605 Current Challenges to Complying with the Foreign Corrupt Practices Act

Luis H. Derrota
Deputy General Counsel-Chief Compliance Officer
Baker Hughes Incorporated

Johnnie W. Hoffman, Jr.
Counsel
ExxonMobil Exploration Company

Rob Johnson
Assistant Chief Attorney
ExxonMobil Production Company

Martin J. Weinstein
Partner
Foley and Lardner

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Faculty Biographies

Luis H. Derrota
Deputy General Counsel-Chief Compliance Officer
Baker Hughes Incorporated

Johnnie W. Hoffman, Jr.

Johnnie W. Hoffman, Jr. specializes in international transactions and the Foreign Corrupt Practices Act for ExxonMobil's upstream organization.

He joined Exxon's Southeastern Exploration Division in New Orleans and for the past 22 years has worked legal issues for Exxon in North and South America, Europe, Africa, the Middle East, Far East, and Asia.

Mr. Hoffman has spoken and published on the subjects of petroleum agreements and the FCPA at numerous conferences and CLE seminars.

Mr. Hoffman holds a BA and JD from Louisiana State University.

Rob Johnson

Rob Johnson is assistant chief attorney for ExxonMobil Production Company in Houston. His responsibilities include providing legal counsel and advice to ExxonMobil's U.S. onshore oil and gas production activities, and oil and natural gas production operations in the Southeast Asia region, including Indonesia, Malaysia, Thailand, and Australia.

Immediately prior to the merger of Exxon and Mobil, Mr. Johnson was general counsel for Mobil Exploration & Producing U.S. (MEPUS), the Mobil affiliate responsible for the exploration, development, and production of oil and natural gas in the United States. Prior to that position, he worked in a number of areas for Mobil, including litigation and environmental law. Before joining Mobil 11 years ago, Mr. Johnson was an attorney in the Washington, DC office of Hunton & Williams.

Mr. Johnson is a member of the board of directors of ACCA's Houston Chapter.

He received a BS from The American University and is a graduate of the Georgetown University Law Center.

Martin J. Weinstein

Martin J. Weinstein is a partner in the Washington, DC office of Foley & Lardner and chair of the firm's Compliance, Counseling, and Government Enforcement Practice Group.

Mr. Weinsten formerly served as an assistant United States attorney in the Fraud Section of the Northern District of Georgia. Prior to joining the United States Attorney's Office, Mr.

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Weinstein was a prosecutor with the United States Department of Justice in the Criminal Section, Tax Division.

Mr. Weinstein was a founder and board member of Silverstar LLC, a holding company owning and operating small inns. He was also the founder of a portfolio management firm responsible for structuring diversified portfolios for individual clients. Mr. Weinstein cochaired the committee representing prosecutors at the ABA. Mr. Weinstein was an instructor at the University of Virginia Law School's Trial Advocacy Institute and at the United States Attorney General's Advocacy Institute. He was also an adjunct professor of law at Georgia State University.

Mr. Weinstein received a BA *cum laude* from Dartmouth College and a JD from the University of Virginia.

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Outline for Discussion of FCPA Issues in Acquisitions

A. Initial Considerations

1. Are there red flags, such as a high-risk country or industry?

2. Line up outside advisors early in the process.

B. Structuring the Deal

1. Advantages of an asset versus stock acquisition:

(a) Enables purchaser to leave liabilities with seller, including (to some extent) exposure for past FCPA violations.

(b) Enables purchaser to leave questionable contracts and employees with seller.

(c) Enables purchaser to start new financial records.

2. <u>BUT</u>: FCPA concerns are not likely to drive structuring decisions.

C. Conducting Due Diligence

1. What is the target's history? Has it been dependent on contracts, awards or consents from the government? How did it get to where it is?

(a) Can you avoid successor liability for potential past FCPA violations?

(b) What is the down-side risk of a past violation? Is this a risk you can assess and quantify? Are you willing to take such a risk? Can you obtain a meaningful indemnity?

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2. Review all key contracts and meet with counter-parties.

3. Investigate the target's lobbying and government relations policies and practices.

4. Pay particular attention to agents:

   (a) Assess the risk that an agent may violate the FCPA.

   (b) Review the terms of all agency agreements.

   (c) Interview the agents.

   (d) Do a background check.

   (e) If appropriate, require termination of agents before closing.

5. Review the financial records of the target with a view to uncovering FCPA issues.

D. Negotiating the Deal

1. Conditions Precedent:

   (a) Completion of interviews with agents, counter-parties, and government officials.

   (b) Advisory opinions or other comfort letters from US or local country government officials.

   (c) Termination of troublesome contracts or agents.

   (d) Certifications from agents, officers and directors.

2. Representations, warranties and indemnities:

   (a) Seek a specific FCPA/OECD representation and warranty re past activity.

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(b) A broad "compliance with laws" rep is better than nothing.

(c) "Knowledge" limitations will gut the rep.

(d) Seek a meaningful indemnity. Look for a deep pocket and a long survival period.

3. Covenants:

(a) Get appropriate control over business activities between execution and closing.

(b) Get a commitment to comply with FCPA/OECD in obtaining necessary consents and satisfying other conditions precedent.

E. Post-Closing Matters

1. Clean up any lingering issues, such as employees or agents who should be terminated.

2. Get a compliance program in effect.

3. Put reliable officers, directors and management in place.

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Current Challenges In Complying with the Foreign Corrupt Practices Act

Rob Johnson
Assistant Chief Attorney
ExxonMobil Production Company[1]

If your company does or is contemplating doing business in any country outside the U.S., you need to have some familiarity with the U.S. Foreign Corrupt Practices Act ("FCPA"), and the challenges it presents to you and your clients. This paper is intended to present a brief overview of the FCPA, and to offer some practical suggestions on ways in-house counsel can help clients comply with its provisions.

Overview

The FCPA has two basic sets of provisions: the antibribery provisions and the accounting provisions. The FCPA is both a criminal and civil statute. Its antibribery provisions prohibit improper payments to or other improper transactions with, non-U.S. government officials to influence the performance of their official duties.

Specifically, the FCPA prohibits "issuers" of securities and any U.S. company and its employees and representatives from giving, paying, promising, offering, or authorizing the payment, directly or indirectly through a third party, of anything of value to any "foreign official" to persuade that official to help the company, or any other person, obtain or keep business or to secure some other improper advantage. While that last sentence is a mouthful, the point is that the FCPA's anti-bribery provisions make it illegal for any company that is doing business in the U.S. to make improper payments of cash or other things of value to foreign government officials.

The FCPA's accounting provisions require US companies and their majority-owned affiliates to keep accurate and complete records of the transactions in which they engage, and also mandate that those companies make good faith efforts to cause the ventures in which they have a minority interest to keep such records.

The Anti-bribery Provisions

The anti-bribery provisions make it unlawful for a covered person to corruptly make any offer of cash or anything of value, directly or indirectly, to a foreign government official for the purpose of influencing any official act to assist the covered person in obtaining or retaining business. The six elements of a potential violation of the FCPA's antibribery provisions are described in greater detail below:

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- **Persons covered under the FCPA:**
  - U.S. companies
  - "Issuers" - publicly held companies subject to registration and reporting requirements of the Securities Exchange Act of 1934. Thus, non-U.S. companies can also be subject to the FCPA. U.S. enforcement authorities have initiated prosecutions against non-U.S. companies and have indicated a willingness to proceed just as aggressively against non-U.S. companies who violate the FCPA as domestic violators.
  - US citizens, nationals, or residents
  - Non-U.S. persons acting within the U.S. and U.S. persons acting outside the U.S. if they perform any act in furtherance of an improper payment within US territory

- **"Corruptly:"**
  - Not a defined term under the Act
  - Same intent as under domestic bribery statutes - a payment is made corruptly if made with the intent to influence the recipient in performing an official act - quid pro quo required

- **Offers, pays, promises to pay or authorized payment of money or anything of value:**
  - Broadly construed - not just cash

- **To any "foreign official:"**
  - Elected government officers, appointed or career officials and employees
  - Employee of foreign government department, agency, instrumentality
  - Employee of government owned or controlled enterprise (i.e.,. state oil company)
  - Officer or employee of "public international organization"
  - Officials or officers of foreign political parties
  - Any person acting in an official capacity for or on behalf of a foreign government or entity, or public international organization
  - Private consultants holding a position with or acting on behalf of a foreign government, public international organization, or state-owned or controlled enterprise
- **For purposes of influencing any act or decision of a foreign official, or securing any improper payment**

- **In order to obtain or retain business**.
  - Broadly construed by prosecutors, though this broad construction has not yet been tested in any litigated case

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- Not limited to efforts to get "new" business; covers existing relationships and contracts

Indirect or Vicarious Liability

The FCPA covers not only direct payments made by the covered person to a foreign official, but also indirect payments, i.e., payments to any person while knowing that all or a portion of that payment will be offered or given to a foreign official. Thus, a company may be liable for illegal payments made by a local agent, a partner, or intermediary company, if the payments were made with the company's knowledge. Knowledge is much more than just actual knowledge, and includes situations where the company is aware that the third party is "substantially certain" to violate the FCPA or where there is a "high probability" of a violation

The Accounting Provisions

The FCPA's accounting provisions require issuers to maintain accurate books and records and maintain a system of adequate internal accounting controls. It is important to note that even where there has been no violation of the anti-bribery provisions a company can be prosecuted under the FCPA for violation of the accounting provisions.

Companies are required to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions" of corporate assets. 15 U.S.C. Section 78m(b)(2)(A). The level of detail required is that level of detail "as would satisfy prudent officials in the conduct of their own affairs." The accounting provisions do not contain any intent requirement (though criminal prosecution requires proof of a "knowing" violation), and companies thus can face liability under the accounting provisions for reckless or even negligent accounting errors.

The accounting provisions also require that companies have a system of accounting controls sufficient to reasonably assure that transactions have (1) management authorization, (2) are recorded in such a way that financial statements will conform with generally accepted accounting principles, (3) that access to assets is permitted only as authorized by management, and (4) that the records of assets are compared with the actual assets at reasonable intervals. 15 U.S.C. Section 78m(b)(2)(B).

Red Flags

The Justice Department views certain circumstances as suggesting a reason to know of a potential FCPA violation. The presence of these "red flags" in a transaction indicates a need for a higher level of scrutiny and the use of additional safeguards in order to avoid a violation of the Act. Among the "red flags" identified by the Justice Department are:

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- The transaction or contract involves a country known for corrupt payments;
- Due diligence suggests that the contracting party or agent has a reputation for improper activities;
- The contracting party or agent objects to FCPA reps and warranties in the contract;
- Unusual contract terms or payment arrangements, such as cash payments or excessive commissions or fees;
- The other party is recommended by a foreign official, particularly one with discretionary authority over the business transaction;
- The other party has a close personal, family, or business relationship with a foreign official or relative of an official.

It is critical that companies take steps to protect themselves by conducting due diligence before entering into contracts and business relationships.

Exceptions and Affirmative Defenses

There is one exception and two affirmative defenses to an allegation of an antibribery violation under the FCPA. The "facilitating payments" exception permits certain small "facilitating or expediting" payments to foreign officials, whose purpose is to expedite the performance of a routine governmental action. Such "routine" governmental actions are defined to such things as processing visas or work papers, providing police protection, mail pick-up, providing phone service, power and water supply, or loading or unloading cargo. Since the facilitating payments provision is an exception to liability under the FCPA, the burden is on the government to demonstrate that the exception does not apply to a given case.

The two affirmative defenses under the FCPA are (1) that the payment was lawful under the written laws and regulations of the foreign officials' country, or (2) that the payment was (a) a reasonable and bona fide expenditure, such as legitimate travel expenses incurred by the foreign official and directly related to the promotion, demonstration, or explanation of the company's products or services, or (b) related to the execution or performance of a contract with a foreign government. Since these are affirmative defenses, the defendant bears the burden of proving that one or both of them apply.

The OECD Convention

On February 15, 1999, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into effect. The Convention requires signatory countries to enact national laws criminalizing bribery of foreign government officials. The Convention sets forth criteria that anti-bribery laws need to meet, and these criteria generally mirror the FCPA's anti-bribery provisions.

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Approximately 34 countries have signed the Convention, including the U.S., The United Kingdom, Canada, Korea, Japan, and most European nations.

FCPA Compliance Programs

Companies doing business or contemplating doing business in countries other than the U.s. need to have in place effective FCPA compliance programs. An effective compliance program will reduce the risk of violations and aid the defense of any enforcement action in the event a violation does occur. An effective program needs the following elements:

- A strong corporate ethics policy
- Clear procedures for dealing with agents, consultants, and joint venture partners
- Training
- Accounting procedures that ensure that the company's records accurately reflect transactions
- Procedures that ensure prompt reporting of questionable conduct

Strong Corporate Ethics Policy

Companies should either adopt a strong policy of corporate ethics, or should revise existing policies to add FCPA/OECD compliance requirements. Such a policy should reflect appropriate standards of corporate governance and also make company personnel aware of conduct that may raise FCPA/OECD concerns.

Once the policy is adopted or revised, it must be enforced. In the course of investigating potential FCPA violations, law enforcement authorities may look to a company's code of ethics to help determine whether a violation should have been prevented or detected. U.S. criminal law contains mitigation provisions that provide an incentive for companies to adopt and enforce an appropriate ethics policy as part of an effective FCPA compliance program.

An effective ethics policy will specifically address FCPA issues, clearly and unequivocally prohibit conduct that would violate the FCPA, and identify where and how employees can obtain additional guidance. The policy should discuss specific issues such as how to handle payments, hosting of government officials, trips and entertainment of government officials, and dealing with agents and partners. The policy also needs to make it clear that failure to comply with the policy is a serious matter that will be grounds for discipline, up to and including termination.

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Dealing with Agents and Business Partners

Companies need to be careful in selecting agents and business partners, and should have written agreements with all agents and partners that specifically require FCPA/OECD compliance. Investigate potential agents and partners **before retaining or doing business with them**, and document your due diligence efforts. Your due diligence record should indicate why the agent was selected, and if other candidates were considered and rejected, the reasons for their rejection.

The investigation should include an interview of the agent and other sources in order to determine that the agent can fulfil his obligations through legitimate means. Ask for, and check references. Consult independent sources of information, such as International Company Profiles (available from the U.S. Commerce Department), and Dun & Bradstreet.

Companies need to be on the lookout for any warning signs of potential violations by agents and partners. These include:

- The agent or partner has a reputation for corrupt or unethical conduct;
- The agent or partner has family or business ties with government officials;
- The agent or partner refuses to certify compliance with the FCPA/OECD;
- The agent or partner was recommended by a government official;
- The payment requested by the agent is substantially above the market rate or has a substantial "up front" component;
- Payment is to be made indirectly, in cash, in checks made out to cash or "bearer," or to an account in a country other than the country in which the agent is located;
- The agent's or partner's business structure is unduly complex (i.e., the presence of "shell companies").

Once an agent or partner has been selected, there should be a written agreement that specifically requires FCPA/OECD compliance. The agent or partner should certify that he understands the FCPA/OECD, agrees not to cause the company to violate the FCPA/OECD, and agrees to comply with the FCPA/OECD as if it were applicable to him. In addition, the agency agreement should include the following types of provisions:

- Certification that no officer, director, shareholder, or owner of the agent's or partner's business is a government official;
- All payments to the agent or partner to be made by check or wire transfer, and are payable in the country where the agent resides or where the work is performed;
- Travel and entertainment expenses to be reimbursed only when approved in advance and supported by detailed records;
- Periodic reports of the work performed will be provided;

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- Company to have reasonable access to the agent's or partner's books and records and audit rights;
- The terms of the agreement may be disclosed to government agencies, if the company so desires;
- The agent or partner will not assign or subcontract work under the agreement without prior approval of the company;
- The agent or partner will annually certify compliance with the FCPA/OECD;
- The company may terminate the contract and/or withhold payment if it believes, in good faith, that the agent or partner has violated the FCPA/OECD.

Once you have conducted your due diligence, satisfied yourself that there are no problems (or that any potential problem areas have been appropriately handled), and entered into a contract, your work is not done. You need to monitor your agent's or partner's activities to ensure continued compliance with the FCPA. The best contract protections won't help you if you fail to stay on top of your agent's or partner's activities.

Training

All employees with responsibility for government contracts, export issues, international sales and marketing, and auditing should receive periodic FCPA/OECD training. Written materials and interactive seminars should be part of any training program. Written materials should be distributed to relevant new employees and should be periodically updated and re-issued. Attendance at such training should be mandatory for relevant employees and records should be maintained to reflect attendees. Lawyers should be involved in the training program.

Accounting Procedures

Both the FCPA and OECD require companies to establish accounting and recordkeeping controls that will ensure transparent, accurate financial recordkeeping and reporting. "Off the books" accounts should not be tolerated. Outside auditors and accountants, and the company's controller should ensure that compliance with accounting mandates is an integral party of the accounting and audit system.

Reporting

The company's compliance program needs to include a clear and easily accessible way for employees to inquire whether certain conduct is permissible, and to report questionable conduct. Consider appointing a high-level official as a Compliance Officer (often, it's the General Counsel or CFO) for the company. Consider instituting an FCPA hotline that permits anonymous reporting of questionable conduct.

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It is essential that the company respond appropriately to reports. Sufficient inquiry should be taken with respect to each report so as to enable you to determine if a fuller investigation is needed. If the decision is made that additional investigation is not needed, there should be records that reflect the reason for that decision. If it appears that an investigation may be needed, seriously consider retaining an outside law firm to conduct or assist in the investigation. Use of an appropriate firm, skilled in the FCPA and in the conduct of internal investigations, can ensure protection of appropriate privileges and help the company best defend itself against any enforcement action. It can also demonstrate to employees and to governmental authorities that the company took the report seriously and conducted a credible investigation.

CONCLUSION

The FCPA presents numerous challenges and potential pitfalls for companies and their lawyers. However, in-house counsel who are sufficiently knowledgeable on FCPA issues can provide great assistance to their clients by helping them to avoid and minimize potential liability, and to conduct international business in full compliance with the law.

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AMERICAN CORPORATE COUNSEL ASSOCIATION
2001 ANNUAL MEETING

CURRENT CHALLENGES TO COMPLYING WITH THE FCPA
OCTOBER 17, 2001

ANTI-BRIBERY EFFORTS ABROAD AND AT HOME: AN OVERVIEW OF THE OECD CONVENTION, RECENT TRENDS IN THE FCPA, AND DUE DILIGENCE OF INTERNATIONAL REPRESENTATIVES

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INTRODUCTION

The past ten years have seen a huge increase in FCPA related activity. From government enforcement to international conventions to corporate compliance, the developments have been numerous. This paper attempts to highlight some of the most major events.

I. The OECD Convention

On February 15, 1999, the Organization for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force. The OECD Convention is the most significant international anti-bribery initiative in history. The Convention requires signatory countries to enact national laws criminalizing bribery of foreign government officials. The Convention sets forth criteria that anti-bribery laws need to meet, and these criteria generally mirror the FCPA's anti-bribery provisions. As of June 25, 2001, 34 countries have ratified the Convention, including the U.S., the United Kingdom, Canada, Korea, Japan, and most European nations.

Article 1(1) of the Convention requires all signatory countries to enact laws making it a crime for any person "to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries," to foreign public officials, to obtain or retain business or to obtain any other improper advantage. Article 1(1) also provides that in order for a payment to constitute a bribe, it must be made "in order that the official act or refrain from acting in relation to the performance of official duties."[1] The Convention also requires the signatory countries to enact laws regarding the maintenance of company books and records, financial statement disclosures and auditing and accounting standards.[2]

Significantly, the Convention contains a number of provisions that bear upon the potential legal exposure of a company or individual doing business in a foreign host country. For example, the Convention requires each signatory country to establish jurisdiction that extends to offenses "committed in whole or in part in its territory," regardless of the offending parties' nationality.[3] The Convention also provides that the bribery of a foreign public official is an extraditable offense under the laws of the signatory countries and the extradition treaties

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[1] Under the OECD Convention, a *foreign public official* is defined as (1) any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; (2) any person exercising a public function for a foreign country (such as a consultant to a public agency or enterprise); and (3) any official or agent of a public international organization (such as the World Bank, the Red Cross or the United Nations). OECD Convention, Art. 1(4).

[2] OECD Convention, Art. 8(1).

[3] *Id.*, Art. 4(1).

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between them.[4] To date, however, there have been no reported prosecutions under the anti-bribery laws enacted pursuant to the Convention.[5]

The following countries have deposited their instruments of ratification of the Convention with the Secretary General of the OECD.[6]

Country	Deposit of instrument of ratification/acceptance	Entry into force of the Convention	Entry into force of implementing legislation
Argentina	8 February 2001	9 April 2001	10 November 1999
Australia	18 October 1999	17 December 1999	17 December 1999
Austria	20 May 1999	19 July 1999	1 October 1998
Belgium	27 July 1999	25 September 1999	3 April 1999
Brazil (*)	25 August 2000	23 October 2000	
Bulgaria	22 December 1998	20 February 1999	29 January 1999
Canada	17 December 1998	15 February 1999	14 February 1999
Chile (*)	18 April 2001		
Czech Republic	21 January 2000	21 March 2000	9 June 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Germany	10 November 1998	15 February 1999	15 February 1999
Greece	5 February 1999	6 April 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999
Iceland	17 August 1998	15 February 1999	30 December 1998
Italy	15 December 2000	13 February 2001	26 October 2000
Japan	13 October 1998	15 February 1999	15 February 1999
Korea	4 January 1999	5 March 1999	15 February 1999
Luxembourg	21 March 2001	20 May 2001	11 February 2001
Mexico	27 May 1999	26 July 1999	18 May 1999
Netherlands	12 January 2001	13 March 2001	1 February 2001
New Zealand	25 June 2001	24 August 2001	3 May 2001
Norway	18 December 1998	16 February 1999	1 January 1999
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	
Slovak Republic	24 September 1999	23 November 1999	1 November 1999
Spain	4 January 2000	4 March 2000	2 February 2000
Sweden	8 June 1999	7 August 1999	1 July 1999
Switzerland	31 May 2000	30 July 2000	1 May 2000
Turkey (*)	26 July 2000	24 September 2000	
United Kingdom	14 December 1998	15 February 1999	---

[4] *Id.*, Art. 10. The OECD Convention also promotes international cooperation by requiring "prompt and effective legal assistance" between signatory countries. *Id.*, Art. 9(1).

[5] The OECD Convention does not obligate signatory countries to prohibit the tax deductibility of bribes. Instead the OECD addressed the problem in a related OECD "Recommendation on the Tax Deductibility of Bribes to Foreign Officials," ("Tax Recommendation"). *See* Implementing the OECD Recommendation on the Tax Deductibility of Bribery to Foreign Public Officials, (C/MIN/(97)17/ADD3); and http://www.oecd.org/ech/index_2.htm. The Tax Recommendation was adopted in 1996 and calls on member countries to disallow tax deductions for bribes. Under the U.S. Internal Revenue Code, bribes to foreign public officials that would be violations of the FCPA if the payer is a U.S. person are not tax deductible. 26 U.S.C. _ 162(c) (2000).

[6] http://www.oecd.org/daf/nocorruption/annex2.htm.

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United States	8 December 1998	15 February 1999	10 November 1998

* These countries have not yet adopted implementing legislation.

II. Recent FCPA Proceedings

The following recent FCPA enforcement actions include both Department of Justice (DOJ) and Securities and Exchange Commission (SEC) cases relating to foreign bribery.

_ Consent offer to SEC cease-and-desist order

On July 6, 2001, Baker Hughes Inc. disclosed that it agreed to consent to the entry of a cease-and-desist order with the SEC involving alleged violations of the books and records and internal controls provisions of the Securities and Exchange Act of 1934, as amended by the FCPA. While the offer of a consent by Baker Hughes, Inc. to the SEC's entry of a cease-and-desist order is subject to approval of the SEC, a formal cease-and-desist order is expected within two to four weeks. The company would neither admit nor deny the factual findings of a formal order, should the SEC issue such an order. Under the terms of the proposed order, the company would cease and desist from committing or causing any violation and any future violation of Sections 13(b)(2)(A) and (B), of the Securities and Exchange Act of 1934, as amended.

Baker Hughes' offer arises out of incidents, involving the authorization by two former senior company officials of an improper $75,000 payment to an Indonesian tax official in 1999, which the company discovered and reported to the SEC and the DOJ in 1999. Baker Hughes, Inc. cooperated with the authorities in 1999 during the investigation of the incidents. In the course of the company's investigation of the Indonesia matter, it learned that other payments of $15,000 and $10,000 were made to the company's agents in India and Brazil in 1998 and 1995, respectively, without taking appropriate steps to ensure that none of the payments would be passed on to foreign government officials. These other payments are also part of the cease-and-desist order and the company's offer of settlement.

_ U.S. v. Robert R. King and Pablo B. Hernandez, Case No. 01-00190-01/02-CR-W-1 (W.D. Miss. June 27, 2001)

On June 27, 2001, the U.S. Attorney for the Western District of Missouri indicted Robert R. King, a stockholder in Owl Securities & Investments, Ltd. ("OSI"), and Pablo B. Hernandez, a Costa Rican national and a foreign agent of OSI, on charges arising from a conspiracy to secretly pay money to foreign officials in Costa Rica to obtain from the Government of the Republic of Costa Rica a land concession to develop a mixed-use facility in Costa Rica, known as the "Costa Rican Project." The ten-count indictment alleges conspiracy to defraud the United States, violation of the FCPA, and committing interstate fraud, all occurring from Fall 1997 to October 2000. Other co-conspirators named in the indictment, include Stephen Kingsley, now deceased, who was the President, CEO and a stockholder in OSI, Albert Reitz, an officer and stockholder in OSI, and Richard Halford, former CFO and a stockholder in OSI.

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The Costa Rican Project involved the construction, development and operation of new port facilities on the Caribbean coast of Costa Rica, an international airport, a beach-front resort, a marina, residential estates, a quarry, a salvage operation, and a dry canal linking the new port to another port on the Pacific coast of Costa Rica.

In particular, the indictment alleges that the defendants and co-conspirators regularly met and communicated through telephone calls, facsimiles, and electronic mail, and discussed strategies for raising funds and for obtaining the concession for the Costa Rican Project through bribery. In addition, the defendants and their co-conspirators allegedly solicited investors in the U.S. for the Costa Rican Project or referred potential investors to other co-conspirators, and represented to such investors that a portion of the invested funds would be used to cultivate "friends" in the Costa Rican government and political parties to ensure the award of the land concession to OSI Proyectos.

The indictment further alleges that the defendants and the co-conspirators authorized payment of over $1 million in bribes to Costa Rican officials to induce them to use their influence in obtaining the land concession, and that they agreed to funnel the money for the illicit payments to the Costa Rican officials through offshore corporations and bank accounts controlled by Hernandez. The payment was to be divided between the ruling political party in Costa Rica, the opposition party, who the defendants believed would be in power in the near future, and various Costa Rican politicians and congressmen. The defendants agreed that the payments would not take place until after OSI received the land concession for the Costa Rican Project.

Each count in the indictment carries a penalty of five years imprisonment, three years supervised release and $250,000 in fines, not including any restitution that may be ordered by the court.

_ SEC v. IBM, 1:00CV030400 (D.D.C. Dec. 21, 2000).

In 1995, allegations arose that IBM Corp.'s Argentine subsidiary paid $37 million in bribes in 1993 to obtain a $250 million contract to computerize Banco Nacion, Argentina's largest state-operated bank. Argentine officials contended that IBM Argentina improperly paid a subcontractor who was reported to be providing a backup computer system, but who actually served as a conduit for corrupt payments to high-level Argentine government officials. They also alleged that $8 million in bribes had been paid into two Swiss bank accounts in the names of two former Banco Nacion directors. An Argentine judge later stated that IBM Argentina's top managers had funneled $21 million through a shell company under a fraudulent subcontract and bribed Banco Nacion directors.

In May 1997, 10 people, including the former presidents of Banco Nacion and IBM Argentina, were indicted in Argentina. One year later, Argentine arrest warrants issued for four former IBM executives, including two U.S. citizens. In June 1999, Switzerland turned over $4.5 million of suspected bribe money to Argentina.

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In addition to the pending criminal investigation, Banco Nacion canceled its contract with IBM, after paying only $80 million of the $250 million contract price, and sued. IBM agreed to reimburse Banco Nacion $34 million. In the United States, the Department of Justice and SEC conducted a parallel investigation into the same transaction. The SEC found that IBM violated the FCPA's accounting provisions by failing to ensure that IBM Argentina maintained accurate books and records disclosing the payments. Without admitting or denying the SEC's findings, IBM agreed to pay a civil penalty of $300,000 and to an administrative order requiring it to cease and desist from violating the FCPA's accounting provisions.

- U.S. v. Metcalf & Eddy, Inc., Civil Action No. 99CV-12566-NG (D. Mass. 1999)

In this case, the Government alleged that from 1994 to 1997, Metcalf & Eddy International, Inc. (M&E)[7] a private environmental engineering firm, violated the FCPA by providing travel benefits to an Egyptian official in order to obtain his support for the award of several engineering contracts by the U.S. Agency for International Development (USAID).[8] The Government claimed that on two occasions M&E flew an Egyptian official, his wife, and two children via first-class to the U.S. and provided the official with spending money, even though M&E paid virtually all of their expenses while in the U.S. Both trips were legitimately associated with the USAID project; however, M&E also paid for the Egyptian official and his family to visit Disney World and California. The government took the view that the travel for the officer's family, the spending money and the travel expenses to Disney World and California constituted bribes because they were intended to induce the Egyptian official to influence the contract's approval.

On December 17, 1999, a U.S. District Court enjoined Metcalf & Eddy, Inc. (Metcalf & Eddy) from further violations of the FCPA and required the company to pay a civil penalty of $400,000 for past violations, to reimburse the Government $50,000 for the costs of its investigation, and to institute remedial actions, including making modifications to its existing compliance program. Metcalf & Eddy did not admit or deny the allegations contained in the Government's civil complaint.

- United States v. Saybolt North America Inc. and Saybolt Inc., Cr. No. 98CR10266WGY (D. Mass., Aug. 18, 1998); U.S. v. David H. Mead, Cr. No. 98-3025 (D.N.J., January 29, 1998)

On August 18, 1998, two Delaware corporations, Saybolt North America, Inc. and its wholly-owned subsidiary, Saybolt, Inc. ("Saybolt"), pled guilty to violating the FCPA.[9] Under the plea bargain, Saybolt agreed to pay a total fine of $4.9 million, $1.5 million of which related to the FCPA violations. Two of Saybolt's officers, David H. Mead, the President and Chief Executive Officer of Saybolt, Inc., and Frank Pluimers, the Chairman of Saybolt's Board of

[7] In 1997, M&E International was merged into defendant Metcalf & Eddy, Inc.

[8] The contracts were related to a USAID-funded modernization of urban sewage and wastewater facilities.

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Directors, were also indicted on charges of violating the FCPA and conspiracy to violate the FCPA. Mead was sentenced to three months in prison, three months' home detention, three years' of supervised release, and a $20,000 fine. Pluimers, a citizen of the Netherlands, remains a fugitive.[10]

The evidence at Mead's trial showed that in 1995, Saybolt had been actively seeking to lease a parcel of land adjacent to the Panama Canal, as well as to secure tax breaks and new business opportunities. In October 1995, Mead, then President of Saybolt, was told that $50,000 in cash had been requested by officials within the Panamanian government, or else Saybolt would be denied the land and other benefits. In telephone conversations and email messages from New Jersey, Mead instructed one of his subordinates to make the illegal payoff. After the payment was made, the Panamanian government approved the contracts and other concessions. On October 16, 1998, a jury returned guilty verdicts on all five charges brought against Mead for violating the FCPA.

_ U.S. v. Herbert Tannenbaum, Cr. No. 97-4441 (S.D.N.Y., August 4, 1998)

On August 5, 1998, Herbert Tannenbaum, president of New York-based Tanner Management Co., pled guilty to one felony count of conspiring to violate the FCPA. Tannenbaum and his co-conspirators had offered payments of between $120,000 to 200,000 to government officials in Argentina to induce those officials to purchase a garbage incinerator manufactured by Tanner. Tannenbaum incorporated a fictitious entity and opened a bank account to disguise the payments.

The U.S. Government conducted a sting operation and caught Tannenbaum "in the act." The Argentine agent receiving the bribe was actually an undercover FBI agent posing as a procurement officer of the Government of Argentina. Notably, the Argentine Ministry of Justice cooperated with the U.S. Department of Justice during the investigation. Tannenbaum was sentenced to one year and one day in jail, three years' probation, and a $100 fine.

_ SEC v. Montedison, S.p.A, Civ. No. 1:96CV02631 (D.D.C., Nov. 21, 1996)

In November, 1996, the SEC filed a civil suit against Montedison, S.p.A. ("Montedison"), an Italian chemical and agro-industrial company, in the United States District Court for the District of Columbia alleging that Montedison concealed millions of dollars in bribes.

The SEC's complaint alleged that Montedison committed financial fraud by materially falsifying documents to misstate its financial condition, and violated the corporate reporting, books-and-records and internal control provisions of the Exchange Act. Montedison was subject

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[9] In addition, Saybolt pled guilty to violating the Clean Air Act.

[10] This case occurred prior to OECD implementation; the Netherlands is a signatory to the OECD.

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to SEC jurisdiction because its American Depository Receipts ("ADRs") were listed on the New York Stock Exchange.

The SEC alleged that Montedison's senior management fraudulently overstated company income by at least $398 million from 1988 through early 1993. The SEC's complaint alleged that Montedison had engaged in a fraudulent scheme in which it attempted to disguise hundreds of millions of dollars of payments that were used, in part, to bribe public officials in Italy. The fraudulent conduct was discovered only after a new management team was appointed in response to Montedison's inability to service its bank debt. The fraudulent conduct occurred on foreign ground and became one of Italy's biggest financial scandals.

On March 28, 2001, the United States District Court for the District of Columbia ordered Montedison to pay a civil penalty of $300,000 for violating the books and records provisions of the FCPA and the anti-fraud provisions of the federal securities laws. The order was the result of a settlement between Montedison and the SEC in which Montedison neither admitted nor denied liability for the allegations contained in the SEC's complaint.

_ U.S. v. American Eurocopter Corp., No. 96-CV-1201 (E.D. Va. Nov. 1, 1996)

On January 16, 1997, the U.S. Attorney for the District Court for the Eastern District of Virginia indicted the President and C.E.O. of American Eurocopter Corporation, David Smith, and two other individuals on charges arising from the sale of the five helicopters to the Israeli Government. The twelve-count indictment alleged conspiracy to defraud the United States, making false statements to the government, committing interstate fraud, and engaging in illegal monetary transactions affecting foreign commerce.

In November, 1993, American Eurocopter and the Israeli Government entered into a contract under which American Eurocopter agreed to sell several Model AS 565 MA Panther helicopters to Israel. As amended in December, 1994, the contract provided that Israel would pay approximately $60 million for five helicopters. This contract was funded in large part by the U.S. Foreign Military Funding program, a program which required American Eurocopter to certify, among other things, that the purchase price of the contract did not include any commissions or contingent fees. Although Jeffrey P. Dallman, an employee of American Eurocopter, had signed a certificate on behalf of the company that no commissions were paid, the FBI's investigation revealed that American Eurocopter and its affiliates in Europe retained an Israeli agent who helped the company secure the lucrative helicopter contract by (i) providing information concerning the Israeli Navy's requirements and budget, and (ii) arranging meetings between the company and the Government of Israel. In an elaborate scheme that involved falsifying the company's accounting records, transferring millions of dollars between corporate affiliates and destroying at least one document that concerned such billing practices, American Eurocopter allegedly paid $10 million, or 10% of the total contract price, to the Israeli agent.

On February 12, 1997, American Eurocopter pled guilty in the U.S. District Court of the Eastern District of Virginia to one count of fraud by interstate commerce and one count of

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making false statements to government officials in connection with the helicopter sale to Israel. The court ordered the company to pay a criminal fine of $11.7 million and $300,000 for investigation and prosecution costs. The company also agreed to a civil settlement worth $12.7 million, of which $10 million will be shared by the whistleblowers who brought the allegations to light, for claims under the False Claims Act.

_ U.S. v. Lockheed Corporation, Suleiman A. Nassar, and Allen R. Love, (Cr. No. 1:94-CR-226, N.D. Ga. Atlanta Division, June 1994)

In 1995, Lockheed Corporation, now merged with Martin Marietta, pled guilty to federal charges that it conspired to pay a $1 million bribe to a member of the Egyptian parliament, Dr. Leila Takla, in order to sell three of Lockheed's C-130 planes to the Egyptian military in 1989. Lockheed acknowledged that it conspired to violate the FCPA and paid a $21.8 million fine and a $3 million civil settlement. The total amount of $24.8 million in fines and civil penalties was twice the amount of Lockheed's profits from the sale of the aircraft.

Lockheed's executives were also implicated. Allen Love, a retired Lockheed manager, pled guilty to a one-count misdemeanor complaint of indirectly conspiring in the bribery scheme. He was sentenced to probation and a $20,000 fine and agreed to cooperate against his lifetime employer.

Suleiman Nassar, the former vice president of Middle East and North Africa marketing, fled to Syria after being indicted. Nassar was returned to the United States in July 1995 and sentenced to 18 months in prison and ordered to pay a $125,000 fine. Nassar was given credit for the 4 months he had already served in a Syrian prison.

III. Conducting Due Diligence of Foreign Agents, Consultants, or Other Representatives and Joint Venture Partners

Due to the broad nature of the FCPA's prohibitions, the Act may be implicated by a wide range of activities in addition to the direct bribery of a foreign official. For instance, arrangements with foreign joint venture partners, foreign agency or consulting arrangements, and any direct dealing with, including lavish entertainment of, foreign officials may raise issues under the FCPA. Under certain circumstances, U.S. companies can be held responsible for the actions of their foreign agents, consultants or other representatives (such as production managers and advertising representatives), as well as the actions of other third parties such as joint venture partners. Therefore, it is essential that in all relationships with international representatives, U.S. companies thoroughly screen and perform due diligence concerning potential representatives prior to beginning a relationship or entering into an agreement and that they continue to monitor the representatives' activities, including periodic review of their performance.

U.S. corporate personnel responsible for engaging a consultant, agent or representative or conducting due diligence of a joint venture partner, in conjunction with the company's legal department, as needed, should prepare a written due diligence report. If at any time during either

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the due diligence review or the term of the relationship, the U.S. company is suspicious of potential actions, payments or demands of an joint venture partner, consultant or representative (the "representative"), further investigation should be conducted. The following warnings or "red flags" are signs of conduct that could violate the FCPA, and which should immediately be discussed with the counsel:

- comments or suggestions that bribery has occurred;
- activities or operations of the representative occurring within a foreign country that traditionally has had a reputation for corruption and bribery (which may be verified through the local U.S. embassy and/or non-governmental organizations);
- unusual or excessive payment requests, such as requests for over-invoicing, up-front payments, unusual commissions or mid-stream compensation payments, requests for payments in a third party country, to a third party, to a foreign bank account, in cash or otherwise untraceable funds;
- requests for political or charitable contributions;
- unethical practices, such as falsifying documents or providing incomplete or inaccurate background information;
- learning of a previously undisclosed relationship between the representative and a foreign official;
- any refusal or hesitancy by the representative to promise in writing to abide by a company's policy;
- charges against the representative for violation of local or foreign laws or regulations relating to the award of government contracts;
- a demand or strong suggestion by a government official that a representative should be retained as an agent or joint venture partner;
- unexplained or inadequately explained breakup of the representative's association with one or more foreign companies;
- reliance by the representative on political/government contacts as opposed to knowledgeable staff and investment of time to promote a company's interests; or
- a desire of the representative to keep his representation or the terms of his or her retention secret.

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Foreign Agents, Consultants or Other Representatives

The following is a checklist of inquiries that should be covered in a due diligence report on a foreign agent, consultant or other representative.

_ Need for the Representative: Explain why the services of a particular representative are appropriate and identify the qualifications of the representative.

_ General Background: Broadly describe the representative's primary areas of business activity.

_ Experience: Identify the number of years the representative has been in business, and, specifically, the number of years the representative has been involved in the particular type of business he or she will be performing under the proposed agreement with the Company.

_ Ownership Structure: Identify relative percentages of ownership of each of the principals of the representative. Ask whether any current or former foreign official, political party official, candidate for political office, or relative (by blood, marriage or otherwise) of such a person has an ownership interest, direct or indirect, in the representative or is an employee, officer or director of the representative.[11]

_ Financial Stability: If possible, obtain financial statements of the representative (audited, if available) for the past three years, including balance sheets and profit and loss statements.

_ Quantity of Work to be Performed: If practical, estimate the percentage of time of the representative's business that will be devoted to the company's business under the proposed agreement and the time period in which the services are to be provided.

_ Individuals: Obtain the names and titles of those individuals who will be responsible for working for the company.

_ Location: Identify the anticipated country(ies) or territory(ies) where the work will be performed under the proposed agreement with the company.

[11] If a foreign official is an owner, director, officer or employee of the proposed representative, or is related to any such owners, directors, officers or employees, further due diligence should be conducted to determine: (i) the name and official position of the representative official; (ii) the foreign official's official duties and responsibilities (or potential, if a candidate); (iii) the type and extent of the foreign official's ownership interest, if any, in the representative; (iv) the position in the representative company held by the foreign official or any relative of such official; and (v) if the foreign official is a relative of an owner, employee, officer or director of the foreign company, the exact relationship of that official to the representative company's owner, employee, officer or director.

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_ References: Obtain a list of business references. Contact the references with regard to their experience with the proposed representative including the credibility and capability to carry out the proposed representation and summarize the information obtained through them.

_ Embassy Check: Obtain information about the representative from the local U.S. embassy. The appropriate country desk officer may know the reputation of the representative and whether the representative has engaged in any improper conduct. Such information should specifically include reference to commercial service reports obtained from the embassy, as available, regarding the proposed representative.

_ Commerce Department Check: Memorialize any information obtained from the U.S. Department of Commerce. In assessing potential representatives, it may be helpful to obtain an International Company Profile Report (formerly known as a World Trader Data Report) from the Department of Commerce.

Note: International Company Profile Reports ("ICP Reports") are not available in all countries and may reflect incomplete data in other countries. In the United States, an ICP Report can be obtained by submitting a letter to a local office of the Commerce Department and identifying as much information possible concerning the representative. Outside the United States, ICP Reports can be purchased at the Foreign Commercial Service posts of the Commerce Department. the Company's Legal Department can assist you in obtaining these reports.

_ Compliance Verification: State whether or not the appropriate company personnel have reviewed and discussed the provisions of the FCPA with the representative.

_ Representative's Cooperation: Indicate whether or not the representative has objected to any of the representations contained in the proposed representative agreement or to any questions pertaining to his background.

_ Foreign Regulatory Authorities Check: Determine the local, regional and/or national government authorities, agencies, ministries or other bodies that regulate any significant activities or business operations of the representative.

_ Licenses. If the representative is required by law to be licensed to perform its services, obtain the name of the appropriate government agency the representative's license number and expiration date.

Joint Venture Partners

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U.S. companies should ensure, prior to entering into an international joint venture relationship, the potential joint venture is educated about and agrees to comply with the FCPA. In addition, the U.S. company must perform an effective due diligence review prior to entering into the foreign joint venture agreement and should determine that no FCPA violations have occurred up to that point. Joint ventures with foreign officials or foreign governments raise even more questions and potential for liability under the FCPA. In countries with developing markets where the public and private sectors often overlap, it can be difficult to discern between the government versus a private concern when doing business. Frequently, foreign officials may have dual roles and serve both as private business persons and as government officials. The following is a checklist of inquiries, in addition to the inquiries described for foreign consultants, that should be covered in a due diligence report of a joint venture partner:

- Need for the Joint Venture Partner: Identify the other potential partners for the contemplated joint venture and explain why the selected partner(s), as opposed to the other companies in the industry or sector thereof, is the preferred partner for the joint venture.

- Qualifications: Describe the essential and unique qualifications of the selected joint venture partner.

- Ownership Structure: Describe whether the joint venture partner is a government- or state-owned entity, and the nature of its relationship(s) with the various local, regional and governmental bodies.

- Financial Stability: Describe the financial stability of and any capital provided by the joint venture partner.

- Labor: Determine whether the joint venture partner will be providing labor and describe the employees, particularly whether any of the employees are considered government or public officials of the local or central government.

- Facilities: Describe what facilities and/or related real estate, if any, will be provided by the joint venture partner, whether the facilities require improvement and, if so, who will provide the necessary capital.

- Reputation: Broadly describe the business reputation of the joint venture partner in its geographic and industry-sector markets, as well any special prestige or goodwill of the joint venture partner

Contractual Provisions

U.S. company agreements with foreign consultants, agents or representatives should contain an agreement by the foreign representative or joint venture partner that it will not make any payment, loan or gift of anything of value to a foreign official, political party or candidate in

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order to obtain or retain business or secure any improper advantage for the U.S. company. The agreement also should contain an obligation on the part of the representative to certify periodically that it has no knowledge of any such activities (***see*** **Exhibits A and B**).

In addition, whenever possible, the consultancy agreement should contain the following provisions:

- obligate the representative to report immediately any information the representative learns that may indicate that either an FCPA violation has occurred or an improper payment has been made;
- certify that no foreign official, political party or candidate owns an interest in the representative and obligate the representative to notify the U.S. company as soon as possible if there is any change in ownership of the representative's firm;
- provide the U.S. company the right of investigation and audit, as deemed appropriate by the company, to verify compliance with the company's FCPA policy;
- permit the U.S. company to terminate the agreement immediately upon a good faith belief by the company that the representative has violated the company's FCPA policy or put the company in material risk of an FCPA violation; and
- permit the terms of the agreement, including payment terms, to be disclosed to government agencies, *e.g.*, the United States Department of Justice, or other entities that may have a legitimate need to know.

Certifications

U.S. companies should periodically obtain an executed FCPA certification from each of their international agents, consultants, and representatives. Copies of all such documentation and certifications are to be maintained in the representative's file and with the Legal Department. The sample annual certification of compliance attached as Exhibit B is an example of how such a certification may be structured.

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EXHIBIT A

U.S. FOREIGN CORRUPT PRACTICES ACT RIDER
TO INTERNATIONAL AGENCY OR
CONSULTANCY AGREEMENT

The following provisions should be included in international agency or consultancy agreements:

1. U.S. Foreign Corrupt Practices Act. The *U.S. Foreign Corrupt Practices Act* (the "FCPA") makes it unlawful to offer, pay, promise or authorize to pay any money, gift or anything of value, including but not limited to bribes, entertainment, kickbacks or any benefit, directly or indirectly, (i) to any foreign official or any foreign political party or (ii) to any person while knowing or suspecting that the payment or gift will be passed on to a foreign official, in connection with any business activity of the Company or its wholly or partially owned affiliates (collectively "the Company"). For the purpose of this agreement, a "foreign official" means any employee or officer of a government of a foreign country (*i.e.*, a country other than the United States of America), including any federal, regional or local department, agency, enterprise owned or controlled by the foreign government, any official of a foreign political party, any official or employee of a public international organization, any person acting in an official capacity for, or on behalf of, such entities, and any candidate for foreign political office.

2. Representations, Warranties and Covenants of Agent. The Agent makes the following representations and warranties to the Company, and covenants and agrees as follows:

2.1 Public and Commercial Bribery Representations, Warranties and Covenants of the Agent. The Agent hereby represents, warrants and covenants to the Company that the Agent has not, and covenants and agrees that it will not, in connection with the transactions contemplated by the Agreement or in connection with any other business transactions involving the Company, make, promise or offer to make any payment or transfer of anything of value, directly or indirectly: (i) to any foreign official (as defined above) or to an intermediary for payment to any foreign official; or (ii) to any political party. It is the intent of the parties that no payments or transfers of value shall be made which have the purpose or effect of public or commercial bribery, acceptance of or acquiescence in extortion, kickbacks or other unlawful or improper means of obtaining business. This subsection shall not, however, prohibit normal and customary business entertainment or the giving of business mementos of nominal value in connection with the Agent's performance under the Agreement.

2.2 Agent Certifications. The Agent agrees that it will, and will cause each of its directors, officers, employees, agents or other representatives who have any direct involvement with any of the management or operations of the business of the Agent under the Agreement, at the request of the Company, and at least annually, provide the Company with a certification in the

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form hereto attached and incorporated by reference as Schedule 1 [*See* **Exhibit B** for the form of such Certificate].

2.3 Agent's Continuing Obligation to Advise. The Agent agrees that should it learn or have reason to know of: (i) any payment, offer, or agreement to make a payment to a foreign official or political party for the purpose of obtaining or retaining business or securing any improper advantage for the Company under the Agreement or otherwise, or (ii) any other development during the term of the Agreement that in any way makes inaccurate or incomplete the representations, warranties and certifications of the Agent hereunder given or made as of the date hereof or at any time during the term of the Agreement, relating to the FCPA or the Company's FCPA Policy, the Agent will immediately advise ______________________ [Company representative] in writing of such knowledge or suspicion and the entire basis known to the Agent therefor.

2.4 No Governmental Ownership of Agent. The Agent hereby represents and warrants to the Company that no ownership interest, direct or indirect, in the Agent or in the contractual relationship established by the Agreement, is held or controlled by or for the benefit of any foreign official or foreign political party, and that it will notify the Company in the event of a change in the foregoing.

2.5 Company Right of Investigation. The Agent agrees that the Company shall have the right, from time to time, upon written notice to the Agent, to conduct an investigation and audit of the Agent to verify compliance with the provisions of this section. The Agent agrees to cooperate fully with such investigation, the scope, method, nature and duration of which shall be at the sole reasonable discretion of the Company.

2.6 Company Rights upon an FCPA Default. In the event that the Company believes, in good faith, that the Agent has acted in any way that may subject the Company to liability under the FCPA, the Company shall have the unilateral right, exercisable immediately upon written notice to the Agent, to terminate the Agreement, subject to the provisions of _____________ [insert any applicable section references regarding rights of the parties upon termination] of the Agreement.

2.7 Disclosure to U.S. Government. The Agent agrees that full disclosure of information relating to a possible violation of the Company's FCPA Policy or the existence and terms of this Agreement, including the compensation provisions, may be made at any time and for any reason to the U.S. government and its agencies, and to whomsoever the Company's General Counsel determines has a legitimate need to know.

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EXHIBIT B

ANNUAL CERTIFICATION OF COMPLIANCE FOR INTERNATIONAL AGENTS, CONSULTANTS AND REPRESENTATIVES

I ____________________ [name] a duly authorized representative of ____________________ [name of agent, representative, or consultant company] (the "Representative") do hereby certify for and on behalf of such company, that neither I, nor to my knowledge any other person, including but not limited to every officer, director, stockholder, employee, representative and agent of Representative has made, offered to make, or agreed to make any loan, gift, donation or payment, or transfer of any other thing of value directly or indirectly, whether in cash or in kind, to or for the benefit of any "foreign official and/or foreign political party," in connection with any business activity of the Company or any of its wholly or partially owned affiliates (collectively "the Company"). For purposes of this certification, the term "foreign official" includes:

1. any employee or officer of a government of a foreign country (i.e., a country other than the United States of America), including any federal, regional or local department, agency, or enterprise owned or controlled by the foreign government,
2. any official of a foreign political party,
3. any official or employee of a public international organization,
4. any person acting in an official capacity for, or on behalf of, such entities; and
5. any candidate for foreign political office.

I hereby confirm that should I learn of any of the prohibited activities described above, or if there are any changes in the ownership or control of the Representative, I will immediately advise [name of designated Company representative or the Company's Legal Department].

I hereby confirm that neither I nor anyone else at the Representative company is a foreign government official.

[REPRESENTATIVE]

____
(Representative name)

Date:______________ By:______________________________
Name:______________________________
Title:______________________________

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Practical Guidance on Corporate Compliance Programs

An Outline Primer*

Lucinda A. Low
John E. Davis
Miller & Chevalier, Chartered
Washington, D.C.

Johnnie W. Hoffman, Jr.
ExxonMobil Exploration Company
Houston, Texas**

I. THE NEED FOR CORPORATE COMPLIANCE PROGRAMS

A. Introduction

1. Increasing criminalization by the United States (and increasingly by other governments) of international business regulation. Many statutes have a criminal as well as a civil dimension; some are solely criminal

a. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78dd-3, 78ff

b. Export Controls and Trade Sanctions

i. Export Administration Act, 50 U.S.C. App. §§ 2401 et seq. (effectively continued in force by Presidential order under the International Emergency Economic Powers Act); Export Administration Regulations, 15 C.F.R. Parts 730 - 774 (includes Commerce Department's antiboycott regulations)

ii. Arms Export Control Act, 22 U.S.C. §§ 2751 et seq.; International Traffic in Arms Regulations, 22 C.F.R. Parts 120 - 130

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iii. Trading with the Enemy Act, 50 U.S.C. App. §§ 1 et seq.

iv. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 et seq.

c. Customs Laws

18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915, 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b)

d. Miscellaneous

i. Economic Espionage Act, 18 U.S.C. §§ 1831-39

ii. Money Laundering: Bank Records and Foreign Transactions Reporting Act (formerly the Currency and Foreign Transactions Reporting Act), 31 U.S.C. §§ 5311-5322

iii. False Statements: False Statements Act, 18 U.S.C. § 1001

iv. Immigration: 8 U.S.C. §§ 1160(b) (7)(A), 1185(a)(1)-(5), 1252(e), 1324(a), 1325(a)-(c), 1326-28

v. Environment, e.g.: Toxic Substances Control Act, 15 U.S.C. §§ 2601-2741; Hazardous Substances Act, 15 U.S.C. §§ 1261-1277

e. "Domestic" regulatory legislation, (e.g., tax, antitrust, securities) having extraterritorial application with a criminal dimension

2. Emphasis of U.S. Sentencing Guidelines on compliance programs -- companies with effective programs may be able to reduce corporate liability for fines

3. Outside of the criminal arena, increasing emphasis in international business regulatory regimes on the use of compliance programs to reduce civil liability, and on knowledge-based regulations that place a premium on compliance programs, e.g.,

a. FCPA -- Metcalf & Eddy case (December 1999) complaint cited lack of compliance and training program as issue possibly aggravating liability, and resulting consent agreement imposed an aggressive panoply of compliance obligations on the company

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b. Antiboycott enforcement -- Office of Antiboycott Compliance ("OAC") has viewed absence of a compliance program as an aggravating factor

c. Export controls

i. Internal control programs ("ICPs") required for holders of special comprehensive licenses ("SCL") (15 C.F.R. § 752.11) and their foreign consignees

ii. As a result of the Enhanced Proliferation Control Initiative ("EPCI") and other knowledge-based regimes that focus more on product end-users and end-uses, ICPs have become more common outside the SCL context. See, Department of Commerce, Export Management System Guidelines (BXA/DOC, Sept. 1992)

iii. In addition, a specialized ICP, called a Technology Transfer Plan, is required for any U.S. company that seeks export licenses to transfer technology to employees who are foreign nationals. See Department of Commerce, Guidelines for Preparing Export License Applications Involving Foreign Nations (BXA/DOC 1998)

d. But see Customs Service Mitigation Guidelines, 19 C.F.R. Part 171, App. B, Subpart (F)

i. No provision for compliance programs

ii. "Immediate remedial action," including the removal of offending employees, is a mitigating factor

iii. But: "the correction of organizational or procedural defects will not be considered a mitigating factor. It is expected that any importer or other involved individual will seek to remove or change any condition which contributed to the existence of a violation."

4. An important opinion issued by the Delaware Chancery Court in 1996 suggested that the duty of care for corporate directors requires them to ensure that the corporation has a reporting system that provides adequate and timely information to management and the Board regarding the corporation's compliance with laws; failure to do so may be considered failure by the directors to act in good faith, thus making the limitation of liability normally applicable to them unavailable. See In Re Caremark

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International Derivative Litigation, 1996 WL 549894 (De. Ch. Sept. 25, 1996)

5. In addition, strict liability standards in some areas put a high premium on preventive law

   - See Iran Air v. Kugelman, No. 91-1596, D.C. Cir. July 2, 1993 (upholding civil penalties under Export Administration Act for unwitting violation)

B. The U.S. Sentencing Guidelines

1. Effective November 1, 1991

2. Commentary on sentencing of organizations states that:

   Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization's actions after an offense has been committed.

United States Sentencing Commission Guidelines Manual, Chapter Eight, Introductory Commentary (Nov. 1991), reprinted in Matthew Bender & Co. Inc., Federal Sentencing Manual, Pub. 471, Rel. 7 (Nov. 1998), at 385 ("Sentencing Manual").

3. "An effective program to prevent and detect violations of law" is defined as a program that has been reasonably designed, implemented and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following types of steps:

[Seven steps are specified. These are summarized below; the full text can be found in Commentary to § 8A1.2, Note 3(k), Sentencing Manual at 388-91.]

   a. Establishment of reasonable compliance standards and procedures;

   b. Assignment of high-level oversight responsibility;

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c. Exclusion of risky individuals from positions of discretionary authority;

d. Effective communication and training in use of program;

e. Monitoring/auditing performance under the program (including a system for reporting violations);

f. Enforcement of standards; penalties for noncompliance; and

g. Other appropriate follow-up, including program modification as shown to be necessary.

4. The Guidelines recognize that the details of an effective program will vary, depending on the size of the organization, the likelihood that certain offenses may occur due to the nature of its business, and the prior history of the organization

C. Possible Objections to the Guidelines' Approach

1. Under the Guidelines, programs will not reduce liability if senior management is aware of violations and prompt disclosure to government agency is not made by the Company, or if senior management knows of or condones conduct

2. Programs that may mitigate liability in government actions may lead to increased vulnerability to civil suits

a. Lack of privilege for voluntary disclosures to government agencies

– Westinghouse v. Republic of the Philippines, 951 F.2d 1414 (3rd Cir. 1991) (disclosure of documents to SEC and DOJ in connection with FCPA investigation a waiver of attorney-client privilege and work product doctrine in subsequent private suit by the Government of the Philippines seeking damages for allegedly tortious conduct, including conspiracy to interfere tortiously with fiduciary duties owed by former President Marcos to the Philippines -- a theory presumably resulting from the absence of a private right of action under the FCPA)

b. Program creates a paper trail for plaintiffs' lawyers to follow

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3. No guarantee of non-prosecution for disclosed matters

4. Smaller companies may find it much more difficult to maintain effective programs, due to expense and lack of personnel resources: a bias in the Guidelines?

II. DEVELOPING A COMPLIANCE PROGRAM FOR THE CONDUCT OF INTERNATIONAL BUSINESS ACTIVITY

A. Overview of Major Steps in Program Development

1. Step 1: Assessing the Company's international activities, understanding the legal implications of those activities, and determining its current compliance posture

2. Step 2: Obtaining the commitment of top management of the Company to the development and implementation of a compliance program

3. Step 3: Preparing a compliance program that is tailored to the needs and circumstances of the Company

4. Step 4: Implementing the program through:

a. Education and training of relevant Company personnel, affiliates, and other third parties (e.g., agents, consultants, co-venturers, vendors) in the U.S. and abroad

b. Establishing appropriate control positions within the Company, either by creating new positions (e.g., Business Ethics Officer, or specialized compliance personnel for each substantive area, such as an FCPA specialist in the Company's General Counsel's Office) or assigning compliance responsibilities to existing personnel; making other organizational changes as necessary

c. Reviewing and revising as necessary standard international contracts or checklists used by the Company, developing new standard contracts and checklists as necessary; reviewing new contracts on an ongoing basis

d. Conducting periodic internal audits to measure compliance

e. Establishing a system for reporting violations, investigating reported violations, and following up on findings, including discipline of violators, and exclusion of violators from positions of discretionary authority

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f. Periodically revising the program as necessary

B. Step 1: Assessing the Current State of the Company

1. Background on the Company and its subsidiaries and affiliates

a. Identify whether the Company is public or private (compliance requirements may differ for companies in certain areas; for example, the FCPA imposes additional recordkeeping and accounting requirements on public companies)

b. Identify locations within the organization at which international business activity (exports, imports, licensing, investment financing) occurs (U.S. and abroad)

c. Identify locations where Company operations pose possible higher risks for certain specific issues (e.g., countries subject to U.S. or international sanctions, countries noted for corruption, countries targeted by U.S. export controls or antiboycott requirements)

d. Identify geographic areas of possible future expansion of activities

2. Products and Services

a. Identify the Company's products and services marketed abroad, including

i. Commodities

ii. Software (and hardware it runs on)

iii. Training, installation, support and maintenance services

iv. Consulting services

v. Other services or technology

3. Product Markets/Suppliers

a. Identify current geographic markets for the Company's products and services

b. Identify likely future markets

c. Identify current foreign suppliers and likely future suppliers

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4. International Functions in the Company

   a. Determine whether the Company's operations are centralized or decentralized

   b. Identify international sales and marketing responsibility

   c. Identify other sensitive positions: international purchasing, chief financial officer, contract administration, etc.

   d. Determine the chain of approval for all contracts and business ventures

   e. Determine who is responsible for arranging for, scheduling and administering the field service activities of Company personnel

   f. Determine who is responsible for order processing and contract administration, and for shipping

   g. Identify the Company's representative (agent, distributor) relationships in all countries of operation (get copies of agreements)

   h. Identify the Company's partners, co-venturers, etc. in all countries of operation (get copies of agreements)

   i. Determine what control units currently exist within the Company

   j. Determine whether the Company has any standard-form contracts which it uses for overseas transactions, e.g.:

      i. Sales agreements

      ii. Agency or distribution agreements

      iii. Other

   k. Determine what records the Company keeps of its international shipments and the Company's current policy regarding records retention

5. Compliance History/Culture

   a. Review track record of the Company with regard to compliance matters

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b. Review track record of individuals in a position to exercise discretionary authority in compliance sensitive areas

c. Consider attitude and commitment of top management to compliance program

d. Consider resources available for compliance activities

e. Consider experience with any existing business conduct, ethics program

C. Step 2: Obtaining the Commitment of Top Management of the Company to the Development of a Program

1. Important to obtain at the outset, possibly through a Board of Directors resolution or at least Board discussion

a. Gives credibility to program, inside as well as outside the Company

b. May affect level of resources

c. Arguably an important step for avoidance of Caremark-style liability for directors

2. Will need not only in the development stage, but also in implementation: staffing, training, monitoring, etc.

3. Allocation of Board responsibility

a. Consider establishing a committee of the Board to be responsible for compliance matters

b. In a smaller organization, this may be an individual rather than a committee

c. Even with a committee, still need awareness on the part of entire Board

D. Step 3: Preparing the Compliance Program

1. Determine the Compliance Requirements

a. A function of the Company's international activities (see Step 1)

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b. Consider requirements on a statute-by-statute-by-statute basis

c. Interplay between a and b: as delve into statutory requirements in detail, may need further information -- a process conducted in levels

2. Establish a Compliance Strategy

a. Selection options within the regulatory regime

– For example, an export-licensing strategy for companies whose products/services are subject to licensing under the EAA may be based on

: Bulk versus individual licenses

: Using particular types of general licenses

b. Decide "to play or not to play"

– For example, the Company may decide that in certain countries, the FCPA risks are so high that they outweigh the potential benefits, and thus they will not operate there

c. Structural options

i. Are there ways (without constituting prohibited evasions, such as those found in U.S. sanctions laws) to structure activities so as to bring them outside of regulatory ambit of U.S. laws (such as devolving responsibility for certain operations to foreign affiliates)?

ii. Are there structural ways to reduce risks, e.g., by selling directly instead of through intermediaries who may present an increased risk of noncompliance that could be attributed to the Company?

3. Develop Compliance Policy and Procedures

a. Policy

i. States general rules of conduct clearly and concisely

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ii. May (some argue should) include ethical as well as legal requirements

iii. Signed by senior corporate management (President or CEO)

iv. May be supplemented by more detailed guidelines or rules

b. Procedures

i. Deal with operational aspects of policies

ii. Tie in with control strategy

iii. Aspects

– Designation of key control positions within the Company, e.g.:

: Chief compliance officer with overall responsibility (subject to Board oversight) for compliance function

: Subordinate officers with compliance responsibility in specific sub-areas of activity

: Role of the Legal Department in compliance

Note: All persons in positions of compliance responsibility need to be screened for compliance risks

: Board oversight function

– Approval, documentation and other requirements for specific activities, e.g.,

: two signature requirements for significant funds disbursement

: designated control person approval for certain activities

– Violations reporting system

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: Hot lines

: Suggestion "boxes" (e-mail?)

: Whistleblower protection

: Note: Need for involvement of legal counsel to secure privilege of communications

– Disciplinary procedures/standards for violators

B. Education and Training

1. Initial Education and Training

a. All employees

i. Steps to ensure familiarity with the Program to be taken; possibilities for dissemination include:

– Read and acknowledge

– Video and discussion

– Interactive software

– Live seminar

ii. Steps will depend on size, degree of centralization/dispersal of Company

b. Key employees

i. Need more detailed education and training

– Outside seminars/workshops may be cost-effective for certain employees

– Training the trainers should be considered

ii. Necessary reference materials

– Copies of relevant statutes, regulations

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- For export controls: Federal Register or Export Administration Bulletin subscriptions

- For FCPA: DOJ/DOC summary; conference materials are often freshest source of updates; commercial videos are also available

c. Foreign Consignees/Agents/Distributors/Co-Venturers

i. Consider training those with whom there is an ongoing relationship

ii. For others, contractual covenants

iii. Lack of knowledge or support for U.S. rules an issue

2. Subsequent training

a. In some areas (e.g., export controls) rules change frequently, requiring periodic updating; in others, less frequently

i. New developments circulars

ii. Where extensive changes, outside or inside seminars may be necessary

b. As Program is revised and refined over time, personnel will need to be apprised of changes

c. "Frequently asked questions" memos as a good continuing education device

3. Need for key management exposure to, involvement in, training and education

C. Development of Appropriate Contract Documentation

1. Ensure that the Company's standard contracts and checklists contain appropriate provisions

2. Establish compliance review mechanism for new contracts

D. Audits/Monitoring

1. Under direct supervision of the relevant compliance officer

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2. Types: periodic (e.g., annually) and on a "spot" basis

   a. Within the Company

   b. Special challenges of auditing foreign partners

3. Results to be communicated to Board and to higher-level compliance officers

4. Results to be taken into account in updating program

E. Violations

1. Program needs to establish procedures for reporting of violations

   a. Procedures need to encourage informants to come forward, while at the same time preserving legal privilege

   b. Options

      i. "Hot" line staffed by attorney

      ii. "Suggestion" box (electronic or others) monitored by attorney

      iii. Ombudsman (privilege issues unless an attorney)

2. Investigations

   a. Structure to maintain privilege, work product protection (possible use of outside counsel)

   b. Findings must be acted upon

3. Discipline of violators

   a. Program should clearly communicate consequences of violation

   b. Actual discipline imposed should correspond to published intentions

4. Voluntary disclosure of violations -- usually a case-by-case determination, depending on substantive legal area, facts and circumstances; often involves consultations with expert outside counsel

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F. Periodic Updating

1. Company experience, as well as external developments, will require periodic updating

2. Depending on degree of updating necessary, the update will trigger a new cycle of activity

III. ADAPTING A COMPLIANCE PROGRAM FOR A SPECIFIC LEGAL REGIME: THE FCPA

A. Introduction

1. Since the mid-1990s, Justice Department and SEC enforcement actions under the FCPA have multiplied, and both companies and individuals have paid significant penalties (including jail time) for violations

2. FCPA is a "knowledge-based" statute -- corporate liability can attach in certain cases through a failure to identify and address warning signs ("red flags") of illegal activity

3. FCPA violations are subject to the Sentencing Guidelines

4. Thus, a compliance program addressing FCPA issues is essential

B. Elements and Special Considerations

Key aspects of the FCPA for consideration in policy and program development:

1. Prohibits payment of "anything of value" (money, gifts, entertainment expenses, contracts, investment opportunities, stock options, etc.)

2. Prohibits payments to all "foreign officials" (including officials or employees (paid or unpaid) of government agencies or ministries, officials or employees of state-owned companies, political parties or their officials or candidates, or anyone "acting in an official capacity")

3. Third Party Liability/"Knowledge" -- a U.S. company and its individual officers or employees may be liable for a payment made by a third party, such as a joint venture partner, agent, consultant, or vendor (which may or may not itself be covered by the FCPA) if the company transfers something of value to that third party "knowing" that it will be passed through to a government official. "Knowing" goes beyond actual knowledge -- a firm belief that the third party will pass all or part of the value received from the company to a government official, or an awareness

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of facts that create a "high probability" of such a pass-through, also constitute "knowledge" under the FCPA.

a. Belief or signs of a "high probability" of payments can be indicated by the presence of "red flags" in a specific transaction, which include the following:

i. The country in question has a history of corruption

ii. The foreign company with which the Company is dealing is owned or controlled by a government official or a close relative

iii. There are rumors that the foreign partner has a "silent partner" who is a high foreign official

iv. The foreign partner contributes nothing to a relationship except influence

v. There is a significant mismatch between the foreign partner's economic interest and its contributions

vi. The foreign agent or partner insists on sole control over any host country government approvals

vii. The foreign partner refuses to agree to reasonable financial or other controls, or demands excessive compensation

viii. The proposed relationship with the foreign partner is not in accordance with local laws

b. Red flags are discovered through due diligence of a proposed transaction or business partner, and should be addressed to avoid the potential for vicarious liability

4. Accounting and Recordkeeping Requirements -- the FCPA requires "issuers" (generally, but not limited to, publicly-traded companies) and their majority-owned affiliates to keep accurate and complete records of the transactions in which they engage. In particular, companies must

a. Keep books and records that, in reasonable detail, reflect the transactions and asset dispositions of the company

b. Develop and maintain a system of internal accounting controls that provides reasonable assurances that

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i. transactions are carried out as authorized by management

ii. transactions will be recorded so as to maintain accountability for assets and permit preparation of GAAP-based financial statements

iii. access to assets is allowed only as authorized by management

iv. there are periodic audits

5. Facilitating Payments -- certain types of payments to secure non-discretionary "routine governmental actions are allowed under the FCPA, but this is a very narrow exclusion

6. Penalties and Sanctions -- the FCPA provides for criminal fines and imprisonment, as well as civil fines and other relief, such as an injunction. Mere indictment can trigger suspension and debarment of a company from U.S. government contracts and the loss of U.S. government financing and insurance; even news of an investigation against a company can affect share prices and trigger adverse publicity

7. International Reach -- actions that can trigger potential FCPA liability can also implicate the laws of other countries in which a company operates:

a. Local laws against bribes or other payments to local government officials

b. As a result of the OECD and OAS conventions combating bribery of foreign officials, many countries now have domestic laws that prohibit and sanction the same types of activities as the FCPA

C. Step 1 (Assessment) Issues

1. Company Background and Markets

a. Is the Company an "issuer" under the FCPA? If so, it will be subject to the Act's accounting and recordkeeping requirements

b. Identify international operations and locations/markets where Company operations may be affected by corruption (for guidance, can refer to U.S. government (State and Commerce Department) reports, or the Corruption Perceptions Index issued by the non-governmental organization Transparency International (<http://www.transparency.de/documents/cpi/index.html>)

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2. Products and Services

   a. Identify products and services marketed abroad

   b. Determine whether Company operates in a "red flag" industry (identified in the past as the petroleum or aerospace industries)

   c. Determine whether Company is involved in contracting with or selling products and services to a foreign government or state-owned company

3. International Functions

   a. Centralized or decentralized -- will affect determinations regarding compliance responsibility

   b. Identify the Company's representative (agent, consultant, distributor) and other business (co-venturers, partners) relationships in all countries of operations - - all such third parties can create risks of potential vicarious liability under the FCPA if the Company can be deemed to have "knowledge" of their actions

   c. Determine control units in the Company and whether they operate inside of U.S. jurisdiction or are manned by U.S. persons

   d. Review all standard form contracts for overseas transactions to determine whether FCPA compliance is covered

   e. Determine what records the Company keeps and what accounting controls are exercised over various operating units, including majority-owned and minority-held foreign affiliates

4. Compliance History/Culture

   a. Review existing FCPA compliance policies, if any, together with the effect on international operations of policies regarding business ethics, gifts and entertainment, political contributions, etc.

   b. Determine whether any control units have a history of receiving requests for payments from foreign officials

   c. Consider attitude and commitment of management, especially foreign citizens, to FCPA compliance

   d. Consider special legal issues, if any (e.g., past violations, consent decrees)

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D. Step 2 (Management Commitment) Issues

1. Consider Board of Directors resolution specifically ordering FCPA compliance program

2. Designation of Board oversight responsibility

E. Step 3 (Program Design) Issues

1. Structural issues

a. Can some Company operations be placed outside of the regulatory ambit of the FCPA to reduce liability risks, since foreign affiliates are not subject to the FCPA (see Dooley v. United Technologies Corp., 803 F. Supp. 428, 439 (D.D.C. 1992))?

i. 1998 amendments expanded jurisdiction to cover actions by any person in the United States, and actions by U.S. persons anywhere in the world (including employees of foreign subsidiaries)

ii. Vicarious liability can attach to U.S. company from actions by foreign subsidiaries if there is authorization or requisite "knowledge" under the Act (see H.R. Conf. Rep. No. 831, 95th Cong., 2d Sess. 14 (1977))

iii. OECD and OAS countries that are the situs for foreign affiliates are adopting laws against bribery of foreign officials that will likely apply to resident foreign affiliates

iv. Most multinational corporations adopt FCPA compliance policies that do not treat foreign incorporation as a shield

b. Can the Company reduce risks by changing modes of operation?

i. Eliminating reliance on agents or consultants can reduce the number of parties that potentially subject the Company to third-party liability, but must be weighed against business considerations

ii. Reliance on minority investments can reduce requirements under the accounting and recordkeeping rules, but will also reduce corporate control

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c. How should the FCPA compliance program be integrated with other Company compliance programs? As a separate, stand-alone program? Or as part of the general business ethics policy? Note that other Company policies should be consistent with the FCPA policy (e.g., policies on political contributions, or the giving and receiving of gifts and entertainment, on business due diligence, etc.)

2. Policies and Procedures: Key Elements

a. The recent consent agreement in the Metcalf & Eddy case provides insight into what the Department of Justice (the chief enforcer of the FCPA) considers to be the important elements of an FCPA compliance program, although this agreement does not necessarily reflect the "state of the art"

b. Many of these provisions are reflected in section II above and have been among the recommendations by FCPA experts regarding the basic elements of a compliance program

c. Some of the procedures in the consent agreement, however, are likely punitive and are tailored to the alleged facts of the case, which note that the payments to a government official by company executives were made in a context in which there was no operational compliance program and no FCPA training for company employees

d. The following panoply of compliance obligations (many of which are found in the Metcalf agreement) should be considered as part of a general FCPA compliance program for many companies:

i. a "clearly articulated" corporate policy against FCPA violations and the establishment of compliance standards and procedures for all officers and employees

ii. assignment of responsibility for compliance to one or more senior officers with the authority to implement and utilize monitoring systems to detect possible criminal conduct by company employees

iii. the establishment of an independent committee within the company to review the retention of all agents, consultants, business partners, and joint venture partners, including the structure and terms of all contracts related thereto, and the

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due diligence conducted in connection with the selection of such persons or entities

iv. clearly articulated due diligence procedures to ensure that the company "has formed business relationships with reputable and qualified agents, consultants and other business representatives"

v. procedures designed to inhibit the exercise of discretionary corporate authority by persons "with the propensity to engage in illegal activities"

vi. regular training regarding the FCPA and other foreign bribery laws for employees, agents, consultants, and other representatives of the company

vii. the establishment of an effective reporting system for company employees and agents to report possible violations

viii. implementation of appropriate disciplinary mechanisms for employees that violate compliance policies and for individuals responsible for the failure to detect a violation of law or compliance standards

ix. the inclusion of antibribery clauses in all existing and new contracts with agents, consultants and other business partners, as well as requirements for periodic certifications, prior approval by the company of any subcontractors or assignments, and termination clauses for the violation of such provisions [note that the ability of companies to impose such contract clauses on their partners often depends on the nature of the business relationship -- companies can insist on such clauses in an agency contract; such insistence may not be possible if the company is a 10 percent minority shareholder; in the latter case, creative alternatives can sometimes be fashioned]

x. the implementation of books and records and internal financial control requirements [note that the Justice Department insisted that Metcalf & Eddy adopt all such procedures required by the FCPA for issuers, despite the company's apparent non-issuer status; compliance with

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these standards is not mandatory for non-issuers, although the Department clearly prefers them in all cases]

xi. periodic review of corporate compliance policies and procedures [note that the Metcalf & Eddy consent decree requires that such review be conducted by outside auditors and counsel; while this may be appropriate in some cases, it is not required]

3. Creating a Compliance Culture

As with any policy or procedure, FCPA compliance policies only serve to engender and support a culture of compliance within a company. Detailed procedures that mirror the Metcalf & Eddy example precisely are of little use if not followed by Company employees and managers.

F. The Role of Outside Counsel

1. Outside counsel can play a role in many aspects of FCPA compliance programs; the level of involvement is dictated by the Company's needs and methods of operation

2. FCPA Opinions -- while not strictly related to compliance programs, outside counsel can play an important role in addressing possible liability in specific transactions. Liability under the FCPA requires "corrupt intent" on the part of the violating party. The Department of Justice has stated publicly that, with regard to a particular transaction, a reasoned opinion that accounts for all relevant facts by experienced FCPA outside counsel can serve to mitigate a finding of "corrupt intent" by a company. The ability of counsel to render such an opinion depends on the facts in a particular case.

3. Local Counsel -- companies can also use experienced local counsel for FCPA compliance; such counsel can render advice regarding, for example,

a. the application of local antibribery, conflict-of-interest, and other relevant laws to particular facts

b. determinations as to whether certain courses of action comply with the written laws and regulations of the country at issue and might thus be subject to the "local law" affirmative defense under the FCPA

c. determinations as to who is a "government official" under local law and what entities might be government-owned

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d. the conduct of due diligence on potential local partners or agents

e. advice on the commercial reasonableness of a transaction

4. Advice on Step 1 assessment issues, such as identifying possible high risk countries, reviewing Company contracts with business partners and agents, and benchmarking the Company's existing program with the current "state of the practice"

5. Advice on Step 3 program design issues, such as risk assessments of the Company's intended operating structure, drafting policies and procedures, drafting standard contract clauses, or testing due diligence procedures

6. Education and training of Company management, employees, and foreign agents and business partners

7. Auditing and monitoring compliance program operations

8. Investigating reports of possible violations of law or the compliance program

    a. Can be used to maintain the attorney-client privilege and work product protection for some aspects of the investigation

    b. Can act as counsel for Company or for individual officers or employees

    c. Can manage investigation on behalf of Board or other senior authority to maintain independence if management is involved in possible violation

    d. Can recommend and implement appropriate findings and actions, such as the disciplining of violators

    e. Can provide advice regarding possible disclosure to enforcement authorities, including risks of mitigation versus prosecution

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