303:FCPA: Comparisons to the U.S. Statute

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Gregory S. Dunn is an attorney on the Rolls-Royce North America legal staff, located at Rolls-Royce North America's largest manufacturing facility in Indianapolis. Rolls-Royce has many facilities in North America, and Mr. Dunn's responsibilities involve advising all of these facilities, in such areas as health safety & environmental, labor relations, advising the purchasing organization on commercial issues and the UCC and corporate ethical considerations, including managing the Foreign Corrupt Practices Act compliance program for Rolls-Royce North America businesses.

Prior to joining the Rolls-Royce legal staff, Mr. Dunn held several positions in the Indianapolis Operations as a contracts manager, manager of labor relations, adviser to the environmental sciences department, and for eleven years, prior to moving into the contracts department, he was a machinist in the manufacturing facility in Indianapolis.

Mr. Dunn received a BA Indiana University, and is a graduate of the Indiana University School of Law in Indianapolis.

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Alexandra A. Wrage is senior counsel—international for Northrop Grumman Corporation. She is responsible for international regulatory matters, including compliance with the Foreign Corrupt Practices Act and the OECD Convention on Combating Bribery, as adopted by member states. She has created due diligence programs for the retention and training of international sales representatives, consultants, suppliers, distributors, and subcontractors.

Prior to joining Northrop Grumman, Ms. Wrage worked in the Washington, DC and Middle East offices of MCI Communications. She joined MCI after several years as a business litigation associate with Ober, Kaler, Grimes and Shriver in Baltimore and Washington, DC.

Ms. Wrage is the president of Transparent Agents and Contracting Entities ("TRACE"), a non-profit association of companies and their intermediaries committed to raising the standards of anti-corruption compliance, while lowering costs. She also works with the ABA task force on international corrupt practices and the ABA section of international law and practice. She speaks frequently on anti-corruption initiatives and on the hidden costs of corruption and has addressed the OECD on the U.S. private sector perspective on the OECD Convention.

Ms. Wrage received a BA and an MA from Cambridge University in England and completed an accelerated American law degree for lawyers with foreign credentials.

History and Key Elements of the U. S. Foreign Corrupt Practices Act

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As a result of the Watergate investigation during the mid 1970's, the Watergate Special Prosecutor revealed that many large American corporations relied upon the bribery of foreign government officials to market their products and services abroad. This revelation then prompted the Securities and Exchange Commission (SEC) to mount an investigation into the business practices of large American publicly held companies, and especially their bookkeeping activities associated with foreign transactions. When the dust settled, the SEC had discovered that these companies utilized highly questionable record keeping practices, such as falsified entries into their own books and records, to purposely misrepresent or hide the true nature of these payments.

At this time in U.S. history, there existed no laws that prohibited American companies from paying bribes to foreign government officials or requiring U.S. companies to disclose improper payments made to foreign agents or foreign government officials. Therefore, neither the Department of Justice (DOJ) nor the SEC had legal authority to prosecute these questionable activities involved with bribing foreign officials, or the generation of false records with which these companies concealed their illicit and unethical practices.

The SEC did, however, rely upon its authority to require publicly held companies to disclose information that would provide appropriate facts and details enabling investors to protect their investments. The SEC indicated that information regarding any questionable payments to foreign officials was "material information" that must be disclosed to investors because it provided insight into a company's managerial integrity, and would impact a company's value and quality as a potential investment.[1]

As a result of its investigations, wherein the SEC concluded that many American companies had made questionable payments to foreign officials and had maintained false and inadequate books and records to hide those payments, the SEC alleged violations of federal securities laws against many of these companies. The SEC also created a voluntary disclosure program in which violating companies were encouraged to disclose these improper activities.[2]

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[1] See report of the SEC on Questionable and Illegal Corporate Payments and Practices to the Senate Banking, Housing and Urban affairs Committee 30 (May 12, 1976); as cited in Complying with the Foreign Corrupt Practices Act, American Bar Association (ABA) Guide for U.S. Firms Doing Business in the International Marketplace, Second Edition, Donald R. Cruver, 1999; pages 2-3, (hereinafter, the ABA FCPA Guide).

[2] See the ABA FCPA Guide, Donald R. Cruver; page 3.

The SEC's voluntary disclosure program brought to light that more than 450 of the largest and successful American companies had made over $400 million in questionable payments to either third party intermediaries (for ultimate payment to foreign government officials) or directly to the foreign officials themselves. These payments were made to induce these foreign officials to purchase goods and services from these U.S. companies on behalf of their governments.[3]

With this resounding indictment of the integrity of the American Business Community, in 1977 the U.S. Congress passed the Foreign Corrupt Practices Act (FCPA). Under this new law, which prohibited the offering or making of an offer of anything of value to a foreign official as an inducement to misuse his or her authority in order for an American company to obtain or retain business, the American Business Community became the first in the world required to employ ethical business practices to market their wares in the world's marketplace. Further, American companies were now required to maintain accurate and transparent books and records that properly accounted for their transactions with foreign governments and foreign government officials as well as third party intermediaries marketing and promoting their products and services to foreign markets. Specifically, the FCPA applies to "Issuers" of a security registered pursuant to section 781 of Title 15 or a company required to file periodic reports with the SEC, (hereinafter "Issuers"), and "Domestic Concerns", who are companies who have their principal places of business in the United States or who are organized under the laws of a State of the United States, (hereinafter "Domestic Concerns").

The FCPA was amended in 1988. One key issue that was addressed was the concept of the quality and sufficiency of "knowledge" needed to be held by a U.S. Company that an illegal payment to a foreign official was actually being contemplated in pursuit of business. For there to be an illegal payment in violation of the FCPA, it must be offered for the corrupt purpose of influencing a foreign official's conduct to assist the U.S. Company in some way. When a U.S. Company has hired an agent or consultant (third party intermediary) to interface with a foreign government on their behalf, this relationship could create a particularly onerous situation, when, without authority or concurrence of the U.S. Company, this agent makes an offer of an illegal payment to a foreign official. Should the U.S. Company be held responsible for this act, or have positioned themselves to reasonably foresee that this might occur? How does this unanticipated occurrence impact the potential knowledge of the company that this illegal act might occur, and how can they mitigate this risk?

Congress sought to clarify this ambiguity with the 1988 FCPA amendments. As originally enacted, the FCPA made illegal the corrupt act of making a payment, offer or promise of anything of value to any person while knowing or having reason to know that all or a portion of the payment would be given to a prohibited recipient. This made oversight and management of overseas agents very difficult

[3] See ABA FCPA Guide; Donald R. Cruver, page 3.

for U.S. Companies, in that, while the agent may have offered the payment to a foreign official corruptly, the U.S. Company may not have actual knowledge of the corrupt nature of the payment and could very well be held liable for the ensuing FCPA violation. The amended language maintained the "knowing" requirement, and dropped the "has reason to know" language. Actual knowledge of the corrupt payment is now required for a violation of the Act to occur. For the sake of clarity, and to provide guidance of what standard a U.S. Company will be held to regarding actual knowledge of corrupt payments, the 1988 amendments included a definition of "knowing"; the text reads:

> "(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 a result is substantially certain to occur; or
> (ii) such person has a firm belief that such circumstance exists or that such a 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 such circumstance does not exist."[4]

Obviously, this "knowing" standard will apply to payments made with knowledge of a corrupt intent, however, the real risk of falling outside the scope of the FCPA exists for U.S. Companies who act with deliberate ignorance or conscious disregard of known circumstances that would reasonably reflect a high probability of a violation of the FCPA. Any U.S. Company that takes a "head in the sand" approach to suspicious or unlikely activity or conduct involving overseas agents or foreign officials is taking a grave risk. Statements such as "We really need this deal, just do what it takes", or "I know it's a foreign culture, I don't want to know the details", will only place a company in harm's way.

Suspicious activity, or the existence of any of the U.S. DOJ Red Flags (Red Flags have been listed and detailed in the Appendix of this material) when dealing with overseas agents demands a reasonable investigation and resolution of any issues. Deliberately ignoring corrupt, or seemingly corrupt circumstances will not sustain a defense to a charge of FCPA violations. By now you have probably observed that there are significant pitfalls and risks to operating in the global marketplace through the support of third party intermediaries. That is why the hopeful purpose of this course, by supplying background information and compliance tools, is to offer the basics that make up a successful FCPA compliance program.

[4] 15 U.S.C. § 78dd-2(h)(3).

Finally, the FCPA was amended again in 1998, to incorporate several of the significant global anti-corruption initiatives that were being promoted by the Organization for Economic Cooperation and Development (OECD). As will be explained in greater detail in a later section of these materials, while U.S. Companies were governed since 1977 by the firm language of the FCPA, no other country had similar anti-corruption standards to abide by. This made the entire global marketplace an "unlevel playing field" for U.S. Companies and created significant advantages to companies in other countries that had no legal restrictions against bribery of foreign officials or other corrupt and unethical practices.

By this amendment, the International Anti-Bribery and Fair Competition Act of 1998 ("the 1998 Amendments") added several important OECD-driven provisions to the basic FCPA language. Although the OECD Convention reflected much of what was already the law in the U.S. under the FCPA, there were several concepts that Congress thought prudent to incorporate.

The 1998 Amendments broadened the category of prohibited payments made to foreign officials to "secure any improper advantage". This language expanded the scope of the prohibition and inserted the OECD's language making it a criminal offense for any person to offer, promise or give any improper payment to a foreign official, " …in order to obtain, or retain business or other improper advantage in the conduct of international business." The improper advantage refers to something that the Company has received due to an illegal payment of something of value, but would not normally be entitled to.

The 1998 Amendments also expanded the definition of "foreign public official" to include employees or officials associated with public international organizations or non-governmental public organizations (NPOs). Examples of such organizations would be the United Nations or the World Bank. This change makes the FCPA consistent with the language of the OECD Convention and minimizes potential bribery objectives aimed toward members of these influential organizations.

The amended FCPA also addressed another tenet of the OECD Convention by creating a nationality based jurisdiction. Subsection 15 U.S.C. § 78dd-1(g) was added as an alternative basis for jurisdiction over bribery committed outside the territory of the United States by Issuers. Issuers, or any "United States Person" who is an "officer, director, employee, or agent of an Issuer or a stockholder acting on behalf of an Issuer", are now liable for prohibited payments made outside the United States regardless of whether the illegal payments made use of the U.S. mails or other instrumentalities of interstate commerce.
(15 U.S.C. § 78dd-1(g)(1).

By 15 U.S.C. § 78dd-1(g)(2), the term "United States Person" means any United States national as well as any business organization organized under the laws of

the United States. Congress intended that United States Issuers would be liable under the Doctrine of Respondeat Superior for the corrupt acts of their agents taken outside the United States, regardless of the nationality of the actor.

Further, the reach of the FCPA anti-bribery laws was expanded to include conduct of "any person", other than an Issuer or Domestic Concern, who furthers a prohibited act of bribery within the jurisdiction of the United States. This new section (15 U.S.C. § 78dd-3) provides for criminal jurisdiction in the United States over acts of bribery committed by a foreign national. This means that the prohibited acts that apply to Issuers and Domestic Concerns now apply to other persons, as well.

Under this section, for liability to attach, there are two qualifications. First, these prohibited acts must occur in the United States. It follows that those foreign nationals, or any other person for that matter, who bribe foreign officials are criminally liable under the FCPA when some act in furtherance of the bribe occurs within United States territory. The second qualification is that any act in furtherance of a prohibited bribe establishes jurisdiction. And so, prohibited activities do not need to involve the use of the mails or other instrumentalities of interstate commerce to create liability; their very occurrence creates jurisdiction.

Now that the history and breadth of the FCPA has been briefly discussed, we can explore the actual elements of what makes up a violation of the FCPA.

Elements of an FCPA Violation; Anti-Bribery Provisions

The FCPA prohibits an entity or an individual from making, directly or indirectly through a third party intermediary:

1. a payment of – or an offer or promise to pay – money, gifts or anything of value:
2. to a foreign official, or any person acting in an official capacity for or on behalf of a foreign government or any of its agencies or departments, any foreign political party or party official, any candidate for foreign political office, or (by the 1998 Amendments) any official or employee of a nongovernmental public organization;
3. with a corrupt motive or intent; for the purpose of influencing an official act or decision of that foreign official; inducing that person to act or refrain from acting in violation of his or her official or lawful duty; or inducing that individual to use his or her influence with a foreign government to affect or influence any government act or decision; or to secure any improper advantage;

4. in order to obtain, or retain business, or to direct any business to any person.[5]

While this series of anti-bribery prohibitions links together quite clearly and succinctly, some of these elements are worth further discussion.

It is important to note that the DOJ interprets, with great scrutiny, the prohibition of paying "anything of value" to a foreign official. Anything of value can include money, gifts, entertainment, re-imbursement of a foreign official's expenses, loans, college educations for a foreign official's children, beneficial interests in a business, in-kind contributions or any excessive per diem or promotional activities. The U.S. authorities also apply these prohibitions to cover payments and gifts made to a member of the foreign official's family. Also, the FCPA covers payments and gifts that would benefit a candidate for public office or an official of a political party.

The question then is raised: are payments to foreign officials ever allowed or are they defensible under the FCPA? In both 15 U.S.C. § 78dd-1 (Prohibited practices by Issuers), and 15 U.S.C. §78dd-2 (Prohibited practices by Domestic Concerns), the FCPA recognizes two (2) areas where payments to foreign officials is acceptable.

Subsection 78dd-1 & 2 (b) is entitled "Exceptions for routine governmental action", and describes the situation where "facilitating" or "expediting" payments are appropriate when made to foreign officials in positions of administrating routine governmental activities. This deals with routine government bureaucracy. Where bureaucratic delays and administration can be sped up by a small payment to a low-level government official, the FCPA recognizes this as a cultural fact of international life. Examples of such "routine governmental action" are: obtaining permits, licenses or other official documents; processing governmental paperwork such as visas and work orders; providing police protection, mail pick-up and delivery, phone service and power and water supply; loading and unloading cargo or protecting perishable goods; or scheduling inspections. This list is not exhaustive and these are all considered routine governmental activities that sometimes need a small "grease payment" to make them happen in a timely manner.

The key concept is that these activities are reasonably certain to occur; it's just a matter of time and working through the bureaucracy. There is no real discretion on the part of the government official as to whether the activity will occur; the issue is when. These are not discretionary decisions made by a foreign official that helps a U.S. Company keep or obtain business. A good example of an acceptable facilitation payment would be paying a government

[5] Excerpt from Corporate Counsel's International Adviser; Bribery Abroad – Stay Out Of Jail: Understanding the U.S. Antibribery Regulations; Lillian V. Blageff, associate editor at Business Laws Inc.; dated March 1, 2000.

clerk to speed up the processing of an application for an operating permit that is sitting on his desk. However, paying a city clerk to approve this same application (when he is the official with the discretion to accept or deny the permit application) would not be permissible.

Grease payments were included in the FCPA by the 1988 Amendments to "change the focus of illegality from the status of the recipient to the purpose or nature of the payment".[6] For a payment to be illegal under the FCPA, it must be offered corruptly, to induce a foreign official to misuse his or her authority and discretionary powers to assist the Company in an improper way. It is still important to understand that such facilitation payments must be legal in the country of interest, and not violate local law.

The 1988 Amendments also provided two statutory "affirmative defenses" to some actions that may appear, on their face, to violate the FCPA. First, a person charged with an FCPA anti-bribery violation can argue that the payment or promise of anything of value was lawful under the written laws of the foreign official's country. (15 U.S.C. § 78dd-1(c)(1)). This applies strictly to the written laws in a country and does not take into account the customary practices that may be followed in the country.

The second affirmative defense involves the assertion that the payment or transfer was a "reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official", and was "directly related to a. the promotion, demonstration or explanation of products or services; or b. the execution of performance of a contract with a foreign government of agency thereof." (15 U.S.C. § 78dd-1 (c)(2)). Congress acknowledged that exempting these types of payments makes business sense because these are the usual and legitimate expenses that occur in any negotiation or business undertaking. Note that this particular defense holds significant risks if the alleged business expenses are lavish in nature and the officials are treated to exorbitant side trips and entertainment, or the trips involve the official's family members unrelated to the business purpose of the trip.

As mentioned previously, by the 1988 Amendments, the nature and purpose of the payment will be investigated to determine if the payment was offered or made "corruptly" with the intent of influencing the recipient's official conduct to wrongfully assist the Company to succeed in obtaining or retaining business or secure an improper advantage. The word "corruptly" indicates an evil purpose. While the FCPA does not provide a definition for "corruptly", it is clear by the enforcement history of this Act that a course of conduct yielding a foreign official's favorable disposition of business to a Company that is bought by gifts and other payments of anything of value is unlawful.

[6] See the ABA FCPA Guide, Donald R. Cruver; page 20.

Overview of Record Keeping and Internal Accounting Provisions of the FCPA:

Generally, the FCPA requires companies that are registered with the Securities and Exchange Commission, whether or not they are U.S. or foreign owned companies, to comply with two accounting related provisions. First, the FCPA requires Issuers to "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." (15 U.S.C. § 78m (b)(2)(A)).

This sounds like a generally accepted standard for any business that desires to accurately record their business dealings. However, by influencing the generation of this language, the SEC was interested in attacking the root causes of record keeping problems that surfaced during the Watergate investigations. Prohibiting U.S. Companies from failing to record improper transactions and prohibiting the recording of falsified books and records entries is the purpose of this language. Further, the Watergate investigations revealed that U.S. Companies were fairly accurate at documenting the quantitative elements of a transaction (i.e. the dollar value). But where these books and records failed at transparency was in the qualitative description of the transaction. These transaction descriptions were misleading and purposefully misrepresented the nature of the transactions, hiding the illegal and unethical reason the Company did the deal. Essentially, the FCPA, by requiring the keeping of records "in reasonable detail" to "reflect transactions", heightened the expectations of DOJ and SEC auditors to review transparent and accurate financial disclosures.

The second accounting provision required by the FCPA record keeping provisions places an obligation upon U.S. Companies to, "devise and maintain a system of internal controls sufficient to provide reasonable assurances that":

1. Management authorizes transactions,
2. Transactions are prepared in accordance with generally accepted accounting principles and the Company maintains accountability for Company assets,
3. Management authorizes access to Company assets, and
4. Records accounting for assets are periodically reconciled.

(15 U.S.C. § 78m (b)(2)(B))

The unstated goal of the SEC was to actively encourage all Issuers to establish an internal audit committee by the Company Board of Directors to oversee such records. "The SEC has issued so many pronouncements calling for the establishment of Audit Committees that any board that fails to

heed the calls should be prepared to justify its actions in the event of a violation of the FCPA."[7]
This statement underscores the serious position the SEC takes in which it expects Issuers' upper management to be actively involved in reviewing international transactions, as well as maintaining accurate descriptions of those arrangements.

Although the anti-bribery prohibitions and the record keeping and internal auditing provisions of the FCPA are distinctly separate areas of the Act, together they create a formidable set of obligations for any U.S. Company to comply with. The balance of this paper describes the essential elements of an effective compliance program that is rooted in DOJ guidance and recent caselaw. First, the case.

Overview of *U.S. v. Metcalf & Eddy, Inc.* Consent and Undertaking Agreement[8]

In 1999, Metcalf & Eddy, an environmental engineering firm, was charged with civil violations of the FCPA for paying excessive travel, lodging and entertainment expenses on behalf of an Egyptian foreign official. Metcalf & Eddy had approached the Alexandria General Organization for Sanitary Discharge (AGOSD) in Egypt and submitted proposals and entered discussions for engineering contracts to support AGOSD efforts. In the course of their negotiations and relationship building activities, the Chairman of AGOSD traveled to Europe and the United States incurring significant expenses largely paid for by Metcalf & Eddy. They sought to influence the Chairman to use his authority with the AGOSD to direct contracts and contract extensions between the U.S. Agency for International Development (USAID) and Metcalf & Eddy. According to the Complaint, this Chairman was able to convince AGOSD officials who sat on project review boards to send such work to his new friends, Metcalf & Eddy.

The alleged violations centered upon two trips the Chairman made, which were mostly paid for by Metcalf & Eddy. The first trip, on which he brought his family, included travel to Boston, Massachusetts; Washington, D.C.; Chicago, Illinois; and Orlando, Florida (Gee, I wonder why they went to Orlando?). The second trip, which the Chairman made without his family, included travel to Paris, France; Boston, Massachusetts; and San Diego, California. Metcalf & Eddy paid the Chairman per diem expenses at 150% of his estimated expenses, and once upgraded his entire family to first class on one trip. The Chairman traveled first class on the second trip.

[7] See ABA FCPA Guide, Donald R. Cruver; page 18.
[8] See Consent and Undertaking Agreement in United States v. Metcalf and Eddy, Civ. Act. No. 99CV-12566-NG (Dist. Mass. Dec. 29, 1999.

Metcalf & Eddy initially denied the charges, but to resolve the pending investigation, they agreed to enter a Consent and Understanding Agreement with the DOJ in December of 1999. In addition to all of the elements described below, the Agreement required Metcalf & Eddy to pay a fine of $400,00 and reimburse the Government $50,000 for the cost of their investigation.

More significantly, Metcalf & Eddy agreed to create and maintain an extensive FCPA compliance program and associated ethics policies to ensure that such illegal activity (FCPA violations) would not occur again. This case is highly regarded as a clear statement and guidance by the DOJ of the minimum requirements the DOJ expects to see in any U.S. Company FCPA compliance program. It is interesting to note that DOJ personnel indicate that this represents a minimum set of guidelines.

Basically, by the Consent and Undertaking Agreement, the DOJ required Metcalf & Eddy to implement a rigorous and highly management-involved compliance program, which includes the following components:

1. A clearly articulated corporate policy against violations of the FCPA and the establishment of compliance standards and procedures to be followed by employees, consultants and agents that are reasonably capable of reducing the prospect of violative conduct.
2. Several senior Metcalf & Eddy corporate officials were assigned to oversee compliance with the procedures, policies and standards established as a result of this Agreement. These officials are to have the authority and responsibility to implement and utilize monitoring and auditing systems to detect any illegal or inappropriate conduct by the company's employees and other agents.
3. The establishment and maintenance of a committee to review the retention of any agent, consultant or other representative for purposes of developing business in foreign jurisdictions, and all contracts associated with this activity. This committee also reviewed prospective joint venture partners to determine ability to comply with the FCPA, as well as adequacy of the due diligence performed in connection with the selection of joint venture partners. The majority of the committee members could not be in positions where they were subordinate to the most senior officer of the department responsible for the relevant transaction.
4. Clearly articulated procedures to ensure that Metcalf & Eddy exercises due care to assure that substantial discretion 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 Metcalf & Eddy has formed business relationships with reputable and qualified agents, consultants and other representatives for purposes of business development in foreign

jurisdictions. Such policy shall require that evidence of such a "due diligence" inquiry be maintained in Metcalf & Eddy files.

6. The effective communication to all officers, employees, agents, consultants, and other representatives of corporate policies, standards and procedures regarding the FCPA by requiring regular training concerning the requirements of the FCPA and of other applicable foreign bribery laws on a periodic basis with its officers and employees involved in foreign projects. Such training is to be given as soon as practical following their retention and periodically thereafter.
7. The implementation of appropriate disciplinary measures, 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 may report suspected criminal conduct without fear of retribution or going through the chain of command or reporting the same to the employee's agents, or representative's immediate managers.
9. The inclusion in all contracts and contract renewals entered into (subsequent to this date) with agents, consultants, and other representatives for the purpose of business development in a foreign jurisdiction of a representation and undertaking by each prospective agent, consultant and representative that no payments of money or anything of value will be offered promised or paid, directly or indirectly, to any foreign officials, political parties, party officials, or candidates for foreign public or political 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 Metcalf & Eddy 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 that it shall not retain any subagent or representative without prior written consent of a senior officer of Metcalf & Eddy. All such contracts shall further provide for termination of said contract as a result of any breach or such undertakings, representations and agreements.

It is interesting to note that prior to the entering of this Consent and Undertaking Agreement, Metcalf & Eddy did not have a FCPA Compliance Program. Afterwards, they had a top of the line, bells and whistles program that was imposed upon their business by the DOJ. Clearly, any company would rather voluntarily develop and implement such a program and have the flexibility to tailor it to serve their business needs and risks. That is the lesson learned by the rest of the global business community from the actions of Metcalf & Eddy.

And the list is not complete. Metcalf & Eddy also agreed as part of the Consent Agreement to bolster their internal accounting and financial practices to comply with the Record Keeping and Internal Controls section of the FCPA, by implementing the following systems:

1. make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company;
2. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that;
    a. transactions are executed in accordance with management's general or specific authorization;
    b. transactions are recorded as necessary (1) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (2) to maintain accountability for assets;
    c. access to assets is permitted only in accordance with management's general or specific authorization; and
    d. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Now that you have had an opportunity to review the program imposed on Metcalf & Eddy because of their illegal currying of a foreign official's favor, inducing him to misuse his official position to benefit their business, the balance of this paper will distill these components as the core of an FCPA compliance program.

Elements of a FCPA Compliance Program:

Summarizing the essential elements of a viable FCPA compliance program is not complicated. In fact, most law firms dealing in international transactions have a ready checklist that they can offer to provide guidance. The real challenge is in nurturing upper management commitment to the program and maintaining the internal vigilance necessary to keep the dynamic aspect of such a program alive. Each of the components listed below will require key management involvement to be successful.

First, a company must have a **general policy and ethical code of conduct** that provides a mechanism for reporting ethical violations. The FCPA segment of this general policy should simply be a specific piece of a broader ethical culture. This broad policy is the starting point. Such a policy should further define the roles and accountabilities for everyone in the company regarding ethical conduct, from the President on down.

A specific **procedure** should be in place that accomplishes several things. The heart of the entire program, the piece that the DOJ will certainly want to review should an allegation of an FCPA violation be lodged, is to what extent **due diligence** was performed on anyone or any entity who is marketing or promoting your business in a foreign country. The DOJ does not expect a company to hold the hand of the sales representative or agent they have hired to market their products and services in other countries. However, they do expect a company to responsibly and diligently investigate the reputation and integrity of the prospective agent, and maintain such documentation, prior to signing a contract with him or her. This due diligence exercise must be thorough enough to satisfy any potential integrity concerns. There are several international watchdog groups who rank countries of the world based on their proclivity to harbor or tolerate corruption. The more corrupt a country's reputation, the more rigorous the due diligence should be.

Typical background due diligence questions that must be answered by a candidate agent or representative involve:

1. Description of the candidate's business. When established, how many employees, any mandatory business or government registrations required, any subsidiary organizations or branch offices, background information on candidate's experience and expertise, percentage of ownership by candidate and other principle officers or owners, any silent partners, and most importantly, are there any connections (partners, family members, co-owners, etc.) to the government that must be disclosed?
2. Reference information. At least three (3) business references should be provided by the candidate to whom the company can further inquire regarding the candidate's reputation and performance history. In addition, the company should require an audited financial statement, or at least a financial reference (bank or supplier) to establish the candidate's financial stability.
3. Personnel information on key people. The candidate should provide a resume or curriculum vitae on all owners, partners or shareholders, board of directors, and employees who will be acting on behalf of the company. They should provide information on additional directorships or employment outside candidate's business.
4. Conflicts information. The candidate should verify that there are no key people holding government positions, positions in any political party, or are there any prohibitions or time restrictions for ex government or ex military employees.
5. Compliance information: The candidate should provide any policy it has that addresses bribery or corruption. The country and method of payment preferred by the candidate should be disclosed. A series of questions should be posed requesting information that will disclose if the candidate or any employee of candidate's business has been involved in any violation of any local laws, tax evasion, denial of security clearances,

antitrust violations, arrests or charges of criminal conduct, or has the candidate or any employee had their name listed on one of the U.S. Government's lists of terrorists or narcotics traffickers, or other such lists.

6. Media search: The candidate and key employee's names should be the subject of a rigorous Internet media research exercise.

Further, the candidate should sign and certify to the accuracy and completeness of the information provided.

The procedure should include provisions for investigations into suspicious activity by the agent after he or she is under contract, such investigations to be performed under the guidance of in-house counsel. Also, the procedure should require that a tightly written agent or consultant agreement be the only vehicle or document that can be used to hire a representative to work in foreign jurisdictions. Levels of authority for approval of the agent's appointment as well as defined accountability for the agent's performance should be described. Finally, the procedure should require that all company employees who will have even a remote connection to the agent's activities should be periodically trained. Remember that to ensure proper compliance with the bookkeeping and internal financial controls requirements of the FCPA, you must include financial staff employees in the training protocol.

As mentioned above, a tightly written **contract** with the agent must include certification and representation that the agent understands and complies with the anti-bribery prohibitions of the FCPA. This contract must be terminable should any of these certifications related to FCPA compliance be breached. Including the text of the FCPA as an attachment to the contract is a good practice.

The obvious last element of the FCPA compliance program is the **training** of all employees who play any role in the international business of the company. Such training should be given periodically to provide information on new developments in the field and to catch new people who move into the international business segment of the company's business. This training will include an explanation of the DOJ's Red Flags so that employees are aware of the signs of potential corrupt or unethical behavior on the part of overseas agents.

It is important that the company's financial group and marketing group, with oversight by in-house counsel, coordinate their activities to ensure that all commission payments or other legitimate payments to the agent are transparent and reasonably reflect in sufficient detail the essence of the payment.

At the end of the day, all of the documentation that is generated in the administration of overseas agents will be the foundation of any defense that

may have to be made should the agent or an employee of the company allegedly become involved in any corrupt activity. The company will have to prove that it prudently and responsibility researched the agent's integrity prior to his or her appointment, kept appropriate records detailing the agent's activities, had internal systems in place to formalize the administration of the agent, trained all employees as to FCPA compliance requirements and responded to any suspicious or unexplained activity the company became aware of during the agent's performance. The documentation associated with the above activities is the only defense that will be persuasive to a DOJ investigator. Many years can pass by before an SEC or DOJ investigation gains momentum and they begin to question certain transactions or ask questions about an agent's conduct, and the company's knowledge or understanding of that conduct. Records and documents, and the procedures for generating them, suddenly become very important.

The global marketplace has much promise and opportunity, but poses significant risks for companies who fail to heed the anti-corruption message found in the FCPA. Adhering to these principles provides U.S. companies the knowledge and confidence to do business in almost any country in the world. I'll end this paper with a quote from my respected colleague, regarding the assessment of risks in the world of international business, "We have made sure that the people we are doing business with understand we are going to do business in an appropriate, transparent manner or not at all. I've said this hundreds of times: 'We will walk away from this opportunity rather than put the company at risk'".[9]

[9] Corporate Legal Times International, June 2002, Article "The Best Defense – In-House Counsel Keep Close Watch Over Military Contracts in the Middle East"; Quote in the Article by Alexandra Wrage, Senior Counsel for International Affairs, Northrop Grumman Corp., Baltimore, Md.

International Anti-Bribery Conventions: History and Implementation

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Bribery has received widespread recognition and condemnation as an international, rather than simply a domestic matter. This is reflected in the proliferation of both binding and voluntary instruments demonstrating growing political will to cooperate to increase transparency in international business transactions. By supporting this process, each government presumably hopes to enhance not only its nation's moral standing, but also its attractiveness to foreign direct investment. That is the good news. The bad news is that companies operating internationally must be aware that, while the broad principles and goals of these instruments are roughly aligned, there are distinctions that can present real problems for in-house counsel.

A detailed comparative study of the various international anti-bribery instruments is beyond the scope of this brief paper. Instead, set forth below, are key excerpts from the most important conventions with brief comments as to their potential significance to in-house counsel.

Inter-American Convention Against Corruption

The Inter-American Convention Against Corruption, adopted in March 1996 by the thirty-four member Organization of American States, was the first multilateral convention to address transnational bribery.[1] Prior to the OAS Convention, the U.S. Foreign Corruption Practices Act ("FCPA") alone criminalized bribery of foreign government officials.

The OAS Convention contains many provisions comparable to those in the FCPA. It is generally broad in scope, addressing both domestic and transnational corruption. It contains sweeping language prohibiting offers or gifts of any benefit "in connection with" an economic or commercial transaction in exchange for an act or omission in the performance of an official's duties. This appears broader than the FCPA "obtain or retain business" provision.

[1] All the American States have ratified the Charter and are Member States of the OAS: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba (By resolution of the Eight Meeting of Consultation of Ministers of Foreign Affairs, 1962, the current Government of Cuba is excluded from participation in the OAS), Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Lucia, St. Vincent and the Grenadines, Suriname, St. Kitts and Nevis, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

The Convention also appears broader in its definition of a "payment", extending not only to "something of value" as addressed in the FCPA, but also to the gift of "other benefit, such as a gift, favor, promise or advantage".

Although there appears to have been little discussion about this, the OAS Convention does not include an exception for routine "facilitating payments" to government officials for performance of non-discretionary tasks, as the FCPA does.

Finally, the Convention does not include political parties and candidates for political office in its definition of government officials.

Article I
Definitions

For the purposes of this Convention:

"Public function" means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level of its hierarchy.

"Public official", "government official", or "public servant" means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

Article VI
Acts of Corruption

1. This Convention is applicable to the following acts of corruption:

a. The solicitation or acceptance, directly or indirectly, by a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

b. The offering or granting, directly or indirectly, to a government official or a person who performs public functions, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or for another person or entity, in exchange for any act or omission in the performance of his public functions;

c. Any act or omission in the discharge of his duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself or for a third party;

d. The fraudulent use or concealment of property derived from any of the acts referred to in this article; and

e. Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this article.

The OECD Convention on Fighting Bribery of Foreign Government officials in Transnational Business Transactions.

The 1997 OECD Convention is the culmination of the efforts and negotiations of the members of the Organization for Economic Cooperation and Development to address and criminalize transnational bribery. [2]

Although not the first international convention of its kind, the OECD Convention has been widely promoted by the United States in an effort to level the playing field left askew by the Foreign Corrupt Practices Act. It arguably receives the greatest attention from the business community not only because it has been widely publicized, but also because the two-tier audit process that has succeeded in showing that the Convention has "teeth", (or at least the ability to embarrass member states).

The Convention is non self-executing. Each country must enact domestic legislation that meets the broad requirements of the Convention. Each has some latitude with respect to certain provisions. Although this flexibility was ostensibly to address the different legal models of member countries, the policy of "functional equivalence" has led to disputes over several important issues including facilitating payments, for which countries may or may not include an exception. In the first stage of the OECD audit, countries may fail on the grounds that their implementing law is inadequate. Most notorious among the states that failed at this preliminary stage was the United Kingdom, which sought to rely on a law that pre-dated that OECD Convention and which was deemed inadequate.

Like the FCPA, the Convention addresses only supply-side bribery, for which it includes both civil and criminal provisions. Also like the FCPA, the Convention has accounting provisions, which prohibit off-the-book accounts and require proper recording and documentation.

As mentioned above, the OECD Convention does not contain an automatic exception for facilitation payments, but each country is free to implement an exception. Most, but not all, have done so.

[2] OECD Member States include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. Non-member countries include Argentina, Brazil, Bulgaria, Chile and Slovenia.

The Convention contemplates criminal sanctions that are "effective, proportionate and dissuasive". As there has been only one prosecution to date, however, the Convention's power to dissuade bribe-payers is difficult to measure.

Article 1 - **The Offence of Bribery of Foreign Public Officials**:

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

> a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
>
> b. "foreign country" includes all levels and subdivisions of government, from national to local;
>
> c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 12 - Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Council of Europe : CRIMINAL LAW CONVENTION ON CORRUPTION

Adopted in January 1999, the Council of Europe's Convention of Corruption[3] addresses issues that most other conventions do not, making it arguably the most expansive of the international conventions currently in force. The Convention includes prohibitions on private sector bribery and trading in influence.

Article 7 – Active bribery in the private sector

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties.

Article 12 – Trading in influence

> Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.

The expansiveness of this convention is of particular importance in light of the considerable overlap between Council of Europe member states and OECD countries. U.S. companies with operations in Europe are likely to be subject to the FCPA, the OECD Convention and the Council of Europe Convention. While significant prosecutions have taken place only under the FCPA, corporate counsel should be aware of the additional prohibitions embodied in these conventions in part because there is a monitoring provision in the Council of Europe Convention which provides for monitoring by GRECO.

Article 24 – Monitoring

> The Group of States against Corruption (GRECO) shall monitor the implementation of this Convention by the Parties.

[3] Council of Europe member states include Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine and the United Kingdom.

African Union Convention on Preventing and Combating Corruption

The African Union ("AU") Convention was adopted in Maputo in July 2003.[4] Like the Council of Europe Convention, the AU Convention addresses private sector bribery and does not have an exception for facilitating payments.

Article 4 - Scope of Application

1. This Convention is applicable to the following acts of corruption and related offences:

(a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

(b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

(c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

(d) the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;

(e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

(f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

(g) illicit enrichment;

[4] African Union member states include Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Cote d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea Conakry, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe.

(h) the use or concealment of proceeds derived from any of the acts referred to in this Article; and

(i) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or on any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

Article 11: Private Sector

State Parties undertake to:

1. Adopt legislative and other measures to prevent and combat acts of corruption and related offences committed in and by agents of the private sector.

2. Establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect of the tender procedures and property rights.

3. Adopt such other measures as may be necessary to prevent companies from paying bribes to win tenders.

Draft United Nations Convention Against Corruption

Negotiations continue on the proposed United Nations Convention against Corruption with a final draft anticipated by the end of 2003. While the most controversial aspects appear to be procedural rather than substantive, the draft convention does address private sector bribery. The final version of this proposed convention will be of particular importance not only because the parties have benefited from the expertise of those involved with the previous instruments but because, if ratified, this convention has the potential to have the greatest number of signatories; the United Nations has 147 member states. Although the potential for standardization across jurisdictions is great, so too is the likelihood of conflict with existing national laws and international conventions.

Conclusion

A large number of anti-bribery instruments have been developed since the OAS Convention of 1996. Arguably, a larger number than is strictly required to address the problem. Had a single, coherent international convention been developed originally, competing and occasionally conflicting instruments might have been avoided.

Although corporate counsel must be primarily concerned with compliance with the Foreign Corrupt Practices Act, companies doing business overseas should bear the following areas of risk in mind:

Facilitating Payments: Several instruments do not contain the FCPA exception for facilitating payments. Although the OECD Convention permits such

an exception in national implementing law, several countries have declined to follow the U.S. example. As such, an American company with a British subsidiary making facilitating payments in Asia, will be compliant with the FCPA, but in violation of English law and the law of the Asian country. The risk of prosecution is unquestionably low, but the risk of a books and records violation is high. Reluctant to memorialize a "small facilitating bribe to local government official", employees of U.S. companies may be tempted to misrepresent the nature of the expense. By so doing, they will have created a violation of the FCPA books and records provision where there had been no underlying violation of the FCPA initially.

"Payments" expansively defined: While it is clear that items with clear monetary value may not be given to foreign government officials in order to secure a business advantage under any of the instruments discussed, some conventions have extended the definition of prohibited payments to include, as the OAS Convention does, "advantage" or "other benefit". Whether this definition will be applied to, for example, modest hospitality and simple corporate gifts seems unlikely, but cannot be discounted as countries seek to demonstrate a serious commitment to reducing bribery.

Private Sector Bribery: There is increasing support for including prohibitions on private sector bribery in international anti-bribery conventions. This is particularly true in Europe where shareholder rights are less entrenched and the majority opinion appears to be that there are few remedies against corporate representatives who make business decisions based not on the best interests of the company, but on potential personal enrichment. The pitfall for U.S. corporate counsel is not simply the need to avoid clear impropriety in this respect, but the ambiguity in the definition of private bribery. There is current language and draft language that arguably includes bulk discounts and preferential terms for long-standing customers in the definition of private bribery.

Corporate counsel should consider whether their international business model subjects them to multiple anti-bribery conventions. If they determine that it does, the most efficient and cost-effective response may be a corporate prohibition on a broader array of behaviors, (including facilitating payments and gifts to government officials) and additional safeguards to ensure that private procurement decisions are monitored in a way that safeguards the integrity of the procurement process. These steps are prudent from a legal perspective, but like all steps taken to increase the transparency, predictability and enforceability of international transactions, also make good business sense.

ACCA Conference
San Francisco: October 8, 2003
FCPA Hypotheticals

You are charged with vetting potential commercial intermediaries (sales agents to be paid on commission) prior to their retention by your company. You conduct your company's usual due diligence and in the process you learn:

1. *An agent (a sole proprietor) in Greece seeks to be paid in an account in the Channel Islands. There are no other anomalies in his due diligence materials.*

2. *An agent (a partnership) in Ghana has, as a silent partner not involved in the business in any respect, the Deputy Minister for the Ministry that will be your primary customer.*

3. *A media search of a potential agent (a corporation) in Norway reveals a scandal involving the company's mislabeling of Norwegian farm-raised salmon as "wild".*

4. *An agent (a limited liability company) in Pakistan is 50% owned by a trust. The agent flatly refuses to reveal the beneficiaries of the trust.*

You have reviewed with approval the proposed intermediaries and your company has retained them, on two-year contracts when you then learn that:

1. *Your agent in South Africa (half of a two-man team) working on a particularly long-term and complicated contract is requesting an advance payment of 50% of the commission he expects to earn. He states that the advance is key to securing the contract as he is short of resources.*

2. *Your agent in the Philippines is under investigation for tax evasion.*

3. *Your agent in the United Kingdom has made several £500 facilitating payments to customs officials in Egypt in order to expedite delivery of goods required to meet contract deadlines. While permitted under U.S. law, facilitating payments are not permitted under UK or Egyptian law.*

4. *The intermediary representing your competitor for an important contract in Bolivia calls your field office to "expose" your agent there for the "unethical, corrupt, criminal mastermind" that he is. He takes the opportunity of the call to offer his own services on behalf of your company.*

Doing Business With Intermediaries Internationally[1]

The Role of Business Intermediaries

Companies retain business intermediaries for a number of reasons:

- to gain access to and build relationships with senior government officials;
- to explore business opportunities in new regions without the expense of hiring or relocating employees;
- to penetrate an opaque or tight local market;
- to comply with local law which may *require* the use of a resident intermediary;
- to fulfill a business model that depends on a large volume of modest sales across a number of countries - a model that does not readily support a large international workforce; or
- to expand an in-country presence on a temporary basis with as little financial risk as possible.

The TRACE Standard

Applies to:

- the selection of intermediaries;
- the investigation of intermediaries; and
- the management of contractual partnerships with intermediaries.

Selecting Intermediaries

As with all employees or business partners, the initial stage in the vetting and retention of an intermediary should be a methodical search for the most qualified person or company. It should include (1) the business justification for selecting the intermediary; (2) the expertise and resources that the proposed intermediary brings to the marketing he will undertake; and (3) an interview at which the responsible company employee confirms that the proposed intermediary has a good reputation in the community, understands the company's business values and agrees to conduct himself accordingly.

After business justification for retaining an intermediary has been established and documented, an internal review should be undertaken to establish more fully the background, status and qualifications of the Intermediary.

The Internal Review

This information may be easily obtained by a questionnaire completed by the intermediary or by the compliance team based on discussions with the intermediary,

[1] The due diligence program outlined is a portion of the TRACE Standard for Doing Business with Intermediaries Internationally © 2002 and has been reproduced with approval of TRACE International, Inc.

which will require more information from intermediary companies than from individuals. The internal review should address the following primary topics:

***Contact Information**:* Obtain the full name, address, telephone and facsimile numbers of the company or individual, along with an email address, if available.

***Company Structure**:* Ascertain the organizational structure of company intermediaries.

***Company Ownership**:* Identify ownership interests of 5% or more. The goal is to ensure that real people are identified – not parent companies, holding companies or trusts – and that those people are not themselves government officials. An ownership interest of less than 5% is unlikely to put the shareholder or partner in a position to significantly influence management decisions.

Ownership information on publicly-held companies need not be obtained unless there is significant ownership by the government as a result of recent privatization. Principals should be adequately protected by the oversight of the appropriate securities regulatory body.

Company Description: Intermediaries should provide a brief history of their company and their qualifications.

Employees and Third Parties: Intermediaries should identify the key employees and third parties that will undertake marketing efforts.

***Local Law Requirements**:* Intermediaries should identify the laws and regulations that apply to their industry in their home country. This provides company counsel with an indication of the intermediary's willingness to research and comply with governing laws.

***References**:* Intermediaries should provide three business references and either (1) audited financial statements for the previous two years or (2) one financial reference for use during the External Review portion of the background investigation.

***Disclosures*:** Intermediaries should disclose prior bankruptcies, criminal convictions or pending investigations for bribery, tax evasion, export or anti-trust violations and all civil litigation in which they are or have been defendants.

The External Review

The external review should uncover any adverse information an unethical intermediary might attempt to suppress during the Internal Background Review.

***Business References**:* Ask the independent business references about the intermediary's (1) effectiveness; (2) reputation; (3) government relations, and (4) business ethics. These references can be an important source of information.

***Financial Reference*:** If audited financial records are not available for the previous two years, ask the financial reference about the longevity of the intermediary's relationship with the bank. The answer can provide insight into the intermediary's stability in the community and evidence that the intermediary banks locally rather than in another country where there may be less banking transparency.

***Media Search*:** A simple but cost effective mechanism is to search a global media database for the name of the intermediary, its owners, principals, partners and key employees.

Documentation

A company's documented commitment to the establishment, implementation and enforcement of a sound compliance plan can reduce reputational damage should a bribe be paid. Moreover, such evidence may reduce criminal sanctions in some countries.

The documentation should also include:

- a written commitment by the intermediary to avoid even the appearance of an inappropriate payment and to report any requests by government officials for inappropriate payments to the identified point of contact within management;

- express language prohibiting the intermediary from offering or giving anything of value to government officials in order to secure a business advantage; and

- guidelines as to when the intermediary should seek the principal's approval for any hospitality or customary gifts and a requirement to certify compliance annually.

TRACE "Red Flags"

During the review process, there are a number of "red flags" which do not necessarily end the possibility of a business relationship with an intermediary, but require significant additional investigation.

More investigation is required if the intermediary:

- requests payment in cash or to a numbered account or the account of a third party;

- requests payment in a country other than the intermediary's country of residence or the territory of the sales activity, and especially if it is a country with little banking transparency;

- requests payment in advance or partial-payment immediately prior to a government decision;

- has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts;

- refuses to disclose owners, partners or principals;

- uses shell or holding companies that obscure ownership without credible explanation;

- is specifically requested by a government official;

- has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking;

- has little or no expertise in the industry in which he seeks to represent the principal;

- is insolvent or has significant financial difficulties;

- is ignorant of or indifferent to the local laws and regulations governing the region in question and the intermediary's proposed activities in particular;

- identifies a business reference who declines to respond to questions or who provides an evasive response;

Even greater caution should be exercised if the intermediary is doing business in an industry or in a country with little business or financial transparency.

ABOUT TRACE

Trace is a non-profit membership organization of companies and business intermediaries working to increase transparency in transactions involving agents, representatives, consultants, distributors and subcontractors.

For copies of the complete TRACE Standard, please write to info@TRACEinternational.org

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FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS

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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. 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 Peter B. Clark, Deputy Chief, or Philip Urofsky, Senior Trial Attorney, Fraud Section, Criminal Division, U.S. Department of Justice, P.O. Box. 28188, McPherson Square, Washington, D.C. 20038, (202) 514-7023.

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.

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usdoj/criminal/fraud/dlj

MODEL FCPA LANGUAGE FOR AGREEMENTS WITH INTERMEDIARIES

Representative acknowledges receipt of a copy of and confirms its understanding of the Foreign Corrupt Practices Act (the "FCPA") (15 U.S.C. Section 78dd-1, et. seq.) as amended. Representative represents, warrants and covenants that it will not violate any provision of the FCPA, regardless of applicability of the law as a whole to the representative.

Specifically, Representative represents, warrants and covenants that it has not and will not, directly or indirectly, pay, promise or offer to pay, or authorize the payment of, any money or give any promise or offer to give, or authorize the giving of anything of value, to:

(a) an officer, employee, agent or representative of any government, including any department, agency, or instrumentality thereof or any person acting in an official capacity therefor or on behalf thereof;

(b) a candidate for political office, any political party or any official of a political party; or

(c) any other person or entity while knowing or having reason to know that all or any portion of such payment or thing of value will be offered, given or promised, directly or indirectly, to any of the foregoing persons, for the purpose of influencing any act or decision of such government official, political party, party official, or candidate in his or its official capacity, including a decision to do or omit to do any act in violation of the lawful duty of such person or entity, or inducing such person or entity to use his or its influence with the government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist Company or Representative in the promotion, marketing, or sale of products and services under this Agreement.

Anti-Bribery Websites and Resources

I. U.S Government

- **U. S. Department of Justice**
  http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm

- **U. S. Securities and Exchange Commission: SEC Enforcement Actions**
  www.sec.gov

II. International Anti-Corruption Conventions

- **Organization for Economic Cooperation and Development (OECD)**
  www.oecd.org/daf/nocorruption

- **Council of Europe: Anti-corruption Convention**
  www.greco.coe.int

- **Organization of American States: Inter-American Convention Against Corruption**
  www.oas.org

- **African Union**
  www.african-union.org

- **United Nations: Draft Convention Against Corruption**
  www.undcp.org

III. Anti-Corruption Resources

- **Center for International Private Enterprise ("CIPE"): information on corporate governance and anticorruption programs …**
  www.cipe.org

- **TRACE: non-profit organization that (1) prepares background reports on business intermediaries; (2) provides training at locations around the world and (3) that undertakes surveys and other compliance benchmarking research**
  www.TRACEinternational.org

- **Transparency International: Berlin-based non-profit that publishes annual Corruption Perceptions Index**
  www.transparency.org

- **World Bank Institute: collection of anti-bribery governmental and non-governmental resources**
  www.worldbank.org/wbi

Foreign Corrupt Practices Act (FCPA)

Gregory S. Dunn
Counsel
Rolls Royce North America

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

I. FCPA History
   a. 1977: FCPA passed by Congress after years of SEC investigations
      - Watergate prosecutor discloses many corrupt payments to foreign officials/overseas agents by U.S. companies.
      - over 450 U.S. Companies; illegal payments in excess of $400M.
      - without full and accurate records/accounting
      - SEC discovered falsified entries in Company books
   b. 1988: FCPA extensively amended
      - FCPA "reason to know" standard refined because it was unclear
      - Emphasized duty to investigate improper acts
   c. November 10, 1998: FCPA amended to incorporate several concepts of newly ratified Organization for Economic Cooperation and Development (OECD) "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions". This Amendment adds several significant changes to the FCPA.

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

II. FCPA Penalties
- a. Individuals:
  1. Imprisonment for up to five (5) years and/or
  2. Fine, not more than $100,000
  3. Any fine imposed on an individual may not be paid, directly or indirectly, by Company
- b. Corporations/Domestic Concerns:
  1. Fine, up to $2,000,000
- c. Other Sanctions/Applicable Federal Statutes:
  1. Racketeer Influenced and Corrupt Organizations (RICO)
     - potential for treble damages through private civil lawsuits
  2. Federal Government debarment
     - Convicted companies may be suspended from doing business with U.S. Government
  3. Denial of Export Licenses
  4. Disgorge benefits/profits from corrupt activities
  5. Requirement to reimburse DOJ for costs associated with the investigation

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

III. FCPA Format: The FCPA is relatively short and simple; it consists of two (2) sections: 1) Accounting Standards and 2) Foreign Corrupt Practices Prohibitions.
- a. Accounting Standards :
  1. Recordkeeping: requires companies to make and keep books, records and accounts that reasonably detail and accurately reflect transactions:
     - prohibits deliberate failure to record transactions
     - prohibits falsification of business records
  2. Internal Controls: require companies to devise and maintain a system of internal accounting controls to assure:
     - transactions have management authorization
     - transactions are recorded under general accounting principles
     - access to assets require management authorization
     - assures no off-book accounts

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

III. FCPA Format (continued):

b. Foreign Corrupt Practices Prohibitions:

- covers "issuers" and "domestic concerns"
- Generally, prohibits payments by issuers or domestic concerns to any person, knowing that all or a portion of such payment will be given, offered or promised, directly or indirectly, to a foreign official for any corrupt purpose prohibited by the FCPA.
- It is unlawful to bribe foreign officials, directly or indirectly, to obtain or retain business, or to secure an improper advantage.

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

IV. FCPA: **Elements** of FCPA Violation

a. **Use of an instrumentality or means of interstate commerce (e-mail, internet, telephone, mail, etc.) to further**

Note: 1998 Amendments made it unlawful for an issuer/domestic concern, to corruptly do any FCPA prohibited acts outside the U.S., whether or not a means/instrumentality of interstate commerce is used.

b. **A payment or offer of "anything of value", directly or indirectly**

c. **To any foreign official, political party or political candidate, or representative of a nongovernmental public organization (NPO)**

d. **If the purpose of the payment is corrupt**

- the word "corrupt" implies that the gift, offer, payment or promise is intended to induce the foreign official to misuse his/her official position to wrongfully direct business to the payer.
  - evil motive or intent
  - ***DISCRETION*** is the key concept

e. **In order to assist the Company in obtaining or retaining business or to secure an improper advantage**.

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

IV. FCPA: **Elements** of FCPA Violation (continued)

- Affirmative Defenses (from 1988 Amendments):
  1. A payment to foreign official was lawful under the written laws of the foreign official's country.
     - not "customary practices"
  2. The payment was a reasonable and bona fide expenditure, such as traveling or lodging, incurred by the foreign official related to:
     a. promotion, demonstration or explanation of products or services, or
     b. the execution or performance of a contract with a foreign government or agency

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

IV. FCPA: **Elements** of FCPA Violation (continued)

- Facilitation Payments - "Grease Money"
  1. FCPA provides exemption for facilitation payments to foreign officials where purpose of payment is to "expedite or secure performance of routine government action . . ."
  2. 1988 Amendments provided guidance describing payments for routine government action that would not be FCPA violations:
     - to obtain permits, licenses or other official documents;
     - processing government papers, visas or work orders
     - providing police protection, mail pick-up/delivery;
     - scheduling inspections;
     - providing phone service, power and water supply; loading/unloading cargo
  3. **Discretion** is key.
     - Routine government activities that are non-discretionary, which will occur at some point in time, are recognized by the FCPA to be subject, in many countries, to facilitation payments. Caution: although these payments may be acceptable under the FCPA, they may still be illegal in the country of interest.

Foreign Corrupt Practices Act (FCPA) - 15 USC Sec. 78; and Global Anti-Corruption Initiatives

V. FCPA- General Discussion

a. FCPA Opinion Procedure (28 CFR Part 8)

- allows companies to obtain an opinion of the Attorney General as to whether certain specific, prospective - not hypothetical - conduct would violate the FCPA.

b. Other DOJ areas of concern

1. Vicarious liability: U.S. Company may be liable for FCPA violations committed by third parties (consultants, JV partners, distributors) operating on their behalf in other countries.
2. Foreign Subsidiaries: DOJ investigates knowledge and authorization by U.S. Company of foreign subsidiaries' activities; culpability based upon:
   - degree of ownership; involvement in day to day management
   - same individuals acting as officers of both parent and subsidiary
3. Minority Shareholders: Evidence of "acquiescence" to corrupt activities

c. 1998 FCPA Amendments

- Incorporation in U.S. Law of the global anti-corruption initiative sponsored by the OECD is a significant step to leveling the global commercial playing field.
  - broadened jurisdictional reach of FCPA
  - expanded definition of foreign official to include employees of NPOs
  - expanded FCPA to cover payments "to secure improper advantage "

Dueling International Anti-Bribery Conventions: A Dilemma for In-House Counsel

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Dueling International Anti-Bribery Conventions: A Dilemma for In-House Counsel

- Network of inconsistent international conventions and initiatives, often ratified with different *optional* provisions by each member country
- Apparent "rush to ratify" to demonstrate country's commitment to the issue and enhance standing in the global economic community
- Results in a spider web of regulations that vary across borders and can vary, depending upon citizenship, within one country

Inter-American ("OAS") Convention Against Corruption

- First international convention to address transnational bribery; adopted in March 1996
- Ratified by all 34 members of the Organization of American States and by Cuba (not an OAS member)
- Differs from the FCPA:
    - Addresses both supply-side and demand-side bribery
    - 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 Cooperating and Development

- Adopted in 1997, ratified to date by 30 member states and five non-member states; not the first convention, but arguably the most influential due to audit process
- Countries that have ratified the OECD Convention that had previously ratified the OAS convention include Argentina, Brazil, Chile, Canada and the United States
- Differs from the OAS Convention and FCPA:
    - Unlike OAS, permits each country to decide about facilitating payments
    - Unlike FCPA, defines prohibited action broadly: cannot influence to "act or refrain from acting in relation to performance of official duties"

Council of Europe: Criminal Law Convention on Corruption

- Adopted in January 1999 and ratified by all 45 member states, including 20 states that had previously ratified the OECD Convention
- CoE provision for monitoring by GRECO (Group of States against Corruption)
- Most expansive international convention to date. Differs from other predecessor conventions and FCPA:
    - Requires criminalization of private-to-private bribery
    - Requires criminalization of trading in influence

African Union Convention on Preventing and Combating Corruption

- The African Union ("AU") Convention was adopted in Maputo in July 2003 by 53 member states; ratification process has not yet begun
- Prohibited acts are broadly defined
- No overlap with countries that have ratified other conventions
- Differs from OECD Convention and FCPA (but not OAS or CoE):
    - Addresses private sector bribery
    - Addresses both supply-side and demand-side bribery
    - No exception for facilitation payments
    - (but unlike CoE, does not address trading in influence)

DRAFT United Nations Convention Against Corruption

- Draft convention adopted October 1st
- Ratification by 147 member states anticipated
- Trend appears to have been to make *optional* the provisions that met the greatest resistance
- Question need for yet another international convention, but recognize that drafters have benefited from lessons of previous instruments
- UN Convention offers greatest opportunity for standardization (greatest number of member states), but also greatest opportunity for conflict with existing national laws and international conventions as adopted

Summary

- Large number of instruments since first Convention in 1996
- Arguably a larger number than is required to address the problem
- Preferable to fund monitoring and enforcement of those already in place
- Although primary concern of in-house counsel in the United States must be compliance with the FCPA, areas of risk to bear in mind include:
    - Facilitation payments
    - "Payments" expansively defined
    - Definition of inappropriate act by government official expansively defined
    - Increasing attention paid to private-to-private bribery

Ask Yourself

- Does your company's business model subject it to multiple anti-bribery instruments?
- What is the best and most cost-effective response?
    - Compliance roulette?
    - Separate codes for each site?
    - A single high standard across all locations?