to act "willfully" if he acts intentionally and purposely, with an intent to do something the law forbids, in other words, with a purpose to disobey or disregard the law. Under the Alternative Fines Act, the amount of the criminal penalties mentioned above may actually be much higher, as much as up to twice the benefit that the defendant sought to obtain when making the corrupt payment.[xxxii] In addition to criminal penalties, Issuers, Domestic Concerns, foreign concerns and U.S. and foreign nationals may be subject to a civil penalty of up to $10,000.

In an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for U.S. and foreign nationals and $50,000 to $500,000 for an Issuer, Domestic Concern or foreign concern.[xxxiii] It is important to note that any fine imposed upon a U.S. or foreign national may not be paid, directly or indirectly, by Issuers, Domestic Concerns or foreign concerns for which the person serves as an officer, director, employee, agent or stockholder.[xxxiv]

Companies found to violate the FCPA can also face other penalties and adverse consequences, including: preliminary and permanent injunctions; suspension of the right to do business with the U.S. government; loss of eligibility to receive export licenses; suspension or debarment from the securities business by the SEC; suspension or debarment from agency programs provided by the Commodity Futures Trading Commission and the Overseas Private Investment Corporation; an inability to deduct the payments as a business expense on taxes and possible penalties and interest thereon; securities law violations under the Exchange Act's anti-fraud provisions; private causes of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act ("RICO"); and actions under other federal or state laws. Actions under RICO may be brought by a competitor who alleges that the prohibited conduct resulted in the defendant winning a contract for which the competitor was also attempting to secure.

III. BOOKS AND RECORDS AND INTERNAL CONTROL PROVISIONS

In addition to the prohibition on payments "to obtain or retain business," Sections 13(b)(2)(A) and 13(b)(2)(B) of the Securities and Exchange Act of 1934, as amended (the "Exchange Act") require accurate accounting for all transactions and the maintenance of a system of adequate internal controls.[xxxv] These sections, known as the books and records and internal control provisions of the FCPA, are generally viewed as easier for the DOJ and SEC to prove, and can be violated even without the presence of an illegal payment under the FCPA's anti-bribery provisions. In addition, there is no materiality standard under the books and records and internal control provisions, and companies must therefore maintain accurate accounting for any amount of money, not just those amounts deemed to be material.

Section 13(b)(2)(B) requires Issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—1. transactions are executed in accordance with management’s general or specific authorization; 2. 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; 3. access to assets is permitted only in accordance with management’s general or specific authorization; and 4. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.”[xxxix]

In determining whether internal controls satisfy the reasonableness standard, the 1981 SEC Enforcement Policy (the “Policy”) for the FCPA provided two guidelines to assist Issuers. First, the test is whether a company’s internal control system, taken as a whole, reasonably meets the statute’s specified objectives. Next, the Policy recognized that a cost-benefit analysis is proper when implementing a system of internal controls and a company is not expected to implement a system whose costs exceed its benefits. Further, *World-Wide Coin* indicates that the factors that determine the adequacy of a system of internal accounting controls include “its organizational structure, including the competence of personnel, the degree and manner of delegation and responsibility, the quality of internal budgets and financial reports, and the checks and balances that separate incompatible activities.”[xl]

For purposes of the books and records and internal control provisions, the terms “reasonable assurances” and “reasonable detail” mean the level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[xli]

B. Exception

The FCPA’s books and records and internal control provisions contain one very narrow exception. With respect to matters that concern the national security of the U.S., no duty or liability shall be imposed upon any person acting in cooperation with the head of any federal department or agency responsible for the matters, but only if the act was performed upon the specific, written directive of the head of the department or agency pursuant to presidential authority to issue the directive.[xlii] Any directive issued under the exception automatically expires one year after the date of issuance unless renewed in writing.

The Sarbanes-Oxley Act of 2002 significantly increased the penalties for willful violations of the books and records and internal control provisions of the FCPA (it did not, however, affect the penalties for violations of the anti-bribery provisions of the FCPA). An individual can face criminal penalties in the form of imprisonment for up to twenty (20) years and/or a fine of up to $5,000,000. The maximum fine for violation by an entity is now $25,000,000.[xliv]

In a major development, the SEC recently used a Report of Investigation pursuant to Section 21(a) of the Exchange Act to indicate that it plans to utilize the antifraud and proxy provisions of the Exchange Act in cases where a party is deemed to have made a disclosure to investors that may be misleading.[xlviii] Such a “disclosure” can arise in a multitude of ways, including the filing of an agreement with the SEC that contains an FCPA representation, or even when such a representation is incorporated by reference.

In addition to the FCPA’s accounting provisions, there are additional statutory provisions that address illegal payments and their accounting. Section 10A(a) of the Exchange Act requires that audits be conducted using generally accepted auditing standards and that procedures be designed to uncover illegal acts having direct and material effects on financial statements. Section 10A(b) further requires that independent public accountants who become aware of any information suggesting that illegal acts[xlix] have or may have occurred perform an investigation and inform the management of the Issuer. If the independent accountants determine that an illegal action is material (including, for purposes of materiality, the effect of possible SEC penalties), and the Issuer’s management takes no action to remedy this, the independent accountants are required to report the illegal act to the board of directors. Issuers receiving such reports must inform the SEC within one business day after receipt and provide the SEC with a copy of the accountants’ report. If the independent accountants do not receive notice from the Issuer within one business day, they must either resign or provide the SEC a

copy within one business day after the failure to receive the report.[l] Resignation only delays the inevitable, as the independent accountants must still provide the SEC with its report.

The SEC gives guidance to Issuers with regard to appropriate remedial actions to be taken upon receiving a report of possible illegal acts from an independent accountant in referencing the American Institute of Certified Public Accountants' ("AICPA") statement on Accounting Standards 54, which states, "[p]ossible remedial actions include disciplinary action against involved personnel, seeking restitution, adoption of preventive or corrective company policies, and modifications of specific control activities."[li]

Because neither the Exchange Act nor SEC rules specify when a matter is accounted for under the FCPA, it is unclear at what point in the accounting for an illegal act such accounting would be considered in sufficiently final form to result in a books and records violation. For example, where an improper accounting entry has been presented to the Issuer's external auditors and used as a basis to prepare financial statements that have been incorporated into Exchange Act filings, such entry would be considered a violation of the books and records provisions of the FCPA. However, where an entry has not been transferred from the general ledger to the financial statements, an error corrected at this stage would not seem to violate the books and records provisions as it has not been reviewed by outside accountants or incorporated in any filing with the SEC.

The SEC has taken the position that "depending on the circumstances, there is a duty to correct statements made in any filing, whether or not the filing is related to a specified transaction or event, if the statements . . . are later discovered to have been false or misleading from the outset, and the [company] knows or should know that persons are continuing to rely on all or any material portion of the statements."[lii] A books and records violation would normally be subject to this principle only if the violation resulted in a material misstatement or omission in financial statements filed with the SEC. "A material fact that is undisclosed in an SEC filing . . . may bring into play a concomitant duty, i.e., the duty to correct."[liii]

F. SEC Disclosure Obligations and Cooperation

The SEC looks favorably upon Issuers that cooperate in the form of self-policing, self-reporting, remediation and cooperation with law enforcement authorities. Among the factors that the SEC indicated it will consider in determining what enforcement action to take, if any, are:

1. The nature of the misconduct. Did the misconduct result from an inadvertent honest mistake, simple negligence, or reckless disregard or willful misconduct?
2. How the misconduct arose. Was it a result of a corporate culture that required the achievement of specific results or set a similar tone of lawlessness?
3. The level in the organization at which the misconduct occurred. Did the actions occur with low-level employees or independent contractors, or did more senior personnel approve the transaction?
4. How long the misconduct lasted.
5. Whether misconduct inflicted harm on investors. If the company makes affirmative disclosures regarding FCPA compliance, its risk is even greater.
6. How the misconduct was detected and who detected it.
7. The length of time after the discovery of the misconduct was made until an effective response was implemented.
8. The remedial steps the Issuer took upon learning of the misconduct. This important factor includes matters such as whether the Issuer properly disciplined or fired the wrongdoers, whether the Issuer strengthened internal controls and procedures to prevent recurrence, and whether the Issuer compensated those adversely affected by the conduct.
9. Reporting of the misconduct. Were the board of directors and audit committee notified of the misconduct and, if so, when? Did the Issuer conduct a prompt and thorough investigation of the misconduct and report the misconduct to the appropriate regulators and the public? In addition to reporting, did the Issuer cooperate with the SEC and not seek to invoke attorney-client or work product privilege?[liv]

IV. 1998 AMENDMENTS

Subsequent to the adoption of the FCPA in 1977, Congress felt that U.S. companies were forced to operate at a competitive disadvantage in international business transactions due to the lack of similar anti-corruption laws in other countries throughout the world.[lv] Essentially, some foreign companies continued to routinely pay bribes and even deduct the payments as business expenses on their taxes while U.S. companies were forced to face the severe consequences imposed by the FCPA for similar actions. In response to the perceived competitive disadvantage facing U.S. companies, Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (the "OECD") to obtain an agreement from the OECD members to enact legislation similar to the FCPA. In 1997, the U.S. and the 29 other OECD members,[lvi] along with Argentina, Brazil, Bulgaria and Chile, executed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"). Slovenia adopted the OECD Convention in September 2001. In order to conform the provisions of the FCPA to the OECD Convention, the U.S. signed the International Anti-Bribery and Fair Competition Act of 1998 (the "1998 Amendments").

The most important aspects of the 1998 Amendments include:

A. Expansion of the FCPA's jurisdictional reach to eliminate the requirement of a nexus with interstate commerce for U.S. nationals and concerns and make them liable if they do "any act" outside the U.S. in violation of the FCPA.
B. Expansion of the FCPA to apply the anti-bribery provisions to "any person," including foreign nationals and concerns that do any act in furtherance of a prohibited payment in the U.S.
C. Elimination of the disparity in penalty provisions between U.S. employees or agents of U.S. companies and foreign employees or agents of U.S. companies. Under the previous version of the FCPA, U.S. employees or agents were subject to criminal penalties under the FCPA, while foreign employees or agents were only subject to civil penalties. After the 1998 amendments, all employees or agents are subject to criminal prosecution if they willfully violate the anti-bribery provisions of the FCPA.
D. Expansion of the prohibited conduct to cover payments made to secure "any improper advantage."

The DOJ has identified several situations, referred to as "red flags," to which companies should pay close attention when considering entering into or negotiating a business relationship in another country. These situations include:
A. Unusual payment patterns or financial arrangements;
B. A history of corruption in the country;
C. A refusal by a foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S firm to be in violation of the FCPA;
D. Unusually high commissions;
E. Lack of transparency in expenses and accounting records;
F. Apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered; and
G. Whether the joint venture partner or representative has been recommended by an official of the potential government customer.[lvii]

Companies should be aware of these "red flags" prior to entering into any business association with a foreign joint venture partner or agent and should try to discover whether any of these "red flags" exist during the due diligence process. In the event that any of these items are uncovered after the formation of the business relationship, companies should promptly follow up to determine how to best remedy the situation and minimize potential FCPA penalties.

VI. CASE STUDIES

A. Baker Hughes Incorporated

The SEC accepted an offer of settlement from Baker Hughes Incorporated ("Baker Hughes") after three questionable payments were discovered and reported by Baker Hughes.[lviii] The payments included (i) an illegal payment to tax authorities in Indonesia, (ii) an apparent facilitating ("grease") payment for obtaining a shipping permit in India, and (iii) an apparent facilitating payment to obtain approval for a reorganization in Brazil. In all three situations, the SEC found that the actions of Baker Hughes violated the books and records and internal control provisions of the FCPA. *Baker Hughes Incorporated* illustrates that the FCPA's accounting provisions apply even if the payment or gift was not an illegal payment under the FCPA's anti-bribery provisions or if it was a gift for which there would be an affirmative defense to the anti-bribery provisions. For example, in the first instance, Baker Hughes improperly recorded the payment as an expense for "professional services rendered." Importantly, Baker Hughes took aggressive steps to rectify the payments, including attempting to stop the illegal tax payment, engaging outside counsel to report to its audit committee, voluntarily and promptly disclosing the misconduct to the SEC and the DOJ, disclosing the matter to its outside auditors, correcting its books and records, firing its auditors and firing the individuals responsible for the conduct. As a result of these actions, the SEC accepted Baker Hughes' offer of compromise whereby the SEC ordered Baker Hughes to cease and desist from committing or causing any future violation of the FCPA, but did not prosecute the company further or impose a fine.

Additionally, in 1997, BellSouth acquired a 49% ownership interest in Telefonia Celular de Nicaragua, S.A. ("Telefonia"), Nicaragua's only provider of wireless telephone services, and an option to acquire an additional 40%. At the time of the acquisition, Nicaraguan law prohibited foreign companies from acquiring a majority interest in Nicaraguan telecommunications companies. The only way for BellSouth to exercise the 40% option was in the event that the Nicaraguan law was repealed. In connection with BellSouth's acquisition of the minority interest in Telefonia, one of BellSouth's domestic subsidiaries executed an agreement ceding operating control of Telefonia to the domestic subsidiary. Under this agreement, the domestic subsidiary became responsible for Telefonia's daily operations and for its long-term business planning. Further, Telefonia restructured its board of directors so that four of the six board seats were held by personnel of BellSouth's domestic subsidiary.

In 1998, Telefonia retained the wife of the chairman of the Nicaraguan legislative committee with oversight of Nicaraguan telecommunications to be responsible for providing various regulatory and legal services, including lobbying for the repeal of the foreign ownership restriction. The wife had no prior legislative experience and ultimately worked predominately on the repeal of the foreign ownership restriction. During the wife's tenure with Telefonia, her husband drafted the text of the proposed repeal of the foreign ownership restriction and enlisted support from other members of the legislative committee. In May 1999, the wife was terminated and shortly thereafter Telefonia made a severance payment to her, improperly recording the total amount of $60,000 paid to the wife as consulting services and as a severance payment. In December 1999, the Nicaraguan National Assembly voted to repeal the foreign ownership restriction and BellSouth subsequently exercised its 40% option.

As a result of BellSouth's actions with respect to the Telcel and Telefonia matters, the SEC found that BellSouth violated the books and records and internal control provisions of the FCPA. Telcel's internal controls failed to detect the unsubstantiated payments to the six offshore companies for a period of at least two years and BellSouth was unable to reconstruct the circumstances surrounding the payments. Thus, BellSouth essentially was strictly liable for the acts of its majority-owned foreign subsidiary. With respect to Telefonia, the SEC found BellSouth had the ability to cause Telefonia to comply with the books and records and internal control provisions of the FCPA due to BellSouth's operational control of Telefonia through BellSouth's domestic subsidiary, but failed to do so. The SEC eventually issued a cease-and-desist order against BellSouth, but no other action was taken due to BellSouth's aggressive remedial actions, including the disciplining and termination of various employees and the steps taken to enhance its FCPA compliance program.

Chiquita's policies and procedures contained strict guidelines regarding the use of discretionary expense accounts and the subsidiary did not provide the documentation required by Chiquita's internal accounting control procedures relating to such discretionary expenses. Chiquita also had strict policies prohibiting payments made to customs officials and required quarterly identification and disclosure of all payments to government officials or employees, political candidates, or political parties. In violation of these policies, the subsidiary failed to identify and disclose the payment to customs officials on the

disclosure forms submitted for the relevant quarters. Once Chiquita conducted an internal audit and discovered the payment, Chiquita took aggressive remedial action, including terminating the responsible employees and reinforcing its internal controls with respect to the Colombian operations.

The SEC found that Chiquita violated the books and records and internal control provisions because Chiquita was responsible for ensuring that its wholly-owned foreign subsidiaries comply with the FCPA's accounting provisions. Chiquita agreed to the issuance of a cease-and-desist order and the payment of a $100,000 fine. This case, much like *BellSouth*, illustrates that the accounting provisions of the FCPA effectively impose strict liability upon Issuers with respect to the acts or omissions of their wholly-owned foreign subsidiaries.

D. Metcalf & Eddy, Inc.

The DOJ brought an enforcement action against Metcalf & Eddy, Inc., a Massachusetts environmental engineering firm that provided services outside the U.S. ("M&E").[lxi] According to the complaint, a predecessor of M&E provided benefits to the chairman of an Egyptian governmental instrumentality to induce him to use his influence over his subordinates, the ultimate decision makers, to grant M&E two contracts funded by the U.S. Agency for International Development ("USAID") worth approximately $36,000,000 in the aggregate. The benefits provided to the chairman included the costs of travel, lodging and entertainment for two trips by the chairman, his wife and his two children from Egypt to the U.S. Both of the trips occurred during times when both contracts were under consideration. In addition to the payment of these costs, M&E paid the chairman and his family a per diem at 150% of the rate authorized by the Federal Travel Regulations (the "FTRs"), which was paid in a lump sum in advance of travel. The DOJ complaint noted that the per diem payments were not necessary expenses, even though approved by USAID based upon representations of M&E that accommodations could not be obtained at the usual per diem amount, and the payment of the additional 50% was not justified or documented as required by the FTRs. Additionally, despite having advanced the per diem amounts, M&E separately paid most of the travel and entertainment expenses incurred during the trips, thus causing the DOJ to deem the advanced per diem amounts "unrestricted cash payments" to the chairman. Finally, M&E upgraded the airline tickets provided to the chairman on both trips and purchased first class tickets for his family on the second trip. The upgrade to first class airline tickets was prohibited by the FTRs except in circumstances that were not applicable to either trip.

As a result of these actions, M&E was charged with violations of the FCPA's anti-bribery provisions because the chairman received payments of cash and things of value. The DOJ also alleged that M&E failed to maintain accurate books and records and effective internal controls and lacked an effective compliance and ethics program, although it is unclear whether these failures form a separate basis for FCPA liability. The consent agreement imposed a civil fine of $400,000 and a $50,000 charge to cover costs of the investigation and permanently enjoined M&E from future violations of the FCPA.

The result in *M&E* illustrates the problems associated with the payment of travel and entertainment expenses and that paying for the travel and entertainment expenses of an immediate family member of a foreign official constitutes "a payment of a thing of value" to the foreign official. Further, this case creates the inference that Domestic Concerns may be subject to the books and records and internal control provisions of the FCPA, even though the accounting provisions of the FCPA are expressly applicable only to Issuers, and also reflects that a company may be liable under the FCPA for the acts of a predecessor entity.

In addition to the fines and injunction imposed upon M&E, the DOJ imposed compliance obligations on M&E that provide helpful insight into the policies and procedures that the DOJ deems appropriate when preparing an FCPA compliance program. However, the DOJ noted that M&E was "*at a minimum*" to adopt these policies and procedures, which creates a strong inference that the state policies and procedures were not exhaustive and that even more was expected of M&E to ensure future compliance with the FCPA. The policies and procedures include:

1. a "clearly articulated" corporate policy against FCPA violations;
2. assignment of responsibility for compliance to one or more senior company officers;
3. establishment of an independent committee to review contracts retaining agents and consultants and review the

suitability of potential joint venture partners;
4. "clearly articulated" due diligence procedures to determine whether potential agents, consultants and business partners are reputable and reliable;
5. "clearly articulated" procedures designed to inhibit discretion of corporate authority to persons with propensity to engage in illegal payments;
6. regular employee training on the FCPA and other countries' foreign bribery laws, including training of agents, consultants, and other representatives involved in foreign projects;
7. an effective reporting system for company employees to report suspected violations without fear of retribution;
8. appropriate disciplinary mechanisms for employees violating policies and for those employees who fail to detect violations;
9. anti-bribery clauses in all contracts with consultants or business partners, including periodic certifications, prior approval of any sub-agents, and termination clauses for violations;
10. books and records and internal accounting requirements identical to requirements imposed on Issuers under the FCPA;
11. periodic certifications on FCPA compliance to U.S. governmental entities based on independent outside audits;
12. periodic reviews of the FCPA compliance program by outside law firms or auditors (at least once every five years);
13. full disclosure of future and past payments activities to the DOJ; and
14. truthful and complete cooperation with law enforcement officials.

F. U.S. v. Kay

The DOJ alleged that former officers of American Rice, Inc. ("American Rice") paid or authorized bribes in the amount of $500,000 to Haitian customs officials to reduce American Rice's import taxes by approximately $1,500,000.[lxv] The DOJ argued that these actions were encompassed by the "obtain or retain business" language in the anti-bribery provisions of the FCPA because the bribes resulted in a cost reduction, thus American Rice could maintain or increase the amount of rice sold in Haiti. In FCPA cases, the government often alleges an expansive interpretation of the "obtain or retain business" element of the FCPA's anti-bribery provisions and is often successful in its interpretation. However, at trial the District Court for the Southern District of Texas did not accept the DOJ's position and dismissed the indictment against the American Rice officers. The court found that the "legislative history weighs against the Government's argument that the FCPA should be construed so broadly so as to encompass payments made to reduce customs duties or tax obligations."[lxvi]

The decision was appealed by the DOJ to the 5th Circuit Court of Appeals, which reversed and remanded the case.[lxvii] In contrast to the district court, the Fifth Circuit held that the "obtaining or retaining business" language in the FCPA did not require that a bribe be made to get a particular piece of business. Rather, the Fifth Circuit held that in enacting the FCPA, "Congress . . . made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity's business in that country."[lxviii] The court examined the legislative history and purpose of the FCPA and found that Congress had intended to cast a "wide net over foreign bribery."[lxix] The court held that the purpose of the FCPA is to criminalize "bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending or renewing a contract, or executing or preserving an agreement."[lxx] While a bribe must still in some way be related to increasing one's business opportunities to be unlawful, it does not have to relate directly to obtaining a particular piece of business or a particular contract. The Fifth Circuit concluded that a bribe paid to evade customs duties could in certain circumstances assist a U.S. company in obtaining or retaining business in a foreign country, and could therefore be covered by the FCPA.

G. ABB Vetco Gray, Inc.

On July 6, 2004, ABB Vetco Gray, Inc. ("Vetco U.S.") and ABB Vetco Gray U.K. Ltd. ("Vetco U.K.") pleaded guilty to violating the anti-bribery provisions of the FCPA by bribing certain government officials in Nigeria in order to win a number of oil-related government contracts. Vetco U.S. and Vetco U.K. each agreed to pay separate fines of $5.25 million (for a total of $10.5 million).[lxxi] ABB Ltd., the Swiss parent company of Vetco U.S. and Vetco U.K., separately agreed to pay a fine of

$5.9 million as part of an offer of settlement negotiated with the SEC.

The DOJ alleged that employees of Vetco U.S. and Vetco U.K. offered a number of bribes, including an automobile, shopping trips, country club memberships, and cash payments, to various government officials in Nigeria in order to obtain an improper advantage while bidding on government contracts in Nigeria.

The *ABB Vetco Gray* case is significant because the DOJ brought charges under the FCPA against not only Vetco U.S., a U.S. company clearly subject to the FCPA, but also Vetco U.K., a foreign subsidiary of a non-U.S. company. This appears to suggest that the DOJ will prosecute foreign companies for FCPA violations, even if the conduct leading to the FCPA violation took place entirely outside the United States. It appears that the DOJ will claim jurisdiction over a foreign company for a FCPA violation if the foreign company conspired or acted with U.S. persons (*e.g.*, employees of a U.S. affiliate) when engaging in conduct that violates the FCPA's anti-bribery provisions.

H. InVision Technologies, Inc.

In conjunction with its acquisition of InVision Technologies, Inc. ("InVision") in early 2004, General Electric Company ("GE") and InVision voluntarily disclosed to the DOJ and SEC the results of an internal investigation into alleged FCPA violations by InVision.[lxxii] Investigations by the DOJ and SEC revealed that a senior sales executive and a regional sales manager became aware of a high probability that the company's agents or distributors in Thailand, China and the Philippines had intended to use their commissions or other payments from InVision to fund improper payments to foreign officials in connection with sales of InVision products. The SEC found that InVision's former sales executive and sales manager failed to conduct an adequate inquiry regarding this information and thereby avoided learning the true intentions of InVision's agents and distributors. In exchange for the DOJ's agreement not to prosecute, InVision agreed, among other things, to pay a civil penalty of $800,000 and to negotiate a settlement with the SEC for violations of the FCPA's books and records provisions. In a separate settlement, GE agreed, among other things, to cause InVision to perform its obligations under its Non-Prosecution Agreement, to integrate InVision into GE's FCPA compliance program, and to retain an independent consultant to evaluate GE's efforts in that regard.

This case demonstrates how liability under the FCPA can be predicated on a theory of "deliberate ignorance." In other words, the DOJ and SEC view the failure to follow-up on "red flags", by itself, to be a sufficient basis for establishing liability under the FCPA. Additionally, this case is yet another mergers and acquisitions case demonstrating how an acquiring company uncovered an FCPA issue and required the target company to take corrective (and expensive) action. It underscores the importance of reviewing FCPA matters in the acquisition context and illustrates some of the adverse effects of FCPA noncompliance on a company.

I. Monsanto Company

The DOJ and the SEC brought charges against Monsanto Company ("Monsanto") under the FCPA in connection with Monsanto's illegal payment of $50,000 to a senior Indonesian Ministry of Environment official, and the false certification of the bribe as "consultant fees" in Monsanto's books and records.[lxxiii]

According to the filed information, Monsanto hired an Indonesian consulting firm to assist it in obtaining various Indonesian governmental approvals and licenses necessary to sell its genetically-modified cotton products in Indonesia. At the time, the Indonesian government required an environmental impact study before authorizing the cultivation of genetically-modified crops. After a change in governments in Indonesia, Monsanto sought, unsuccessfully, to have a senior government official in the new government amend or repeal the requirement for the environmental impact study.

Having been unsuccessful in obtaining the senior government official's agreement to amend or repeal the environmental impact study requirement, a Monsanto employee authorized and directed its Indonesian consulting firm to make an illegal payment totaling $50,000 to the senior government official to "incentivize" him to agree to do so. False invoices for "consulting fees" were also sought from the Indonesian consulting firm to obtain reimbursement for the bribe. In 2002 Monsanto, through its Indonesian subsidiary, paid the false invoices and reimbursed the consulting firm for the $50,000

bribe and the taxes payable by the consulting firm on the $50,000 bribe. A false entry for these “consulting services” was included in Monsanto’s books and records.

In its deferred prosecution agreement with the DOJ, Monsanto agreed to pay a fine of $1,000,000, continue its mandatory FCPA compliance program and retain an independent compliance expert. The independent compliance expert was directed to review Monsanto’s books and records for a period of three years to ensure compliance with the FCPA. The DOJ deferred prosecution for three years and agreed to dismiss the criminal investigation after such 3-year period if Monsanto fully complied with the terms of the DOJ settlement agreement.

In its civil enforcement proceedings, the SEC found that Monsanto had violated the anti-bribery, books and records and internal control provisions of the FCPA. Monsanto agreed in its settlement agreement with the SEC to cease and desist from any further violations of the FCPA, consented to the SEC’s issuance of its administrative order, and agreed to pay a fine of $500,000. In addition to the improper $50,000 payment, the SEC’s order charged Monsanto with books and records and internal controls violations for up to $700,000 in questionable payments to Indonesian governmental officials between 1997 and 2002. It is worth noting that the Monsanto employee who was found to have authorized both t