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## Bribery Boom or Bust: A Practitioner's Primer for Differentiating Between Bribes and Legitimate Exceptions in the Foreign Corrupt Practices Act

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**BRIBERY BOOM OR BUST: A  
PRACTITIONER’S PRIMER FOR  
DIFFERENTIATING BETWEEN BRIBES  
AND LEGITIMATE EXCEPTIONS IN THE  
FOREIGN CORRUPT PRACTICES ACT**

*Jer Monson\**

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ABSTRACT

This article seeks to help business practitioners anticipate and prevent business challenges related to the Foreign Corrupt Practices Act. To this end, it attempts a high-level, practitioner-friendly review of the FCPA—including an in-depth look at the anti-bribery provisions, case-based illustrations of their application, and guidelines for staying in compliance. Part I provides practitioners with a brief introduction to the FCPA. Part II proceeds with a more detailed background and overview of the FCPA, examining both the statute’s enactment and the obligations arising from it. Part III provides practitioners with an overview of significant global developments in anti-corruption policy, and profiles the important FCPA trends that will dot the business landscape in the near future. Part IV further examines the difference between activities proscribed by the FCPA and those excepted. And finally, Part V discusses several implications for business practitioners, including salient points and guidelines for compliance.

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You spent tens of thousands of dollars to secure a good education and, after a multitude of interviews and internships, you landed the job. Your ingenuity, dedication, sacrifice, and hard work paid dividends and led to increasing responsibility and several promotions. It has taken half your life, but your work now spans the globe and your company trusts your oversight of thousands of people and many millions of dollars. *Unbelievably, everything now hangs in the balance . . .*

On Monday, you learned that both you and your company are being investigated by the United States Department of Justice. You recently oversaw the acquisition of a company in India. The new business was ancillary to your current concerns and the deal was small, so you relegated the fine details to a capable subordinate and moved on. Now, there are allegations of a Foreign Corrupt Practices Act (FCPA) violation, and talk of criminal penalties! You face the possibility of arrest—losing everything you have worked so hard for. The experience is surreal, and your entire life seems to have entered the twilight zone. *How could you have anticipated this?* More importantly, how could you have prevented it?

This article seeks to help business practitioners address both questions. To this end, it attempts a high-level, practitioner-friendly review of the FCPA, including an in-depth look at the anti-bribery provisions, case-based illustrations of their application, and guidelines for staying in compliance. Part I provides practitioners with a brief introduction to the FCPA.<sup>1</sup> Part II proceeds with a more detailed background and overview of the FCPA, examining both the statute's enactment and the obligations arising from it.<sup>2</sup> Part III provides practitioners with an overview of significant global developments in anti-corruption policy, and profiles the important FCPA trends that will dot the business landscape in the near future.<sup>3</sup> Part IV further examines the difference between activities proscribed by the FCPA and those excepted.<sup>4</sup> And finally, Part V discusses several implications for business practitioners, including salient points and guidelines for compliance.<sup>5</sup>

#### I. INTRODUCTION—"BUSINESSPERSON, MEET THE FCPA!"

The FCPA is a Watergate-era law designed to prevent companies from bribing foreign government officials and employees of foreign state-owned companies for the purpose of gaining a business advantage. After several decades of relative inactivity, the FCPA has now returned with a vengeance due in large part to the economic collateral damage and contributing corporate corruption of the most recent decade.<sup>6</sup> Accordingly, the United States federal government has been

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<sup>1</sup> See *infra* notes 6–14 and accompanying text.

<sup>2</sup> See *infra* notes 15–84 and accompanying text.

<sup>3</sup> See *infra* notes 85–125 and accompanying text.

<sup>4</sup> See *infra* notes 126–65 and accompanying text.

<sup>5</sup> See *infra* notes 166–88 and accompanying text.

<sup>6</sup> Dionne Searcey, *Watergate-Era Law Revitalized in Pursuit of Corporate Corruption*, WALL ST.

cracking down and, after nineteen prosecutions in 2009 and another twelve in 2010,<sup>7</sup> it shows no sign of slowing down. In fact, FCPA enforcement is expected to remain a prominent feature of the legal-regulatory landscape throughout the duration of the coming decade,<sup>8</sup> with an intentional focus on individual FCPA violators.<sup>9</sup> Notably, many other nations and international organizations have followed the United States' lead in establishing formal prohibitions against business-related bribery of officials; some even more comprehensive and far-reaching than the FCPA.<sup>10</sup> Consequently, it can now be said that there exists a pronounced "international consensus against corruption"<sup>11</sup> and, stated emphatically, "all companies, in all industries, doing business in all countries face FCPA risk and exposure."<sup>12</sup> Thus, the stakes have been raised for business practitioners both foreign and domestic, and it is more important than ever for individual decision-makers to understand the FCPA's proscriptions and exceptions.

Problematically, however, the FCPA's wording is broad enough that determining the difference between prohibited bribes and excepted facilitating "grease" payments can be a challenge. What's more, there also exists a decided lack of judicial scrutiny and proliferating aggressive, but untested, enforcement theories suggesting that almost everyone is somewhat fuzzy about the dividing line between legitimate aggressive business conduct and bribery that violates the FCPA.<sup>13</sup> As a result, many companies now employ consultants to help determine whether expenditures, like dinners for foreign state officials or foreign business-

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J., October 15, 2010, at B2.

<sup>7</sup> *Id.*

<sup>8</sup> Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389 (2010).

<sup>9</sup> *Id.* at 404 (citing The FCPA Blog, available at <http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html> (last visited Apr. 19, 2012)).

<sup>10</sup> Philip M. Nichols, *Regulating Transnational Bribery of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 287 (1999). See also H. Lowell Brown, *Avoiding Bribery When Doing Business Overseas*, 20 ME. B.J. 78, 78 (2005) ("Although all nations prohibit the bribery of their own government officials, for many years the United States was alone in prohibiting corrupt payments made to officials of foreign governments. However, due largely to the efforts of the United States as well as private organizations such as Transparency International, multinational conventions have been adopted by the Organization of American States, the Organization for Economic Cooperation and Development, the European Union, the Council of Europe, and most recently, the United Nations, directing their signatories to adopt FCPA-like legislation governing the overseas actions of their own nationals and others acting within their territories.").

<sup>11</sup> See Brown, *supra* note 10, at 78.

<sup>12</sup> See Koehler, *supra* note 8, at 396 (indicating this to be the main loss from the increase in FCPA enforcement over the course of the last decade). See also Brown, *supra* note 10, at 78 ("[A]nyone doing business internationally now faces an increasingly complex and interlocking network of criminal and civil laws whose aim is to eliminate transnational bribery, but whose effect may extend beyond simply prohibiting corrupt foreign payments.").

<sup>13</sup> Koehler, *supra* note 8, at 409 ("[T]he fact remains that every corporate FCPA enforcement action over the last two decades has been resolved without a trial and nearly every FCPA individual enforcement action has also been resolved without a trial. If nothing else, the FCPA trials in 2009 demonstrate that when a FCPA enforcement action is challenged, the DOJ is not infallible when enforcing the FCPA, that its aggressive interpretations of the statute will not be universally accepted, and that even judges remain fuzzy as to the dividing line between aggressive business conduct and conduct that violates the FCPA.").

related golf outings, will land them in the center of federal enforcement agency crosshairs.<sup>14</sup>

## II. BACKGROUND AND OVERVIEW OF THE FOREIGN CORRUPT PRACTICES ACT

### A. *Enactment of the FCPA*

As described, the portion of the FCPA considered herein prohibits companies from paying or offering to pay foreign government officials or employees of foreign state-owned companies in order to gain a business advantage. However, the FCPA also explicitly includes one exception and two affirmative defenses that inoculate against penalties for otherwise actionable conduct. The obfuscating gray area resulting from these provisions is a salient focus of this paper. Nonetheless, a broader, contextualizing understanding of the FCPA is necessary.

An amendment to the Securities Exchange Act (SEA) of 1934, the FCPA was enacted in 1977 as “the result of an extensive Securities and Exchange Commission (“SEC”) investigation and voluntary disclosure program during the 1970s in which it was discovered that U.S. companies were making millions of dollars in bribes to foreign officials to secure business.”<sup>15</sup> Disclosures also revealed that many of America’s largest public companies maintained “off-shore ‘slush funds’” to finance illegal campaign contributions in the United States.<sup>16</sup> Consequently, Congress enacted the FCPA in order to restore public confidence in the business community, combat bribery of foreign officials, and require public companies to demonstrate adherence by complying with certain bookkeeping requirements.<sup>17</sup> Congress amended the FCPA in both 1988<sup>18</sup> and 1998,<sup>19</sup> adding the aforementioned affirmative defenses and extending the statute’s reach to include foreign entities and persons in an attempt to encourage international anti-corruption efforts, and to foster a level business playing field for U.S. companies doing business abroad.<sup>20</sup>

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<sup>14</sup> See Searcey, *supra* note 6, at B2.

<sup>15</sup> Rollo C. Baker, *Foreign Corrupt Practices Act*, 47 AM. CRIM. L. REV. 647, 648 (2010) (citing S. REP. NO. 95-114, at 3–4 (1977), H.R. REP. NO. 95-640, at 4–5 (1977); SEC REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (May 12, 1976)). Baker notes that approximately 400 U.S. corporations admitted to making such payments, totaling over \$300 million. *Id.*

<sup>16</sup> Brown, *supra* note 10, at 78 (quoting *Abuses of Corporate Power: Hearings Before the Subcomm. on Priorities in Government of the Joint Economic Comm.*, 94th Cong. (1976)).

<sup>17</sup> Baker, *supra* note 15, at 648.

<sup>18</sup> See HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC HANDBOOK § 15:49 (2d ed. 2009) (for a succinct discussion of the 1988 amendment’s modifications to the FCPA).

<sup>19</sup> See Donald Zarin, *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks*, 1619 PLI/Corp 11 (2007) (for intermittent discussion on the 1998 amendment’s modifications to the FCPA).

<sup>20</sup> Baker, *supra* note 15, at 648 (citing Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001–03, 102 Stat. 1415, 1424 (1988); International Anti-bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 1–6, 112 Stat. 3302 (1998)).

### B. Obligations Arising Under the FCPA

For analytical purposes, there are two key categories of obligations established by the FCPA:<sup>21</sup> 1) accounting provisions, of which this paper will offer only a cursory review; and 2) anti-bribery provisions, which will be dissected and discussed at length. In terms of accounting obligations, the FCPA amended SEA provisions by adding record-keeping and internal control requirements for companies issuing stock (issuers). These requirements apply to both a firm itself and all the subsidiaries and affiliates under its control.<sup>22</sup> The FCPA requires these companies to: 1) “make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of the issues”;<sup>23</sup> and 2) create and maintain a system of internal accounting controls adequate to provide “reasonable assurances that, among other things, transactions are recorded as necessary to maintain accountability for assets.”<sup>24</sup> Notably, as is also the case for the anti-bribery obligations, violation of these accounting obligations can lead to both civil enforcement actions by the SEC, and even criminal prosecution by the United States Department of Justice (DOJ) where an individual *knowingly* circumvents (or fails to implement) a system for internal accounting controls, or falsifies any book, record, or account.<sup>25</sup>

The anti-bribery obligation promulgated by the FCPA is extremely comprehensive, and:

[G]enerally prohibits U.S. companies (whether public or private) and their personnel; U.S. citizens; foreign companies with shares listed on a U.S. stock exchange or otherwise required to file reports with the SEC; or any person while in U.S. territory from: (i) corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business.<sup>26</sup>

As demonstrated, the FCPA is not simple—each subsection has multiple parts and remains broadly defined—so the first challenge for the business practitioner is to understand the statute elementally, and then grasp the meaning and significance of each element. The elements of the FCPA’s anti-bribery obligation are as follows:

1) An issuer, domestic concern or any other person while in the territory of the United States;<sup>27</sup> 2) makes use of the mails or any other means or instrumentality of

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<sup>21</sup> Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, 17 CURRENTS: INT’L TRADE L.J. 3, 4 (2008) (noting that the Foreign Corrupt Practices Act of 1977 is codified as amended at 15 U.S.C.A. §§ 78m(b), (d)(1), (g)-(h), 78 dd-1, 78 dd-2, 78 dd-3, 78 ff (West 1997 & Supp. 2008)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (citing 15 U.S.C.A. § 78m(b)(2)(A) (West 2011)).

<sup>24</sup> *Id.* (citing 15 U.S.C.A. § 78m(b)(2)(B)(ii) (West 2011)).

<sup>25</sup> Taylor, *supra* note 21, at 4 (citing 15 U.S.C.A. § 78m(b)(5) (West 2011) and noting that criminal liability is not imposed for technical or insignificant accounting errors).

<sup>26</sup> Koehler, *supra* note 8, at 389–90 (citing 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2006)).

<sup>27</sup> Taylor, *supra* note 21, at 4 (citing 15 U.S.C.A. § 78dd-2 (West 1998) for domestic concerns, § 78dd-3 for persons other than issuers or domestic concerns, and noting that the prohibitions listed “include the officers, directors, employees, agents or shareholders action on behalf of the issuer,

interstate commerce,<sup>28</sup> 3) corruptly,<sup>29</sup> 4) to offer, pay, promise to pay, or authorize the payment of money or anything of value;<sup>30</sup> 5) to any foreign official, political party or candidate for political office or any other person while knowing that some payment will be passed to such parties;<sup>31</sup> 6) to influence any act or decision, inducing unlawful action or inducing action to influence any act of a government or instrumentality to secure any improper advantage;<sup>32</sup> and 7) to obtain, retain, or direct business to any person.<sup>33</sup>

The first element establishes the ubiquitous panoply of constituents covered by the statute's prohibitions. First, the FCPA applies to "Issuers," meaning generally companies with publicly traded stock on any U.S. stock exchange.<sup>34</sup> Next, the FCPA applies broadly to "Domestic Concerns."<sup>35</sup> This includes any individual who is a citizen, national, or resident of the United States, and any business entity (i.e., corporation, partnership, association, joint stock company, business trust, unincorporated organization, or sole proprietorship) that has its principle place of business in the United States, or is organized under the laws of a

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domestic concern or person").

<sup>28</sup> *Id.* (citing 15 U.S.C.A. §§ 77dd-2(a), 77dd-3(a) (West 1998)).

<sup>29</sup> *Id.* (citing 15 U.S.C.A. §§ 77dd-2(a), 77dd-3(a) (West 1998), and noting that "corruptly" is not explicitly defined in the statute but has been defined by the court in *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991)).

<sup>30</sup> *Id.* (citing 15 U.S.C.A. §§ 78dd-1 (West 1998) for issuers, 78dd-2 for domestic concerns, 78dd-3 for any person).

<sup>31</sup> *Id.* See also Zarin, *supra* note 19, at 31. "The prohibition against 'corrupt' payments also applies to payments made by third parties, where the corporation pays the third party knowing that the payment will be passed on in whole or in part to a foreign official for a proscribed purpose." *Id.* at 29 (citing S. REP. NO. 95-114, at 11 (1977)).

<sup>32</sup> Taylor, *supra* note 21, at 4, 5 (citing 15 U.S.C.A. §§ 78dd-1(a)(1)(A)&(B), (2)(A)&(B), (3)(A)&(B), 78dd-2(a)(1)(A)&(B), (2)(A)&(B), (3)(A)&(B) (West 1998)).

<sup>33</sup> *Id.* (citing 15 U.S.C.A. §§ 78dd-1 (West 1998) for issuers, 78dd-2 for domestic concerns, 78dd-3 for any person).

<sup>34</sup> See 15 U.S.C. § 78dd-1 (2006) (note that this section applies both the accounting and anti-bribery proscriptions to "Issuers"); see also Zarin, *supra* note 19, at 16–18 (noting that, according to the Exchange Act, an issuer is defined as "any person who issues or proposes to issue any security . . . ." 15 U.S.C. §78c(a)(8) (2006)). Zarin expounds on the definition of "Issuers" with exacting detail, indicating that issuers include the following:

Issuers with a class of securities registered on a national securities exchange pursuant to section 12(b) of the Exchange Act; Issuers with a class of equity securities listed on the National Association of Securities Dealers Automated Quotation (NASDAQ) System; Issuers that have \$10 million or more in assets on the last day of their most recent fiscal year and that have a class of equity securities held by 500 or more persons, with the exception of issuers specifically exempt under section 12 or the rules there under or that have received an exemption from the SEC; Foreign private issuers whose securities are registered under the Exchange Act"; "Banks and other financial institutions that file Exchange Act reports with the Office of the Comptroller of the Currency (OCC) or other appropriate financial institution agency, also known as "section 12(i) companies"; Issuers that offered securities to the public using the vehicle of a registration statement and prospectus pursuant to the Securities Act of 1933 – but only during the on-year "duty to update" period following the offering (section 15(d) registrants).

Zarin, *supra* note 19, at 16–18.

<sup>35</sup> See 15 U.S.C. § 78dd-2 (2006) (note that this section applies only the anti-bribery proscriptions to "Domestic Concerns").

state, territory, possession, or commonwealth of the United States.<sup>36</sup> Finally, the FCPA also applies to other persons, including United States persons<sup>37</sup> and foreign persons.<sup>38</sup> Accordingly, several of the more notable emerging trends in FCPA enforcement include the DOJ's intentional focus on individual FCPA violators for giving bribes, *and bribe recipients* for their part in receiving them.<sup>39</sup>

The second element addresses the method of conveyance utilized in the violating act.<sup>40</sup> "It requires that some means or instrumentality of 'interstate commerce' be used to offer or make the improper payments," and defines "interstate commerce" to include "trade commerce, transportation, or communication between states or a foreign country and any state or between any state or any place on ship outside."<sup>41</sup> Notably, this element can be satisfied by almost any method of conveyance, to almost any location. Even a single "letter, fax, cable, phone call, airline ticket, etc. . . ." will suffice, if done "in furtherance of the effort to make a prohibited payment."<sup>42</sup> Again, the language employed is extremely broad, allowing many otherwise innocuous actions to constitute a violation so long as they can be construed to be "in furtherance of the effort," as noted above.<sup>43</sup>

The third element addresses the kind of intent, or willfulness, necessary to constitute an FCPA violation. While the FCPA itself does not explicitly define the term "corruptly," congressional reports make clear its proper connotation as "an evil motive or purpose"<sup>44</sup> intended to induce a foreign official to misuse either his position or power.<sup>45</sup> More specifically, the inducement must be intended to

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<sup>36</sup> Brown, *supra* note 10, at 83.

<sup>37</sup> See 15 U.S.C. §78dd-3 (2006); see also Brown, *supra* note 10, at 83 (noting that the FCPA "establishes individual liability for 'any officer, director, employee or agent' of an issuer or domestic concern," and that "[a]ny act done corruptly by a U.S. person outside the United States will be subject to the anti-bribery provisions of the FCPA").

<sup>38</sup> 15 U.S.C. §78dd-3. See also Koehler, *supra* note 8, at 390 (noting that the FCPA is routinely described as applicable only to U.S. companies and citizens; however, as written and enforced, the FCPA can apply to both foreign companies and foreign citizens, as well). Koehler later explicitly states as "widely held misperception" the notion that "foreign nationals are not subject to the FCPA." *Id.* at 405.

<sup>39</sup> Koehler, *supra* note 8, at 405 (including a November 2009 quote from Assistant Attorney General Lanny Breuer indicating that the DOJ's pursuit of individuals was "no accident" and a "cornerstone" of the DOJ's enforcement strategy).

<sup>40</sup> Taylor, *supra* note 21, at 5.

<sup>41</sup> *Id.* (citing 15 U.S.C.A. § 78dd-2(h)(5) (West 1998) introductory language).

<sup>42</sup> Lillian Blageff, *Guide to the Foreign Corrupt Practices Act*, 1 FOREIGN CORRUPT PRACTICES REPORTER 1-7 (2008).

<sup>43</sup> See Zarin, *supra* note 19, at 26 ("The inclusion of the phrase 'in furtherance of' as part of this jurisdictional standard was intended to make clear that for liability to attach, the use of interstate commerce need only be in furtherance of making a prohibited payment. This clause significantly broadened the jurisdictional scope of the FCPA, making it easier to meet this requirement. Under this standard, the use of an interstate facility need only be 'incident to an essential part of the scheme.'" (citing *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986) (quoting *United States v. Lea*, 618 F.2d 426, 430 (7th Cir. 1980))).

<sup>44</sup> Brown, *supra* note 10, at 80 (quoting *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Protection and Finance of the Comm. On Interstate and Foreign Commerce*, 95th Cong. (1977)).

<sup>45</sup> Taylor, *supra* note 21, at 5.



procure wrongfully directed business, preferential legislation, or favorable regulation.<sup>46</sup> Thus, the attempted bribe must be made knowingly, with an understanding that payment is being given in exchange for some unlawful government action.<sup>47</sup> As a consequence, mere negligence is insufficient to constitute a violation of the FCPA; however, *any* willful attempt at bribery is sufficient, and need not actually succeed or produce the desired result.<sup>48</sup> Thus, an individual can be convicted of bribery under the FCPA even if the recipient of the bribe had no intent of attending to the briber's wishes, or lacked the power to do so.<sup>49</sup>

The fourth element addresses the form in which the bribe is made. The FCPA is written expansively and prohibits payments, gifts, or the giving of "anything of value,"<sup>50</sup> thereby covering both attempts to bribe<sup>51</sup> as well as actual bribes of any type.<sup>52</sup> Again, the phrase "anything of value" is not explicitly defined in either the FCPA or its legislative history; however, it is included in other U.S. criminal statutes and is "broadly construed to encompass both tangible and intangible benefits that an official subjectively believes to be of value."<sup>53</sup> Consequently, it is not necessary for that which is given or promised as the bribe to have any definite value;<sup>54</sup> rather, the value of the payment is evaluated solely from the perspective of the intended recipient.<sup>55</sup> Tangible offerings that have been found to be "of value" by the courts include: money, discounts, use of resources (e.g., materials, facilities, and equipment), entertainment, expense-paid travel, lodging, food, loans with favorable interest rates, insurance benefits, charitable contributions, and college scholarships.<sup>56</sup> Similarly, intangible offerings that have

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<sup>46</sup> Baker, *supra* note 15, at 660.

<sup>47</sup> *Id.* at 661. See also Brown, *supra* note 10, at 80. Brown elaborates on legislative history indicating that the use of the term "corruptly" in the FCPA is consistent with its use in the domestic bribery statute, 18 U.S.C.A. § 201(b); therefore, related Supreme Court comments are applicable to the FCPA. *Id.* Thus, "[b]ribery requires intent to influence an official act . . . there must be a *quid pro quo* – a specific intent to give or receive something of value in exchange for an official act." *Id.* (quoting *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999)).

<sup>48</sup> Zarin, *supra* note 19, at 29. See Brown, *supra* note 10, at 81. Interestingly, even if there is a valid or lawful purpose for a given payment to a government official, such fact alone does not insulate an individual in an otherwise unlawful transaction from criminal liability "if there is evidence from which it can be found that 'the unlawful purposes were of substance, not merely vague possibilities that might attend an otherwise legitimate transaction.'" *Id.* (citing *United States v. Biaggi*, 909 F.2d 662, 663 (2d Cir. 1990)). The lawful purpose does not inoculate against the unlawful one.

<sup>49</sup> Zarin, *supra* note 19, at 31.

<sup>50</sup> *Id.* at 44 (quoting 15 U.S.C. §§ 78dd-2(a) (2006)).

<sup>51</sup> Brown, *supra* note 10, at 79. "A corrupt payment does not have to actually be made to constitute a violation of the FCPA." *Id.*

<sup>52</sup> Taylor, *supra* note 21, at 5.

<sup>53</sup> Zarin, *supra* note 19, at 44.

<sup>54</sup> Brown, *supra* note 10, at 80.

<sup>55</sup> Taylor, *supra* note 21, at 5. Taylor further indicates that companies must be careful to consider the context of a given situation when evaluating potential FCPA considerations. *Id.* For example: "If an investment is being made, such as a joint venture 'anything of value' could be 'a stock interest in a joint venture company, a contractual right or interest, real estate, personal property, or other interests arising from business relationships.'" *Id.* at n.59 (citing Lucinda A. Low & John E. Davis, *The FCPA in Investment Transactions*, 1 FOREIGN CORRUPT PRACTICES REPORTER 5–6 (2008)).

<sup>56</sup> Baker, *supra* note 15, at 658; Brown, *supra* note 10, at 80.

been found to be “of value” by the courts include: information, sex, promises of future employment, and witness testimony.<sup>57</sup> Once again, the FCPA’s language is interpreted very broadly in order to affect the congressional purpose, as previously discussed.

The fifth element elaborates on the identity of the intended recipient. The FCPA “makes it clear that any bribe must go to a foreign government official, political party or candidate.”<sup>58</sup> However, the FCPA does not address bribes paid to employees of private, non-governmental entities,<sup>59</sup> or payments made directly to governmental departments that are not for the personal use or benefit of any specific foreign official.<sup>60</sup> Nonetheless, there is general agreement that the term “foreign official” should be construed broadly, and includes persons working in any branch of government, employees of state-owned enterprises,<sup>61</sup> and officials of public international organization[s]<sup>62</sup> or persons working on the behalf of such an organization.<sup>63</sup> Accordingly, once a foreign entity is considered to be an “instrumentality” of a foreign government, all of that organization’s employees are considered to be “foreign officials,” regardless of individual status or level of responsibility.<sup>64</sup> In addition, the FCPA proscribes payments made directly to a

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<sup>57</sup> Zarin, *supra* note 19, at 45; Baker, *supra* note 15, at 658.

<sup>58</sup> Taylor, *supra* note 21, at 5. The inclusion of “candidates” in the FCPA proscription is a recognition that such persons may be influential in the award of government business. *Id.* However, this proscription is not intended to include lawful campaign contributions made in the course of legitimate lobbying or other normal representations to foreign government officials. Zarin, *supra* note 19, at 42.

<sup>59</sup> Publisher’s Editorial Staff, *Commercial Bribery*, THE LAWYER’S BRIEF 27 (Thomson Reuters, June 27, 2008) (“The FCPA makes a rather curious distinction between a foreign official and a private person. It is illegal to bribe a ‘foreign official’ but, at least under the FCPA, it is not illegal to bribe a private procurement agent of a private foreign company . . . . Although individual countries make have domestic bribery laws prohibiting such conduct.”).

<sup>60</sup> Zarin, *supra* note 19, at 31.

<sup>61</sup> A given entity need not be wholly owned by a foreign government to be deemed an “instrumentality” of a foreign government under the FCPA. Baker, *supra* note 15, at 660.

<sup>62</sup> *Id.*; see also Zarin, *supra* note 19, at 42 (“The ‘public international organizations’ covered by the FCPA are those organizations designated by Executive Order pursuant to the International Organizations Immunities Act, 22 U.S.C. § 288 (1998), or any other international organization designated by the President by Executive Order. This includes such organizations as the Organization of American States, the European Space Agency, the Hong Kong Economic and Trade Offices, and the World Bank.”).

<sup>63</sup> Baker, *supra* note 15, at 660; see also Zarin, *supra* note 19, at 32–33 (“Neither the FCPA nor its legislative history contains any guidance on the scope of the terms ‘officer’ or ‘employee.’ There are no cases under the FCPA that further define these terms. Nor is it clear whether the scope of these terms should be determined with reference to foreign local law. The domestic bribery statute and the Federal Tort Claims Act (“FTCA”), and the cases decided thereunder, offer the most instructive guidance in delineating the scope of these terms under the FCPA. Based upon these statutes and cases, an ‘officer’ of a foreign government would include individuals appointed by the head of state or by heads of executive departments and individuals who hold positions authorized by statute. An ‘employee’ of a foreign government would include individuals whose day-to-day performance is supervised by the governmental authority.”).

<sup>64</sup> Baker, *supra* note 15, at 660. See also Koehler, *supra* note 8, at 391–92, 410. “The lack of judicial scrutiny of FCPA enforcement actions is most troubling in connection with the enforcement agencies’ aggressive interpretation of the key ‘foreign official’ element of an FCPA anti-bribery violation.” *Id.* at 410.

There is no dispute that elected foreign government officials, other foreign heads of state, and employees of foreign government agencies such as foreign

“foreign official,” or facilitated via a third party (e.g., consultant, distributor, joint venture partner, foreign subsidiary, affiliate, subcontractor, etc.), where the initiating payer knows<sup>65</sup> that the payment will ultimately be used for some prohibited purpose.<sup>66</sup> Consequently, business practitioners must remain intentionally vigilant, and be cognizant that “almost all international transactions pose FCPA compliance risks.”<sup>67</sup>

The sixth element deals with inducement—or influencing a foreign official to act. There are four different types of inducements that are prohibited by the FCPA: Acting to<sup>68</sup> 1) influence a foreign official’s act or decision in his official capacity; 2) induce a foreign official to act, or not act, in violation of his lawful duty;<sup>69</sup> 3) induce a foreign official to influence or affect an act or decision of his

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equivalents of the U.S. Treasury Department, U.S. State Department, etc., are “foreign officials” under the FCPA. Improper payments to such “foreign officials” to “obtain or retain business” are what Congress intended to prohibit by passing the FCPA in 1977. But the majority of 2009 FCPA enforcement actions . . . have absolutely nothing to do with such government officials. Rather, the alleged “foreign officials” are often employees of alleged foreign state-owned or state-controlled enterprises (“SOEs”). The enforcement agencies deem such individuals (regardless of rank or title and regardless of how such individuals may be classified under local foreign law) as “foreign officials” under the theory that their employers . . . are an “instrumentality” of a foreign government.

*Id.* at 391–92.

[This] interpretation . . . has never been accepted by a court . . . [and is] no different than the DOJ or SEC telling you that the person you play softball with on Thursday nights is a U.S. “official” merely because he or she works for General Motors . . . given that [GM is] owned or controlled by the U.S. government.

*Id.* at 410.

<sup>65</sup> See Zarin, *supra* note 19, at 51–55 (explaining that the FCPA’s knowledge standard does not require actual knowledge).

<sup>66</sup> Taylor, *supra* note 21, at 5 (“Congress incorporated the ‘knowing’ standard into the statute to ensure that corporate officials would not attempt to engage in either conscious disregard or deliberate ignorance of the conduct of third parties with whom they did business.”); see also, Zarin, *supra* note 19, at 48–49 (“Foreign sales agents were responsible for many of the questionable foreign payments disclosed during the 1970s. As a result, the FCPA included a provision delineating the circumstances under which a U.S. company or its officers and employees would be held accountable for illicit payments made indirectly through intermediary third parties. The U.S. domestic bribery statute does not contain a special standard for illicit payments made through intermediary third parties . . . . In contrast, the FCPA may hold a U.S. company directly responsible for the conduct of a third party . . . . Interestingly, however, the foreign intermediary engaging in the illicit conduct may be outside the scope of, and therefore not subject to, liability under the FCPA . . . . The third party payment provision continues to create great uncertainty and confusion regarding potential liability under the FCPA . . . . Frequently, a U.S. company not directly involved in an illicit payment discovers that a third party with which it has a commercial relationship . . . has made an illicit payment with regard to a contract award involving the sale of the U.S. company’s goods or services . . . [I]t is infrequent that the U.S. company would know for certain that the third party in fact made a prohibited payment. More frequently, suspicions or concerns are raised when allegations or inconclusive information comes to its attention. The allegations of wrongdoing are generally vehemently denied by the third party. The third party may also have important contacts and ties with government officials, thereby making it difficult and commercially damaging to disengage from the relationship. It is in this kind of commercial setting that the potential liability of a U.S. company for actions of a third party is most murky, making the actions required of the U.S. company unclear.”).

<sup>67</sup> Taylor, *supra* note 21, at 5.

<sup>68</sup> 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (West 1998).

<sup>69</sup> See Zarin, *supra* note 19, at 60 (indicating that this language was added as a part of the 1988

government; or, 4) secure any improper advantage.<sup>70</sup> Examples of these inducements include: payments made to a government official to influence the award of a telecommunications contract;<sup>71</sup> payments made to a legislator to obtain a report of restrictions on foreign ownership of telecommunications companies;<sup>72</sup> payments made to a chief procurement officer to influence the purchase of spare parts by a foreign air force;<sup>73</sup> payments made to a close advisor of a foreign head of state to influence the sale of crude oil;<sup>74</sup> and payments made to a government official to amend or repeal a regulation requiring an environmental impact assessment for genetically modified agricultural products.<sup>75</sup> Notably, as discussed further below, the FCPA's proscriptions address both the winning of new contracts and official decisions affecting existing business as well. Thus, payments to government officials to obtain favorable tax treatment,<sup>76</sup> or reduced customs duties,<sup>77</sup> have also been held to constitute "corrupt" inducements prohibited under the FCPA.

The seventh element addresses the reason for the bribe. The FCPA prohibits payments made to obtain or retain business, or divert or direct a business opportunity.<sup>78</sup> This "business-purpose" test is intended to limit the scope of the FCPA's proscriptions by requiring that the illicit payment be made specifically to 1) direct business to a particular person, 2) divert business from a particular person, or 3) maintain an established business relationship.<sup>79</sup> However, in contrast to the "foreign official" element discussed above, this element has been subject to judicial scrutiny.<sup>80</sup> Accordingly, "[c]ourts have held that Congress intended the FCPA to prohibit bribes beyond a narrow range of payments sufficient to obtain or retain government contracts."<sup>81</sup> Thus, the FCPA precludes payments to foreign

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amendments to make the FCPA conform to the standard found in the domestic bribery statute).

<sup>70</sup> *Id.* at 60–62 (indicating that this language was added as a part of the 1998 amendments to make the FCPA conform to the OECD Convention).

<sup>71</sup> *United States v. Harris Corp.*, Cr. No. 90-0456 (N.D. Cal. 1990).

<sup>72</sup> *S.E.C. v. BellSouth Corp.*, Lit. Rel. No. 17310 (2002).

<sup>73</sup> *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).

<sup>74</sup> *S.E.C. v. Ashland Oil, Inc.*, Civ. Act. No. 86-1904 (D.D.C. July 8, 1986).

<sup>75</sup> *S.E.C. v. Monsanto Co.*, Civ. Act. No. 1:05CV-00014 (D.D.C. Jan. 6, 2005), Lit. Rel. No. 19023 (2005).

<sup>76</sup> *In the Matter of Baker Hughes Inc.*, Release No. 34-44784 (2001); *United States v. KPMG Sidharta Sidharta Harsono*, Lit. Rel. No. 17127 (2001); *S.E.C. v. Triton Energy Corp.*, Civ. Act. No. 1:97CV00401 (RMU) (D.D.C. 1997), Lit. Rel. No. 15396 (1997).

<sup>77</sup> *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

<sup>78</sup> 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2006)

<sup>79</sup> *Zarin*, *supra* note 19, at 62.

<sup>80</sup> *Koehler*, *supra* note 8, at 392; *see also*, *Taylor*, *supra* note 21, at 6 ("This particular element of the statute was recently subjected to a searching analysis by the Fifth Circuit Court of Appeals. In *United States v. Kay*, the Fifth Circuit reviewed an attack made on the FCPA for vagueness. According to the court, the meaning of 'obtain or retain business' in the FCPA was not vague even if it was ambiguous." (quoting *United States v. Kay*, 513 F.3d 432 (2007))).

<sup>81</sup> *Baker*, *supra* note 15, at 661; *see also*, *Zarin*, *supra* note 19, at 64 ("In rendering its decision, the [Kay] court found significant the fact that the Senate's legislative proposal, from which the final statutory language for the FCPA was drawn, prohibited the use of 'payments that assist in obtaining or retaining "business," not just "government contracts."' The court noted that Congress had the option of choosing the narrower language, which appeared in an SEC report, but had elected not to do so." (quoting *Kay*, 359 F.3d at 738)).

officials for a broad range of purposes, ostensibly including corrupt payments related to carrying out existing business, as well<sup>82</sup>—even where the payments are not directly related to the underlying business transaction.<sup>83</sup> For example, payments made to a “foreign official” to incentivize him to lower taxes or customs duties applied to a particular company can provide that company with an unfair cost advantage over its competitors, and thereby assist it in “obtaining” or “retaining business.”<sup>84</sup> As a result, there exists yet another pitfall for wary business practitioners to avoid.

### III. OVERVIEW OF HISTORICAL ENFORCEMENT AND MODERN DEVELOPMENTS

All nations prohibit the bribery of their own government officials,<sup>85</sup> but for many years the United States stood alone in prohibiting the bribery of “foreign officials.”<sup>86</sup> Even still, while the FCPA was technically on the books, enforcement was largely non-existent during its first two applicable decades.<sup>87</sup> Further, cases that were brought generally represented only the most flagrant violations.<sup>88</sup> As a result, for most of the statute’s history, business practitioners considered the FCPA as only applying to large, multi-national corporations.<sup>89</sup>

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<sup>82</sup> Baker, *supra* note 15, at 661.

<sup>83</sup> Zarin, *supra* note 19, at 63.

<sup>84</sup> Koehler, *supra* note 8, at 393 (“But the Kay court empathetically stated that not all such payments to a ‘foreign official’ outside the context of directly securing a foreign government contract violate the FCPA; it merely held that such payments could violate the FCPA. According to the court, the key question of whether such payments constitute an FCPA violation depend (sic) on whether the payments were intended to lower the company’s costs of doing business . . . enough to assist the company in obtaining or retaining business . . . . The court then listed several hypothetical examples of how a reduction in customs and tax liabilities could assist a company in obtaining or retaining business in a foreign country. On the other hand, the court also recognized that ‘[t]here are bound to be circumstances’ in which a customs or tax reduction merely increases the profitability of an existing profitable company and presumably does not assist the payer in obtaining or retaining business. Thus, contrary to popular misperception, Kay does not hold that all payments to a ‘foreign official’ for avoiding customs duties or sales taxes in a foreign country fall within the FCPA’s scope. Rather, the decision merely holds that Congress intended for the FCPA to apply broadly to payments intended to assist the payer, directly or indirectly, in obtaining or retaining business and that payments to a ‘foreign official’ to reduce customs and tax liabilities can, under appropriate circumstances, fall within the statute.” (quoting *Kay*, 359 F.3d at 755–56, 59–60)).

<sup>85</sup> Nichols, *supra* note 10, at 257. The author later elucidates that “bribery is illegal in every country in the world and is thus chronically difficult to observe;” and, that while “bribery as a phenomenon is as old as bureaucratic systems . . . the prevalence of large-scale transnational bribery is a recent occurrence” constituted in part by the “supply of bribes by investors from industrialized countries . . . .” *Id.* at 272–73.

<sup>86</sup> Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1588 PLI/CORP. 63, 81 (2007) (“For almost 25 years, the FCPA stood alone as the sole statute worldwide that criminalized the bribery of foreign public officials.”).

<sup>87</sup> Koehler, *supra* note 8, at 389.

<sup>88</sup> *Commercial Bribery*, *supra* note 59, at 28 (further indicating that most FCPA cases rarely reach trial and are, instead, resolved by guilty pleas or pleas of no contest).

<sup>89</sup> Koehler, *supra* note 8, at 396 (noting that the business community generally assumed resource extraction companies doing business in emerging markets faced the greatest risk related to the FCPA).

*A. Modern Developments*

The last decade, however, has witnessed drastic changes in the domestic<sup>90</sup> and international landscape with regard to corruption in the public and private sectors—the attitude of both the developed and developing world has changed.<sup>91</sup> The United States is now actively coordinating its FCPA enforcement activities with dozens of other countries; foreign governments are both assisting the United States and pursuing their own independent prosecutions. A large variety of multi-lateral initiatives have resulted in major regional conventions on bribery, corruption, and increased prosecution.<sup>92</sup> Briefly, the significant new conventions and noteworthy components that business practitioners should be aware of are as follows: the Inter-American Convention Against Corruption (facilitates international cooperation in gathering evidence, seizing assets, and enforcing forfeiture actions);<sup>93</sup> the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (fosters increased international cooperation in the investigation and prosecution of transnational bribery, including standards for addressing jurisdictional conflicts, and also lacks any exception for “facilitating” payments);<sup>94</sup> Council of Europe Criminal and Civil Law Conventions on Corruption (provides for the criminalization of both active and passive (i.e., receipt) domestic bribery in the private sector, includes explicit provisions regarding corporate liability (criminal),<sup>95</sup> and extends jurisdiction to illicit actions of members of international parliamentary assemblies, judges, and other officials of international courts (civil));<sup>96</sup> the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU) (prohibits bribery of public officials in the EU);<sup>97</sup> the African Union Convention on Preventing and Combating Corruption (covers bribery in the public and private sectors, protects whistleblowers, and provides a framework for cross-border enforcement);<sup>98</sup> and, the United Nations Convention Against Corruption (establishes mandatory preventative measures and criminalized obligations for both public and private sectors, provides private causes of action for victims of corruption, includes extensive anti-money laundering measures, and has a provision for cooperation in investigation, prosecution, and asset recovery).<sup>99</sup>

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<sup>90</sup> Taylor, *supra* note 21, at 3 n.2 (“[W]hile it was already the world’s leading prosecutor of foreign bribery offenses, ‘the [DOJ] brought more FCPA prosecutions in the last five years than in all of the previous 26 years dating back to the passage of the FCPA in 1977.’” (citing Office of the Attorney General, Dep’t of Justice, *The Accomplishments of the U.S. Department of Justice 2001-2009*, 37 (2009))).

<sup>91</sup> Low, *supra* note 86, at 81; *see also* Koehler, *supra* note 8, at 416 (noting that enforcement of anti-corruption laws has ramped up around the globe).

<sup>92</sup> Taylor, *supra* note 21, at 3.

<sup>93</sup> Low, *supra* note 86, at 81–85.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Baker, *supra* note 15, at 672.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 673.

<sup>99</sup> Low, *supra* note 86, at 85–86. The UN Convention is “conceptually the most ambitious,” and

Finally, the major international financial institutions are also actively implementing policies and programs designed to mitigate bribery and corruption.<sup>100</sup> These include the World Bank, International Development Association,<sup>101</sup> World Trade Organization, and International Monetary Fund.<sup>102</sup>

### *B. Noteworthy Trends*

The increasing global focus, and the success of the world community's efforts at addressing bribery and corruption, have catalyzed the development of a handful of notable domestic trends in FCPA enforcement. These trends are of practical importance to business practitioners.

First, both federal enforcement agencies (i.e., the SEC and DOJ) are taking increasingly aggressive action against FCPA violations.<sup>103</sup> In fact, today each agency typically oversees more than seventy FCPA investigations at any given time.<sup>104</sup> These historically high levels of enforcement are complimented by the fact that each agency's areas of enforcement are slightly different. As a result, "many companies have faced parallel enforcement actions by both entities."<sup>105</sup> In addition, the FCPA's reach continues to grow as both agencies have demonstrated a broadened enforcement focus (e.g., including both charitable and political contributions), and aggressive use of other statutory authorities (i.e., bringing additional charges against alleged FCPA violators, including: money laundering, wire fraud, tax evasion, false statements, racketeering, conspiracy, and anti-fraud provisions of the securities laws).<sup>106</sup> Consequently, "it is becoming increasingly common for companies to be subjected to simultaneous or sequential investigations by U.S. authorities," and then, thanks to the aforementioned increase in international focus, foreign authorities and other international institutions as well.<sup>107</sup> Thus, the FCPA has become "a three-headed monster"<sup>108</sup> that is only

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has already been ratified by more than eighty countries including several major emerging market countries that are not a party to any other anticorruption treaty (i.e., China, Russia, and Indonesia). *Id.* at 86.

<sup>100</sup> Baker, *supra* note 15, at 672–73.

<sup>101</sup> Low, *supra* note 86, at 89.

<sup>102</sup> Baker, *supra* note 15, at 673.

<sup>103</sup> *Id.* at 676; *see also* Koehler, *supra* note 8, at 416 ("[Assistant Attorney General] Breuer noted that the FCPA-specific FBI squad 'has been growing in size and in expertise over the past two years.' He announced that the DOJ has 'begun discussions with the Internal Revenue Service's Criminal Investigation Division about partnering with [the DOJ] on FCPA cases' as well as 'pursuing strategic partnerships with certain U.S. Attorney's Offices throughout the United States where there are a concentration of FCPA investigations.' The SEC has also ramped up its FCPA resources . . . creating a specialized FCPA unit.")

(quoting Lanny A. Breuer, Assistant Att'y Gen., The 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* [www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf](http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf)).

<sup>104</sup> Baker, *supra* note 15, at 676–77.

<sup>105</sup> Low, *supra* note 86, at 91.

<sup>106</sup> *Id.* at 67, 91, 104–11.

<sup>107</sup> *Id.* at 111 (recognizing that firms are often subjected to "simultaneous or sequential investigations by U.S. authorities and foreign authorities, as well as investigations by international institutions").

expected to get bigger.<sup>109</sup> It is little surprise then, that most FCPA cases are settled rather than litigated!<sup>110</sup>

Second, FCPA violations are being punished with increased severity,<sup>111</sup> as reflected by the assessment of significantly higher penalties and increasing disgorgement of profits.<sup>112</sup> In addition, enforcement agencies are making use of a broader array of enforcement tools.<sup>113</sup> These include agency discretion as to whether to prosecute a parent corporation, individual subsidiary, employee, agent, or a combination thereof.<sup>114</sup> Enforcement agencies are also using varied prosecution agreements, consent decrees, pleas, compliance monitoring, and other measures.<sup>115</sup> Again, this trend is expected to continue.

Third, the DOJ and SEC are each placing increasing emphasis on the efficacy of organizational compliance programs.<sup>116</sup> Notably, “[d]ecisions as to sentencing amounts, non-prosecution agreements, and investigation initiation are made substantially with an eye towards the business’ compliance program.”<sup>117</sup> With this in mind, business practitioners should focus particular attention on compliance issues related to foreign agency, as all of the 2009 FCPA enforcement actions against companies included foreign agent conduct.<sup>118</sup>

Fourth, recent years have seen a noteworthy increase in self-reporting.<sup>119</sup>

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<sup>108</sup> Koehler, *supra* note 8, at 396 (“Because improper payments that violate the FCPA’s antibribery provisions are also often disguised or inaccurately recorded on the company’s books and records, many FCPA enforcement actions against Issuers include parallel DOJ and SEC enforcement actions for both antibribery and books and records violations. Further, internal control violations are often also pursued in connection with antibribery and books and records violations on the theory that effective internal controls would have prevented the improper payments and improper recording of the payments. Thus, as to Issuers, the FCPA is often a three-headed monster when improper payments are made.”).

<sup>109</sup> *Id.* at 417 (recognizing that “such parallel or ‘tag-along’ enforcement actions in other jurisdictions as to the same core conduct at issue in a U.S. FCPA prosecution is (sic) expected to become a new norm in this decade”); *see also* Baker, *supra* note 15, at 678 (stating that, “[a]mong the developments that are anticipated are widespread multi-jurisdictional anti-bribery efforts with facilitated cross-border evidence gathering, asset seizures, speedy extradition, and increased scrutiny of American firms abroad, often without constitutional safeguards”); *see generally* Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement*, 3, 6–7 (2008), available at [http://www.shearman.com/files/upload/FCPA\\_Trends.pdf](http://www.shearman.com/files/upload/FCPA_Trends.pdf).

<sup>110</sup> Low, *supra* note 86, at 77; *see also* Taylor, *supra* note 21, at 8 (recognizing that the FCPA currently triggers the largest proportion of pre-trial agreements with government enforcement officials); Koehler, *supra* note 8, at 406–07 (“Business entities involved in FCPA enforcement actions have historically shown zero interest in challenging the enforcement agencies’ aggressive prosecution theories, holding the agencies to their burden of proof, and enduring the uncertainties of trial. In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years. . . . Individuals involved in an FCPA enforcement action, faced with a loss of liberty, are more inclined to challenge the enforcement agencies and the summer of 2009 was the most active trial period in the history of the FCPA.”).

<sup>111</sup> Baker, *supra* note 15, at 677.

<sup>112</sup> Low, *supra* note 86, at 67, 92; *see also* Taylor, *supra* note 21, at 8.

<sup>113</sup> Low, *supra* note 86, at 93.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (noting that enforcement agencies are using non-prosecution agreements, deferred prosecution agreements, and compliance monitoring with three-year mandates).

<sup>116</sup> Baker, *supra* note 15, at 677.

<sup>117</sup> *Id.*

<sup>118</sup> Koehler, *supra* note 8, at 402.

<sup>119</sup> Baker, *supra* note 15, at 677.



Whether or not due to the ominous threat posed by increased enforcement activity, “an increasing number of firms are making voluntary disclosures of FCPA violations in order to limit the chances of and/or impact of FCPA prosecutions.”<sup>120</sup> To this end, “[t]he SEC and DOJ have announced the official policy of favorable treatment for voluntary disclosure, often resulting in fines well below the Guidelines.”<sup>121</sup> Nonetheless, voluntary disclosure is the subject of increasing controversy, as the apparent benefits have not been conclusively quantified and are still perceived to be uncertain.<sup>122</sup>

Fifth and finally, the enforcement agencies have demonstrated an increased willingness to bring FCPA enforcement actions against individuals, both foreign and domestic.<sup>123</sup> This focus is intentional.<sup>124</sup> “The deterrent effect of an individual losing his or her liberty is . . . more powerful than a corporation paying a multi-million [dollar] fine with corporate money.” This trend is particularly significant for business practitioners because the SEC has historically charged business executives under indirect theories of liability, and 2009 saw a unique expansion of this precedence.<sup>125</sup>

#### IV. BRIBES, “GREASE PAYMENTS,” AND BUSINESS PRACTITIONERS

The FCPA includes one exception and two affirmative defenses against otherwise actionable conduct. However, business practitioners should note that these provisions are quite limited in their effect, as demonstrated by the examples to follow.

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<sup>120</sup> Taylor, *supra* note 21, at 8.

<sup>121</sup> Baker, *supra* note 15, at 677 (citing case documentation claiming fines averaging twenty percent lower where firms self-report).

<sup>122</sup> Low, *supra* note 86, at 92.

<sup>123</sup> Baker, *supra* note 15, at 667; *see also* Low, *supra* note 86, at 99 (providing examples including lawyers, accountants, and corporate executives); *see also* Koehler, *supra* note 8, at 405 (“Another significant development from the 2009 enforcement year is a demonstrated commitment by the DOJ to target ‘foreign official’ recipients of bribe payments. In a November 2009 speech at [a] global anti-corruption conference, Attorney General Eric Holder urged nations to work together to ensure that ‘corrupt officials do not retain the illicit proceeds of their corruption’ and announced a ‘redoubled commitment on behalf of the [DOJ] to recover’ funds obtained by foreign officials through bribery. Because the FCPA only applies to bribe-payers and not bribe-takes, the FCPA is not a tool in DOJ’s pursuit of ‘foreign officials.’ But other legal avenues are available . . .” (quoting Eric Holder, Att’y Gen., Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>)).

<sup>124</sup> Koehler, *supra* note 8, at 404 (“Assistant Attorney General Lanny Breuer . . . underscored this point when he said . . . ‘prosecution of individuals is a cornerstone of [DOJ’s] enforcement strategy,’ and that ‘the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.’” (quoting Lanny A. Breuer, Assistant Att’y Gen., The 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf>)).

<sup>125</sup> *Id.* at 415. The 2009 Nature’s Sunshine Products (NSP) prosecution was the “first time the SEC has used a ‘control person’ theory of liability in an FCPA enforcement action.” *Id.* The SEC alleged that two of NSP’s executives had “supervisory responsibilities” over senior management and corporate policy, and thus the company’s violations were essentially their own. *Id.* The author notes that the SEC’s language here should “induce a cold sweat in any executive.” *Id.* at 414–15.

A. The “Grease” Payment Exception

The FCPA’s sole statutorily mandated exception permits gratuities for government officials who perform “routine governmental actions.”<sup>126</sup> These gratuities are also known as “facilitating” or “grease” payments<sup>127</sup> because they can be used to “expedite or secure the performance” of certain governmental actions, as noted.<sup>128</sup> An example of such a “grease” payment would be a small tip given to a government worker in order to obtain faster service than otherwise normally experienced.<sup>129</sup> However, although seemingly simple, this provision has been the subject of controversy since the FCPA was first established.<sup>130</sup> Thus, a good ‘rule of thumb’ for business practitioners is that a grease payment “is paid to get a government employee to do what she should do, whereas a corrupt bribe is paid to get a government employee to do what she should *not* do.”<sup>131</sup>

Still, a more sophisticated understanding is helpful because the phrase “routine governmental action” is actually defined very narrowly in the statute.<sup>132</sup> In fact, Congress has specified four types of actions as being “routine governmental actions.” These include: 1) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; 2) processing governmental papers, such as visas and work orders; 3) obtaining police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or the transit of goods; and, 4) obtaining phone service, or power or water supply, loading or unloading cargo, or protecting perishable products or commodities from deterioration.<sup>133</sup> Congress also included a fifth ‘catch-all’ category for “other similar activities . . . ordinarily and commonly performed by an official.”<sup>134</sup>

While this explication ought to be helpful, a number of challenges remain. First, “grease” payments cannot be for purposes that can be construed as encouraging an official to award new business or continue old business.<sup>135</sup> Second, “grease” payments must only ‘facilitate’ actions that are purely

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<sup>126</sup> 15 U.S.C. §§ 78dd-1(b) (issuers), 78dd-2(b) (domestic concerns), 78dd-3(b) (any person) (2006).

<sup>127</sup> Thomas P. Knoten, *The Foreign Corrupt Practices Act: Practicable Considerations for U.S. Corporations*, 55 J. MO. B. 39, 39 (1999).

<sup>128</sup> 15 U.S.C. §§ 78dd-1(b) (issuers), 78dd-2(b) (domestic concerns), 78dd-3(b) (any person) (2006).

<sup>129</sup> Knoten, *supra* note 127, at 39.

<sup>130</sup> Brown, *supra* note 10, at 81.

<sup>131</sup> Knoten, *supra* note 127, at 39. *See also* Nichols, *supra* note 10, at 271. Some scholars make the distinction as between “according-to-rule benefits” and “against-the-rule benefits”—the first are benefits that the bribe-giver should have received pursuant to the rules, and the bribe-taker takes action that he or she should have taken anyway. *Id.* “Common examples include matters such as routine government approvals or the provision of basic government services.” *Id.* Bribes paid to obtain these benefits are “facilitating payments.” *Id.*

<sup>132</sup> Taylor, *supra* note 21, at 6.

<sup>133</sup> Brown, *supra* note 10, at 81; *see also* Low, *supra* note 86, at 76.

<sup>134</sup> Low, *supra* note 86, at 76.

<sup>135</sup> Baker, *supra* note 15, at 662.

“ministerial,” or in other words, “non-discretionary.”<sup>136</sup> Third, there is no statutorily proscribed maximum dollar amount, or set guideline for appropriate “grease” payment size.<sup>137</sup> And fourth, the “grease” payment exception is not mirrored in the domestic bribery laws of many foreign countries and institutions and, thus, frequently raises conflict-of-law issues.<sup>138</sup> Suddenly, the confusion and genesis of the enduring controversy becomes clear.<sup>139</sup>

### B. The Affirmative Defenses

The FCPA also provides two affirmative defenses, which remove liability for payments that fall into either of two specific categories.<sup>140</sup> The first affirmative defense relates to payments that are legal in the country in which they are made.<sup>141</sup> Because the statutory language requires that the payment-justifying laws be written, “a firm or individual charged with a violation cannot simply point to customary practice in the relevant country” to apply this defense.<sup>142</sup> Consequently, this defense is rarely used, and probably only applies in very limited factual situations.<sup>143</sup>

The second affirmative defense provides leeway for “reasonable and bona fide expenditures.”<sup>144</sup> It is much more frequently used in practice<sup>145</sup> and is

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<sup>136</sup> *Id.*; see also Taylor, *supra* note 21, at 6 (“The definition of the phrase negates the inclusion of any conduct by a foreign official that hinges upon decision-making, *i.e.*, the exercise of discretion. Congress insisted upon this type of interpretation in the legislative history of the statute, noting that it would not consider ‘ordinarily and commonly performed’ actions with regard to issuing permits or licenses to include ‘those governmental approvals involving an exercise of discretion by a government official where the actions are the functional equivalent of obtaining or retaining business for or with, or directing business to, any person.’” (quoting H.R. REP. NO. 100-576, at 921 (1988) (Conf. Rep.)).

<sup>137</sup> Baker, *supra* note 15, at 662. The author continues by noting that all payments found to fall within the “grease” payment exception have been less than \$1000. Additionally, courts have yet to interpret this exception, but commentators suggest that the correct focus is on the payer’s intent and purpose of the payment, instead of the amount of the payment. See also Taylor, *supra* note 21, at 6. “There is no set limit on the amount that can be paid as a facilitating payment. The crucial issue is not really value but purpose.” *Id.*

<sup>138</sup> Low, *supra* note 86, at 76. Low continues by noting that there is also no parallel exception on the books and records side of the statute for such payments. *Id.*

<sup>139</sup> See Koehler, *supra* note 8, at 394 (“Post-Kay there has been an explosion in FCPA enforcement actions, including actions in 2009, where the alleged improper payments involve customs duties and tax payments or are otherwise alleged to have assisted the payer in securing foreign government licenses, permits, and certifications which assisted the payer in generally doing business in a foreign country.”).

<sup>140</sup> 15 U.S.C. §§ 78dd-1(c) (issuers); 78dd-2(c) (domestic concerns); 78dd-3(c) (any person) (2006).

<sup>141</sup> *Id.*

<sup>142</sup> Taylor, *supra* note 21, at 6 (“Congress noted clearly in the legislative history that the absence of written laws ‘would not by itself be sufficient to satisfy this defense.’” (quoting H.R. REP. NO. 100-576, at 922 (1988) (Conf. Rep.)).

<sup>143</sup> Low, *supra* note 86, at 77 (“The facts of most cases rarely support the application of the first defense, especially if it is construed in accordance with its literal terms. Nevertheless, it may be applied . . . to transactions or activities which are legally compelled by [a] host country’s written laws . . . for example, the requirement that a parastatal entity participate in a project, or that the investor satisfy other terms or conditions mandated by the government.”).

<sup>144</sup> 15 U.S.C. §§ 78dd-1(c) (issuers); 78dd-2(c) (domestic concerns); 78dd-3(c) (any person) (2006); see also Baker, *supra* note 15, at 663 (noting that “[t]he second affirmative defense encompasses payments, gifts, offers, or promises of anything of value . . .”).

important for any business practitioner or organization active abroad.<sup>146</sup> In order to qualify under this defense, payments must “relate directly to the promotion, demonstration, or explanation of products or services, or to the execution or performance of a contract”—obviously, corrupt bribes do not qualify.<sup>147</sup> However, payments made to reimburse foreign officials for expenses directly associated with visits to product demonstrations, or tours of company facilities do qualify.<sup>148</sup> Notably, while no court has interpreted this defense,<sup>149</sup> the DOJ does facilitate an FCPA review procedure that provides companies an advance ruling from the DOJ as to whether or not a proposed activity would provoke FCPA enforcement.<sup>150</sup> In addition, business practitioners can review published DOJ opinions requested by other firms with questions regarding particular transactions.<sup>151</sup> Many of these relate to “the acceptability of payments made for traveling and entertainment expenses connected to business,” which is one of the main areas of recent concern for business practitioners.<sup>152</sup>

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<sup>145</sup> Low, *supra* note 86, at 77.

<sup>146</sup> Taylor, *supra* note 21, at 7.

<sup>147</sup> *Id.*

<sup>148</sup> Low, *supra* note 86, at 77.

<sup>149</sup> Baker, *supra* note 15, at 663.

<sup>150</sup> *Commercial Bribery*, *supra* note 59, at 28 (noting that a favorable response from the DOJ sets up a presumption in favor of the legality of the company’s conduct).

<sup>151</sup> DOJ Opinion Releases are available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/>. Business practitioners should note that each DOJ opinion issued has no binding application on any party which did not join in the specific request, and contains boilerplate language to that effect. However, the successful requests will offer business practitioners some idea of whether they can justify certain types of expenditures, and how to go about doing so.

<sup>152</sup> Taylor, *supra* note 21, at 7.

[The] major FCPA settlement in 2007 against Lucent Technologies may make more companies concerned about the extent of the payments that qualify as reasonable business expenses. A reading of the 2008 Opinion Releases on the topic suggests that the DOJ recognizes that transportation costs, meals and lodging for business-connected visits or trips by government officials or employees can be legitimate but that the business purpose needs to be clear and the expenses need to be proportionate to the activity involved.

*Id.* Accordingly:

The [DOJ] has upheld the payment of travel expenses by several state agricultural departments for foreign officials to visit the United States to sample and test agricultural products and to witness demonstrations for the purpose of promoting their states’ products. The [DOJ] has also allowed U.S. firms to pay the expense of foreign officials to visit the U.S. in order to tour facilities used in the performance of contracts, or to attend training required by a contract.

Brown, *supra* note 10, at 82. Thus:

[T]he DOJ’s released opinions indicate that expenditures are more likely to be considered “reasonable and bona fide” (i) when made directly to the service provider as opposed to the government official, and (ii) where the company making the payments does not have pending business with the government agency whose employees’ are receiving the benefits of the expenditures.

Baker, *supra* note 15, at 663–64.

*C. Bribery in Action: Practitioner-Focused Examples*

To begin, *United States v. Metcalf & Eddy*<sup>153</sup> presents business practitioners with an example of a flagrant FCPA violation. In this case, the company provided travel advances and hotel upgrades for two separate international trips (one to the United States and the other to Europe) unrelated to business for the chairman of an Egyptian municipal sanitation and drainage organization—and his wife and two children.<sup>154</sup> In return, the company secured the chairman’s influence over the review of bids for a project funded by the United States Agency for International Development (USAID).<sup>155</sup> Accordingly, the company was charged with violations of both the anti-bribery and accounting provisions of the FCPA, and settled.<sup>156</sup> The Metcalf case is not imbued with any particular moral for business practitioners to note—other than the obvious connotation that *bribery is wrong, and potentially expensive*.

*United States v. Kay*<sup>157</sup> is a closer call. Officers at American Rice, Inc., Douglas Murphy and David Kay, allegedly authorized payments to Haitian customs officials to induce their acceptance of documents understating the quantity of rice the company shipped by approximately one-third.<sup>158</sup> This would understandably affect a decrease in both the customs duties and sales taxes owed by American Rice.<sup>159</sup> Initially, a federal district court dismissed the indictment saying that these payments were “facilitating” payments not made to “obtain or retain business;” however, the Court of Appeals for the Fifth Circuit reversed that decision, saying that the reduction in taxes and duties lowered the costs associated with doing business and could, therefore, fall within the scope of the “obtain or retain business” element of the FCPA bribery offense.<sup>160</sup> This is a very significant holding because *it forces business practitioners to acknowledge that “business” under the FCPA is more than contracts*, but also relates to administrative actions where payment activity is “intended to produce an effect . . . that would ‘assist in obtaining or retaining business.’”<sup>161</sup> Stated alternatively, under certain circumstances otherwise excepted facilitating payments *may* nonetheless violate the FCPA!

Finally, *Baker Hughes Inc.*<sup>162</sup> adds an interesting twist, and demonstrates the potential consequences for falling short with regard to due diligence. The case involves payments made by an acquired entity through subsidiaries to agents in India and Brazil, “without determining to whom the money ultimately would be

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<sup>153</sup> *United States v. Metcalf & Eddy*, Case No. CV-99-12566 (D. Mass. 1999).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Metcalf & Eddy paid a fine of \$400,000, agreed to reimburse costs of the investigation, agreed to implement an FCPA compliance program including financial and accounting controls, and acquiesced to conducting periodic reviews of these programs. *Id.*

<sup>157</sup> *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 756.

<sup>162</sup> In the Matter of Baker Hughes Inc., Exchange Act Release No. 1444 (Sept. 12, 2001).

paid or the specific purpose of the payment,” and thereby inaccurately described in business records.<sup>163</sup> Notably, the payments were not particularly large: In India, a subsidiary paid \$15,000 to obtain shipping permits; similarly, in Brazil, the company approved a \$10,000 payment to obtain approval for in-country corporate restructuring.<sup>164</sup> The interesting twist, however, is that Baker Hughes’ FCPA liability did not center on whether or not the payments made were actual bribes—they may well have been legitimate “grease” payments. Instead, the FCPA violation occurred when Baker Hughes failed *during the merger process* to perform the due diligence necessary to ensure that the payments were *not* bribes.<sup>165</sup> Thus, this decision goes a step further than *Kay* in demonstrating that *FCPA liability can surface even when an organization is engaged in an excepted activity* (e.g., making “facilitating” payments) if that activity is not undertaken in complete compliance with the obligations promulgated by the FCPA.

## V. BACK TO THE FUTURE—THE FCPA AND BUSINESS PRACTITIONERS

### A. Salient Points for Business Practitioners

First, business practitioners must recognize that FCPA risk is omnipresent, as this article has noted several times.<sup>166</sup> More significantly, however, this risk applies not just to organizations, but to individuals as well.<sup>167</sup> Second, business practitioners must appreciate that, despite the FCPA’s vintage, “only limited guidance exists on how to comply with its provisions.”<sup>168</sup> Both the lack of implementing regulations or DOJ-issued guidelines,<sup>169</sup> and the enforcement agencies’ aforementioned enterprising aggressiveness, necessitate that business practitioners proceed with caution. Third, business practitioners should understand that FCPA considerations inherently imply additional legal risks beyond those previously discussed. Notably, “[w]hen allegations of corruption arise against a publicly-traded company . . . the risk of a shareholder derivative suit can increase.”<sup>170</sup> In addition, “[w]hile individuals cannot bring private actions under the FCPA, courts have allowed private parties to bring FCPA civil claims under

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<sup>163</sup> *Id.* at 13.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Koehler, *supra* note 8, at 396.

[T]he FCPA does not discriminate against any one industry doing business in any particular country. The 2009 enforcement year also demonstrates that it is just not Asian, African, or Middle Eastern markets that present FCPA risks as several of the [2009 corporate FCPA] enforcement actions concerned conduct “closer to home” in the Western Hemisphere – a region that is often overlooked in terms of FCPA compliance. The breadth of 2009 enforcement actions, both in terms of the companies involved and the countries where the alleged conduct took place, show that FCPA risk is present in all industries operating in all countries.

*Id.* at 398.

<sup>167</sup> Taylor, *supra* note 21, at 9.

<sup>168</sup> Low, *supra* note 86, at 77.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 111.

the civil provisions of RICO,” and “[p]rivate parties may also bring violations of the FCPA to the attention of [the DOJ and SEC].”<sup>171</sup> Finally, competitors may advance allegations as well.<sup>172</sup> Fourth, business practitioners must learn to spot FCPA issues and understand the statute’s prohibitions. There are several basic questions business practitioners can familiarize themselves with as a rough diagnostic to help identify potential FCPA violations, or at least define concerns in need of further scrutiny.<sup>173</sup> Fifth, business practitioners must learn to identify potential bribes. There are essentially six ‘red flags’ that increase the likelihood of prohibited illicit activity and evidence the need for further investigation: commissions in excess of the going rate; requests for payments in cash, or to areas other than those where the underlying contract is being performed; urgings by foreign government decision makers to utilize the services of a specific agent; use of more than one agent when the economic rationale for doing so is absent, inadequate, or illusory; and requests by an agent to increase commissions during the course of active negotiations.<sup>174</sup> Sixth, business practitioners must implement comprehensive FCPA compliance programs. The importance of this final preventative point cannot be overstated! Affirmative preliminary action to this end will, at best, keep business practitioners from having to deal with the FCPA enforcement agencies and, at worst, limit the impact of litigation should enforcement materialize.<sup>175</sup> Therefore, the next section provides business practitioners with a framework for getting started.

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<sup>171</sup> Baker, *supra* note 15, at 664–65; *see also* Low, *supra* note 86, at 112 (“Companies also tread on delicate ground when dismissing or terminating employees or third parties, even when these dismissals or terminations are based upon a finding or belief that the employee or third party has engaged in improper conduct. Indeed, in several recent cases employees terminated in connection with or coincidental to the investigation of corruption issues have brought suit against their former employers.”).

<sup>172</sup> Low, *supra* note 86, at 112 (indicating that the last few years have seen competitors in both the oil and telecommunications industries invoke the civil racketeering statute to bring suit alleging improper competition based on allegations of corruption).

<sup>173</sup> Knoten, *supra* note 127, at 40 (summarizing Michael R. Geroe, *Complying with U.S. Antibribery Law*, 31 INT’L LAW 1037 (Winter 1997)). Questions include: 1) Is the actor an issuer or a domestic concern? 2) Is there a “corrupt” intent in the activity? 3) Is there activity “in furtherance of” a promise or provision of something of value? 4) Does the promise or payment make use of interstate commerce? 5) Is the recipient of the payment or promise a foreign official or other covered entity? 6) Was the payment provided to obtain or retain business? *Id.*

<sup>174</sup> *Id.* at 41.

<sup>175</sup> Taylor, *supra* note 21, at 6. “Obviously, a company needs to consider whether to develop a policy defining what a facilitating payment is or having a system for authorizing such payments since it might have to persuade the DOJ and the courts about whether any questioned payments qualify.” *Id.*

Given the breadth of the FCPA and its interpretation by the SEC, the DOJ and the courts, all U.S. companies conducting business internationally must create and implement compliance programs. By establishing such programs and by conducting rigorous investigations of potential violations of the Act, corporations can both signal to the enforcement authorities their intention to comply and prevent or limit the impact of prosecutions and litigation. These programs should cover both sets [i.e., accounting and anti-bribery provisions] of FCPA obligations.

*Id.* at 7.

### B. Guidelines for Compliance

“The establishment of procedures to ensure compliance with the FCPA, and the practice of due diligence through self-monitoring and reporting to the board of directors, should . . . be standard for public companies conducting international business.”<sup>176</sup> Fortunately, the standard elements of such a compliance program are widely agreed upon.<sup>177</sup> First, a company implementing a new compliance program (or updating an existing one) should begin by assessing its risk of FCPA non-compliance.<sup>178</sup> This includes considering the extent of its dealings with foreign officials, use of agents, existing corporate culture and ethics, current compliance policies, and array of operations.<sup>179</sup> Efforts toward the establishment of an FCPA compliance program should also be documented from the very beginning as well.<sup>180</sup> Second, a company should develop a written code of conduct with clear standards on FCPA issues, and endeavor to create a “culture of compliance” within the corporation.<sup>181</sup> The firm should make its FCPA policies and determination to eliminate corruption clear from the top down.<sup>182</sup> Third, the company should develop due diligence procedures for retaining foreign agents and making acquisitions in order to examine relevant parties or potential relationships for “red flags.”<sup>183</sup> Fourth, the company should provide FCPA-related training for all internal constituents.<sup>184</sup> Fifth, the company must provide a retaliation-free system for reporting potential FCPA violations. Sixth, create a disciplinary mechanism for investigating and punishing those violations.<sup>185</sup> Seventh, the company should enlist an independent audit program for regular review.<sup>186</sup> Finally, eighth, the company should begin structuring all transactions with the FCPA in mind.<sup>187</sup> This hinges on clearly establishing the terms of engagement between the company and any foreign entity, and can be affected by means of pertinent provisions in all contracts involving foreign parties.<sup>188</sup>

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<sup>176</sup> Baker, *supra* note 15, at 674.

<sup>177</sup> Taylor, *supra* note 21, at 7.

<sup>178</sup> Baker, *supra* note 15, at 674.

<sup>179</sup> *Id.* “Companies should focus proportionally more resources on FCPA compliance in those countries that rate highly on corruption indices.” *Id.*

<sup>180</sup> *Id.* “It is essential that all efforts to implement and update compliance programs are carefully documented: in the event of an investigation, the DOJ and SEC consider the compliance program in determining whether to indict the corporation or to prosecute the individual employee(s).” *Id.*

<sup>181</sup> Taylor, *supra* note 21, at 8.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* (including domestic and foreign employees and affiliates); *see also* Baker, *supra* note 15, at 675 (noting that a company needs “a specific and unambiguous policy on how it expects its U.S.-based employees and agents to conduct business in a foreign environment” (quoting William L. Jennings & Craig A. Gillen, *Complying with the Foreign Corrupt Practices Act*, NAT’L L.J., C10 (1995)).

<sup>185</sup> Taylor, *supra* note 21, at 8.

<sup>186</sup> *Id.*

<sup>187</sup> Baker, *supra* note 15, at 676.

<sup>188</sup> *Id.*; *see also* Knoten, *supra* note 127, at 40 n.12 (exemplifying a typical boilerplate clause to this effect: “Licensee agrees that neither it nor any of its directors, officers, employees, subcontractors or agents will make any offer, payment, promise to pay or authorization of the payment of any money, offer, gift, promise to give, or authorization of the giving of anything of value to any official, political



## VI. CONCLUSION

Given the uncontroverted expansion in FCPA reach and enforcement, and the growing global focus on rooting out corruption, it is more crucial than ever before for business practitioners to understand the risks posed by the FCPA and act to mitigate them. This includes understanding how to stay within the statutorily provided margins and avoid bribery of “foreign officials.” In addition, diligence demands that business practitioners develop effective FCPA compliance programs, and implement them effectively. Prioritizing these concerns will minimize the exposure business practitioners face as individuals, and in their corporate lives. In addition, when all else fails and FCPA enforcement becomes a reality, such cognizance will allow business practitioners to respond to any FCPA issues presented so as to minimize potential detriment.

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party, party official or political candidate or any person, knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly to any official, political party, party official or political candidate, for the purpose of retaining business for or with, or directing business to, Licensee or Licensor. As used in this section, the term ‘official’ refers to any officer or employee in private or public service and includes any officer or employee of a government, or any department, agency or instrumentality thereof, or any person acting in such an official capacity for or on behalf of any such government or any department, agency or instrumentality thereof.”).