103 Leading the Effort Against Corrupt Practices in the Global Arena

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David Glogoff is deputy general counsel for Vertis Communications and is located in Bristol, Pennsylvania and Baltimore. Vertis Communications partners with its clients to solve the most complex, time-sensitive marketing challenges through consulting, creative, research, direct, media, technology, and production services. Mr. Glogoff and his team are responsible for providing a full range of legal support to Vertis' domestic and international operational units.

Prior to joining Vertis, he was a corporate associate in the business and finance group of the law firm of Smith, Stratton, Wise, Heher & Brennan in Princeton, New Jersey and a litigation associate at the law firm of Flood, Johnston & McShane in New York City where he specialized in environmental law and general litigation.

Mr. Glogoff graduated from Tulane Law School in New Orleans, Louisiana, where he was senior managing editor of the Tulane Journal of International and Comparative Law.

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Alexandra Wrage is the president and general counsel of TRACE, an international non-profit business association helping companies raise their anti-bribery standards, while lowering the cost of compliance. TRACE provides a series of tools for companies, including due diligence reports on commercial intermediaries, summaries of foreign law prepared by TRACE member firms, benchmarking research and in-person and on-line training.

Ms. Wrage previously held the position of senior counsel - international with Northrop Grumman Corporation for five years. Prior to that she worked in the Washington, DC and Middle East offices of MCI Communications. She joined MCI after several years as a business litigation associate with a Washington firm.

Ms. Wrage has written three guidebooks, including The TRACE Standard for Doing Business with Intermediaries Internationally, The High Cost of Small Bribes and First to Know: Robust Internal Reporting Programs. She currently is working on a guidebook addressing gifts, hospitality and travel for foreign government officials.

Ms. Wrage is chair of the Women in International Regulatory Law ("WIRL") steering committee, vice-chair of the ABA's committee on anti-corruption initiatives and compliance issues, a member of the steering committee for business principles for countering bribery and a member of the working group for the united nation's global compact 10th principle. She speaks frequently on topics of international law and anti-corruption initiatives and on the hidden costs of corruption.

Ms. Wrage studied law at Kings College, Cambridge University and lives now in Annapolis, Maryland.

Voluntary Disclosure under the Foreign Corrupt Practices Act

David L. Glogoff, Deputy General Counsel of Vertis Communications

Currently, there is no legal requirement to voluntarily disclose Foreign Corrupt Practices Act[1] ("FCPA") violations. Yet, in the past few years, there has been an increase in the number of companies willing to voluntarily disclose FCPA violations to the Department of Justice ("DOJ") and/or the Securities and Exchange Commission ("SEC"). Although voluntary disclosure is not typically a common practice among businesses that have violated federal laws, the DOJ and the SEC have encouraged voluntary disclosure of FCPA violations by agreeing to consider cooperation and voluntary disclosure when determining whether to prosecute a company and what penalty to assess.

In both last year's decision against Titan Corp.[2], and this year's decision against Tyco[3], two companies that voluntarily disclosed violations, the DOJ and SEC implemented large fines. While many companies have entered into favorable agreements with the DOJ and SEC after voluntary disclosure, the Titan and Tyco cases serve as reminders that voluntary disclosure is not a guaranty that the government will assign a less severe punishment. Despite the risk of severe fines, many companies continue to take a chance with voluntary disclosure. Eleven companies voluntarily disclosed potential FCPA violations between early March and early April 2006. A few examples of companies that have chosen to voluntary disclose potential violations in 2006 are Nature's Sunshine, Outback Steakhouse and Apex Silver Mines.

To date, the majority of companies that have voluntarily disclosed a violation of the FCPA have received favorable treatment. The question remains whether the trend of voluntarily disclosure of violations will continue if the authorities levy penalties like those imposed against Titan and Tyco.

Steps a Company Should Take After Finding a Potential FCPA Violation

Immediately upon suspecting that a violation of the FCPA has occurred, a company should conduct a thorough internal investigation to determine whether a violation has, in fact, occurred, and if so, the violation's scope and magnitude. The company must carefully decide if the investigation should be conducted internally or by a third party under obligations of confidentiality. If the company decides to use a third party, it should do so through counsel to protect the legal privilege.

If the investigation reveals that there was a violation of the FCPA, it is crucial that the company take action immediately. The company should determine the exact amounts paid to foreign officials and how or if they were recorded in the company's accounting books. If a subsidiary is responsible for the FCPA violation, the parent company must establish whether the violation was recorded in the parent company's accounting records. Other important factors are the length of time that the violations have been occurring and whether there were any red flags that could have warned the company of the violation prior to its discovery.

The company should analyze its internal controls to determine where and why existing internal controls failed to prevent the FCPA violation and immediately correct those controls to help ensure that a similar violation will not occur in the future and the company should immediately terminate all people involved with the illegal activity. Each of these measures will help to prevent the reoccurrence of a violation and may help mitigate penalties if the violation is later discovered by or disclosed to the government.

Once the company has completed its investigation, if it has not done so already, the company should engage an external legal advisor expert in the FCPA.

If the company finds that no violation occurred, the company should still make changes to its internal controls to help prevent future violations. The detailed investigation may expose weaknesses in the company's internal controls, which should be corrected as quickly as possible.

Deciding Whether to Voluntarily Disclose

Upon completion of the internal investigation, the company must then determine whether it wants to voluntarily disclose the violation to the government. In order for the government to consider voluntary disclosure when determining whether to prosecute and what penalty to impose, a disclosure must be timely.[4] Timely can mean two things; first, the disclosure must be made soon after the company becomes aware that a potential violation exists.[5] This time constraint does not impose a specific time limitation on the length of an internal investigation, but the investigation should be made within a reasonable amount of time.

[1] 15 U.S.C. §§ 78m, 78dd-1 – 78dd-2, 78ff (1994); 15 U.S.C.A. §§ 78dd-1 – 78dd-3, 78ff(1999).
[2] *United States v. Titan Corp*., No. 05 CR 0314 BEN (S.D. Cal. Mar. 1, 2005); *United States v. Titan Corp*., Civ. A. No. 05-0411 (D.D.C. filed Mar. 1, 2005) (Requiring Titan Corp. to pay more than $28 million in penalties).
[3] *Sec. and Exch. Comm'n v. Tyco Int'l Ltd*., 06 CV 2942 (S.D.N.Y. Apr. 17, 2006) (assigning $51 million in penalties was assigned to Tyco for FCPA and other violations of federal statutes).
[4] F. Joseph Warin and Jason A Monahan, *Journal of Payment Systems Law*, Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure, Vol. 1, No. 5 (Sept. 2005) at http://media.gibsondunn.com/fstore/documents/pubs/Warin-Monahan-FCPA-JPSL09.05.pdf.
[5] *Id.*

Second, the disclosure must be made prior to the DOJ or SEC learning about the violation from another source.[6] If another party has brought a potential violation to the government's attention, the government is unlikely to provide the violating party with any incentive to disclose the same information.[7] It is also important that a company make disclosures to both the DOJ and SEC if both agencies have the ability to prosecute the company under the appropriate provisions of the FCPA. While the DOJ and SEC may share information about possible violations and cooperate in investigations, each prosecutes independently;[8] therefore, disclosure should be independent.

Statute of Limitations

Before a company determines if it should voluntarily disclose a violation, it must consider the statute of limitations. No matter how compelling disclosure may be to a company, if the statute of limitations has almost run, the company should seriously consider its decision. Like other non-capital offenses, the statute of limitations for an FCPA violation is five years.[9] The government can extend this limitation period in certain circumstances; therefore, the five-year period does not mean that a company will not be indicted for a violation. The government may request a tolling of the statute of limitations if it has knowledge of the violation before the original five-year period has expired, but needs evidence located outside the United States to indict the company or individuals involved.[10] The extension is only applicable until the foreign government responds to the request for evidence. Acknowledging that there may be delays in the recovery of the evidence beyond the government's control, the Legislature permits tolling of the statute of limitations when evidence is required from somewhere outside of the United States. The tolling begins on the day the official request is made and ends on the day the foreign government takes action, but may not exceed three years.[11] Therefore, a company can be confident that there are no charges if it has not been indicted within eight years of the offense.

Companies should not assume that they will be made aware of a DOJ or SEC investigation. The DOJ has stated that it may tell a person or company that they are being investigated, but will not always do so.[12] Therefore, a company should consider the time that has elapsed since a violation before deciding whether to voluntarily disclose, not whether it has been notified of an investigation.

Cost Benefit Analysis

If the company finds that it will meet the timely requirement, and the statute of limitations is not an influencing factor in its decision to voluntarily disclose, the company should conduct a cost benefit analysis to determine if it will voluntarily disclose. There is no general answer that can be given on whether to voluntarily disclose; it will rely entirely on the facts of the specific situation.

This analysis will include weighing the reasons to and the reasons not to disclose a violation, considering the company's specific situation. The analysis should consider the amount of proof the government could obtain without the company's cooperation and disclosure. Additionally, the company must determine the likelihood that the discrepancy will be brought to the government's attention from an outside source.

To be an effective analysis, the company must not isolate the FCPA violation but consider all affects the disclosure may have on the company as a whole. This includes conducting a thorough analysis of *all* records that the DOJ and SEC may obtain and how they reflect other aspects of the company. The company needs to be confident that no other illegal activities will surface due to the government investigation.

Reasons To and Reasons Not To Voluntary Disclose

The SEC and DOJ have strived to make voluntary disclosure popular for FCPA violators. One way they have accomplished this is by promising to consider voluntary disclosure and cooperation when determining the most appropriate punishment for a violator. The SEC issued a Report of Investigation in October of 2001 asserting that voluntary disclosure, cooperation with the SEC, existence of compliance procedures and other mitigating factors will be considered when determining whether to bring criminal or civil proceedings against a company.[13]

The DOJ issued the Principles of Federal Prosecution of Business Organizations ("Thompson memorandum") in January of 2003.[14] The Thompson memorandum states that voluntary disclosure and a company's willingness to cooperate with the government's

[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] 18 U.S.C § 3282 (2004).
[10] 18 U.S.C. § 3292 (2004).
[11] *Id*.
[12] http://www.usdoj.gov/criminal/fraud/fcpa/suppleme.htm

[13] Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969 (Oct. 23, 2001).
[14] Memorandum from Deputy Attorney Generealy Larry Thompson to United States Attorneys (Jan. 20, 2003) (*available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

investigation are the most important factors the DOJ will consider when determining whether to prosecute. However, if the DOJ determines that other factors outweigh cooperation and voluntary disclosure, a company may not receive a benefit by disclosing.

Relying on these documents, many companies disclose potential violations in the hope that the government will not prosecute. Even if the agencies decide to prosecute, the companies expect that voluntary disclosure will help mitigate penalties.[15] In many instances, voluntary disclosure does help mitigate penalties, [16] but some companies that voluntarily disclose are left with severe penalties. The largest penalty imposed to date for an FCPA violation was imposed on a company that voluntarily disclosed the violation.[17]

The discrepancies between penalties imposed on voluntarily disclosing corporations lead many to believe that the DOJ and SEC are inconsistent with their punishments; "[t]he problem, say many involved in corporate compliance, is that the DOJ's policy is neither transparent nor consistent."[18] While many companies avoid large fines or prosecution all together, the DOJ and SEC occasionally punish one voluntary disclosing company more severely than another that appears to be similarly situated. Therefore, if a company is disclosing solely to help mitigate penalties, it may be disappointed if the DOJ and SEC choose to implement a severe punishment against them. Both the DOJ and SEC have stated that voluntary disclosure and cooperation are only factors that it will consider, and that they may be outweighed by other factors in the case. However, distinguishing between the cases that impose excessive penalties and those that impose none can be difficult.

Voluntary disclosure can also help maintain a company's reputation. If the company appears ready and willing to make changes to better the company, shareholders may remain pleased with the company and not bring derivative suits. Voluntary disclosure can also help create quick settlements and prevent the DOJ and SEC from making damaging remarks during a trial, allowing companies to maintain their reputation despite a violation.

Companies need to be aware that voluntary disclosure may not prevent shareholder suits in all instances. Drawing attention to wrongdoings, and incurring excessive fines because of it, may open a company to shareholder derivative lawsuits. These suits are costly to defend and can further damage the reputation of the corporation.

The increase in voluntary disclosure may be attributed to the Sarbanes-Oxley Act[19] and an escalated probability that the company will get caught and charged for a violation. Although the FCPA has provisions requiring companies to review books and records and implement internal controls that significantly predate the Sarbanes-Oxley Act[20], the Sarbanes-Oxley Act requires CEOs and CFOs to take responsibility if there are errors in periodic filings with the SEC.[21] The DOJ believes that this has led to heightened scrutiny of companies' books, bringing greater attention to potential violations.[22] It also provides CEOs and CFOs with a greater incentive to disclose potential violations.

Companies also face an increased possibility of being caught for FCPA violations. The DOJ is putting additional manpower behind seeking out and prosecuting FCPA violators by increasing the number of attorneys hired in the fraud division (the division that prosecutes potential FCPA violations).[23] While the threat of increased prosecution spurred some voluntary disclosures, the number of voluntary disclosures continues to rise as the DOJ continues to prosecute companies and levy large fines and punishments for those companies that are found guilty.

The risk of being caught has also increased because corrupt business practices are becoming a global concern. The United States is not the only country implementing regulations to assure that companies and persons that are involved in corrupt acts will be punished; many other countries are adopting similar legislation to punish bribery of public officials.[24] The countries that have adopted similar policies tend to collaborate to ensure that companies

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[15] *See* the Principles of Federal Prosecution of Business Organizations (Dep't. of Justice 2003) *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm (stating that voluntary disclosure would be a factor considered when determining appropriate punishment).
[16] *See In the Matter of B.J. Services Co.*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644 (Jun. 09, 2004); *see also* Press Release *Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability*, (Dep't. of Justice Mar. 2, 2005) *available at* http://www.usdoj.gov/opa/pr/2005/March/05_crm_090.htm; *see also United States v. Monsanto Co.*, No. 05 CR 00008 (D.D.C. Jan. 6, 2005).
[17] *See generally Titan Corp.*, No. 05 CR 0314 BEN and *Titan Corp.*, Civ. A. No. 05-0411.
[18] Leonard Post, *Deferred Prosecutions on Rise in Corporate Bribery Cases*, The National Law Journal, Aug. 17, 2001 *available at* http://www.law.com/jsp/article.jsp?id=1124183109360.
[19] Sarbanes-Oxley Act of 2002, 116 Stat 745, Pub. L. No. 107-204 (2002).
[20] 15 U.S.C. § 78m (2004).
[21] 15 U.S.C. § 7241 (2004).
[22] Marie Leone, *Coming Clean About Bribery*, Apr. 03, 2006 *at* http://www.cfo.com/article.cfm/6764209?f=options (referencing comments made by Mark Mendelsohn, deputy chief of DOJ's Fraud Section).
[23] *Id.*
[24] *See* Organization for Economic and Cooperative Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, 37 I.L.M. 1 *available at* http://www.oecd.org/document/20/0,2340,en_2649_34859_2017813_1_1_1_1,00.html; *see also* Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 *available at* http://www.oas.org/juridico/english/Treaties/b-58.html; *see also* Council of Europe, Criminal Convention on Corruption, Jan. 27, 1999, ETS No. 173 *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm; *see also* Council of Europe, Civil Law Convention on Corruption, Nov. 4, 1999, ETS No. 174 *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm; *see also* the United Nations Convention Against Corruption, Oct. 31, 2003, 43 I.L.M. 1 at 37 *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

participating in corrupt acts are properly punished. Some international conventions go as far as requiring ratifying countries to extradite potential violators.[25]

Many recent disclosures can be tied to a pending merger or acquisition.[26] Typically, the disclosure is made after the violation is found through the due diligence process.[27] Once a violation is found that could cause a significant amount of money in penalties if detected later, the non-violating company usually requires that the problem be corrected before the completion of the merger or acquisition. Voluntary disclosure in this instance is often made regardless of what penalties will be imposed. The company chooses to disclose the information to obtain a quick resolution to the problem so that the merger or acquisition may be completed. Often, both companies will voluntarily disclose together to ensure that the merger or acquisition is completed as quickly and smoothly as possible.[28] Even if the merger or acquisition is cancelled due to a potential violation, the violating company may want to disclose the information because there is a heightened chance of involuntary disclosure.

Although voluntary disclosure may be advantageous and the proper course of action in some scenarios (pending mergers and acquisitions or prior to inevitable involuntary disclosure), there are many situations where voluntary disclosure will not be the best option for a company.

One risk with voluntary disclosure is the possibility that the DOJ and SEC may not have enough information to prosecute without the disclosure and/or cooperation of the company. In these situations, voluntary disclosure may cost the company a significant amount of time and money. Two of the largest expenses associated with voluntary disclosure are the investigation expense (the government may also require that an outside investigator be hired) and the penalties imposed. The DOJ and SEC also may expect a company to provide many materials before it will consider them cooperative and the settlement or deferred prosecution will still likely hold some penalties and fines that the company will be required to pay.[29] If the government does not have enough information to prosecute without disclosure, these resources may be better spent on correcting the problem and revising internal controls.

The DOJ will also ask that the company relinquish its attorney-client privilege. The DOJ requires complete access to all materials that may help the agency determine the existence and extent of a violation, but relinquishing the attorney-client privilege can affect more than just the DOJ's access. It can also allow third parties and other government authorities access to these materials. Therefore, loss of the attorney-client privilege may be problematic to future government and third party claims. A company must keep in mind that providing the agencies access to internal documents may expose problems not previously known. By drawing attention to itself, the company opens itself to liability and prosecution on matters unrelated to the FCPA. Just because the discrepancies found do not tie into what the government was originally searching for, does not prevent the government from prosecuting them.

The DOJ and SEC have high standards for what constitutes cooperation. This may be changing in the near future. In *U.S. v. Stein*, S1 05 Crim. 0888 (June 26, 2006), Judge Lewis A. Kaplan, a federal district judge in New York, found that the DOJ was using the Thompson memorandum in an unconstitutional way. The DOJ insinuated to KPMG that the company should not pay legal fees for officers that stood trial for bad business practices. To prevent the DOJ from prosecuting the company, KPMG refused to represent those company officials. The officials had to hire other attorneys that were more affordable at a great cost to their defense.

Judge Kaplan found that the DOJ improperly pressured KPMG to refrain from paying legal fees. Specifically, Judge Kaplan believed that "the government held the proverbial gun to [KPMG's] head"[30] in order to ensure attorney's fees were withheld from the officers. The ruling is specific to this case where prosecutors violated the employee's constitutional rights to a fundamentally fair trial and the right to a lawyer as promised by the 5th and 6th Amendments to the United States Constitution respectively.[31] Professor Monroe H. Freedman, of Hofstra University School of Law, believes that Judge Kaplan has missed the constitutional issue.[32] Professor Freedman argues that the Supreme Court has recognized that defendants do not have a

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[25] Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 *available at* http://www.oas.org/juridico/english/Treaties/b-58.html, ; *see also* Council of Europe, Criminal Convention on Corruption, Jan. 27, 1999, ETS No. 173 *available at* http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm.

[26] *See Sec. and Exch. Comm'n v. GE InVision, Inc. (formerly known as InVision Technologies, Inc.)*, Civ. A. No. C-05-0660 MEJ (N.D. Cal. Feb. 2005); *see also United States v. Syncor Taiwan Inc.*, No. 02 CR 01244 (C.D. Cal. Dec. 5, 2002); *see also Titan Corp*., No. 05 CR 0314 BEN and *Titan Corp*., Civ. A. No. 05-0411.

[27] *See GE InVision Inc.*, Civ. A. No. C-05-0660; *see also Syncor Taiwan, Inc.*, No. 02 CR 01244; *see also Titan Corp*., No. 05 CR 0314 BEN and *Titan Corp*., Civ. A. No. 05-0411.

[28] *See GE InVision Inc.*, Civ. A. No. C-05-0660; *see also Syncor Taiwan, Inc.*, No. 02 CR 01244; *see also Titan Corp*., No. 05 CR 0314 BEN and *Titan Corp*., Civ. A. No. 05-0411.

[29] *See B.J. Services Co.*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644; *see also* Press Release *Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability*, (Dep't. of Justice Mar. 2, 2005), *see also United States v. Monsanto Co.*, No. 05 CR 00008 (D.D.C. Jan. 6, 2005); see also *In Vision Agreement*, *see also GE InVision Inc.*, Civ. A. No. C-05-0660; *see also Syncor Taiwan, Inc.*, No. 02 CR 01244; *see also Titan Corp*., No. 05 CR 0314 BEN and *Titan Corp*., Civ. A. No. 05-0411.

[30] Lynnley Browning, *U.S. Improperly Pressured KPMG, Judge Rules*, The New York Times, June 27, 2006 available at http://www.nytimes.com/2006/06/28/business/28kpmg.html?ex=1309147200&en=356d51abe376782c&ei=5090&partner=rssuserland&emc=rss

[31] *Id*.

[32] Peter Lattman, Wall Street Journal Online Law Blog, June 28, 2006 *available at* http://blogs.wsj.com/law/2006/06/28/kpmg-ruling-the-post-game-hodge-podge/.

right to their choice of counsel; and by withholding legal fees, the defendants were merely required to use public defenders or less expensive attorneys.[33] Therefore, the officers were not denied the right to an attorney under the constitutional requirements.

Professor Freedman also notes that the Supreme Court has determined that "any member of the bar is constitutionally competent to handle any case."[34] This would mean that the denial of their choice of lawyer would not affect their right to a fundamentally fair trial under the 5th Amendment of the Constitution of the United States. Professor Freedman goes on to assert that he may not agree with the concepts behind these decisions, but they have been made.[35]

The decision may be appealed although no appeal has been filed yet; and there are signs that the DOJ is "scrutinizing how the guidelines are used."[36] Professor Freedman has brought up valid points that may overturn the decision in higher courts, but for now the decision stands as applied to the Federal Courts in the Southern District of New York. This is relevant because many high-profile white collar crimes and corporate fraud cases take place in New York, giving Judge Kaplan's opinion extra weight.[37]

This case could affect voluntary disclosure because the Thompson memorandum asserts that the DOJ will take into consideration a company's willingness to relinquish its attorney-client privilege. This guideline has been the topic of debate among lawyers and company rights advocates. The Association of Corporate Counsel, among many, has strongly opposed using this as a determinative factor of whether the government should proceed with prosecution. Although the decision in the KPMG case does not address the constitutionality of this guideline, it has opened up the doors for defendants to bring suits over the guideline at a later date.

Whatever the result, Judge Kaplan has started down a road that many believe is long overdue. The Thompson memorandum provided a concrete set of guidelines that let a potential defendant know exactly what the government would consider when deciding whether to prosecute. However, some argue that the DOJ has taken these guidelines as a right to pressure potential defendants into giving up rights with which they would not normally part.

Other Options

Voluntary disclosure is not the only action a company can take to affect the DOJ's and SEC's decision to prosecute. If a company's decision to voluntarily disclose a FCPA violation is solely based on preventing prosecution or mitigating penalties, the company should first consider other available options. These options are applicable in situations where the company chooses not to disclose or if the violation against the company has been involuntary disclosed. The DOJ and SEC will also consider the seriousness of the offense, the pervasiveness of the wrongdoing, the history of similar conduct, the company's willingness to cooperate in the investigation, the company's compliance program, remedial actions taken, collateral consequences and the adequacy of non-criminal remedies.[38] After the grand jury investigation has been completed, the company may submit a paper or make a presentation on which of these factors they believe apply and why the factors should be considered in the prosecution's decision.[39]

The paper offered to the SEC is called a Wells Submission. Often, the SEC will not provide a lot of time for a company to produce a Wells Submission. Therefore, the company should begin putting this document together as soon as it learns that an SEC investigation is occurring. Wells Submissions may be used as evidence in a later proceeding and should be drafted carefully to ensure that the company is not implicating itself in any criminal activity.[40]

Position Papers are submitted to the DOJ in an attempt to convince the federal prosecutors to abandon criminal cases or bring less serious charges. Typically, Position Papers will not be considered as an admission of guilt and will not be used directly against the company in later proceedings.[41] Position Papers should address the factors above and discuss strengths and weaknesses in the prosecutor's case as well as other reasons why the company believes that the prosecution should not move forward with the case.

Another popular option is to have the company's counsel make a presentation to highlight reasons why the government should not proceed with their case. This option is becoming increasingly common because it provides the company with an opportunity to explain the company's actions while addressing the prosecution's specific questions. A presentation may be the best option because the lack of writing prevents the language from being strictly scrutinized, and after presenting the case verbally, the company still has the opportunity to follow up with a Position Paper or Wells Submission.[42] The company should be sure to address the key concerns of the prosecution during the presentation.

[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] Greg Farrell, *Judge Blasts Pressure Put on KPMG Over Legal Fees*, USA TODAY, June 27, 2006 *available at* http://www.usatoday.com/money/companies/regulation/2006-06-27-kpmg-usat_x.htm.
[37] *Id*.
[38] Criminal Resource Manual U.S.A.M. § 9-162 part II(A).
[39] Robert W. Tarun, *Basics of the Foreign Corrupt Practices Act*, Apr. 2006 *at* http://www.lw.com/resource/Publications/_pdf/pub1287_1.pdf.
[40] *Id*.
[41] *Id*.
[42] *Id*.

The most difficult aspect of creating an effective presentation is the timing. If the presentation is offered too early, the DOJ or SEC may say that it is premature and not allow it.[43] If the presentation is given too early, it creates the risk of exposing problems that the DOJ and SEC have not yet come across. If the presentation is made too late, the prosecution may have already made up its mind and the presentation will not effectively persuade its audience.[44]

In general, it is important for a company to keep in contact with the DOJ and SEC throughout an investigation. This contact gives a company an advantage when filing Wells Submissions, Position Papers and giving verbal presentations by providing the company with information on what the key issues are and when the timing would be appropriate for submission.

Cases

The cases below were selected to show different results of voluntary disclosure. Although some cases seem to have a correlation between the amount paid in bribes and the penalty imposed, not all do. Titan and Tyco are excellent examples of high penalties for actions that appear to be in the same category of violation as other companies that incurred lower penalties. Tyco's penalty is difficult to assess because the amount assigned specifically for the FCPA violation is not separated from other unrelated penalties. The penalty assigned was a lump sum for FCPA violations and other violations. It is also important to remember, that the factors considered that mitigated penalties in a particular case might not be obvious from the DOJ opinions.

In re: BJ Services Company[45]

B.J. Services, S.A. is a wholly owned Argentinean subsidiary of B.J. Services Co. This subsidiary made questionable payments in 2001 to Argentinean customs officials to obtain equipment it was waiting for to complete an order. The equipment had been improperly imported under Argentinean customs law and the customs official offered to overlook the improper import for 72,000 pesos (slightly less than $23,500). The official threatened to deport the equipment if the payment was not made. If the equipment was deported, B.J. Services S.A. would lose 71, 575 pesos that it had already paid in import taxes, a penalty between 1 and 5 times the cost of the equipment and a second set of importation taxes when the equipment was properly imported. B.J. Services hired an outside consultant to negotiate a lower payment and authorized him to make the payment of 65,000 pesos (around $21,000). B.J. Services S.A. then improperly reported this payment in its accounting books. An additional 7,000 pesos (approximately $2,500) was paid to a customs official in September 2001, which was also improperly recorded.

In June 2002, B.J. Services' senior management learned of the improper payments and bookkeeping errors. After a complete investigation into the matter, B.J. Services voluntarily disclosed the violations to the SEC. B.J. Services also replaced management in the area where the violation occurred, changed accounting procedures and expanded its internal audit department. B.J. Services also retained an independent auditor to review the books and records of its Argentinean subsidiary to help ensure that future violations would not occur. The SEC determined that B.J. Services has taken adequate measures to correct the problem and prevent future violations from occurring and the SEC merely filed a cease and desist order. No monetary penalty was imposed against B.J. Services for this violation.

Micrus Corporation Agreement[46]

Micrus Corporation develops and sells medical devices that help provide minimally invasive treatments for neurovascular diseases. Investigations show that Micrus was making payments to doctors in publicly owned hospitals in France, Turkey, Spain, and Germany in return for the hospital's purchase of Micrus's product. While some of the payments may have been legal if Micrus had obtained prior administrative or legal approval, the corporation failed to do so. Micrus voluntarily disclosed to the DOJ and SEC that it had potential FCPA violations totaling over $105,000.

Micrus entered into a non-prosecution agreement with the DOJ. This agreement requires Micrus to comply with the terms of the agreement for two years. The terms include a $450,000 fine, accepting responsibility for its actions, continuing to disclose possible FCPA violations, its continued cooperation with the investigation and the development of a compliance program and internal controls.

United States v. Monsanto[47]

Monsanto is an agricultural company that helps farmers produce a larger and healthier product while minimizing agriculture's negative impact on the environment. A senior Monsanto manager in the United States authorized payments to a senior Indonesian Ministry of

[43] *Id*.
[44] *Id*.
[45] *B.J. Services Co.*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644.

[46] Press Release, *Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability*, (Dep't. of Justice Mar. 2, 2005) *available at* http://www.usdoj.gov/opa/pr/2005/March/05_crm_090.htm.
[47] *Monsanto Co*, No. 05 CR 00008.

Environment official in an attempt to have a law repealed that was adverse to Monsanto's Indonesian operations. The payment to the official was made, but the law remained in force. Monsanto continued to make payments for five years to Indonesian officials in an attempt to have the law repealed. The payments over the five-year period totaled around $700,000. Throughout this time, the senior Monsanto manager either did not record the bribes or created false invoices to cover up the expenditure of the bribes.

After an internal audit exposed the bribes, Monsanto voluntarily disclosed the violations to the DOJ and SEC. The DOJ entered into a deferred prosecution agreement with Monsanto. If Monsanto follows the terms of the agreement for three years, the case will be dismissed with prejudice. The terms require Monsanto to pay a $1 million fine and retain an independent consultant to review its policies and procedures. Monsanto settled with the SEC by agreeing to pay a $500,000 penalty.

Inision[48]

InVision is a California company that produces airport security explosive detection products and sells them to airports worldwide. InVision used employees and agents to pay bribes to government officials to obtain or retain business. InVision made or attempted to make bribes to officials in China, the Philippines and Thailand. (The payment to an officer in Thailand was prevented after disclosure). InVision made payments to an agent who then paid the officials or sent payments through a company it created disguised as an InVision distributor. General Electric ("GE") detected the FCPA violations and brought them to InVision's attention during due diligence connected with the potential merger between the two companies.

InVision voluntarily disclosed the conduct. The DOJ decided not to file criminal charges because this was InVision's first offense and it was prompt in its disclosure. The non-prosecution agreement requires InVision to follow all the terms of the agreement for a two-year period. The terms require InVision to pay an $800,000 fine, accept responsibility for its conduct, continue to cooperate with the investigation, and adopt a compliance program and internal controls. InVision settled with the SEC by agreeing to pay a $1.9 million penalty.

General Electric also entered into agreements with the DOJ and SEC wherein it agreed to take responsibility for assuring that InVision will continue to comply with the FCPA. InVision was fortunate that the violation did not prevent the completion of the merger, which is often the case if a company finds out about another company's FCPA violation through due diligence.

[48] *GE InVision, Inc. (formerly known as InVision Technologies, Inc.)*, Civ. A. No. C-05-0660 MEJ.

United States v. Syncor Taiwan, Inc.[49]

Syncor Taiwan is a wholly owned Taiwanese subsidiary of Syncor International Corporation. Syncor Taiwan provides radio-pharmacy services and outpatient medical imaging services. Syncor Taiwan was making payments to doctors who controlled the purchasing of nuclear medicine departments, including hospitals owned by the legal authorities in Taiwan. They made the payments to the doctors for the purpose of obtaining or retaining business with the hospitals. The Chairman of the Board of Syncor Taiwan authorized the payments while he was in the United States. Syncor Taiwan then falsely recorded the payments as promotional and advertising expenses.

Through due diligence for a possible merger, Cardinal Health, Inc. discovered the improper payments by Syncor Taiwan and notified Syncor. Syncor then voluntarily disclosed the information to the SEC and DOJ. Syncor also obtained outside counsel to investigate the matter. Syncor Taiwan entered into a plea agreement with the DOJ requiring it to pay a $2 million fine. Syncor settled with the SEC by paying a $500,000 civil fine, consenting to a cease and desist order and obtaining an independent consultant to improve Syncor's internal controls for record keeping and financial reporting.

United States v. ABB[50]

ABB Ltd. is a Swiss engineering company that has an upstream Oil, Gas and Petrochemicals division. ABB Ltd.'s United States and United Kingdom subsidiaries are responsible for the FCPA violation in question. In Nigeria, officials in the government program known as the National Petroleum Investment Management Services ("NAPIMS") are responsible for awarding bids to potential contractors for oil exploration projects in the country. The ABB U.S. and U.K. subsidiaries hired a Nigerian agent to do consulting work. The subsidiaries then had the agent pay bribes to the NAPIMS to obtain information on other company's bids and to help ABB secure contracts. The amount paid in bribes is difficult to determine because it included club memberships, shopping excursions, cars and housing expenses.

Interested purchasers of ABB's upstream Oil, Gas and Petrochemical division noticed the FCPA violations. The interested purchasers and ABB hired outside counsel and conducted a thorough investigation into the matter. The investigation took a substantial amount of time and effort and both the purchasers and company made frequent updates to the SEC and DOJ during

[49] *Syncor Taiwan Inc.*, No. 02 CR 01244.
[50] *United States v. ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.*, No. 04 CR 27901 (S.D. Texas 2004).

the investigation. At the conclusion of the investigation, the two subsidiaries pleaded guilty to bribing officials. The DOJ fined each subsidiary $5.25 million. The SEC filed a complaint against the Swiss parent company, which was settled for $5.9 million in disgorgement and a $10.5 million fine. The SEC imposed fine was considered paid in full after the subsidiaries paid the fines imposed by the DOJ, which totaled the same amount.

United States v. DPC (Tianjin) Co. Ltd.[51]

DPC (Tianjin) Co. Ltd., a Chinese company, is a wholly-owned subsidiary of Diagnostic Products Corporation (DPC). DPC produces and sells diagnostic medical equipment worldwide. DPC (Tianjin) was charged with violating the FCPA by paying more than $1.6 million to physicians and laboratory personnel at government-owned hospitals in China between 1991 and 2002. The payments were made to secure agreements that the hospitals would purchase DPC products. DPC (Tianjin) then recorded the payments as "selling expenses." The books and records of DPC (Tianjin) were then sent to DPC in California, where the parent company included the recorded payments in its consolidated financial statement.

DPC did not learn about the payments until 2002 when it put an immediate end to them. Shortly there after, DPC voluntarily disclosed the actions of its subsidiary to the DOJ and SEC. DPC (Tianjin) agreed to plead guilty for a $2 million fine, and to promises to adopt internal compliance measures and to cooperate with ongoing criminal and SEC civil investigations. The SEC investigations resulted in an order to cease and desist and a $2.8 million fine, which included slightly over $2 million in disgorgement.

United States v. Titan Corporation[52]

The DOJ and SEC have imposed the largest penalty for an FCPA violation to date on Titan Corporation. Titan is a leading military and intelligence contractor. Titan maintains a sales revenue around $2 billion per year. Much of that comes from contracts with United States military, intelligence and homeland security agencies. Titan also has many subsidiaries that are in the business of creating and constructing wireless phone networks for developing countries.

Titan hired an agent in Benin, Africa for $3.5 million. The agent was known to be the President of Benin's business advisor. Approximately $2 million of the $3.5 million went to the President's reelection campaign. It is suspected that these payments were made to assist Titan in its development of a telecommunications project in Benin. Titan also sought the government's consent to increase the percentage of its project management fees. Titan had no policy in place to prevent FCPA violations from occurring even though it had agents working in more than 60 countries.

The FCPA violations were discovered through due diligence for a potential merger with Lockheed-Martin. Both companies made disclosures to the SEC and DOJ. Titan pleaded guilty and arranged for the corporation to pay a $13 million criminal fine. Titan entered into a consent decree with the SEC. This required Titan to pay an additional $15.5 million and to retain an independent consultant to review the company's FCPA compliance procedures. Titan is required to adopt whatever recommendations the consultant makes regarding FCPA compliance. Following the settlements, Titan's merger with Lockheed-Martin fell through. Titan was fortunate that neither the DOJ nor SEC case resulted in Titan losing its ability to contract with the government.

Securities and Exchange Commission v. Tyco International Ltd.[53]

Tyco was charged with a variety of accounting and FCPA violations. The alleged problems took place between 1996 and 2002. Tyco voluntarily disclosed FCPA violations during an SEC investigation into other accounting discrepancies.

The alleged violations occurred due to the acquisition of subsidiaries in the mid to late 1990s. Tyco obtained a Brazilian subsidiary in 1996. This subsidiary made payments to Brazilian officials to obtain or maintain business, mostly in entertainment expenses for the officials. Tyco also acquired a South Korean subsidiary that violated the FCPA after the acquisition was completed. The SEC alleged that Tyco recognized problems during due diligence and failed to correct them within the subsidiaries.

After a lengthy investigation, Tyco settled with the SEC for a $50 million penalty and $1 million in disgorgement. It is difficult to assess how much of the penalty derives from the FCPA violation, leaving Titan to continue to claim to the title of the largest FCPA penalty assigned to date. There were no indications that Tyco received any leniency on the FCPA violations even though those particular violations were voluntarily disclosed.

The Future of Voluntary Disclosure

There are arguments to support both that voluntary disclosure will continue to be a trend among potential violators and that voluntary disclosure will decline. On one side, companies are

[51] Press Release, *DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act*, (Dep't. of Justice May 20, 2005) *available at* http://www.usdoj.gov/opa/pr/2005/May/05_crm_282.htm.
[52] *Titan Corp*., No. 05 CR 0314 BEN; *Titan Corp*., Civ. A. No. 05-0411.
[53] *Tyco Int'l Ltd*., 06 CV 2942.

no longer obtaining the benefit of non-prosecution agreements and mitigated penalties that they sought when voluntarily disclosing. In fact, many of the larger penalties are assigned to companies that voluntarily disclose. On the other hand, many companies are willing to risk a large fine to correct the problem. But how large can the fines get before companies refuse to cooperate and take their chances in court?

Statistics suggest that even though the DOJ and SEC are assigning large fines to companies that voluntarily disclose, many companies continue to follow the trend to disclose. Between early March and early April of this year, 11 companies reported violations to the DOJ and/or SEC.

Although, it appears as though companies will continue to voluntarily disclose potential FCPA violations for now, this may change if the DOJ cannot promise disclosing parties any advantage. The most significant advantage of voluntary disclosure is the mitigation of some of the penalties imposed on a corporation. If the DOJ continues to assess some of the largest penalties to companies that voluntarily disclose a potential violation, we may see a decline in the companies willing to take this risk.

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An Overview of the Foreign Corrupt Practices Act

David L. Glogoff, Deputy General Counsel of Vertis Communications

The Foreign Corrupt Practices Act[1] ("FCPA") is intended to prohibit corrupt bribery of foreign officials by American persons and corporations. The FCPA sought to accomplish this by specifically making it illegal for any person or company to bribe foreign officials and by adding provisions that required a corporation to maintain certain standards in bookkeeping. The FCPA requires all corporations who issue their securities with the Securities and Exchange Commission ("SEC") to keep detailed books, records, and accounts that accurately record corporate payments and transactions. By doing this, the FCPA has made it more difficult for companies to make illegal bribes and cover them up through different accounting entries. The FCPA also mandates all issuers of securities to implement and maintain internal accounting control systems to ensure that only people who have the proper authority have control over the company assets. By not only making the bribery itself illegal, but also regulating books, records and accounts, Congress exerts more control over prohibiting the corrupt bribery of foreign officials.

Pre-Foreign Corrupt Practices Act

Prior to the enactment of the FCPA in 1977, the United States government relied on other federal statutes to prevent corrupt business practices. These statutes included the Securities and Exchange Act of 1934[2], the Mail and Wire Fraud Acts[3], the Internal Revenue Code[4], and the False Statements Act[5]. The Securities and Exchange Act of 1934 requires all publicly traded companies in the United States to disclose material facts that are necessary to make financial and management statements regarding the company (the FCPA is codified into the United States Code in the same chapter as the Securities and Exchange Act.)[6] The Mail and Wire Fraud Acts prohibit persons or companies from using the mails or interstate or international telecommunications to defraud a party.[7] The Mail and Wire Fraud Acts provide one of the original bases for obtaining jurisdiction over companies that violate the bribery standards of the FCPA. The Internal Revenue Code disallows the deduction of illegal payments to foreign

[1] 15 U.S.C. §§ 78m, 78dd-1 *et. seq.*, 78ff (1977).
[2] 15 U.S.C. § 78 (1934).
[3] 18 U.S.C. § 1341 and 1343 (2004).
[4] 26 U.S.C. §§ 1 – 9833 (2004).
[5] 18 U.S.C. § 1001 (2004).
[6] 15 U.S.C. § 78 (2004).
[7] 18 U.S.C. §§ 1341 and 1343 (2004).

officials.[8] Lastly, the False Statements Act prohibits making a false statement to any United States department or agency, if the person knows the statement to be false.[9] The United States government was limited by the language of these statutes when punishing corrupt behavior involving bribery of foreign officials and improper accounting procedures and controls.

During the 1970s, the Unites States government conducted investigations into illegal practices among American businesses. More than 400 companies admitted to making questionable or illegal payments greater than $300 million to foreign officials, politicians and political parties.[10] The United States government became concerned that the illegal payments being made would harm, if they had not already done so, American foreign policy and the image of the American democracy, and would weaken public confidence in the financial integrity of American corporations.[11] The United States Legislature decided to take a more direct approach to control corrupt business practices.

Original Enactment of the FCPA

To implement a more direct approach, the United States government enacted the FCPA in 1977. The FCPA has included the same three major provisions since its original implementation. The three provisions are (1) no company (public or private) may bribe a foreign official for the purpose of obtaining or maintaining business[12]; (2) issuers of securities must register their securities with the SEC and keep detailed books, records, and accounts which accurately record corporate payments and transactions[13]; (3) registered issuers of securities must have internal accounting control systems that assure management retains control over the company's assets[14].. The definition of a foreign official and what knowledge a business or individual must have regarding illegal payments has changed over time. At the time of the original enactment, foreign official was defined to include foreign officials, foreign political parties, party officials, or candidates and their employees. To be convicted of the first provision, the person or company had to know that the money would be used for an illegal payment, or have reason to know that an illegal payment would be made. Sometimes, situations arose where it was not obvious that an employee or agent intended to make an illegal payment. If the government could show that there was a sign, no matter how small, that could have alerted the company, the company may have been convicted. This allowed the government to prosecute and convict people and corporations unfairly. To avoid a conviction, a person or company was often required to do substantial research on whether an employee or agent made an illegal payment.

The FCPA gives both the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") the ability to bring charges against a violating party. The DOJ is responsible for enforcing the antibribery provisions for domestic concerns and foreign companies and nationals. The SEC is responsible for enforcing all of the books and records and internal control provisions. The SEC is also responsible for bringing civil charges to enforce the antibribery provisions when an SEC issuer commits the potential violation. While the DOJ and SEC work closely together to gather research and information about possible violations, they prosecute separately from one another.

The 1977 version recognized that all payments made to foreign officials were not corrupt business practices. The FCPA laid out three exceptions in particular to the bribery provision of the Act. It was not considered a corrupt practice if the payment was a "grease payment."[15] Under the 1977 Act, grease payments included "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, specifically permitting transactions which may involve the proper performance of duties."[16] The second exemption excludes a bribe made by a foreign national that was made completely by his own decision.[17] The first exception allowed payments in true extortion situations.[18] This provision was designed to protect a company against threats from foreign officials. The Legislature recognized that it was unreasonable to hold a company responsible for defending itself against another's corrupt acts that were intended to harm the company.

The FCPA was the first attempt to regulate corrupt practices on a larger level. For the first time, the government prohibited the payment of bribes to foreign officials and treated business corruption as more than a domestic concern. While the FCPA was an excellent starting point, critics argued that it contained too many grey areas to be completely effective as originally written.[19]

[8] 26 U.S.C. § 162(c)(1) (2004).
[9] 18 U.S.C. § 1001 (2004).
[10] H.R. Rep. No. 95-640, at 4 (1977).
[11] S. Rep. No. 95-114, at 3 (1977).
[12] 15 U.S.C. §§ 78dd-1 *et. seq* (2004).
[13] 15 U.S.C. § 78m(b)(2)(A) (2004).
[14] 15 U.S.C. § 78m(b)(2)(B) (2004).
[15] S. Rep. No. 95-114, at 10 (1977).
[16] *Id*.
[17] H.R. Rep. No. 95-114, at 8 !977).
[18] S. Rep. No. 95-114, at 11 (1977).
[19] Michael V. Seitzinger, CRS Report to Congress, Foreign Corrupt Practices Act (1999) *available at* http://www.fas.org/irp/crs/Crsfcpa.htm.

The 1988 Amendments, The Alternative Fines Act & The Corporate Sentencing Guidelines

Although the FCPA prohibited and prevented many corrupt actions that may have occurred prior to the implementation of the Act, it still has its critics. One of the major concerns was the over-reaching knowing standard in the original Act. Critics argued that the 1977 standard was too severe on companies and was preventing them from participating in some business arrangements; arrangements in which they would have normally participated.[20] In 1988, the Legislature agreed to remove the "reason to know" language and change the standard to just "knowing".[21] "Knowing" under the Act would not encompass negligence or reckless disregard. "Knowing" would be defined to include willful blindness and a conscious disregard for corrupt practices.[22] The term "knowing" also includes being aware that there is a "high probability of improper conduct."[23] The intention of this standard was to hold persons and corporations responsible for their actions in a situation where warning signs suggest that there was improper conduct and the person or corporation conducted no further inquiry into the matter. The change relaxed the knowing requirement somewhat, but not as much as critics had hoped.

The Legislature also acknowledged that a person could not be criminally liable for a violation of the accounting standards, as long as the person does not knowingly circumvent or knowingly fail to implement accurate and reasonable accounting controls. This includes having reasonable assurance that management has control over the firm's assets.[24] Additionally, the 1988 Amendment eased the provision in the Act that required an issuer to keep reasonably detailed books, records, and accounts by requiring a company to exert only reasonable assurance and reasonable detail. This prevented the requirement of an unrealistic degree of precision by a company.[25] The test used to determine whether reasonable assurance and reasonable detail are met is whether a prudent official would use more care in dealing with his own affairs.[26]

Under the 1977 FCPA, an issuer that had any share of voting power could be accountable for corrupt business decisions that the company made.[27] Critics argued that this provision was not fair because it was impossible for a party who does not control the majority of votes to implement proper procedures, books and records. The Legislature agreed that it was unrealistic to expect a minority owner to control the majority decision. Accordingly, the Legislature amended the statute to provide that a minority owner could not be held liable for a corrupt business decision, as long as it used what vote it did have to influence the business in good faith.[28]The 1988 amendment also more clearly defined the exceptions and affirmative defenses in the FCPA. Grease payments continued to be permissible. Also permitted were payments to foreign officials to encourage them to do routine governmental actions or functions which they were permitted and expected to complete without payment.[29] The Legislature also added two affirmative defenses that a company could use if it was charged with violating the antibribery provision. The 1988 amendment allowed a company to make payments or promises for anything of value if the payment or promise was lawful under the written laws of the foreign official's country.[30] The 1988 amendment further allowed a party to pay a foreign official for a reasonable and bona fide business purpose such as the promotion, demonstration or explanation of products or services (e.g. flying a foreign official to the company site to view the services that would be provided if the company were awarded the contract).[31] The 1988 amendment also increased the applicable criminal penalties for FCPA violations (which have since been further increased).

In 1987, the Alternative Fines Act[32] was enacted. This Act allows a company to be fined either: (i) twice the amount that the victim lost as a result of the illegal act; or (ii) twice the amount that the defendant gained as a result of the illecgal act.[33] The Legislature believed that the double fine would dissuade corporate violators because it removed any financial incentive to incur a fine in order to obtain business.

In 1991, the Sentencing Guidelines for Organizations[34] was enacted. Although the Alternative Fines Act allowed for more severe monetary penalties, the Legislature believed more regulation was required not only to provide punishment and a deterrent but also to provide incentives for companies to keep internal controls and policies and to report violations.[35] The Legislature added an incentive in the Sentencing Guidelines for Organizations by permitting reduced sanctions if there were any mitigating factors.[36] Mitigating factors include, but are not limited to, having proper internal controls and procedure, voluntary disclosure, and the company taking swift action to correct a problem.

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[20] *Id*.
[21] 15 U.S.C. §§ 78dd-1 *et seq*. (2004).
[22] *Id*.
[23] *See generally United States v. Titan Corp*., No. 05 CR 0314 BEN (S.D. Cal. Mar. 1, 2005); *see also United States v. Titan Corp*., Civ. A. No. 05-0411 (D.D.C filed Mar. 1, 2005).
[24] 15 U.S.C. § 78m(b)(2)(B) (2004).
[25] 15 U.S.C. § 78m(b)(2)(A) (2004).
[26] 15 U.S.C. § 78m(b)(7) (2004).
[27] 15 U.S.C. § 78m(b)(6) (2004).
[28] H.R. Rep. No. 100-576, at 917 (1988).
[29] 15 U.S.C. §§ 78dd-1 *et seq*. (2004).
[30] *Id*.
[31] *Id*.
[32] 18 U.S.C. § 3571 (2004).
[33] 18 U.S.C. § 3571d (2004).
[34] U.S. Sentencing Guidelines Manual app. C. amend. 422 (effective Nov. 1, 1991).
[35] U.S. Sentencing Guidelines Manual ch. 8, introductory comm., app. A (2001).
[36] U.S. Sentencing Guidelines Manual ch. 8 (2001).

Organization for Economic Cooperation and Development's Convention on Bribery

In 1997, the first international convention aimed at preventing corruption worldwide was created. The Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") was eventually ratified by 36 countries. The United States supported the OECD Convention as well as other international conventions aimed at creating a universal standard for the punishment of corrupt business practices.[37] In part, this support stemmed from critics' claims that the FCPA had put United States corporations at a disadvantage in conducting international business. The strict regulations and punishments implemented in the United States were much more severe than punishments and regulations in foreign countries, which led to United States businesses losing contracts with foreign governments.

To date, 36 countries have ratified the OECD Convention. These countries are Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.[38]

In 1998, when the United States ratified the OECD Convention, it amended the FCPA to comply with the OECD Convention provisions. One change was the expansion from making bribery illegal when obtaining or maintaining business to making bribery illegal if payments were given to obtain "any improper advantage."[39] The 1998 amendments also expanded who could be liable under the FCPA. Previously, it was limited to SEC issuers and domestic concerns, but the OECD Convention required that the FCPA include foreign firms and persons who act to further a foreign bribe while within United States borders.[40]

The OECD Convention redefined foreign officials to include an official of a public organization.[41] This included people such as doctors or heads of hospitals, medical facilities and companies that are state owned. The OECD Convention also provided the United States the jurisdiction to punish United States corporations and individuals that act wholly outside of the United States.[42] Previously, the FCPA only punished corrupt acts that stemmed from the United States and that had, in some part, been performed there.

The 1998 amendment also allowed the United States to impose civil and criminal punishments on foreign agents or employees of a United States business that have acted corruptly.[43] The 1998 amendment significantly expanded whom the government could hold liable for an FCPA violation.

The FCPA Today

Today, the FCPA retains the basic provisions implemented in 1977. The most obvious and continuous change has been the increases in penalties imposed for violations. Section 1106 of the Sarbanes-Oxley Act amended the penalties allowed for violations of the accounting provisions of the FCPA. It changed the penalty for individuals violating the accounting provisions from up to a $1,000,000 fine and up to ten (10) years imprisonment to up to a $5,000,000 fine and up to twenty (20) years imprisonment.[44] Section 1106 changed the penalties for corporations from a fine of up to $2,500,000 to a fine of up to $25,000,000.[45] Individuals who violate the bribery standard may be subject to $250,000 in fines and up to five (5) years imprisonment.[46] Corporations who violate the bribery standard may be subject to $2,000,000 per violation[47] *or* under the Alternative Fines Act, twice the loss to the victim or benefit the defendant did or intended to obtain from making the corrupt payment.[48] Any corporation or individual who violates the anti-bribery provision may also be subject to a $10,000 civil fine.[49] The FCPA also prohibits an employer or principal from indemnifying or paying the fines imposed on an individual.[50]

Additionally, punishment for a FCPA violation may include the suspension of the right to do business with the United States government.[51] Additionally, a company may be ineligible to receive an export license and the SEC may suspend or bar persons from purchasing or selling

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[37] *See* Council of Europe, Criminal Law Convention on Corruption, ETS No. 173 ch. II (Jan. 27, 1999); *see also* Reportment on Enforcement and Monitoring of the ORCD Convention, *Battling International Bribery* (Dep't. of Statee July 31, 2004); *see also* Fact Sheet, *QAS Inter-American Convention Against Corruption*, (Dep't of State May 27, 1997).
[38] A list of the states that have signed can be found at http://www.oecd.org/document/30/0,2340,en_2649_34859_2027102_1_1_1_1,00.html.
[39] Pub.L. No. 105-366 (codified at 15 U.S.C. §§ 78dd-1 to dd-3 (2004)).
[40] Pub.L. No. 105-366 (codified at 15 U.S.C. § 78dd-3(a) (2004)).
[41] Pub.L. No. 105-366 (codified at 15 U.S.C. §§ 78dd-1(f)(1)(A), dd-2(h)(2)(A) and dd-3(f)(2)(A) (2004)).
[42] Pub.L. No. 105-366 (codified at 15 U.S.C. §§ 78dd-1(g)(1) and dd-2(i)(1) (2004)).
[43] Pub.L. No. 105-366 (codified at 15 U.S.C. §§ 78 dd-1 *et seq* (2004).
[44] Corporate Fraud Accountability Act of 2002 § 1106.
[45] *Id*.
[46] 15 U.S.C. §§ 78dd-2(g)(2)(A) and dd-3(e)(2)(A) (2004).
[47] 15 U.S.C. §§ 78dd-2(g)(1)(A) and dd-3(e)(1)(A) (2004).
[48] 18 U.S.C. § 3571d (2004).
[49] 15 U.S.C. §§ 78dd-2(g)(1)(B), dd-2(g)(2)(B), dd-3(e)(1)(B) and dd-3(e)(2)(B) (2004).
[50] 15 U.S.C. §§ 78dd-2(g)(3) and dd-3(e)(3) (2004).
[51] Department of Justice, Foreign Corrupt Practices Act Antibribery Provisions at http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm.

securities.[52] These sanctions are often more costly to the future of a business than any monetary sanction.

The values of the bribes paid to foreign officials from the start of the enactment until Spring 2006 has been between $16,000 and $272 million.[53] The value of fines paid (when at least some monetary fine was imposed) by companies during the same period has ranged from $10,000 to $28.5 million.[54]

The DOJ and SEC have made a commitment to increasing enforcement of the FCPA. They have held to the commitment and increased the number of companies under investigation. Partly because of the increased enforcement, companies are voluntarily disclosing possible FCPA violations in the hope that voluntary disclosure will mitigate their exposure, though the benefits of this practice in the current enforcement climate is not as clear as it once was. Increased enforcement has also made it more important for businesses to implement proper internal controls. Attached are examples of a sample policy (Appendix A) and sample certifications (Appendix B) that businesses may adopt to help ensure compliance with the FCPA.

UN Convention Against Corruption

The most recent convention aimed at the international standardization of bribery laws is the UN Convention Against Corruption. To date, 53 states have ratified this convention.[55] The United States is not among the ratifying states. President George W. Bush submitted the Convention to the Senate Foreign Relations Committee for ratification on October 27, 2005 with the hope that it would be discussed and ratified quickly.[56] As of April 14, 2006, the Senate had not scheduled any action on the Treaty.[57] One reason the Senate may be slow to respond is that ratification of this Treaty would require significant changes to the FCPA. These include the removal of the definition of corruption as a concept;[58] the prohibition of offering any undue advantage, not just money or anything of value;[59] and the prohibition of trading in influence.[60]

[52] *Id*.
[53] Masako N. Darrough, *The FCPA and the OECD Convention Some Lessons from the U.S. Experience*, pp. 16-17 (2004).
[54] *Id*.
[55] A list of states and their signing and ratifying dates can be found at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty19.asp.
[56] Kristi Gaines, *Rule of Law – International: International Treaties* (ABA June 28, 2006) *available at* http://www.abanet.org/poladv/priorities/it.html
[57] *Id*.
[58] *See generally* United Nations Convention against Corruption (Oct. 31, 2003), 43 I.L.M. 1 at 37 *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf
[59] United Nations Convention against Corruption, Oct. 31, 2003, 43 I.L.M. 1 ch. III, Art. 15 and 16.
[60] United Nations Convention against Corruption, Oct. 31, 2003, 43 I.L.M. 1 ch. III, Art. 18.

One principle difference between the FCPA and the Convention is the Convention's failure to allow grease payments.[61] This exception has been part of the FCPA since its original enactment. Many companies rely on grease payments to run their business. The Convention also does not provide for any of the affirmative defenses currently available under the FCPA.[62] Again, many businesses rely on these long-standing defenses to operate their business in a smooth and effective way. By removing any leeway, the Convention may place companies from ratifying states at a disadvantage. Another major impact the ratification of this Convention would have on the FCPA is its prohibition of bribery to any party, thus removing the limitation that the bribery be of a government official.[63] Currently, the FCPA only regulates bribery of foreign officials. The regulation of purely private bribery would significantly expand the responsibilities of the DOJ and SEC. The Legislature will have to thoroughly analyze the benefits and drawbacks of ratifying this Convention. The largest benefit is the international standardization and cooperation amongst countries. However, this comes with the substantial cost of changing provisions in our Corruption Act that are now deeply routed in American business practices.

The author thanks Pamela Brinker, a Vertis Communications summer associate from Washington and Lee Law School, for her dedicated and tireless efforts in the preparation of this article.

[61] *See* United Nations Convention against Corruption Oct. 31, 2003, 43 I.L.M. 1 *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf, *compare to* 15 U.S.C. §§ 78dd-1(b), dd-2(b) and dd-3(b) (2004).
[62] *See* United Nations Convention against Corruption Oct. 31, 2003, 43 I.L.M. 1 *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf, *compare to* 15 U.S.C. §§ 78dd-1(c), dd-2(c) and dd-3(c) (2004).
[63] United Nations Convention against Corruption, Oct. 31, 2003, 43 I.L.M. 1 ch. III, Art. 21.

Appendix A:

Sample Foreign Corrupt Practices Act Policy

Policy

_____ [Company] is subject to the terms and requirements listed in the Foreign Corrupt Practices Act (FCPA), a provision of the Securities and Exchange Act of 1934. FCPA generally prohibits payments by companies and their representatives to foreign (i.e., non-US) government and quasi-government officials to secure business.

Violations of FCPA can result in severe penalties, including fines and imprisonment, to _____ [Company], its Directors, officers and employees, and would damage _____ [Company]'s reputation and ability to conduct business.

Purpose

It is _____ [Company]'s policy to comply fully with the requirements of FPCA. Each officer, manager and employee of _____ [Company] has the responsibility for compliance with FCPA within his or her area of authority, and must report any suspected violations immediately.

_____ [Company]'s joint venture partners that are operating outside the United States, particularly those with whom _____ [Company] has a joint interest or strategic alliance (i.e., certain outside companies _____ [Company] hires or other third parties who will be acting on behalf of _____ [Company] ("_____ [Company] JV Partners")), must also certify their compliance with FCPA, or _____ [Company] will not enter into business arrangements with them.

Therefore, it is each employee and business partner's responsibility to understand what may constitute a violation, and to proactively seek assistance should he/she see a possible violation of FCPA.

Scope

FCPA has broad application to transactions between _____ [Company] and foreign "officials" or representatives of governmental-type organizations. It is often difficult to determine whether a specific circumstance might represent a violation, therefore, it is imperative that all employees read and understand this policy, ask questions if any aspect of the policy is unclear, and that all _____ [Company] JV Partners operating outside the United States certify their understanding and agreement with this policy in general and FCPA specifically. See sample certification attached, and also available to download/print on the _____ [Company] Intranet Website.

Prohibited Payments:

FCPA prohibits _____ [Company] and its representatives, or any third party on _____ [Company]'s behalf, from making an offer, payment, promise to pay or other transfer of Company assets to a foreign official, foreign political party, candidate for foreign political office, or anyone with reason to know the purpose of such payment is to:

- Influence any act or decision of a foreign official in his official capacity, including a decision to fail to perform his official function

- Induce a foreign official to use his influence with a foreign government in order to assist the Company in obtaining or retaining business or directing business to any person.

Record Keeping/Accounting Requirements:

FCPA requires that _____ [Company] maintain books and records that in reasonable detail accurately and fairly reflect all Company transactions. Accordingly, all transactions should:

- Be executed in accordance with management's authorization

- Be recorded in a manner that permits the preparation of financial statements in accordance with applicable standards (notably Generally Accepted Accounting Principles)

- Maintain accountability of assets

- Be recorded in accounts that are reconciled to underlying detail at reasonable intervals.

None of these statements is intended to supersede existing _____ [Company] accounting policy.

Potential "Red Flags":

Employees and representatives of _____ [Company] are encouraged to be aware of "Red Flags" which might represent a questionable transaction. Such "Red Flags" might include:

- Unusual payments or financial arrangements, such as:
  - Payments to a numbered bank account
  - Payments to accounts in countries other than where agent is located or business is to be performed.
  - Cash payments.

- Unusually high commissions

- History of corruption in country

- Reputation of agent or consultant

- Refusal by Vertis Communications JV Partner or representative to provide certification (see attached) that it will not take any action that would violate the FCPA
  - The attached certification should be included in agreements made with outside Vertis Communications JV Partners. (See attached)

- Lack of transparency in expenses in accounting records

- Inflated invoices

- Relationship between the agent/consultant and the foreign government

• Apparent lack of qualifications or resources on the part of the _____ [Company] JV Partner or representative to perform the services offered.

• "Recommendations" of a _____ [Company] JV Partner or representative that come from an official of a potential government customer.

Where to Get Help with Questions or Concerns:

_____ [Company] has an "open door" policy, formalized in the Employee Handbook which is strongly encouraged through our management structure.

No one will be reprimanded, or otherwise punished, for raising legitimate questions related to any transaction – we encourage this interest in the well being of the Company.

Contact your local Human Resources Manager with any questions or comments on this policy.

Appendix B:

Sample Foreign Corrupt Practices Act Certifications

• This certification should be included in any agreements with _____ [Company] JV Partners, and must be signed by an authorized representative of the Joint Venture:

Certification

This Agreement is contingent upon compliance with any applicable U.S. laws, particularly the Foreign Corrupt Practices Act ("FCPA"), as well as the laws of _____ [Insert country in which the JV is located]. _____ [Insert name of JV Partner] (hereinafter "JV Partner") hereby represents and warrants that it is familiar with the requirements of the FCPA. _____ [Company] and JV Partner agree that all activities of JV Partner, and all of their actions on behalf of _____ [Company], will be conducted in accordance with the FCPA and foreign law.

JV Partner will maintain written books and records in accordance with Generally Accepted Accounting Principles (GAAP). Written records will be maintained of all expenditures made by or on behalf of JV Partner that clearly and accurately identify the persons or entities that receive payments. JV Partner shall employ no marketing representative or consultant without the written, advance approval of _____ [Company].

This agreement can be terminated immediately either upon violation of its terms or in the event that the agreement is found to be impermissible under U.S. or foreign law.

The undersigned hereby certifies that he/she has authority to enter into the bind JV Partner to all the terms and conditions of this Agreement, including the foregoing certification.

By:_____ (Signature of JV Partner Representative)

Name:_____

Title:_____

Date:_____

_____ [Insert name of JV Partner]

• This certification should be included in any agreements _____ [Company] makes to hire outside companies or other third parties who will be acting on behalf of _____ [Company], and must be signed by an authorized representative of the third party:

Certification

This Agreement is contingent upon compliance with any applicable U.S. laws, particularly the Foreign Corrupt Practices Act ("FCPA"), as well as the laws of _____ [Insert country(ies) in which services are to be performed by third party on behalf of _____ [Company]]. On behalf of _____[Insert name of outside company/third party], the undersigned hereby represents and warrants that _____ [Insert name of outside company/third party] is familiar with the requirements of the FCPA and will conduct all actions on behalf of _____ [Company] in accordance with the FCPA. The undersigned further represents and warrants that no money paid to _____ [Insert name of outside company/third party] as compensation or otherwise has been or will be used to pay any bribe or kickback in violation of U.S. or foreign law.

_____ [Insert name of outside company/third party] agrees to provide prompt certification of its continuing compliance with applicable laws whenever requested by _____ [Company].

All agents or employees of _____ [Insert name of outside company/third party] who will be involved in representing _____ [Company] must be identified in writing to _____ [Company] and approved before they perform any actions on _____ [Company]'s behalf. A written accounting must be kept of all payments made by _____ [Insert name of outside company/third party] or its agents or employees on behalf of _____ [Company], or out of funds provided by _____ [Company]. A copy of this accounting must be provided to _____ [Company] upon request. In no event shall any payment be made by _____ [Insert name of outside company/third party] or its agents or employees to any undisclosed third party.

It is understood and agreed that _____ [Insert name of outside company/third party] is an independent contractor without authority to bind _____ [Company] in any way. This agreement can be terminated immediately either upon violation of its terms or in the event that the agreement is found to be impermissible under U.S. or foreign law.

The undersigned hereby certifies that he/she has authority to enter into and bind _____ [Insert name of outside company/third party] to all the terms and condition of this Agreement, including the foregoing certification.

_____ [Insert name of outside company/third party]

By:_____

Name:_____

Title:_____

Date:_____

FCPA Outline:

A. Foreign Corrupt Practices Act ("FCPA")

i. History

1. Enacted in 1977, following highly publicized incidents of U.S. companies bribing foreign officials. Scandalized U.S., hurt image abroad, and interfered with diplomatic efforts. FCPA prohibited bribery and required publicly-traded companies to maintain transparent accounting and internal controls, including accounting for bribes as such. Exception for routine "grease" or "facilitating" payments.
2. Amended in 1988, due to perception that FCPA put U.S. companies at a competitive disadvantage. Added affirmative defenses for (i) activities expressly permitted under the foreign jurisdiction's laws, (ii) bona fide marketing and product demonstration expenses, and (iii) contractual obligations. Directed executive branch to seek parity through diplomatic efforts and international agreements.
3. Amended in 1998, to implement an international Convention on Combating Bribery. Broadened reach of FCPA to cover foreign nationals, and extended jurisdiction to activities outside the U.S.

ii. Statute and Construction

ANTI-BRIBERY PROVISIONS

a. Statute

15 U.S.C. §78dd-1 (Prohibited trade practices by issuers)
15 U.S.C. §78dd-2 (Prohibited trade practices by domestic concerns)
15 U.S.C. §78dd-3 (Prohibited trade practices by others)

b. Five Elements

(1) WHO LIABLE: Any individual, firm, officer, director, employee, or agent of a firm, any stockholder acting on behalf of a firm who violates OR orders, authorizes or assists someone else to violate.

a. Broad jurisdiction extends to "domestic concerns" (U.S. citizen, national, or resident; or organization with principal place of business in the U.S. or organized under laws of a U.S. state, territory, possession, or commonwealth), "issuers" (corporation with U.S.-registered securities or required to file periodic reports with the SEC); and foreign nationals or businesses (with some act in the U.S.)

b. U.S. parent can be liable for foreign subsidiary if it authorized, directed, or controlled the activity

c. U.S. residents or citizens acting on behalf of foreign organizations can be liable

d. Foreign companies and individuals can be liable by causing, directly or through agents, an act in the territorial U.S. in furtherance of a corrupt payment

(2) CORRUPT PURPOSE: Intent to induce recipient to use his or her position or influence. Includes directly or indirectly influencing any act, omission, or decision; affecting an outcome, securing an advantage. Any situation where the recipient has discretion should receive careful scrutiny. "Intent" includes conscious disregard, or deliberate ignorance. Discerning the difference between an unlawful act and a lawful "facilitating or expediting payment" (discussed below) can be challenging.

(3) PAYMENT: Includes authorizing, offering, or promising to pay money or anything of value. Payment can be made directly, or indirectly through a third party. Payment need not have been consummated.

(4) RECIPIENT: Payment made or offered to a "foreign official," "foreign political party," "party official," or "candidate" Broadly defined, may in some cases include:

a. Member of a royal family

b. Member of a legislative body

c. Official in a state-owned or state-funded organization

d. Individual with dual capacity, in government agency and also in a separate, private business

e. Charity whose founder also directs a government agency

(5) BUSINESS NEXUS: Payment made to assist in "obtaining" or "retaining" business, or "directing business" to someone.

a. Obtaining or renewing a contract

b. May be broadly construed, e.g., to include obtaining tax breaks or other government benefits that increase profits and provide a competitive advantage.

c. Permitted activities

(1) "Facilitating or expediting payments," commonly referred to as "grease" – Payments to facilitate "routine governmental action," i.e., customary payments to cause officials to do things they are required to do anyway (processing permits, licenses, providing basic government services, unloading cargo, scheduling inspections). If the person has discretion, the action likely is not "routine." Discerning the boundary of lawful "grease" is not simple or intuitive. Anticipate business pressure if "everyone else is doing it." Statue includes specific list of qualifying actions, including obtaining permits, processing documents, police protection, inspections, mail, phone, power, and water services, and "actions of a similar nature."

(2) Affirmative defenses

a. Payment lawful under the local *written* laws. Local custom or practice is not a defense, unless you can find it written in a local law or court precedent.

b. Money was a "reasonable and bona fide expenditure," spent as part of promoting, demonstrating, or explaining a product or performing a contractual obligation. Discerning whether a benefit to a foreign government agent is a permitted promotional expense or an unlawful gift can be challenging. Note that even if it is a legitimate marketing expense, it must be detailed in the company records with adequate detail to permit the

ACCOUNTING PROVISIONS

a. Statute

15 U.S.C. 78m(b)(2)(accurate records, internal controls)
15 U.S.C. 78m(b)(5)(can't knowingly circumvent or fail to implement internal controls, or knowingly falsify records)

b. Elements

a. WHO: "Issuer" required to file with the SEC

b. WHAT'S REQUIRED: [A] Keep accurate books and records, fairly reflecting transactions and disposition of assets, and [B] Maintain a system of internal controls, ensuring that management actually controls assets and transactions, and that assets and transactions are accurately recorded.

c. INTENT: Violation for "knowingly" failing to implement a system of internal controls, or "knowingly" circumventing the system or falsifying books, records or accounts.

c. Limits and Exceptions

(1) No criminal liability for technical or insignificant accounting errors

(2) Parents with a minority interest aren't criminally liable for subsidiary's acts IF parent acted in "good faith" to encourage subsidiary to comply with FCPA accounting provisions

2. Sanctions

1. Criminal penalties:

b. Corporations – up to $2.5M for accounting breach, $2M for bribery. Combined fines have exceeded $20M.

c. Individuals – up to $5M and 20 years for willful accounting violations, up to $100,000 and 5 years imprisonment for bribery violations. Company may not pay on behalf of the individual(s).

2. Civil penalties:

d. Fines up to $10,000 per person or organization

e. Additional court-imposed fines up to $100,000 per person, and up to $500,000 per organization

f. Injunction against improper practices

3. Other government action:

g. Exclusion from doing business with the Federal government

h. Ineligible for export license

i. Suspension or bar from securities activities

j. Other bars or exclusions

2. Preventing FCPA Problems

a. Implement comprehensive formal compliance and ethics program (*see, e.g.*, Metcalf & Eddy)

d. POLICY: Clearly articulated corporate policy, requiring employees, consultants, and agents to reduce prospective FCPA violations;

e. SR EXEC OVERSIGHT: Assign senior official to establish, update, and oversee compliance with internal policies, standards, and procedures; establish monitoring and auditing systems; investigate and audit as needed to detect criminal conduct;

f. COMMITTEE REVIEW: Establish disinterested committee to ensure appropriate due diligence in selecting and evaluating agents, consultants, joint ventures, and applicable contracts, to ensure FCPA compliance;

g. SPECIFIC PROCEDURES: Restrict discretion of corruptible individuals; Maintain "due diligence" files as to repute and qualification of prospective agents & consultants;

h. PERIODIC TRAINING: Regularly educate employees, agents, affiliates, and consultants about FCPA;

i. DISCIPLINARY MECHANISMS: Discipline not only for malfeasance, but also for failure to detect violations;

j. REPORTING SYSTEM: Establish system to report suspected criminal conduct without fear of retribution;

k. CONTRACT LANGUAGE: Prohibitions clearly spelled out for agents, consultants, etc, including prohibition on retaining sub-agents without the Company's written consent. Contracts terminable for FCPA violations.

2. Be alert for "red flags" with foreign associates

a. Unusual payment patterns or financial arrangements

b. History of corruption

c. Unusually high commissions

d. Lack of transparency

e. Lack of qualifications or resources

f. Intermediary recommended by a government official

3. Due diligence on business partners (see attached sample internal guidelines)

a. Private firms, also Commerce Department, have commercial services to help identify trustworthy partners (International Partner Search Program, International Company Profile Program, Flexible Market Research Program)

b. Commerce Department has Commercial Service Officers stationed overseas, with whom you can discuss prospective partners.

c. See http://ww.export.gov/comm_svc

4. Internal controls

a. Due diligence before making promotional or charitable donations, to identify government officials affiliated with proposed recipients

i. Does the type of charity fit the company's goals and internal policies?

ii. Can payments be broken down into smaller amounts, thus evading higher level review?

iii. Are large individual or cumulative payments given special review?

b. Sources of Compliance Guidance and Assistance

5. Department of Commerce

a. Mandate is to promote commerce, including by assisting businesses with FCPA compliance. Commerce does NOT have an enforcement function.

b. For informal assistance and guidance regarding particular (hypothetical) situations, call Catherine Nickerson, Senior Counsel, Office of Chief Counsel for International Commerce, (202) 482-5622.

c. BEWARE: If you present evidence of past, ongoing, or proposed violations of law, Commerce is required to report it to enforcement agencies.

d. Useful resources and publications regarding transparency and antibribery: http://www.osec.doc.gov/ogc/occic/tabi.html (see esp the March 2005 ethics report)

6. DOJ – Formal Opinions

a. Written opinion available re FCPA compliance

b. Procedure described at http://usdoj.gov/criminal/fraud/fcpa.html

c. Give-and-take discussion with DOJ attorneys often makes final letter unnecessary

d. Presumption of compliance in subsequent proceedings BUT ONLY as to the particular company that sought that opinion. For reference, see released letters at: http://www.usdoj.gov/criminal/fraud/fcpa/opiindx.htm

3. Competing with Corrupt Competitors – What can be done?

a. If feasible, focus company priorities on less corrupt markets.

b. Diplomatic assistance dealing with corruption or bribery by foreign competitors (provided jointly by State and Commerce Department)

c. Diplomatic meetings and pressure to comply with international anti-bribery treatises.

d. Company seeking assistance must agree in writing that it and its affiliates enforce anti-bribery policies.

e. Contact Dept of Commerce International Trade Administration, (202) 482-3896 or www.doc.gov

f. Commerce Department Hotline to report bribery by foreign competitors, through the department's Trade Compliance Center at http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?218:54:1:5

g. DOJ Hotline to report FCPA violations by U.S. companies, or foreign companies and individuals with adequate U.S. nexus

h. U.S. Government may inform foreign government, to obtain clean procurement or re-open tainted bid. If it's too late for either, DOJ may alert foreign counterparts for prosecution under local laws.

Checklist for Contracting with Foreign Entities

When contracting with foreign governments:

[ ] Implement effective anti-corruption policies and procedures internally
- [ ] Educate staff about FCPA
- [ ] Ensure adequate transparency and accounting controls to identify suspect activities
- [ ] Establish corporate compliance program with high-level responsibility and authority
- [ ] Confirm due diligence regarding foreign partner qualifications and associations
- [ ] Review existing and form contracts, job descriptions, company policies: Look for places to educate staff and business partners, and clarify expectations
- [ ] Consider requiring business partners and affiliates to agree in writing to avoid bribery, corruption

[ ] Consider requiring "exclusive" partners to permit exceptions if government objects to the partner. Governments may have political motivations different from other customers.

[ ] Consider buying "political insurance" for big deals in unstable countries

[ ] Check U.S. embargoes and sanctions: Can we do business with this government?

[ ] Learn what you can about peculiarities of the legal and political environment

[ ] Identify counsel with localized expertise

FCPA Antibribery Provisions (DOJ/Commerce)
Also available at: http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm

FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS

United States Department of Justice
Fraud Section, Criminal Division
10th & Constitution Ave. NW (Bond 4th fl.)
Washington, D.C. 20530
phone: (202) 514-7023
fax: (202) 514-7021
internet: www.usdoj.gov/criminal/fraud/fcpa
email: FCPA.fraud@usdoj.gov

United States Department of Commerce
Office of the Chief Counsel for International Commerce
14th Street and Constitution Avenue, NW
Room 5882
Washington, D.C. 20230
phone: (202) 482-0937
fax: (202) 482-4076
internet: www.ita.doc.gov/legal

INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct.

The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.

BACKGROUND

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. *See* Convention and Commentaries on the DOJ web site.

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. *See* 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the antibribery provisions.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers.

ANTIBRIBERY PROVISIONS

BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

A. Who -- The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

> Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a &"domestic concern," or a foreign national or business.

An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

B. Corrupt intent -- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The *offer* or *promise* of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

C. Payment -- The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

D. Recipient -- The prohibition extends only to corrupt payments to a *foreign official*, a *foreign political party* or *party official*, or any *candidate* for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official," such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official."

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for "facilitating payments for routine governmental action" (see below).

E. Business Purpose Test -- The FCPA prohibits payments made in order to assist the firm in *obtaining* or *retaining business* for or with, or *directing business* to, any person. The Department of Justice interprets "obtaining or retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does *not* need to be with a foreign government or foreign government instrumentality.

THIRD PARTY PAYMENTS

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term "knowing" includes conscious disregard and deliberate ignorance.* The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official."

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," *i.e.*, unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the 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, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does *not* include any decision by a foreign official to award new business or to continue business with a particular party.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

CRIMINAL

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to $2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may *not* be paid by their employer or principal.

CIVIL

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm *as well as* any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, 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 a natural person and $50,000 to $500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

OTHER GOVERNMENTAL ACTION

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

GUIDANCE FROM THE GOVERNMENT

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Mark F. Mendelsohn, Deputy Chief, Fraud Section, at (202) 514-1721; or Deborah Gramiccioni, Assistant Chief, Fraud Section, at (202) 353-0449 .

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, (202) 482-0937.

Last Updated: January 2006
usdoj/criminal/fraud/mm:dlj

Sample Large Company Policy: Foreign Corrupt Practices Act (International Sales Practices) (General Motors)

FOREIGN CORRUPT PRACTICES ACT (INTERNATIONAL SALES PRACTICES) -

(LEGL-03)

1. Background
2. Policy Statement
3. Bribery and Facilitating Payments
4. Political Contributors outside the U.S.
5. Accounting Standards
6. Special Invoicing or Payment Arrangements with Customers
7. Affected Business Units
8. Superseded Letter

BACKGROUND

As General Motors renews its efforts to penetrate global markets, it is appropriate to reemphasize General Motors' commitment to conduct its business throughout the world in accordance with both applicable law and high ethical standards. Federal laws, including the Foreign Corrupt Practices Act (FCPA) are applicable to the manner in which General Motors, its controlled affiliates, and each of their employees conduct business outside of the United States. State criminal laws and the laws of the countries in which we conduct business may also be applicable. Although the applicable laws vary in their scope and severity, failure to comply with the policies stated below will at a minimum tarnish General Motors' reputation as a responsible corporate citizen. Substantial violations will result in significant fines against the Corporation, and individual employees could face fines and imprisonment. In contrast, adherence to the policies established below will assist the Corporation in its efforts to implement and enforce an effective compliance program as is expected by the President's Council and recommended by an examination of the U.S. Sentencing Guidelines.

POLICY

The policies set forth below apply to all operations in the United States, General Motors controlled subsidiaries abroad, and their respective employees and agents and all U.S. citizens who are employed by General Motors and its affiliated entities worldwide. For purposes of this policy, a controlled affiliate is one in which General Motors owns directly or indirectly more than fifty percent of the shares, appoints a majority of the Board of Directors, or names the key officers.

BRIBERY AND FACILITATING PAYMENTS

No employee may offer, give, or promise to give any money or anything else of value, or authorize such payment or gift to any officer, employee, or agent of a foreign (i.e., non-U.S.) government or any department, agency, or instrumentality of a foreign government or any political party, candidate or official for the purpose of influencing any act or decision of such person or inducing such persons to do or forebear from taking any action in violation of his or her lawful duty, or inducing such person to use his or her influence with a foreign government to affect or influence any governmental decision relating to the entity's obtaining or retaining business. It is also unlawful to give indirectly, money or anything of value to any third person to accomplish the above purposes. Thus, GM sales and marketing personnel dealing with commission agents, dealers, or other third persons must take appropriate measures to ensure that such third parties do not carry out an illegal payment or promise to pay.

Facilitating payments to minor governmental employees whose duties are essentially ministerial or clerical, or to low level commercial employees in order to expedite the performance of their duties will be permitted on an exceptional basis. Examples include nominal payments for customs clearance of materials and persons, issuance of driver's licenses, placement of international telephone calls, and providing police protection.

It is the responsibility of the General Manager, or corresponding executive, at each location worldwide either to make sure that such payments are avoided altogether or, if he or she deems such payments to be essential to the operation, to establish controls to carry out the following guidelines:

1.) Such payments should be kept as low as possible in the aggregate, both regarding total payments by the General Motors activity and total payments to each individual, and each individual payment should be kept as small as possible;

2.) Such payments must be made only to minor governmental employees or low-level commercial employees whose duties are essentially of a ministerial or clerical nature;

3.) Such payments should be made only in connection with services to which the General Motors activity is clearly entitled;

4.) No such payments should be made for any purpose relating to obtaining or retaining business or directing business to any person;

5.) Such payments should not be made unless in accordance with the general practice in the country or locality where they are made; and

6.) The nature and amount of each facilitating payment must be clearly identifiable in the books, records and accounts of the General Motors activity making the payment.

In the event that the General Manager, or corresponding executive, deems it essential to the operation to make a facilitating payment, or a series of related facilitating payments, which are more than nominal in amount, prior approval of such payment or payments must be obtained from the appropriate Executive Vice President. Prior to submission of the matter to the Executive Vice President, any such proposed facilitating payments must first be reviewed by the Legal Staff to assure that they would comply with all applicable laws.

In view of the complexities of customs requirements, customs regulations should be reviewed with local counsel to determine whether the unit's practices conform to all governing laws and regulations prior to making a facilitating payment to expedite customs clearance. It may be advisable to obtain the services of reputable qualified brokers or agents who are familiar with handling customs matters. While it is recognized that the Corporation cannot control the practices of independent parties such as customs brokers, the payment terms and other aspects of these relationships should be based solely on legitimate commercial considerations and the Corporation should neither encourage nor condone improper practices by such parties. Further, in the event a broker or agent makes a payment, on his or her own and contrary to the requirements of this policy, the General Motors activity may not reimburse the broker or agent for such payment.

POLITICAL CONTRIBUTIONS OUTSIDE THE U.S.

The FCPA does not prohibit political contributions if the purpose of the contribution does not relate to the obtaining or retention of business.

However, political contributions and activities outside the United States warrant special attention because the purpose of such contributions and activities could be misconstrued as payments to obtain or retain business in a given country. Since General Motors and its subsidiaries are potential government suppliers throughout the world, the legality of such contributions might be questioned if they appear to be closely connected to particular business relationships, or are so large in amounts as to suggest that at least an implicit quid pro quo understanding exists.

It is also recognized that it may be appropriate for GM and its subsidiaries to support the political process through contributions to major political parties in some countries where such contributions are legal, publicly known and accepted, and could not be misconstrued as having been made for any improper purpose.

Therefore, with respect to non-U.S., political contributions, General Motors and its subsidiaries will neither fund nor in any way give support to any political party or official thereof or to any candidate for political office, even where permitted by law, unless such political contributions receive the prior approval of the President's Council. Prior to submission to the President's Council, any such proposed contributions must first be reviewed by the Legal and Industry-Government Relations Staffs to assure that they would comply with all applicable laws and policies. Any contributions which are made in accordance with this procedure must be accounted for properly and will be reported to the Audit Committee of the Board of Directors for their information.

The policy against any political contributions of any nature in the United States continues in effect and is in no way modified by this letter.

ACCOUNTING STANDARDS

The FCPA also establishes "Accounting Standards" which are separate and apart from the portion of the Act which prohibits certain "Foreign Corrupt Practices." It is essential to recognize that the accounting standards established by the Act are applicable not only to foreign operations of controlled subsidiaries but also to U.S. operations. The Accounting Standards section requires that books, records and accounts be made and kept which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the corporate assets. While this was specifically designed to prevent "off-the-books" accounts which might be used to conceal improper payments, the application of this standard is not limited to such situations. To implement the FCPA, the SEC has issued a rule that no person shall directly or indirectly falsify any book, record or account. Hence, it is essential that all books, records and accounts continue to be prepared accurately on the basis of reliable supporting documentation.

In this regard, it should be noted that the SEC issued another rule, also supplementing the Act, which prohibits directors or officers from directly or indirectly making materially false, misleading or

incomplete statements to any accountant, including internal accountants, in connection with an audit or examination of the financial statements or the filing of required reports or documents with the SEC.

In addition to the foregoing requirements, the Accounting Standards section of the Act provides that a system of internal accounting controls must be maintained which is sufficient to provide reasonable assurances that the following specific objectives are met:

1.) Transactions are executed in accordance with management's general or specific authorization.

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

3.) Access to assets is permitted only in accordance with management's general or specific authorization.

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

These objectives are consistent with those which have long been a part of the Corporation's overall system of internal controls. GM management has complete confidence in this system of internal controls and in the way these controls are monitored and kept up to date.

Failure by individual employees to comply with these standards could result in severe penalties to the employee and the Corporation.

Accordingly, it is particularly important that the control techniques employed by the Corporation to safeguard its assets and to assure factual reporting and accounting in all phases of its operations continue to function properly and that we ensure that any newly created investments adopt these techniques and procedures as well. In this way, the overall system will remain strong and viable and fulfill the specified objectives of this legislation.

SPECIAL INVOICING OR PAYMENT ARRANGEMENT WITH CUSTOMERS

General Motors' long-standing policy to conform to all applicable laws and regulations in those countries in which it does business includes a commitment not to knowingly enter into any invoicing or accommodating payment arrangements which would enable others to violate U.S. or other laws or facilitate such violations. The Corporation's policy concerning special invoicing or payment arrangements with customers, dealers, distributors, and agents is set forth in the following guidelines:

1.) Invoices to dealers, distributors, or assembler distributors (collectively referred to herein as ("dealers") should not exceed the normal dealer or distributor invoice price level.

The intent of this guideline is to avoid any special arrangement whereby an amount will be rebated, credited or similarly paid back to the dealer or its designee. Furthermore, the invoice price should not include amounts in excess of reasonable charges for items normally applicable to the distribution of a product to a dealer, such as shipping or insurance charges or, in special cases, finance charges. Therefore, if the invoice includes any additional or unusual items or charges which cause the billing to be in excess of the normal dealer invoice price level, such items or charges should be separately described and valued in sufficient detail to be readily comprehensible to an independent third party. It is not the intent of this policy to prevent customary price adjustments available for dealers generally, such as Holdbacks, the Close-out Allowance, etc.

With respect to the price of the product, this guideline does not preclude an invoice price in excess of the normal dealer level where the selling price of the product is negotiated between the General Motors entity and the dealer. For example, an agreement may be made which establishes a firm price for a product to be delivered at a future date which would exceed the normal price level for that product on its actual delivery date. In these circumstances, it would be entirely appropriate to invoice the dealer at the agreed price, provided no portion of the selling price is paid over to the dealer or its designee.

2.) In instances where dealers request that invoices be made to third parties (e.g., the dealer's customer), such request should be granted only if such invoicing is required to serve a legitimate purpose and does not improperly portray the true nature of the transaction.

This guideline deals primarily with the so-called "indent sale" which is a special arrangement involving a sale of the product by a General Motors entity to a dealer and a resale by such dealer to its customer, where the dealer requests that the General Motors entity ship the product to a customer of the dealer and invoice the customer on behalf

of and as a special accommodation to the dealer on terms established by the dealer.

Normally, in a transaction involving a sale to a dealer and a resale by the dealer to its customer, the General Motors entity involved will invoice the transaction for what it is, namely, a sale to the dealer. In turn, the dealer will invoice the customer with its own invoice. Deviations from this practice, such as those defined by an "indent sale," must be clearly necessary and serve a legitimate purpose. Accordingly, a request from a dealer for a General Motors entity to invoice a customer in connection with an "indent sale" should be granted only if such practice is necessary to conclude the sale and resale of the product. Further, the practice must not violate the laws or regulations of the U.S. or the country (or countries) where the customer and the principal place of business of the dealer are located. The request must be in writing and received by the General Motors entity prior to the issuance of the invoice or release for shipment, whichever occurs first. A single request, continuing by its terms but not exceeding one year, will suffice provided the circumstances and parties involved with the sales transaction remain the same.

In addition, there must be a clear understanding between the General Motors entity and the dealer that the applicable invoice will describe the true nature of the transaction, including the fact that the invoice is issued on behalf of the dealer. The selling price designated in an indent invoice must be set by the dealer wholly independent of the General Motors entity and be communicated to such entity in writing. In this connection, where permitted by law, General Motors personnel may suggest in writing, but not establish, the selling price to be charged to the dealer's customer.

To evidence the foregoing conditions, the following language, or its equivalent should appear on the invoice: "Invoice on behalf of and at price quoted by (firm name or dealer or distributor)."

It is recognized that, from time to time, General Motors entities may find it desirable to engage in sales transactions which are similar to the "indent sale" as defined in this policy. For instance, one General Motors entity may sell a product to another General Motors entity for resale to the latter's dealer or to the end user, and the General Motors entity purchasing the product may request that the General Motors entity making the first sale invoice such dealer or such end user on behalf of the General Motors entity reselling the product. In these circumstances also, the preceding guidelines would normally be applicable.

A "direct sale" is a sale in which a General Motors entity sells a product directly to the end user, without an intervening sale to a dealer. In this case, the General Motors entity should invoice the customer on its own behalf and in accordance with the terms and selling price established by the General Motors entity. This guideline is not applicable to such sales transactions. If, however, any sales commission is to be paid by the General Motors entity, the Legal Staff policy on 'Sales Representatives' is applicable.

Thus, it is important for the General Motors entity to determine at the outset whether a transaction involves an "indent sale" or a "direct sale" with a sales commission to be paid to a third party. As a general rule, if the General Motors entity establishes the terms of sale, including the selling price, the transaction is a "direct sale." On the other hand, if the third party (e.g., a dealer) establishes and controls the terms of sale, including the selling price, the transaction is an "indent sale."

In addition to complying with the requirements of this policy, all statements included on invoices should be consistent with the information contained in other documentation relating to the sales transaction (e.g., letters of credit, bid documents, etc.).

3.) Payments of amounts owing to dealers should be made only at the recipient's principal place of business and only to the person or entity entitled to the amount owed.

The only exception to this guideline is where there is a valid business reason and the unit is given a written statement provided by the dealer, distributor or agent advising General Motors of the following:

(a) the business reason for the special arrangement requested;

(b) the arrangement has been reviewed with competent local legal counsel who has advised in writing that the proposed payment arrangements will not contravene the laws and regulations of the local country;

(c) in the case of continuing arrangements, assurance must be given that General Motors will be notified of any changes in laws or regulations which would affect the arrangements and

(d) a statement of understanding that the Corporation has the right to disclose to outside parties matters concerning the special arrangements if necessitated by duly constituted authorities.

All General Motors employees and operations are expected to conduct the Corporation's business within the spirit of the policies stated in this policy to the end that no sale of products should be made where there is reason to believe that improper transactions are involved. It is recognized that situations may arise which would require individual judgment decisions. In making these decisions, consideration should be given to the appearance which a transaction would have if subjected to review by an independent third party. Any questions regarding any of the practices, procedures and explanatory material covered in this policy should be referred to the GM Legal Staff.

Sample Small Company Policy: New International Partners – Due Diligance (ebrary)

Company Policy
New International Partners – Due Diligence

It is Company policy to diligently inquire into the suitability of prospective international business partners. The purposes of this policy include (in no particular order):

(1) Identify and pursue the best possible partners
(2) Focus Company resources on the partners that will best help us achieve our organizational goals
(3) Find partners with common goals and objectives, adequate business experience in the right markets, appropriate level of capitalization and infrastructure, and solid reputations
(4) Avoid wasting time and resources on ineffective or unproductive partners
(5) Avoid involvement with partners that may create problems for Company through improper or disadvantageous activities (such as bribery or other legal or ethical violations, or creating an unfavorable impression in the marketplace)
(6) Identify potential risks and problems as early in the relationship as possible

Making critical inquiries about our international partners is especially important, because people and entities operating in other countries are often working under different cultural norms and expectations, and are accustomed to different laws and regulations. **We must be diligent, as working with corrupt partners can subject ebrary and its employees to civil and criminal liability.**

In order to achieve our goals, prospective partners should be diligently investigated, including:

(1) Identify the market, market value, and market barriers
(2) Understand which of our competitors are in the market; if few or none are, find out why
(3) Determine how pursuit of this market fits within Company's business plans, and what additional resources if any are required to pursue this opportunity
(4) Identify the key players in the market, including prospective customers, resellers, consortia, and government organizations
(5) Investigate and understand the prospective partner's business, including:
    a. corporate structure
    b. affiliations

c. financial health: major investors, capitalization, ability to cover unpaid invoices and pay for any damage they may cause
d. standard business practices, and whether there is adequate record-keeping and transparency
e. length of time in business
f. breadth and depth of market penetration
g. degree of sophistication and existing capabilities regarding technical implementation and customer support
h. degree of sophistication and existing capabilities regarding compliance with local tax, copyright, import, and other applicable laws
i. relationship(s) with local government (including any sort of public agency, official, party, royalty, public university or other entity with close ties to the government), with special attention to any indications that they may exert an inappropriate influence on prospective deals (even if it is indirect)
j. reputation among other key players
k. nature and status any litigation or compliance issues the entity has been involved in
l. key third parties the entity relies on, such as subcontractors, subresellers, attorneys/accountants, and whether such third parties are reliable

(6) Determine how other prospective partners compares with any alternatives
(7) Consider and evaluate ways in which the partnership could backfire: What problems might be anticipated? How likely are they, and can they be averted?
(8) Identify any peculiarities in the foreign market, including:
a. local copyright practices and norms
b. local import, tax, and other relevant regulations
c. **business norms and conventions**, such as whether contractual obligations are respected, whether businesses are slow to pay
d. whether "grease" payments to public functionaries are customary (in which case they must be reviewed by counsel to determine whether they are prohibited under applicable anti-corruption laws.)

Sample Contract Language for FACP Compliance (ebrary)

ebrary

RESELLER AGREEMENT (EXCERPT)

X.X Business Ethics. Reseller will at all times conduct itself according to the highest standard of business ethics. Reseller will not offer or provide money or anything else of value to any agent or representative of any government or government agency in order to obtain or retain business, as prohibited under the Foreign Corrupt Practices Act of 1977 as amended. No payments between Reseller and its Customers will be made in cash or via third parties. All such payments will be made directly by check or wire transfer. Reseller represents and warrants that none of its principals or staff are agents or representatives of governments or government agencies in the Territory. Reseller will provide true, accurate, and complete information in all product orders, reimbursement requests, and other communications relating to Ebrary and its Products.

GOVERNMENT AGREEMENT (EXCERPT)

X.X Ethics. Ebrary is committed to fair competition and the rule of law, and it is the company's policy not to participate in bribes or corrupt activities of any nature. Customer represents and warrants that it has exercised independent business judgment in purchasing or renewing ebrary's products, and has not been offered payments or other benefits to enter into this contract, except the contractual benefits set forth herein.

Sample Job Description Language for FACP Compliance (ebrary)

INTERNATIONAL SALES AND MARKETING JOB DESCRIPTION (EXCERPT)

XX. International Market Development: . . . This position is responsible for investigating prospective international business partners, and monitoring existing partners, to ensure that the Company does not sanction, tolerate, or participate in any dealings involving bribery or other corrupt activities.

XX. Professional Integrity: This position contributes toward maintaining a high standard of professional conduct throughout the Company, including understanding and abiding by applicable laws and company policies and obligations. This position promptly notifies Legal or other responsible Team members if unlawful or questionable actions are encountered or suspected, whether by employees or by any others with whom the company does business. This position seeks guidance from Legal or other responsible Team members if unsure how to respond to unfamiliar or challenging situations.

Text of FCPA as Codified (15 USC 78dd-1)

-CITE-

15 USC Sec. *78dd*-1
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-1. Prohibited foreign trade practices by issuers

-STATUTE-

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make 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 to -

(1) any foreign official for purposes of -

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that -

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

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of

this section and may, based on such determination and to the extent necessary and appropriate, issue -

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present

enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2)(A) A person's state of mind is ''knowing'' with respect to conduct, a circumstance, or a result if -

(i) such person is aware that such person is engaging in such conduct, that such 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.

(3)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include 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 decisionmaking process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States 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 to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term ''United States person'' means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

-SOURCE-

(June 6, 1934, ch. 404, title I, Sec. 30A, as added Pub. L. 95-213,

title I, Sec. 103(a), Dec. 19, 1977, 91 Stat. 1495; amended Pub. L. 100-418, title V, Sec. 5003(a), Aug. 23, 1988, 102 Stat. 1415; Pub. L. 105-366, Sec. 2(a)-(c), Nov. 10, 1998, 112 Stat. 3302, 3303.)

-MISC1-

AMENDMENTS

1998 - Subsec. (a)(1)(A). Pub. L. 105-366, Sec. 2(a)(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or''.

Subsec. (a)(2)(A). Pub. L. 105-366, Sec. 2(a)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,''.

Subsec. (a)(3)(A). Pub. L. 105-366, Sec. 2(a)(3), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or''.

Subsec. (b). Pub. L. 105-366, Sec. 2(c)(2), substituted ''Subsections (a) and (g)'' for ''Subsection (a)''.

Subsec. (c). Pub. L. 105-366, Sec. 2(c)(3), substituted ''subsection (a) or (g)'' for ''subsection (a)''.

Subsec. (f)(1). Pub. L. 105-366, Sec. 2(b), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.''

Subsec. (g). Pub. L. 105-366, Sec. 2(c)(1), added subsec. (g).

1988 - Pub. L. 100-418 substituted ''Prohibited foreign trade'' for ''Foreign corrupt'' in section catchline and amended text generally, revising and restating provisions of subsec. (a) relating to prohibitions, adding subsecs. (b) to (e), and redesignating provisions of subsec. (b) relating to definitions as subsec. (f) and amending those provisions generally.

TREATMENT OF INTERNATIONAL ORGANIZATIONS PROVIDING COMMERCIAL COMMUNICATIONS SERVICES

Pub. L. 105-366, Sec. 5, Nov. 10, 1998, 112 Stat. 3309, provided that:

''(a) Definition. - For purposes of this section:

''(1) International organization providing commercial communications services. - The term 'international organization providing commercial communications services' means -

''(A) the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization; and

''(B) the International Mobile Satellite Organization established pursuant to the Convention on the International Maritime Satellite Organization.

''(2) Pro-competitive privatization. - The term 'pro-competitive privatization' means a privatization that the President determines to be consistent with the United States policy of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access, in the provision of satellite services.

''(b) Treatment as Public International Organizations. -

''(1) Treatment. - An international organization providing commercial communications services shall be treated as a public international organization for purposes of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2 (and 78dd-3)) until such time as the President certifies to the Committee on Commerce (now Committee on Energy and Commerce) of the House of Representatives and the Committees on Banking, Housing and Urban Affairs and Commerce, Science, and Transportation that such international organization providing

commercial communications services has achieved a pro-competitive privatization.

''(2) Limitation on effect of treatment. - The requirement for a certification under paragraph (1), and any certification made under such paragraph, shall not be construed to affect the administration by the Federal Communications Commission of the Communications Act of 1934 (47 U.S.C. 151 et seq.) in authorizing the provision of services to, from, or within the United States over space segment of the international satellite organizations, or the privatized affiliates or successors thereof.

''(c) Extension of Legal Process. -

''(1) In general. - Except as required by international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process for any act or omission taken in connection with such organization's capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States.

''(2) No effect on personal liability. - Paragraph (1) shall not affect any immunity from personal liability of any individual who is an official or employee of an international organization providing commercial communications services.

''(3) Effective date. - This subsection shall take effect on May 1, 1999.

''(d) Elimination or Limitation of Exceptions. -

''(1) Action required. - The President shall, in a manner that is consistent with requirements in international agreements to which the United States is a party, expeditiously take all appropriate actions necessary to eliminate or to reduce substantially all privileges and immunities that are accorded to an international organization described in subparagraph (A) or (B) of subsection (a)(1), its officials, its employees, or its records, and that are not eliminated pursuant to subsection (c).

''(2) Designation of agreements. - The President shall designate which agreements constitute international agreements to which the United States is a party for purposes of this section.

''(e) Preservation of Law Enforcement and Intelligence Functions. - Nothing in subsection (c) or (d) of this section shall affect any immunity from suit or legal process of an international organization providing commercial communications services, or the privatized affiliates or successors thereof, for acts or omissions -

''(1) under chapter 119, 121, 206, or 601 of title 18, United States Code, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), section 514 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 884), or Rule 104, 501, or 608 of the Federal Rules of Evidence (28 App. U.S.C.);

''(2) under similar State laws providing protection to service providers cooperating with law enforcement agencies pursuant to State electronic surveillance or evidence laws, rules, regulations, or procedures; or

''(3) pursuant to a court order.

''(f) Rules of Construction. -

''(1) Negotiations. - Nothing in this section shall affect the President's existing constitutional authority regarding the time, scope, and objectives of international negotiations.

''(2) Privatization. - Nothing in this section shall be construed as legislative authorization for the privatization of INTELSAT or Inmarsat, nor to increase the President's authority with respect to negotiations concerning such privatization.''

(Memorandum of President of the United States, Nov. 16, 1998, 63 F.R. 65997, delegated to Secretary of State functions and authorities vested in the President by section 5(d)(2) of Pub. L. 105-366, set out above.)

ENFORCEMENT AND MONITORING

Pub. L. 105-366, Sec. 6, Nov. 10, 1998, 112 Stat. 3311, provided that:

''(a) Reports Required. - Not later than July 1 of 1999 and each of the 5 succeeding years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report that contains the following information with respect to implementation of the Convention:

''(1) Ratification. - A list of the countries that have

ratified the Convention, the dates of ratification by such countries, and the entry into force for each such country.

''(2) Domestic legislation. - A description of domestic laws enacted by each party to the Convention that implement commitments under the Convention, and assessment of the compatibility of such laws with the Convention.

''(3) Enforcement. - As assessment of the measures taken by each party to the Convention during the previous year to fulfill its obligations under the Convention and achieve its object and purpose including -

''(A) an assessment of the enforcement of the domestic laws described in paragraph (2);

''(B) an assessment of the efforts by each such party to promote public awareness of such domestic laws and the achievement of such object and purpose; and

''(C) an assessment of the effectiveness, transparency, and viability of the monitoring process for the Convention, including its inclusion of input from the private sector and nongovernmental organizations.

''(4) Laws prohibiting tax deduction of bribes. - An explanation of the domestic laws enacted by each party to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes.

''(5) New signatories. - A description of efforts to expand international participation in the Convention by adding new signatories to the Convention and by assuring that all countries which are or become members of the Organization for Economic Cooperation and Development are also parties to the Convention.

''(6) Subsequent efforts. - An assessment of the status of efforts to strengthen the Convention by extending the prohibitions contained in the Convention to cover bribes to political parties, party officials, and candidates for political office.

''(7) Advantages. - Advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by the organizations described in section 5(a) (set out as a note above), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in that section.

''(8) Bribery and transparency. - An assessment of anti-bribery programs and transparency with respect to each of the international organizations covered by this Act (enacting section 78dd-3 of this title, amending this section and sections 78dd-2 and 78ff of this title, and enacting provisions set out as notes under this section).

''(9) Private sector review. - A description of the steps taken to ensure full involvement of United States private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.

''(10) Additional information. - In consultation with the private sector participants and representatives of nongovernmental organizations described in paragraph (9), a list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness. Such additional means shall include, but not be limited to, improved recordkeeping provisions and the desirability of expanding the applicability of the Convention to additional individuals and organizations and the impact on United States business of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2, 78dd-3).

''(b) Definition. - For purposes of this section, the term 'Convention' means the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on November 21, 1997, and signed on December 17, 1997, by the United States and 32 other nations.''

INTERNATIONAL AGREEMENTS CONCERNING ACTS PROHIBITED WITH RESPECT TO ISSUERS AND DOMESTIC CONCERNS; REPORT TO CONGRESS

Section 5003(d) of Pub. L. 100-418 provided that:

''(1) Negotiations. - It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section (amending sections 78dd-1, 78dd-2, and 78ff of this title). Such international agreement should include a process by which problems and conflicts

associated with such acts could be resolved.

''(2) Report to congress. - (A) Within 1 year after the date of the enactment of this Act (Aug. 23, 1988), the President shall submit to the Congress a report on -

''(i) the progress of the negotiations referred to in paragraph (1),(;)

''(ii) those steps which the executive branch and the Congress should consider taking in the event that these negotiations do not successfully eliminate any competitive disadvantage of United States businesses that results when persons from other countries commit the acts described in paragraph (1); and

''(iii) possible actions that could be taken to promote cooperation by other countries in international efforts to prevent bribery of foreign officials, candidates, or parties in third countries.

''(B) The President shall include in the report submitted under subparagraph (A) -

''(i) any legislative recommendations necessary to give the President the authority to take appropriate action to carry out clauses (ii) and (iii) of subparagraph (A);

''(ii) an analysis of the potential effect on the interests of the United States, including United States national security, when persons from other countries commit the acts described in paragraph (1); and

''(iii) an assessment of the current and future role of private initiatives in curtailing such acts.''

(For delegation of functions of the President under section 5003(d)(1) of Pub. L. 100-418 to the Secretary of State, see section 3-101 of Ex. Ord. No. 12661, Dec. 27, 1988, 54 F.R. 779, set out as a note under section 2901 of Title 19, Customs Duties.)

-EXEC-

EX. ORD. NO. 13259. DESIGNATION OF PUBLIC INTERNATIONAL ORGANIZATIONS FOR PURPOSES OF THE SECURITIES EXCHANGE ACT OF 1934 AND THE FOREIGN CORRUPT PRACTICES ACT OF 1977

Ex. Ord. No. 13259, Mar. 19, 2002, 67 F.R. 13239, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 30A(f)(1)(B)(ii) of the Securities Exchange Act of 1934 (15 U.S.C.

78dd-1(f)(1)(B)(ii)) and sections 104(h)(2)(B)(ii) and 104A(f)(2)(B)(ii) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(h)(2)(B)(ii), 78dd-3(f)(2)(B)(ii)), I hereby designate as ''public international organizations'' for the purposes of application of section 30A of the Securities Exchange Act of 1934 and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977:

(a) The European Union, including: the European Communities (the European Community, the European Coal & Steel Community, and the European Atomic Energy Community); institutions of the European Union, such as the European Commission, the Council of the European Union, the European Parliament, the European Court of Justice, the European Court of Auditors, the Economic and Social Committee, the Committee of the Regions, the European Central Bank, and the European Investment Bank; and any departments, agencies, and instrumentalities thereof; and

(b) The European Police Office (Europol), including any departments, agencies, and instrumentalities thereof.

Designation in this Executive Order is intended solely to further the purposes of the statutes mentioned above and is not determinative of whether an entity is a public international organization for the purpose of other statutes or regulations.

George W. Bush.

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 78dd-2, 78dd-3, 78ff of this title; title 7 section 12a; title 18 section 1956; title 22 sections 2197, 2778; title 26 sections 162, 952, 964.

Text of FCPA as Codified (15 USC 78dd-2)

-CITE-

15 USC Sec. *78dd*-2
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-2. Prohibited foreign trade practices by domestic concerns

-STATUTE-

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make 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 to -

(1) any foreign official for purposes of -

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do

an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that -

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

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and

testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue -

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5 and shall not, except with the consent of the domestic

concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any

officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term ''domestic concern'' means -

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(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.

(4)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include 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.

(5) The term ''interstate commerce'' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of -

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States 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 to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this

section, for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term ''United States person'' means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

-SOURCE-

(Pub. L. 95-213, title I, Sec. 104, Dec. 19, 1977, 91 Stat. 1496; Pub. L. 100-418, title V, Sec. 5003(c), Aug. 23, 1988, 102 Stat. 1419; Pub. L. 103-322, title XXXIII, Sec. 330005, Sept. 13, 1994, 108 Stat. 2142; Pub. L. 105-366, Sec. 3, Nov. 10, 1998, 112 Stat. 3304.)

-COD-

CODIFICATION

Section was enacted as part of Pub. L. 95-213, the Foreign Corrupt Practices Act of 1977, and not as part of act June 6, 1934, ch. 404, 48 Stat. 881, the Securities Exchange Act of 1934, which comprises this chapter.

-MISC3-

AMENDMENTS

1998 - Subsec. (a)(1)(A). Pub. L. 105-366, Sec. 3(a)(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official in his official capacity, or (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or''.

Subsec. (a)(2)(A). Pub. L. 105-366, Sec. 3(a)(2), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, or (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate,''.

Subsec. (a)(3)(A). Pub. L. 105-366, Sec. 3(a)(3), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows:

''(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, or (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or''.

Subsec. (b). Pub. L. 105-366, Sec. 3(d)(2), substituted ''Subsections (a) and (i)'' for ''Subsection (a)''.

Subsec. (c). Pub. L. 105-366, Sec. 3(d)(3), substituted ''subsection (a) or (i)'' for ''subsection (a)'' in introductory provisions.

Subsec. (d)(1). Pub. L. 105-366, Sec. 3(d)(4), substituted ''subsection (a) or (i)'' for ''subsection (a)''.

Subsec. (g)(1). Pub. L. 105-366, Sec. 3(b)(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows:

''(1)(A) Any domestic concern that violates subsection (a) of this section shall be fined not more than $2,000,000.

''(B) Any domestic concern that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.''

Subsec. (g)(2). Pub. L. 105-366, Sec. 3(b)(2), amended par. (2) generally. Prior to amendment, par. (2) read as follows:

''(2)(A) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) of this section shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

''(B) Any employee or agent of a domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully violates subsection (a) of this section, shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

''(C) Any officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern,

who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.''

Subsec. (h)(2). Pub. L. 105-366, Sec. 3(c), amended par. (2) generally. Prior to amendment, par. (2) read as follows: ''The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.''

Subsec. (h)(4)(A). Pub. L. 105-366, Sec. 3(e), substituted ''The'' for ''For purposes of paragraph (1), the'' in introductory provisions.

Subsec. (i). Pub. L. 105-366, Sec. 3(d)(1), added subsec. (i).

1994 - Subsec. (a)(3). Pub. L. 103-322 substituted ''domestic concern'' for ''issuer'' in closing provisions.

1988 - Pub. L. 100-418 substituted ''Prohibited foreign trade'' for ''Foreign corrupt'' in section catchline and amended text generally, revising and restating as subsecs. (a) to (h) provisions of former subsecs. (a) to (d).

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 78dd-3 of this title; title 7 section 12a; title 12 section 635; title 18 section 1956; title 22 sections 2197, 2778, 6301; title 26 sections 162, 952, 964.

Text of FCPA as Codified (15 USC 78dd-3)

-CITE-

15 USC Sec. *78dd*-3
01/06/03

-EXPCITE-

TITLE 15 - COMMERCE AND TRADE

CHAPTER 2B - SECURITIES EXCHANGES

-HEAD-

Sec. 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

-STATUTE-

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd-1 of this title or a domestic concern (as defined in section 78dd-2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act 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 to -

(1) any foreign official for purposes of -

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of -

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do

an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of -

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply 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.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that -

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations

of the foreign official's, political party's, party official's, or candidate's country; 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, 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.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such

person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term ''person'', when referring to an offender, means any natural person other than a national of the United States (as defined in section 1101 of title 8 (FOOTNOTE 1) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(FOOTNOTE 1) So in original. A closing parenthesis probably should appear.

(2)(A) The term ''foreign official'' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international

organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term ''public international organization'' means -

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(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.

(4)(A) The term ''routine governmental action'' means only an action which is ordinarily and commonly performed by a foreign official in -

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term ''routine governmental action'' does not include 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.

(5) The term ''interstate commerce'' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of -

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

-SOURCE-

(Pub. L. 95-213, title I, Sec. 104A, as added Pub. L. 105-366, Sec. 4, Nov. 10, 1998, 112 Stat. 3306.)

-COD-

CODIFICATION

Section was enacted as part of Pub. L. 95-213, the Foreign Corrupt Practices Act of 1977, and not as part of act June 6, 1934, ch. 404, 48 Stat. 881, the Securities Exchange Act of 1934, which comprises this chapter.

Text of FCPA as Codified (15 USC 78m(b)(2))

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall -

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

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that -

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

(ii) transactions are recorded as necessary (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 is permitted only in accordance with management's general or specific authorization; and

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

(C) notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 7219 of this title.

Text of FCPA as Codified (15 USC 78m(b)(5))

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

Useful Web Sites for Foreign Government Contracting:

(1) Compliance with FCPA and other U.S. laws:

- Department of Justice: http://www.usdoj.gov/criminal/fraud/fcpa.html

(statute and history, DOJ opinions and procedures, international agreements)

- Department of Treasury, Office of Foreign Assets Control: http://www.ustreas.gov/offices/enforcement/ofac/sanctions/

(embargoes and other sanctions preventing or limiting business with certain foreign governments)

- www.export.gov

(assistance in selecting foreign partners and complying with export requirements)

- Trade Compliance Center: http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?226:54:44963c1dda8790d3fb19303d2f414ae2a05d297648de925a553ad6dbe542d4a1:17

(report bribery here; comprehensive business risk management brochure; various reports)

- Department of State: http://www.state.gov/e/eb/cba/gc/

(archives and reports regarding international bribery)

- Department of Commerce: Transparency and Antibribery Initiatives: http://www.osec.doc.gov/ogc/occic/tabi.html

- Department of Commerce – Office of the General Counsel: http://www.ogc.doc.gov/intl_comm_home.html

(Contact information and summary of advice and help they offer)

(2) International Anti-Corruption Sites:

(a) Major Conventions

United Nations: Convention Against Corruption (UNCAC)
http://www.unodc.org/unodc/en/crime_convention_corruption.html

Interamerican Convention Against Corruption (OAS)
http://www.oas.org/juridico/english/treaties/b-58.html

Organization for Economic Cooperation and Development (OECD)
http://www.oecd.org/document/21/0,2340,en_2649_34855_2017813_1_1_1_1,00.html

Council of Europe: Criminal Law Convention on Corruption (CoE)
http://conventions.coe.int/treaty/en/Treaties/Html/173.htm

African Union Convention on Preventing and Combating Corruption (AU)
http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf#search='African%20Union%20Convention%20on%20Preventing%20and%20Combating%20Corruption'

(b) Other Useful Sites

The Utstein Anti-Corruption Resource Centre
www.u4.no
***Useful charts comparing key elements of the major conventions at:**
http://www.u4.no/themes/conventions/intro.cfm#1

Anti-Corruption Network for Transition Economies
www.anticorruptionnet.org

Financial Action Task Force on Money
www.oecd.org/fatf/

International Chamber of Commerce
www.iccwbo.org/

International Criminal Police Organization (ICPO-Interpol)
www.interpol.int

Transparency International (TI)
www.transparency.org
***Charts of which regions and countries are subject to which conventions, at:**
http://www.transparency.org/global_priorities/international_conventions/regional_coverage

USA: Department of State: Global Forum on Fighting Corruption
www.usinfo.state.gov/topical/econ/integrity/

World Bank: anti-corruption
www.worldbank.org/publicsector/anticorrupt/

OECD Anti-Corruption Division
www1.oecd.org/daf/nocorruptionweb

Stability Pact Anti-Corruption Initiative
www.spai-rslo.org

Alexandra A. Wrage
President
TRACE International, Inc.

ENFORCEMENT UNDER THE FCPA

- **Higher penalties**
- **More expansive application of the law**
- **More interest and oversight from boards of directors**
- **More actions against individuals**
- **Increasingly invasive remedial measures**
- **Greater risk of multiple prosecutions**

David Glogoff
Deputy General Counsel
Vertis Communications

ENFORCEMENT UNDER THE FCPA

- TITAN - **$28.5 MILLION**
- TYCO - **$51 MILLION (includes fines for accounting discrepancies)**
- ABB LTD - **$21.4 MILLION**
- STATOIL - **$21 MILLION (includes $3 million fine to Norwegian Govt.)**
- SCHNITZER STEEL INDUSTRIES - **$7.7 MILLION**
- DIAGNOSTIC PPRODUCTS CORP - **$4.8 MILLION**
- SYNCOR - **$2.5 MILLION**
- GE / INVISION - **$2.7 MILLION**

- **CLASS ACTION SUITS** (Titan and InVision)

FOREIGN CORRUPT PRACTICES ACT

A Brief History

- Prior to the FCPA there were several federal statutes that affected US enterprises abroad (Securities Exchange Act of 1934, Mail and Wire Fraud Act, Internal Revenue Code, False Statements Act)
- FCPA was enacted in 1977 and later amended in 1988 to deal with bribery and corruption on a large level
- 1977 FCPA had three basic provisions
  - SEC issuers must keep detailed books, records and accounts which accurately record corporate payments and transactions
  - SEC issuers must maintain internal accounting control system
  - All domestic corporations cannot corruptly bribe a foreign official

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

Convention on Combating Bribery of Foreign Public Officials

- **Attempt to standardize international bribery statutes**
- **Signed in 1997 and has been ratified by more than 30 countries**
- **Required additional amendments to FCPA which were made in 1998**
  - Includes payments that were made to secure "any improper advantage"
  - Includes not only SEC issuers and domestic concerns but also any foreign firm or person who acts to further a foreign bribe within the U.S. borders
  - Redefined foreign official to include an official of a public organization
  - Provides jurisdiction to punish US corporations that act wholly outside of the United States
  - Foreign agents or employees of a U.S. businesses is subject to both civil and criminal penalties

FCPA PROHIBITS THE FOLLOWING ACTIVITIES

- The intentional violation of the accounting and record-keeping provisions of standards applicable to U.S. Companies
- Corrupt payments to foreign officials for the purpose of obtaining or keeping business

TO WHOM DOES THE FCPA APPLY?

- Applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm
- U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question

ACCOUNTING PROVISIONS

- Make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the company
- Devise and maintain a system of internal accounting controls
- Transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles, and to maintain accountability for assets
  - to prevent off-the-books transactions such as kick-backs and bribes by ensuring transparency,
  - aimed at uncovering and deterring corruption.

ANTIBRIBERY PROVISIONS

- The payment (or offer or promise of payment) of money or anything of value
- To a *foreign official*, a *foreign political party* or *party official*, or any *candidate* for foreign political office
- With corrupt intent to cause foreign official to misuse his or her position as government official to *influence* any act or decision of a foreign official in his or her official capacity
- In order to assist the firm in *obtaining* or *retaining business* for or with, or *directing business* to, any person

PAYMENTS TO THIRD PARTIES

- It is unlawful to make a payment to a third party, while knowing or consciously disregarding a suspicion that all or a portion of the payment will go directly or indirectly to a foreign official
  - This includes situations when the circumstances show that there is a high probability that improper conduct will occur regardless of actual knowledge
- Turning a blind eye to the fact that bribery was going on is not a valid defense

EXCEPTIONS

- **Payments to facilitate or expedite performance of a "routine governmental action"**
  - **Must be a function performed without discretion by the recipient**
- **Payment was lawful under the written laws of the foreign country**
- **Money spent as part of demonstrating a product**

RED FLAGS:

- Political contributions
  - Titan
- Charitable contributions
  - Schering-Plough
- Rumors of unethical or suspicious conduct
  - Statoil
- Remarks made by sales agents suggesting the need to give gifts or pay cash
  - GE / InVision
- Unusual invoices
  - Monsanto

FINES & PENALTIES

Antibribery Provisions

- **A company is subject to a criminal fine of up to $2 million per violation**
- **An individual is subject to a criminal penalty of up to $250,000 and/or imprisonment of up to five years**
- **Under the Alternative Fines Act, the actual fine may be made higher, up to twice the amount of the benefit that the defendant sought to obtain by making the corrupt payment (twice your gain or your competitor's loss)**
- **If an individual is fined, he may not be indemnified by his employer or principal**

FINES AND PENALTIES

ACCOUNTING PROVISIONS

- **A company is subject to a criminal penalty of up to $25 million**
- **An individual is subject to a penalty of up to $5 million and/or imprisonment of up to twenty years**
- **If an individual is fined, he may not be indemnified by his employer or principal**

ENFORCEMENT UNDER THE FCPA

- The values of bribes paid to foreign officials thus far has been between $16,000 and $272 million.
- The value of fines paid by companies during the same period ranges from $10,000 to $28.5 million.
- There is increased focus on and coordination in enforcing the FCPA by the DOJ and SEC

ENFORCEMENT UNDER THE FCPA

A Few Examples

- INTERNATIONAL BUSINESS MACHINES (IBM) CORPORATION
  - Parent company may be prosecuted if subsidiary violates FCPA; even if the subsidiary acts without the consent of the parent company
- VITUSA CORP.
  - Company is responsible if there is a high probability that an agent is engaged in prohibited activities
- SCHERING-PLOUGH CORPORATION
  - Charitable contributions can violate the FCPA

ENFORCEMENT UNDER THE FCPA

Voluntary Disclosure and Corporate Cooperation

- DIAGNOSTIC PRODUCTS CORP
  - SEC considered willingness to pay criminal fines when imposing civil fines
- MONSANTO COMPANY
  - DOJ is willing to enter into deferred prosecution agreements in certain situations

ACC's Annual Meeting
October 23-25, 2006

Manchester Grand Hyatt
San Diego, CA

ENFORCEMENT UNDER THE FCPA

Problems with Voluntary Disclosure

- NO GUARANTY THAT THE PENALTY WILL BE REDUCED (Titan)
  - Titan Corporation voluntarily disclosed and was assigned the largest penalty to date
- CLASS ACTION SUITS (Titan and InVision)
  - After Titan and InVision voluntarily disclosed violations, the shareholders brought a class action suit against the company

COMPANY COMPLIANCE

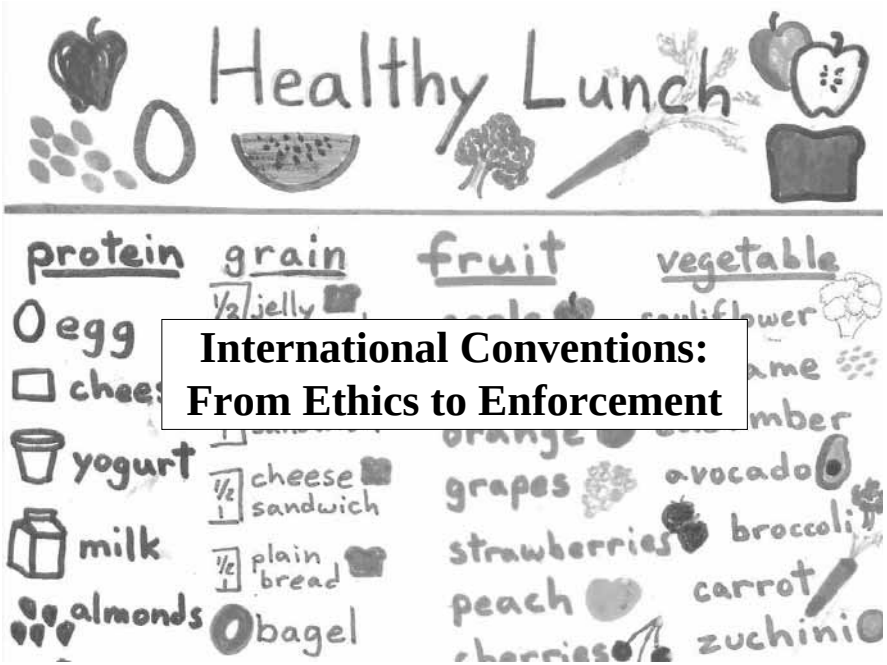
Example Internal FCPA Policy

- **Prohibits payments regardless of amount, to foreign governmental officials and personnel for obtaining, maintaining or directing Company business, including gifts of substantial value or entertainment that is exceptionally lavish under the circumstances, shall not be permitted**

COMPANY COMPLIANCE
Recommended Procedures

- **Due Diligence on consultants working with public officials on behalf of company and investigation of payment made under Consulting Agreement**
- **Require FCPA certifications from consultants and joint venture partners**
- **Mandatory attendance of FCPA Seminars by appropriate employees**

Juliette L. Hirt
Associate General Counsel
Ebrary



International Conventions: From Ethics to Enforcement

ACC Association of Corporate Counsel

International Ethical Norms:

A Changing Landscape (?)

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Changing Ethical Norms through International Collaboration

1. **Organization of American States (OAS)**
2. **Organization for Economic Development (OECD)**
3. **Council of Europe (CoE) – criminal**
4. **Council of Europe (CoE) – civil**
5. **African Union (AU)**
6. **United Nations (UNCAC)**

Organization of American States ("OAS")

- ***Inter-American Convention Against Corruption***
  - Adopted: March, 1996
  - Involves: Western Hemisphere (35 have ratified)
- **Differs from FCPA:**
  - Addresses demand-side bribery, as well as supply-side
  - No exception for facilitating payments
  - Acts covered are defined more broadly: "any act or omission in the performance of [official's] public functions"

Organization for Economic Cooperation and Development ("OECD")

- ***OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions***
  - Adopted: November, 1997
  - Involves: "Significant Economic Actors" (36 States Parties to date)
- **Differs from FCPA:**

  Defines prohibited act more broadly:
  - prohibits efforts to secure any "improper advantage in the conduct of international business"
  - can't influence official to "act or refrain from acting in relation to performance of official duties"
- **Differs from OAS:**

  Permits each country to decide about facilitating payments

Council of Europe ("CoE")

- ***Criminal Law Convention on Corruption***
  - Adopted: January, 1999
  - Involves: Europe, plus a few others
- **Monitoring** by the Group of States Against Corruption ("GRECO")
- **Differs from FCPA, OAS, and OECD:**
  - Requires criminalization of private-to-private bribery
  - Requires criminalization of trading in influence

Council of Europe ("CoE")

- ***Civil Law Convention on Corruption***
  - Adopted: November, 1999
  - Involves: Europe
- Notable Provisions:
  - Private right of action
  - Contract invalidation
  - Accounting and auditing

African Union ("AU")

- ***African Union Convention on Preventing and Combating Corruption***
  - Adopted: July, 2003
  - Involves: Africa
- Prohibited acts are broadly defined
- Differs from FCPA and OECD (but not OAS or CoE):
  - Covers private sector bribery
  - Covers both supply-side and demand-side bribery
  - No exception for facilitating payments
- Differs from CoE:
  - Does not address trading in influence

United Nations

- ***United Nations Convention Against Corruption ("UNCAC")***
  - Adopted: October, 2003
  - Involves: 140 signatories, 70 ratifications to date
  - Implementation Conference this December
- Greatest opportunity for standardization
- Greatest risk of conflict with existing laws and conventions
- Key provisions are optional:
  - Trading in Influence
  - Illicit Enrichment
  - Private Sector Bribery

UNCAC Impact on US Companies

- U.S. Ratification
- Facilitating Payments
- Prosecution Impact
- Private Bribery

Summary and Recommendations

- Complex and changing legal landscape
- Shifting ethical norms & prosecution risks
- Key areas to watch
- Providing competent, ethical counsel

- Keep abreast of the changing landscape
- Understand the business issues
- Establish appropriate internal policies
- Specialized counsel as needed
- Educate!

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David C. Kilpatrick
Corporate Counsel
Dresser Inc.

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The FCPA Compliance Landscape has Evolved:

- Sarbanes-Oxley
- NYSE/NASDAQ rule changes
- Amended US Sentencing Guidelines
- Thompson Memo
- Increased SEC and DOJ enforcement Activity
- 16 FCPA suits filed between 2002-2006
- 9 of 16 required to have external compliance monitor

Your Compliance Programs are an essential part of doing business in today's global market.

- Communicate organization's commitment.
  - deter and detect, avoid bookkeeping issues
- Raises Corporate Awareness.
  - creates a culture of good governance
- Reduce risk of probation, court-imposed program or supervision, fines and ultimately sentences.
  - mitigation of damages
- Makes good business sense.
  - enhance public image, helps manage bad PR

So what makes a robust program?

Look at recent cases, Monsanto and Titan.

They provide a benchmarking checklist of Governmental expectations for anti-bribery compliance programs. Also see Metcalf & Eddy

1.) A clearly articulated corporate policy against violations of the FCPA and other applicable anti-bribery laws and the establishment of compliance standards and procedures to be followed.

The Written Policy and Procedures

- Simple, concise unambiguous plan.
- Clearly define prohibited behavior that addressed company's expectations.
  - - Facilitation payments allowed or not?
- Prohibitions against retaliation.
- Available in multiple language to coincide with appropriate foreign operations.

2.) The assignment to one or more senior corporate officials of the responsibility for oversight of compliance with these policies, standards, and procedures. These officials shall have the authority to implement monitoring and auditing systems to detect criminal conduct and have the authority to retain outside counsel and independent auditors to conduct investigations and audits.

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It Starts at the Top!

- Top Management buy-in is essential.
  - Too often it takes a "hit" before attention is turned to compliance issues.
  - Sets the tone/example for entire organization
- Various models, GC, Chief Ethics Officer, CFO, but someone with the authority to make things happen.
- Key to pushing the message down.
- Fed. Sentencing Guidelines – "active leadership"

3.) The establishment and maintenance of a committee to review the retention of any agent, consultant, or representative for purposes of business development or lobbying in a foreign jurisdiction. This committee will also review the suitability of all prospective joint venture partners for purposes of compliance with the FCPA, as well as the adequacy of the due diligence.

4.) Clearly articulated corporate procedures to assure that substantial discretionary authority is not delegated to individuals that have a propensity to engage in illegal activities.

- Example, sign-off on contracts, agent agreements or commission payments by mid-level manager or above.

5.) Clearly articulated corporate procedures to assure that the company has formed business relationships with reputable and qualified agents.

The due diligence process.

- More than just a credit check.
- Multiple inside and outside resources.

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6.) The effective communication to all officers, employees, agents, consultants, and other representatives, and to sub-contractors, of corporate policies, standards, and procedures regarding the FCPA.

Training

- Mandatory for all.
- Participants recorded and tracked.
- Periodic updating of training materials.
- Include third party agents and contractors, presentations to annual gatherings.
- Utilize outside vendors to reach the masses, but live training sessions are hard to beat.

7.) The implementation of appropriate disciplinary mechanisms.

- Positive incentives for Compliance
- Consistent, negative disciplinary measures for violations;
  - Criminal misconduct
  - Failure to take reasonable measures to prevent

8.) The establishment of a reporting system by which officers, employees, agents, consultants, and other representatives, as well as sub-contractors, may report suspected criminal conduct without fear of retribution.

- The Hotline, Whistleblower policy
- Beware of EU Laws.

9.) The inclusion in all future contracts with agents, consultants and other representatives an agreement for the company to have audit rights for purposes of ensuring adherence with the FCPA, along with a general warranty of compliance with FCPA.

10.) The company will conduct periodic reviews, no less than once every five years, of its corporate policies and compliance programs regarding the FCPA and the anti-bribery provisions of each foreign jurisdiction to which it may be subject.

ACC Association of Corporate Counsel

In sum, robust compliance is:

- Written standards and procedures.
- Oversight starting at the top.
- Care in delegation of authority.
- Effective education and training.
- Monitoring, auditing and reporting.
- Consistent enforcement and discipline.
- Response and prevention.

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CODE OF CONDUCT

Code of Business Conduct for International Business Relationships

XXXXXXXX, Inc. ("XXXXXXXX") is a global company that conducts business in many countries through subsidiaries, branches, joint ventures and other business arrangements. XXXXXXXX also uses agents to represent it in situations where an agent can facilitate accomplishment of business objectives.

As a responsible corporate citizen, XXXXXXXX requires that all of its business operations observe certain basic standards of conduct. Also, as a public company subject to the Laws of the United States, XXXXXXXX must ensure that its business relationships outside the United states will comply with the requirements of certain United States Laws that impose on XXXXXXXX standards of conduct for its business throughout the world.

For International Business Relationships, it is the policy of XXXXXXXX that the following standards of conduct and legal requirements shall be observed:

1. Applicable Law must be complied with in the conduct of such relationships. If there is a conflict between applicable local Law and applicable United States Law, the guidance of XXXXXXXX's Law Department will be sought in order to resolve such conflict. However, the United States Laws referred to in paragraphs 4 and 5 below, must be complied without exception.
2. All dealings involving International Business Relationships will be conducted in a fair manner with honesty and integrity, observing high standards of personal and business ethics.
3. Business books and records will be maintained in a proper, responsible and honest manner which will allow XXXXXXXX to comply with applicable Laws.
4. International Business Relationships will be conducted in compliance with the United States Foreign Corrupt Practices Act. Distributor will not, directly or indirectly, give, offer or promise to give any money or other thing of value to any governmental official, political party or official, or candidate for such offices, for the purpose of influencing any act or decision of such person, in an official capacity, in order to obtain or retain business related to this Agreement.
5. International Business Relationships will be conducted in compliance with the Laws of the United States regarding boycotts. International Business Relationships will be conducted in compliance with the Laws of the United States regarding trade sanctions and export administration.

6. Confidential or proprietary information will not be disclosed at any time to persons outside the International Business Relationship without proper written authorization.
7. The International Business Relationship will be conducted in compliance with applicable antitrust and competition Laws.

XXXXXXXX, INC.	XXXXXXXX
By: _____	By:
_____	
Title: _____	Title:
_____	
DATE: _____	

ARTICLE XIII COMPLIANCE WITH LAWS AND BUSINESS CONDUCT

A. Distributor agrees to comply with all applicable laws, rules and regulations, and will do nothing that will cause **XXXXXXXX** or any Affiliate to be in violation of any law, guideline or regulation of the United States of America or any other country. Distributor will not, directly or indirectly, give, offer or promise to give any money or other thing of value to any governmental official, political party or official, or candidate for such offices, for the purpose of influencing any act or decision of such person, in an official capacity, in order to obtain or retain business related to this Agreement.

B. Distributor understands and agrees that products sold and any technical data provided hereunder may be subject to export and other foreign trade controls restricting re-sales and/or transfers to other countries and parties, including, but not limited to, licensing requirements under applicable law and regulation of the United States. Any other provision of this Agreement to the contrary notwithstanding, Distributor agrees that no products or technical data of U.S. origin or with U.S.-origin content will be sold, re-exported or transmitted, directly or indirectly, except in full compliance with all relevant U.S. government requirements. In particular, Distributor agrees that it will not export or re-export any of the products or technical data provided hereunder to any country, government, person, entity, organization or end-user subject to U.S. foreign trade restrictions and, in particular, not to any of the following:

   (i) any country to which such product and data may not be exported or transmitted without prior specific authorization of the Bureau of Industry and Security, U.S. Department of Commerce, pursuant to the Export Administration Regulations ("EAR") (15 C.F.R. Parts 730 to 774), including through release or disclosure of technical data to a national of another country, wherever located, who is not a citizen or permanent resident of the United States;

   (ii) any country, government, person, entity or organization to which the United States has embargoed or restricted the export or re-export of data or services under the sanctions programs administered by the Office of Foreign Assets Control, U.S. Department of the Treasury (31 C.F.R. Parts 500 to 598);

   (iii) any end-user if Distributor knows that the end-user will utilize any of the data in the design, development or production of nuclear, chemical or biological weapons or missile-delivery systems therefore; or

   (iv) any end-user who has been prohibited from participating in U.S. export transactions by any federal agency of the U.S. government.

A. Distributor understands and agrees that for exports subject to laws and regulations under the United States, Distributor is the Principal Party in interest for the export transaction and expressly assumes responsibility for determining licensing requirements and obtaining license authority, making the Distributor the exporter for EAR purposes. Distributor understands and agrees that its assigned U.S. designated forwarding or

other agent will provide to **XXXXXXXX** proof of electronic filing of the U.S. export declaration information, for purposes under the Foreign Trade Regulations and export control purposes under the EAR, within 10 days upon request from **XXXXXXXX**.

B. Further Distributor hereby agrees, represents and warrants that it will comply in all respects with **XXXXXXXX's** Code of Business Conduct for International Business Relationships as it may apply and be amended from time to time, a copy of which is attached hereto as Schedule "G".

C. Distributor also agrees that **XXXXXXXX** may periodically request, and Distributor shall provide, written certification that Distributor has complied with all applicable laws set forth herein. Any violation of this Article, as determined solely by **XXXXXXXX**, shall be deemed a material breach of this Agreement and shall be grounds for immediate termination of this Agreement. In such case, **XXXXXXXX** shall have no further obligations to Distributor whatsoever hereunder and hereby waives any and all claims against **XXXXXXXX** for termination resulting from violation of this Article.

D. The foregoing obligations of this Article shall survive any termination, expiration or discharge of any other obligations under this Agreement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	CRIMINAL NO.
v.	)	
MONSANTO COMPANY,	)	15 U.S.C. §§ 78dd-1(a) & (g) (Foreign Corrupt Practices Act)
defendant.	)	15 U.S.C. § 78m(b) (False Books & Records)

DEFERRED PROSECUTION AGREEMENT

Defendant MONSANTO COMPANY, a Delaware Corporation, by its undersigned attorneys, pursuant to authority granted by its Board of Directors, and the United States Department of Justice, Criminal Division, Fraud Section, enter into this Deferred Prosecution Agreement.

1. MONSANTO COMPANY accepts and acknowledges that the United States will file a criminal information in the United States District Court for the District of Columbia charging MONSANTO COMPANY with violating the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, and making false entries into its books and records, in violation of Title 15, United States Code, § 78m(b)(2) & (5). In doing so, MONSANTO COMPANY knowingly and willingly waives its right to indictment on these charges.

2. This Agreement reflects MONSANTO COMPANY's previous actions in investigating misconduct in its Asia-Pacific operations, voluntarily reporting its findings, and cooperating in the government's subsequent investigation; its adoption of the remedial measures set forth herein; its commitment to maintain and independently review such measures; and its willingness to continue to cooperate with the Fraud Section in its investigation.

MONSANTO COMPANY does not endorse, ratify or condone criminal conduct and, as set forth below, has taken steps to prevent such conduct from occurring in the future.

3. Based on information provided to MONSANTO COMPANY by the U.S. Securities & Exchange Commission, including sworn testimony, and by the Fraud Section, MONSANTO COMPANY accepts and acknowledges that it is responsible for the acts of its employees as set forth in the Statement of Facts attached hereto as Appendix A. Should the Fraud Section pursuant to paragraph fourteen initiate the prosecution that is deferred by this Agreement, MONSANTO COMPANY will neither contest the admissibility of, nor contradict, the Statement of Facts in any such proceeding.

4. MONSANTO COMPANY expressly agrees that it shall not, through its present or future attorneys, board of directors, officers, or any other person authorized to speak for the Company, make any public statement, in litigation or otherwise, contradicting MONSANTO COMPANY's acceptance of responsibility set forth above or the factual statements set forth in Appendix A hereto. Any such contradictory statement shall constitute a breach of this Agreement as governed by paragraph fourteen of this Agreement, and MONSANTO COMPANY thereafter would be subject to prosecution as set forth in paragraphs fourteen to sixteen of this Agreement. The decision of whether any public statement by any such person contradicting a fact contained in the Statement of Facts will be imputed to MONSANTO COMPANY for the purpose of determining whether MONSANTO COMPANY has breached this Agreement shall be at the sole discretion of the Fraud Section. Should the Fraud Section decide that a public statement by any such person contradicts in whole or in part a statement of fact contained in the Statement of Facts, the Fraud Section shall notify MONSANTO COMPANY. MONSANTO COMPANY may avoid a breach of this Agreement by publicly repudiating such statement within 48 hours after notification. Consistent with MONSANTO COMPANY's obligations as set forth above, MONSANTO COMPANY shall be permitted to raise defenses and to assert affirmative claims in civil and regulatory proceedings relating to the matters set forth in the Statement of Facts. This paragraph is not intended to apply to any statement made by any MONSANTO COMPANY employee in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of MONSANTO COMPANY.

5. MONSANTO COMPANY agrees to issue a press release, the text of which shall be acceptable to the Fraud Section.

6. During the three-year term of this Agreement, MONSANTO COMPANY agrees to cooperate fully with the Fraud Section, and with any other agency designated by the Fraud Section, in investigating MONSANTO COMPANY and any of its present and former officers, employees, consultants, contractors and subcontractors in all matters relating to corrupt payments in the Asia-Pacific region. MONSANTO COMPANY agrees that its cooperation shall include, but is not limited to, the following:

   a. MONSANTO COMPANY shall continue to fully cooperate with the Department of Justice and shall truthfully disclose all information with respect to the activities of MONSANTO COMPANY, its officers, employees, agents, consultants, contractors and sub-contractors concerning all matters relating to corrupt payments in the Asia-Pacific region and related false books and records and inadequate internal controls about which MONSANTO COMPANY has any knowledge or about which the Fraud

Section shall inquire. This obligation of truthful disclosure includes an obligation upon MONSANTO COMPANY to provide to the Fraud Section, upon request, any document, record, or other tangible evidence relating to such corrupt payments, books and records, and internal controls about which the Fraud Section shall inquire of MONSANTO COMPANY. This obligation of truthful disclosure includes an obligation to provide to the Fraud Section access to MONSANTO COMPANY's facilities, documents, and employees. This paragraph does not apply to any information provided to counsel solely for the purpose of enabling counsel to render legal advice with respect to the government's investigation.

b. Upon request of the Fraud Section, with respect to any issue relevant to its investigation of corrupt payments in the Asia-Pacific region and related false books and records and inadequate internal controls, MONSANTO COMPANY shall designate knowledgeable employees, agents, or attorneys to provide non-privileged information and materials on MONSANTO COMPANY's behalf to the Fraud Section. It is further understood that MONSANTO COMPANY must at all times give complete, truthful, and accurate information.

c. With respect to any issue relevant to the Department of Justice's investigation of corrupt payments in the Asia-Pacific region, MONSANTO COMPANY shall use its best efforts to make available its employees to provide information and testimony as requested by the Fraud Section, including sworn testimony before a federal grand jury or in federal trials, as well as interviews with federal law enforcement authorities. Cooperation under this paragraph will include identification of witnesses who, to MONSANTO COMPANY's knowledge, may have material information regarding the matters under investigation.

d. With respect to any issue relevant to the Department of Justice's investigation of corrupt payments in the Asia-Pacific region, MONSANTO COMPANY shall use its best efforts to make available for interviews, or for testimony, present or former MONSANTO COMPANY officers, directors, agents, consultants, and employees, and the officers, directors, employees, agents, and consultants of contractors and sub-contractors as requested by the Fraud Section.

e. With respect to any information, testimony, document, record, or other tangible evidence provided to the Fraud Section pursuant to this Agreement, MONSANTO COMPANY consents to any and all disclosures to other government agencies of such materials as the Fraud Section, in its sole discretion, deems appropriate.

7. In return for MONSANTO COMPANY's full and truthful cooperation, the Department of Justice agrees not to use any information provided by MONSANTO COMPANY pursuant to this Agreement against MONSANTO COMPANY or its subsidiaries in any criminal or civil case relating to past corrupt payments in the Asia-Pacific region except in a prosecution for perjury or obstruction of justice; in a prosecution for making a false statement after the date of this Agreement; in a prosecution or other proceeding relating to any crime of violence; or in a prosecution or other proceeding relating to a violation of any provision of Title 26 of U.S. Code. In addition, the Department of Justice agrees, except as provided herein, that it will not bring any criminal or civil case relating to past corrupt payments against MONSANTO COMPANY based on the conduct of Employee A, who is described

in the attached Statement of Facts. This paragraph does not provide any protection against prosecution for corrupt payments, if any, made in the future by MONSANTO COMPANY, its subsidiaries, affiliates, officers, directors, agents, or consultants, whether or not disclosed by MONSANTO COMPANY pursuant to the terms of this Agreement, nor does it apply to such payments, if any, made in the past outside of the Asia-Pacific region.

8. MONSANTO COMPANY represents that it has implemented a compliance and ethics program designed to detect and prevent violations of the Foreign Corrupt Practices Act and other applicable foreign bribery laws throughout its worldwide operations, including those of its subsidiaries, affiliates, and joint ventures, and those of its contractors and subcontractors with responsibilities that include interactions with foreign officials. Further, MONSANTO COMPANY agrees to adopt and implement by March 1, 2005 , additional specific new policies and procedures relating to the prevention and detection of corrupt practices. These policies and procedures to which MONSANTO COMPANY agrees are described in Appendix B to this Agreement. Nothing in this Agreement precludes MONSANTO COMPANY from amending or changing its policies and procedures in the future so long as said amendments or changes do not diminish the policies and procedures set forth in Appendix B. During the three year period set forth in paragraph nine below, no amendments or changes will be made to the policies and procedures set forth in Appendix B without the approval of the independent compliance expert referred to in paragraph nine below. Moreover, implementation of these policies and procedures pursuant to this Agreement shall not be construed in any future enforcement proceeding as providing immunity or amnesty for any crimes not disclosed to the Fraud Section as of the date of the execution of this Agreement for which MONSANTO COMPANY would otherwise be responsible.

9. MONSANTO COMPANY also agrees that for a period of three years, it will retain an independent compliance expert (who may be an individual, partnership, or other entity, including outside counsel), acceptable to the Department, to undertake a special review of its compliance program during the first year and a follow-up audit during the third year. To the extent that MONSANTO COMPANY structures the retention of the independent compliance expert such that the attorney-client privilege could conceivably be applicable, it shall be a condition of that retention that MONSANTO COMPANY shall waive as to the Fraud Section and the U.S. Securities and Exchange Commission the attorney-client privilege and any other protections accorded to communications and client confidences with respect to communications between the independent compliance expert and MONSANTO COMPANY and the independent compliance expert's work product. The independent compliance expert shall:

   a. certify that MONSANTO COMPANY's policies and procedures are appropriately designed to accomplish their goals;

   b. monitor MONSANTO COMPANY's implementation of and compliance with the policies and procedures; and

   c. report on the independent compliance expert's findings to MONSANTO COMPANY's corporate compliance officer as to the effectiveness of the policies and procedures.

Should the independent compliance expert, during this three year period, determine that there is a reasonable likelihood that corrupt payments have been offered, promised, paid, or authorized by any MONSANTO COMPANY entity, including agents, consultants, and joint ventures, shareholders acting on MONSANTO COMPANY's behalf, and contractors and sub-contractors working directly or indirectly for MONSANTO COMPANY, he or she shall promptly report such payments to the corporate compliance officer and MONSANTO COMPANY shall then be obligated to report the same to the Fraud Section as set forth in paragraph ten below. Should MONSANTO COMPANY not make such a disclosure, the independent compliance expert shall independently make such a disclosure to the Fraud Section notwithstanding any privileged relationship that may exist between the independent compliance expert and MONSANTO COMPANY. Further, the independent compliance expert shall disclose to the Fraud Section in the event MONSANTO COMPANY, or its officers, employees, consultants, agents, and joint ventures, or shareholders acting on MONSANTO COMPANY's behalf, or contractors or sub-contractors working directly or indirectly for MONSANTO COMPANY refuse to provide information necessary for the performance of the independent compliance expert's responsibilities. By this Agreement, MONSANTO COMPANY agrees that any privilege, to the extent it exists, shall not bar such disclosures by the independent compliance expert and that it will not take any action to retaliate against such independent compliance expert for such disclosures.

10. As set forth in paragraphs eight and nine above and in Appendix B attached hereto, MONSANTO COMPANY undertakes pursuant to this Agreement to maintain a rigorous compliance program and internal controls intended to prevent and detect corrupt payments and related false books and records. During the period of this Agreement, MONSANTO COMPANY agrees that it will immediately disclose to the Fraud Section any information of which it learns that suggests there is a reasonable likelihood that corrupt payments were offered, promised, paid, or authorized by any MONSANTO COMPANY entity, including agents, consultants, and joint ventures, shareholders acting on MONSANTO COMPANY's behalf, and contractors or sub-contractors working directly or indirectly for MONSANTO COMPANY.

11. MONSANTO COMPANY further agrees that it shall pay a monetary penalty of $1,000,000 to the U.S. Treasury within ten days of the execution of this Agreement. This amount is a final payment and shall not be refunded a) if the Fraud Section moves to dismiss the Information pursuant to paragraph thirteen below or b) should the Fraud Section later determine that MONSANTO COMPANY has breached this Agreement and brings a prosecution against it pursuant to paragraph fourteen below. Further, nothing in this Agreement shall be deemed an agreement by the Fraud Section that this amount is the maximum criminal fine that in any such case may be imposed in such prosecution, and the Fraud Section shall not be precluded from arguing that the Court should impose a higher fine. The Fraud Section agrees, however, to recommend to the Court that the amount paid pursuant to this Agreement should be offset against whatever fine the Court shall impose as part of its judgment in the event of a subsequent breach and prosecution.

12. In light of MONSANTO COMPANY's self-reporting of the unlawful conduct of its employees and consultants and its willingness a) to acknowledge responsibility for their behavior, b) to continue its cooperation with the Fraud Section and other investigative and

regulatory agencies, c) to adopt or maintain and independently review remedial measures set forth herein and its commitment to implement and audit such measures, and d) to consent to pay the monetary penalty set forth in paragraph eleven above, the Fraud Section shall recommend to the Court that prosecution of MONSANTO COMPANY on the Information filed pursuant to paragraph one be deferred for a period of three years from the date of this Agreement.

13. The Fraud Section agrees that if MONSANTO COMPANY is in full compliance with all of its obligations under this Agreement, the Fraud Section, within thirty (30) days of the expiration of the period set forth in paragraph twelve above, will seek dismissal with prejudice of the Information filed against MONSANTO COMPANY pursuant to paragraph one and this Agreement shall expire.

14. If the Fraud Section determines, in its sole discretion, that MONSANTO COMPANY, at any time between the execution of this Agreement and completion of defendant's cooperation, provided deliberately false, incomplete, or misleading information under this Agreement or has committed any federal crimes subsequent to the date of this Agreement or has otherwise violated any provision of this Agreement, MONSANTO COMPANY shall, in the Fraud Section's sole discretion, thereafter be subject to prosecution for any federal criminal violation of which the Fraud Section has knowledge. Any such prosecutions may be premised on information provided by MONSANTO COMPANY. Moreover, MONSANTO COMPANY agrees that any such prosecutions that are not time-barred by the applicable statute of limitations on the date of this Agreement may be commenced against MONSANTO COMPANY in accordance with this Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and December __, 2007. By this Agreement, MONSANTO COMPANY expressly intends to and does waive any rights in this respect.

15. It is further agreed that in the event that the Fraud Section, in its sole discretion, determines that MONSANTO COMPANY has violated any provision of this Agreement: a) all statements made by or on behalf of MONSANTO COMPANY to the Fraud Section, or any testimony given by MONSANTO COMPANY before a grand jury or any tribunal, at any legislative hearings, or to the U.S. Securities and Exchange Commission, whether prior or subsequent to this Agreement, or any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Fraud Section against MONSANTO COMPANY and b) MONSANTO COMPANY shall not assert any claim under the United States Constitution, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by or on behalf of MONSANTO COMPANY prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. The decision whether conduct or statements of any individual will be imputed to MONSANTO COMPANY for the purpose of determining whether MONSANTO COMPANY has violated any provision of this Agreement shall be in the sole discretion of the Fraud Section.

16. MONSANTO COMPANY acknowledges that the Fraud Section has made no representations, assurances, or promises concerning what sentence may be imposed by the Court should MONSANTO COMPANY breach this Agreement and this matter proceed to judgment. MONSANTO COMPANY further acknowledges that any such sentence is solely

within the discretion of the Court and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

17. MONSANTO COMPANY agrees that in the event it sells or merges all or substantially all of its business operations as they exist as of the date of this Agreement, whether such sale is structured as a stock or asset sale, it shall include in any contract for sale or merger a provision binding the purchaser/successor to the obligations described in this Agreement.

18. It is understood that this Agreement is binding on MONSANTO COMPANY and the Fraud Section but specifically does not bind any other federal agencies, or any state or local law enforcement or regulatory agencies, although the Fraud Section will bring the cooperation of MONSANTO COMPANY and its compliance with its other obligations under this Agreement to the attention of such agencies and authorities if requested to do so by MONSANTO COMPANY and its attorneys.

19. This Agreement sets forth all the terms of the Deferred Prosecution Agreement between MONSANTO COMPANY and the Fraud Section. No modifications or additions to this Agreement shall be valid unless they are in writing and signed by the Fraud Section, MONSANTO COMPANY's attorneys, and a duly authorized representative of MONSANTO COMPANY.

FOR THE DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, FRAUD SECTION:

JOSHUA R. HOCHBERG
Chief, Fraud Section
Criminal Division
United States Department of Justice

PETER B. CLARK
Deputy Chief

_____

PHILIP UROFSKY
Assistant Chief
MARK F. MENDELSOHN
Acting Deputy Chief
MALINDA LAWRENCE
Trial Attorney
Fraud Section, Criminal Division
United States Department of Justice
10th & Constitution Ave. NW (Bond)
Washington, D.C. 20530
(202) 514-7023

FOR MONSANTO COMPANY:

_____

CHARLES W. BURSON
General Counsel
Monsanto Company
800 North Lindbergh Boulevard
St. Louis, Missouri 63167
(314) 694-1000

OFFICER'S CERTIFICATE

I have read this Agreement and carefully reviewed every part of it with counsel for MONSANTO COMPANY. I understand the terms of this Agreement and voluntarily agree, on behalf of MONSANTO COMPANY, to each of its terms. Before signing this Agreement, I consulted with the attorney for MONSANTO COMPANY. The attorney fully advised me of MONSANTO COMPANY's rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this Agreement.

I have carefully reviewed every part of this Agreement with directors of MONSANTO COMPANY. I have fully advised these directors of MONSANTO COMPANY's rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into the Agreement.

No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person authorizing this Agreement on behalf of MONSANTO COMPANY, in any way to enter into this Agreement. I am also satisfied with the attorney's representation in this matter. I certify that I am an officer of MONSANTO COMPANY and that I have been dully authorized by MONSANTO COMPANY to execute this Agreement on behalf of MONSANTO COMPANY.

_____
Date

MONSANTO COMPANY

By:_____
Title:

CERTIFICATE OF COUNSEL

I am counsel for MONSANTO COMPANY in the matter covered by this Agreement. In connection with such representation, I have examined relevant MONSANTO COMPANY documents and have discussed this Agreement with the authorized representative of MONSANTO COMPANY. Based on my review of the foregoing materials and discussions, I am of the opinion that:

MONSANTO COMPANY's representative has been duly authorized to enter into this Agreement on behalf of MONSANTO COMPANY. This Agreement has been duly and validly authorized, executed, and delivered on behalf of MONSANTO COMPANY and is a valid and binding obligation of MONSANTO COMPANY. Further, I have carefully reviewed every part of this Agreement with the General Counsel of MONSANTO COMPANY. I have fully advised him of MONSANTO COMPANY's rights, of possible defenses, of the Sentencing Guidelines' provisions, and of the consequences of entering into this Agreement. To my knowledge, MONSANTO COMPANY's decision to enter into this Agreement is an informed and voluntary one.

_____
Date

_____
Homer E. Moyer Jr., Esq.
Counsel for MONSANTO COMPANY

CERTIFIED COPY OF RESOLUTION

WHEREAS, the Company has been engaged in discussions with the United States Department of Justice in connection with issues arising out of the Company's Indonesian operations;

WHEREAS, in order to resolve such discussions, it is proposed that the Company enter into a certain agreement with the United States Department of Justice; and

WHEREAS the Company's General Counsel has advised the Board of Directors of the Company's rights, possible defenses, the Organizational Sentencing Guidelines' provisions and the consequences of entering into such agreement with the United States Department of Justice;

This Board hereby RESOLVES that:

1. The Company (I) consent to the filing in the United States District Court for the District of Columbia of an Information charging the Company with violating the Foreign Corrupt Practices Act and making false entries in its books and records, both charges relating to its former employee directing and concealing a payment to an Indonesian official; and (ii) waive indictment on such charges and enter into a deferred prosecution agreement with the United States Department of Justice; and (iii) further agrees to pay a monetary penalty of $1,000,000;

2. The General Counsel, or his delegate, be, and hereby is, authorized on behalf of the Company to execute the deferred prosecution agreement substantially in such form as reviewed by this Board of Directors at this meeting with such changes as the General Counsel, or his delegate, may approve;

3. The Board hereby authorizes, empowers and directs the General Counsel of the Company, or his delegate, to take any and all actions as may be necessary or appropriate, and to approve the forms, terms or provisions of any agreement or other documents as may be necessary or appropriate to carry out and effectuate the purpose and intent of the foregoing resolutions; and

4. All of the actions of the General Counsel of the Company, which actions would have been authorized by the foregoing resolutions except that such actions were taken prior to the adoption of such resolutions, are hereby severally ratified, confirmed, approved and adopted as actions on behalf of the Company.

APPENDIX A
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	CRIMINAL NO.
v.	)	
MONSANTO COMPANY,	)	15 U.S.C. §§ 78dd-1(a) & (g) (Foreign Corrupt Practices Act)
defendant.	)	15 U.S.C. § 78m(b) (False Books & Records)

STATEMENT OF FACTS

Background:

1. MONSANTO COMPANY is a business incorporated under the laws of the State of Delaware, and having its principal place of business in St. Louis, Missouri and offices elsewhere, including in the District of Columbia. At all relevant times, MONSANTO COMPANY has had a class of securities registered pursuant to section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78o) and was required to file reports with the U.S. Securities and Exchange Commission under section 12 of the Securities Exchange Act (15 U.S.C. § 78*l*). As such, MONSANTO COMPANY is an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1.
2. Employee A was an American citizen responsible for certain activities in the Asia-Pacific Region. As such, Employee A was an employee of an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1.
3. Consultant Company is a corporation incorporated under the laws of Indonesia, which was hired by MONSANTO COMPANY and its Indonesia subsidiary, P.T. Monagro

Kimia, to assist it in obtaining various governmental approvals and licenses. As such, Consultant Company was an agent of an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1.

4. Official was a high-ranking official of the Republic of Indonesia who was in a position to authorize various decrees and regulations that would have enabled MONSANTO COMPANY to sell certain products in Indonesia. MONSANTO COMPANY viewed Official's support as "essential for for [sic] us to further develop our . . . business" in Indonesia and as "a very important person for our commercial approvals . . . there." As such, Official was a "foreign official" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(f)(1)(A).

Bribery

5. MONSANTO COMPANY is a global provider of technology-based solutions and agricultural products that it markets as improving farm productivity and food quality. Such products include various genetically-modified crops, including cotton, which it markets as being superior to naturally-occurring crops in their ability to resist various diseases, produce higher yields, etc. However, various groups oppose the expansion of such crops and lobby governments and government officials around the world to deny permits, enact restrictive or prohibitive laws and regulations, and generally obstruct the sales, planting, harvesting, and marketing of such crops.

6. In Indonesia, a prior government had announced a rule requiring an environmental impact study, known as AMDAL, for a variety of activities including the cultivation of genetically modified crops. After a change of governments, MONSANTO COMPANY sought to have the new government, in which Official had a post, amend or repeal the requirement for the environmental impact statement.

7. Despite months of such efforts by MONSANTO COMPANY, through Employee A and Consultant Company, MONSANTO COMPANY had failed to obtain Official's agreement to amend or repeal the AMDAL requirement. At several meetings Consultant Company, Official A explained that it was very difficult politically for him to sign a decree amending or repealing the AMDAL requirement. Finally, at a meeting between Employee A and representatives of Consultant Company, Employee A directed Consultant Company to "incentivize" Official by paying him $50,000 in cash. Employee A stated that MONSANTO COMPANY would reimburse Consultant Company through paying invoices that falsely sought "consultant fees" relating to trips by Indonesian officials to the United States in December 2001 and January 2002. Employee A agreed to also cover any taxes Consultant Company would owe by reporting the income from the "consultant fees." During the planning of the payment to Official, Employee A instructed Consultant Company not to discuss the payment with any other employee of MONSANTO COMPANY.

8. On December 20, 2001, Employee A directed Consultant Company to send MONSANTO COMPANY an invoice seeking a "flat fee" of $66,000 for "consultant services." The next day Consultant Company did so, but Employee A sent an electronic mail message stating that he needed the fee justified by hours spent by Consultant Company's employees. On December 31, 2001, Consultant Company sent two invoices, on the letterhead of an affiliated company, seeking reimbursement of $22,000 and $44,000 for two trips by

Indonesian officials and stating that specific employees had spent a certain number of hours at a certain billing rate on these trips, even though one of these trips would not occur for several more weeks.

9. On February 1, 2002, Employee A authorized the payment of Consultant Company's invoices. Upon questioning by other employees of MONSANTO COMPANY, he justified the invoices by stating that Consultant Company had provided additional consulting services related to the Indonesian official's trips that were "outside the retainer." In addition, he obtained from Consultant Company, a third set of invoices, again for $22,000 and $44,000, attached to which were detailed breakdowns of the work purportedly performed by Consultant Company's employees. Based upon these invoices, other MONSANTO COMPANY employees approved the payment of the invoices.

10. On February 5, 2002, an employee of Consultant Company withdrew $50,000 from its affiliate's bank account. The following day, the employee delivered the $50,000 to Official, explaining that MONSANTO COMPANY wanted to do something for him in exchange for repealing the AMDAL requirement. The Official promised that he would do so at an appropriate time.

11. In March 2002, MONSANTO COMPANY, through its Indonesian subsidiary, paid the invoices thus reimbursing Consultant Company for the $50,000 bribe, as well as the tax it owed on that income.

12. Official A never authorized repealing the AMDAL requirement, and MONSANTO COMPANY did not receive any benefit related to the payment authorized by Employee A

False Books and Records

13. As noted, MONSANTO COMPANY reimbursed Consultant Company for the $50,000 bribe, plus taxes, by paying invoices that falsely characterized the payment as being for "consulting services."

14. This payment was paid out of the bank accounts of P.T. Monagro Kimia, MONSANTO COMPANY's Indonesian subsidiary. It was, however, allocated to the Government Affairs cost center in the parent company and the false entry for "consulting services" was, therefore, included in MONSANTO COMPANY's books and records.

APPENDIX B

REMEDIAL COMPLIANCE PROGRAM

Monsanto Company represents that it has already implemented and consents and agrees that it hereafter will maintain a compliance and ethics program designed to detect and prevent violations of the Foreign Corrupt Practices Act and of other applicable foreign bribery laws. Monsanto's program shall include, *at a minimum*, the following components:

1. A clearly articulated corporate policy against violations of the Foreign Corrupt Practices Act and other applicable anti-bribery laws and the establishment of compliance standards and procedures to be followed by its officers, directors, employees, agents, consultants, joint ventures, and by contractors and sub-contractors with responsibilities that include interactions with foreign officials, that are reasonably capable of reducing the prospect of violative conduct;
2. The assignment to one or more senior Monsanto corporate officials of responsibility for oversight of compliance with policies, standards, and procedures established pursuant to the Deferred Prosecution Agreement between the Fraud Section and Monsanto, dated December __, 2004. Such officials shall have the authority and responsibility to implement and utilize monitoring and auditing systems reasonably designed to detect criminal conduct by the company's employees and other agents, including, where appropriate, the retention of outside counsel and independent auditors to conduct investigations and audits. In addition, such officials shall be charged with making any necessary modifications to the compliance program to respond to detected violations and to prevent further similar violations;
3. The establishment and maintenance of a committee to supervise the review of (I) the retention of any agent, consultant, or other representative for purposes of business development or lobbying in a foreign jurisdiction, (ii) the retention of any contractor or sub-contractor for a project in which a foreign government or public international organization, or instrumentalities thereof, is the ultimate customer or beneficiary, and (iii) all contracts related thereto. The committee also will supervise the review of the suitability of all prospective joint venture partners for purposes of compliance with the Foreign Corrupt Practices Act, as well as the adequacy of the due diligence performed in connection with the selection of the joint venture partner, any subsequent due diligence relating to the continued suitability of such joint venture partner, and any due diligence in connection with approvals of the retention of sub-agents, sub-contractors, and consultants by the joint venture for purpose of business development in a jurisdiction other than the United States. The majority of the committee shall be comprised of persons who are not subordinate to the most senior officer of the department or unit responsible for the relevant transaction;
4. Clearly articulated corporate procedures to ensure that Monsanto exercises due care to assure that substantial discretionary authority is not delegated to individuals whom the defendant knows, or should know through the exercise of due diligence, have a propensity to engage in illegal activities;

5. Clearly articulated corporate procedures to assure that all necessary and prudent precautions are taken to ensure that Monsanto has formed business relationships with reputable and qualified agents, consultants and other representatives for purposes of business development and lobbying in foreign jurisdictions and with reputable and qualified contractors and sub-contractors for projects for foreign governments or public international organizations, or instrumentalities thereof, are the ultimate customers or beneficiaries. Such policy shall require that evidence of such a "due diligence" inquiry be maintained in Monsanto's files;
6. The effective communication to all officers, employees, agents, consultants, and other representatives, and to contractors and sub-contractors with responsibilities that include interactions with foreign officials, of corporate policies, standards, and procedures regarding the Foreign Corrupt Practices Act by requiring regular training concerning the requirements of the Foreign Corrupt Practices Act and of other applicable foreign bribery laws on a periodic basis to its officers and employees involved in foreign projects. With respect to the training of agents, consultants, or other representatives retained in connection with foreign business, as well as contractors and sub-contractors for projects for foreign governments or public international organizations, or instrumentalities thereof, are the ultimate customers or beneficiaries, such training shall be given as soon as practicable following their retention and periodically thereafter;
7. The implementation of appropriate disciplinary mechanisms, including as appropriate, discipline of individuals responsible for the failure to detect a violation of the law or of compliance policies, standards, and procedures;
8. The establishment of a reporting system by which officers, employees, agents, consultants, and other representatives, as well as contractors and sub-contractors, may report suspected criminal conduct without fear of retribution or going through the chain of command or reporting the same to the employee's, agent's, representative's, or contractor's or sub-contractor's immediate managers;
9. The inclusion in all contracts and contract renewals entered into subsequent to the date of this Consent Decree with agents, consultants, and other representatives for purposes of business development in a foreign jurisdiction of a representation, and contractors and sub-contractors for projects for foreign governments or public international organizations, or instrumentalities thereof, are the ultimate customers or beneficiaries, and undertaking by each prospective agent, consultant, representative, contractor and sub-contractor that no payments of money or anything of value will be offered, promised or paid, directly or indirectly, to any foreign officials, foreign political parties, party officials, or candidates for foreign public or political party office to influence the acts of such officials, political parties, party officials, or candidates in their official capacity, to induce them to use their influence with a foreign government or an instrumentality thereof, or to obtain an improper advantage in connection with any business venture or contract in which Monsanto is a participant. In addition, all such contracts shall contain an agreement by each prospective agent, consultant, and representative for business development in a foreign jurisdiction, and by contractors and sub-contractors for projects for foreign governments or public international organizations, or instrumentalities thereof, are the ultimate customers or beneficiaries, providing Monsanto with audit rights and an

undertaking that it shall not retain any sub-agent, sub-contractor, or representative without the prior written consent of a senior officer of Monsanto. All such contracts shall further provide for termination of said contract as a result of any breach of such undertakings, representations, and agreements;

10. The inclusion in all joint venture agreements entered into or modified hereafter a representation and undertaking by each joint venture partner, with periodic certifications made to Monsanto, that no payments of money or anything of value will be or has been offered, promised or paid, directly or indirectly, to any foreign officials, foreign political parties, party officials, or candidates for foreign public or political party office to influence the acts of such officials, political parties, party officials, or candidates in their official capacity, to induce them to use their influence with a foreign government or an instrumentality thereof, or to obtain an improper advantage in connection with any business venture or contract in which Monsanto is a participant. In addition, all such agreements shall contain an agreement by each prospective joint venture partner providing Monsanto with audit rights and an undertaking that it shall not retain any sub-agent, sub-contractor, or representative without the prior written consent, after the exercise of due diligence, of a senior officer of Monsanto. All such contracts shall further provide for termination of said contract as a result of any breach of such undertakings, representations, and agreements;

11. Monsanto will conduct periodic reviews, not less than once every five years, of its corporate policies and compliance programs regarding the Foreign Corrupt Practices Act and the anti-bribery provisions of each foreign jurisdiction to which the defendant, its officers, employees, agents, contractors, sub-contractors, affiliates, and subsidiaries may be subject. Such periodic reviews will be conducted by independent legal and auditing firms retained for such purpose by the Board of Directors of Monsanto or its successors.

12. Monsanto will, using objective measures, determine the regions or countries in which it operates that pose higher risks of corruption. It will, on a periodic basis, conduct rigorous FCPA audits of its operations in such regions or countries, which audits shall include:

    a. detailed audits of the operating unit's books and records, with specific attention to payments and commissions to agents, consultants, contractors, and sub-contractors with responsibilities that include interactions with foreign officials and contributions to joint ventures;

    b. audits of selected agents, consultants, contractors, sub-contractors, and joint ventures, where authorized by the governing contract or retention agreement;

    c. interviews with relevant employees, consultant, agents, contractors, sub-contractors, and joint venture partners.

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Facsimile: (415) 705-2501

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

E-Filing

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

DAVID M. PILLOR,

Defendant.

Case No. C 06 4906 WHA

COMPLAINT

Plaintiff Securities and Exchange Commission ("Commission") alleges against defendant David M. Pillor ("Pillor" or "Defendant"):

SUMMARY OF THE ACTION

1. This matter relates to violations of the Foreign Corrupt Practices Act ("FCPA") by InVision Technologies, Inc. ("InVision"), a manufacturer of explosive detection systems used at airports. In three instances from at least June 2002 through June 2004, InVision was aware of a high probability that its sales agents or distributors made or offered to make improper payments to foreign government officials in order to obtain or retain business for InVision.

2. Defendant Pillor was InVision's Senior Vice President for Sales and Marketing and a member of the company's board of directors at the time of the violations. Pillor, as the head of the sales department, had the authority to ensure that InVision's sales staff complied with the FCPA. As described below, however, Pillor failed to devise and maintain a system of internal controls adequate to detect and prevent InVision's violations of the FCPA.

JURISDICTION

3. This Court has jurisdiction over this action pursuant to Sections 21(d)(3) and 27 of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. §§ 78u(d)(3) and 78aa]. Defendant, directly or indirectly, made use of the means and instrumentalities of interstate commerce and the mails in connection with the acts, transactions, practices and courses of business alleged in this Complaint.

4. Venue in this District is proper pursuant to Section 27 of the Exchange Act [15 U.S.C. § 78aa] because a substantial portion of the conduct alleged in this Complaint occurred within the Northern District of California. In addition, as alleged in this Complaint, venue in this District is proper because Defendant's conduct arose out his employment at InVision, which at the time maintained its headquarters in the Northern District of California.

INTRADISTRICT ASSIGNMENT

5. Assignment to the San Francisco Division is proper pursuant to Civil Local Rules 3-2(c) and 3-2(d) because the claims alleged in this Complaint arose out of Defendant's employment at InVision, which at the time maintained its headquarters in Alameda County.

DEFENDANT

6. David M. Pillor, age 52, lives in Ashburn, Virginia. During the relevant period, Pillor was InVision's Senior Vice President for Sales and Marketing and a member of the company's senior management team. He joined InVision in 1994 and became a member of the company's board of directors in 1999. Pillor resigned from InVision in December 2004.

RELATED ENTITY

7. At the time of the conduct described below, InVision was a Delaware corporation headquartered in Newark, California. InVision's common stock was registered with the Commission pursuant to Section 12(g) of the Exchange Act and was listed on the NASDAQ National Market exchange. InVision filed reports with the Commission pursuant to Section 13 of the Exchange Act.

On December 6, 2004, InVision was acquired by an affiliate of General Electric Co. ("General Electric"). The successor company, known as GE InVision, Inc., is an indirect wholly-owned subsidiary of General Electric. The conduct described in this Complaint occurred prior to the acquisition of InVision by General Electric.

FACTS

A. **Background**

8. During the relevant period, InVision designed and manufactured advanced detection systems used by airport security personnel to scan baggage for explosives. Customers for InVision's explosive detection systems included airport authorities owned and operated by foreign governments. InVision derived a substantial portion of its revenue from sales of these systems to foreign airport authorities.

9. As Senior Vice President, Pillor directed InVision's domestic and international sales and marketing efforts during the relevant period. In order to facilitate the company's sales outside the United States, Pillor hired Regional Sales Managers to oversee defined geographic markets. The Regional Sales Managers coordinated sales in the countries that comprised their areas of responsibility. As InVision employees, the Regional Sales Managers reported to Pillor.

10. In addition to the Regional Sales Managers, InVision recruited and retained local sales agents and distributors in countries that InVision viewed as prospective markets. The sales agents and distributors, typically foreign nationals, were familiar with the business practices and customs of their respective countries. The sales agents and distributors negotiated directly with InVision's customers, including foreign government officials, on behalf of InVision and reported to the InVision Regional Sales Managers under Pillor's supervision.

B. **InVision's Lack of Internal Controls**

11. Under the FCPA, InVision was required to design a system of internal controls to ensure that its foreign sales agents and distributors complied with the law. Pillor, as the head of the company's sales department, had the authority to implement internal controls relating to the FCPA. His failure to implement such controls contributed to InVision's violations of the FCPA.

12. For example, in selecting its foreign sales agents and distributors, InVision primarily relied on introductions by other American companies, and conducted few, if any, background checks of its own. InVision provided only informal FCPA training to the Regional Sales Managers and its foreign sales agents and distributors. InVision, moreover, failed to monitor the company's Regional Sales Managers and its foreign sales agents and distributors for compliance with the FCPA. Finally, InVision provided no oversight to make certain that its foreign agents did not make improper payments on its behalf. As described below, InVision's sales activities in three countries—China, the Philippines, and Thailand—revealed material weaknesses in the company's FCPA internal controls.

C. **China**

13. In November 2002, with Pillor's involvement, InVision agreed to sell two explosive detection machines for use at an airport under construction in Guangzhou, China. At the time, and through the relevant period, the airport was owned and controlled by the government of China. The sale to the airport was conducted through InVision's Chinese distributor, which was InVision's primary representative to the airport and to associated governmental agencies.

14. Under the terms of the deal, InVision was obligated to deliver the two machines to the Chinese distributor by mid-2003. Due to problems in obtaining an export license from the United States government, however, InVision was delayed in delivering the machines. The distributor informed InVision that the airport threatened to impose a financial penalty as result of the delay.

15. The distributor further informed InVision's Regional Sales Manager for Asia that, in order to avoid the imposition of the penalty from the airport, it intended to offer free trips and other unspecified compensation to airport officials. In September 2003, the Regional Sales Manager sent e-mail messages to Pillor that alluded to the distributor's intentions. Pillor did not respond to the Regional Sales Manager's messages or acknowledge their receipt. Because Pillor had failed to establish a sufficient system of internal controls, however, InVision took no steps to ensure that the Chinese distributor abided by the requirements of the FCPA.

16. When InVision delivered the machines in October 2003, the distributor asked Pillor for reimbursement in excess of $200,000 from InVision to pay for costs that it had allegedly incurred

as a result of the delay. After consulting with InVision's management team, Pillor agreed to pay the distributor $95,000. At Pillor's request, the distributor sent a one-page invoice, totaling $95,000, and itemizing the costs that it claimed were associated with the delay. Pillor submitted the invoice to InVision's finance department for review, comment, and payment, without requesting further documentation from the distributor to support the alleged costs itemized in the invoice.

17. InVision paid the invoice in full. At the time of the payment, InVision was aware of a high probability that the distributor intended to use part of the funds to pay for airport officials' travel expenses in order to avoid the imposition of the financial penalty for InVision's late delivery. InVision nevertheless improperly recorded the payment in its books and records as though it were a valid cost of goods sold.

D. Philippines

18. In November 2001, with Pillor's involvement, InVision sold two explosive detection machines for use in an airport in the Philippines. Although InVision had retained a sales agent in the Philippines, it concluded the sale through a third-party subcontractor. Soon after the sale was completed, InVision's Filipino sales agent requested a commission under the terms of its agreement with the company. The sales agent indicated that it hoped to complete additional sales on behalf of InVision to the airport, which was owned and operated by the government of the Philippines.

19. In e-mail messages to the Regional Sales Manager for Asia, the Filipino sales agent suggested that it intended to use part of any commission on the November 2001 sale to make gifts or pay cash to Filipino government officials in order to influence their decision to purchase InVision explosive detection systems. The Regional Sales Manager forwarded at least some of the sales agent's e-mail messages to Pillor. Pillor did not respond to the Regional Sales Manager's messages or acknowledge their receipt. Because Pillor had failed to establish a sufficient system of internal controls, however, InVision took no steps to ensure that the Filipino sales agent abided by the requirements of the FCPA.

20. Pillor agreed to pay the Filipino sales agent a commission of $108,000, less than the agent's standard commission in part because of the involvement of the third-party subcontractor. InVision subsequently paid the reduced commission to the Filipino sales agent. At the time of the payment, InVision was aware of a high probability that the sales agent intended to use part of the commission to make gifts or pay cash to influence Filipino government officials. InVision nevertheless improperly recorded the payment in its books and records as though it were a valid sales commission.

E. Thailand

21. Beginning no later than 2002, InVision competed for the right to sell explosive detection machines to an airport under construction in Bangkok, Thailand. Construction of the airport was overseen by a corporation controlled by the government of Thailand. With Pillor's involvement, InVision retained a distributor in Thailand to act as InVision's primary representative to the airport corporation and the associated Thai governmental agencies.

22. From at least January 2003 through April 2004, the Thai distributor informed the Regional Sales Manager for Asia that it intended to offer payments to government officials in order to influence the airport corporation's decision to purchase InVision explosive detection systems. The Regional Sales Manager alluded to the distributor's intention to make payments to Thai government officials in e-mail messages to Pillor during the same period. Pillor did not respond to the Regional Sales Manager's messages or acknowledge their receipt. Because Pillor had failed to establish a sufficient system of internal controls, however, InVision took no steps ensure that the Thai distributor abided by the requirements of the FCPA.

23. In April 2004, InVision and its Thai distributor agreed to sell 26 explosive detection machines to the Bangkok airport for approximately $35.8 million. At the time of the agreement, InVision was aware of a high probability that the distributor intended to use part of its profits to make payments to Thai government officials. InVision nevertheless publicly announced the sale, which was later suspended.

FIRST CLAIM

Violation of Rule 13b2-1 of the Rules and Regulations Under the Exchange Act (Indirect Causing of Falsification of Accounting Records)

24. Paragraphs 1 through 23 are re-alleged and incorporated by reference.

25. As described above, Pillor submitted requests for review and payment from InVision's Chinese distributor and Filipino sales agent to InVision's finance department. InVision, which was aware of a high probability that the distributor and sales agent each intended to use part of the funds to make improper payments, improperly accounted for the payments as legitimate business expenses.

26. By reason of the foregoing, Pillor indirectly caused the falsification of a book, record, or account subject to Section 13(b)(2)(A) of the Exchange Act [15 U.S.C. § 78m(b)(2)(A)], in violation of Rule 13b2-1 [17 C.F.R. § 240.13b2-1] promulgated under the Exchange Act.

SECOND CLAIM

Aiding and Abetting Violations of Section 13(b)(2)(B) of the Exchange Act (Internal Controls)

27. Paragraphs 1 through 23 are re-alleged and incorporated by reference.

28. As described above, during the relevant period, InVision lacked a system of internal controls sufficient to provide reasonable assurances that: (i) transactions were executed in accordance with management's general or specific authorization; and (ii) transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for its assets, in violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

29. Pillor, knowingly or with extreme recklessness, provided substantial assistance to InVision's violation of Section 13(b)(2)(B).

30. By reason of the foregoing, Pillor aided and abetted InVision's failure to devise and maintain a system of internal controls, in violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)].

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court enter a Final Judgment enjoining Pillor from future violations of Rule 13b2-1 promulgated under the Exchange Act [17 C.F.R. § 240.13b2-1] and from aiding and abetting any violation of Section 13(b)(2)(B) of the Exchange Act [15 U.S.C. § 78m(b)(2)(B)], ordering Defendant to pay a civil penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. §§ 78u(d)(3)], and granting such other relief as the Court deems appropriate.

Dated: August 14, 2006

Respectfully submitted:

By: 

Helane L. Morrison
Robert L. Mitchell
Robert L. Tashjian

Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

The FCPA Compliance Landscape has Evolved:

- Sarbanes-Oxley
- NYSE/NASDAQ rule changes
- Amended US Sentencing Guidelines
- Thompson Memo
- Increased SEC and DOJ enforcement Activity
- 14 FCPA suits filed between 2002-2005
- 7 of 14 required to have external compliance monitor

ACC's Annual Meeting
October 23-25, 2006

Manchester Grand Hyatt
San Diego, CA

Building a Robust Anti-Bribery Compliance Program: Creating a Culture of Corporate Compliance

David C. Kilpatrick
Corporate Counsel, Dresser Inc.
david.kilpatrick@dresser.com

ACC's Annual Meeting
October 23-25, 2006

Manchester Grand Hyatt
San Diego, CA

So what makes a robust program?

Look at recent cases, Monsanto and Titan.

They provide a benchmarking checklist of Governmental expectations for anti-bribery compliance programs.

ACC's Annual Meeting
October 23-25, 2006

Manchester Grand Hyatt
San Diego, CA

Your Compliance Programs are an essential part of doing business in today's global market.

- Communicate organization's commitment.
  - deter and detect, avoid bookkeeping issues
- Raises Corporate Awareness.
  - creates a culture of good governance
- Reduce risk of probation, court-imposed program or supervision, fines and ultimately sentences.
  - mitigation of damages
- Makes good business sense.
  - enhance public image, helps manage bad PR

The Written Policy and Procedures

- Simple, concise unambiguous plan.
- Clearly define prohibited behavior that addressed company's expectations.
  - - Facilitation payments allowed or not?
- Prohibitions against retaliation.
- Available in multiple language to coincide with appropriate foreign operations.

Association of Corporate Counsel

1.) A clearly articulated corporate policy against violations of the FCPA and other applicable anti-bribery laws and the establishment of compliance standards and procedures to be followed.

ACC's Annual Meeting
October 23-25, 2006

Manchester Grand Hyatt
San Diego, CA

It Starts at the Top!

- Top Management buy-in is essential.
  - Too often it takes a "hit" before attention is turned to compliance issues.
  - Sets the tone/example for entire organization
- Various models, GC, Chief Ethics Officer, CFO, but someone with the authority to make things happen.
- Key to pushing the message down.
- Fed. Sentencing Guidelines – "active leadership"

2.) The assignment to one or more senior corporate officials of the responsibility for oversight of compliance with these policies, standards, and procedures. These officials shall have the authority to implement monitoring and auditing systems to detect criminal conduct and have the authority to retain outside counsel and independent auditors to conduct investigations and audits.

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4.) Clearly articulated corporate procedures to assure that substantial discretionary authority is not delegated to individuals that have a propensity to engage in illegal activities.

- Example, sign-off on contracts, agent agreements or commission payments by mid-level manager or above.

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3.) The establishment and maintenance of a committee to review the retention of any agent, consultant, or representative for purposes of business development or lobbying in a foreign jurisdiction. This committee will also review the suitability of all prospective joint venture partners for purposes of compliance with the FCPA, as well as the adequacy of the due diligence.

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6.) The effective communication to all officers, employees, agents, consultants, and other representatives, and to sub-contractors, of corporate policies, standards, and procedures regarding the FCPA.

5.) Clearly articulated corporate procedures to assure that the company has formed business relationships with reputable and qualified agents.

The due diligence process.

- More than just a credit check.
- Multiple inside and outside resources.

7.) The implementation of appropriate disciplinary mechanisms.

Training

- Mandatory for all.
- Participants recorded and tracked.
- Periodic updating of training materials.
- Include third party agents and contractors, presentations to annual gatherings.
- Utilize outside vendors to reach the masses, but live training sessions are hard to beat.

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9.) The inclusion in all future contracts with agents, consultants and other representatives an agreement for the company to have audit rights for purposes of ensuring adherence with the FCPA.

Association of Corporate Counsel

8.) The establishment of a reporting system by which officers, employees, agents, consultants, and other representatives, as well as sub-contractors, may report suspected criminal conduct without fear of retribution.

- The Hotline, Whistleblower policy
- Beware of EU Laws.

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In sum, robust compliance is:

- Written standards and procedures.
- Oversight starting at the top.
- Care in delegation of authority.
- Effective education and training.
- Monitoring, auditing and reporting.
- Consistent enforcement and discipline.
- Response and prevention.

10.) The company will conduct periodic reviews, no less than once every five years, of its corporate policies and compliance programs regarding the FCPA and the anti-bribery provisions of each foreign jurisdiction to which it may be subject.

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Building a Robust Anti-Bribery Compliance Program: Creating a Culture of Corporate Compliance

David C. Kilpatrick
Corporate Counsel, Dresser Inc.
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The FCPA Compliance Landscape has Evolved:

- Sarbanes-Oxley
- NYSE/NASDAQ rule changes
- Amended US Sentencing Guidelines
- Thompson Memo
- Increased SEC and DOJ enforcement Activity
- 14 FCPA suits filed between 2002-2005
- 7 of 14 required to have external compliance monitor

Your Compliance Programs are an essential part of doing business in today's global market.

- Communicate organization's commitment.
  - deter and detect, avoid bookkeeping issues
- Raises Corporate Awareness.
  - creates a culture of good governance
- Reduce risk of probation, court-imposed program or supervision, fines and ultimately sentences.
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So what makes a robust program?

Look at recent cases, Monsanto and Titan.

They provide a benchmarking checklist of Governmental expectations for anti-bribery compliance programs.

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