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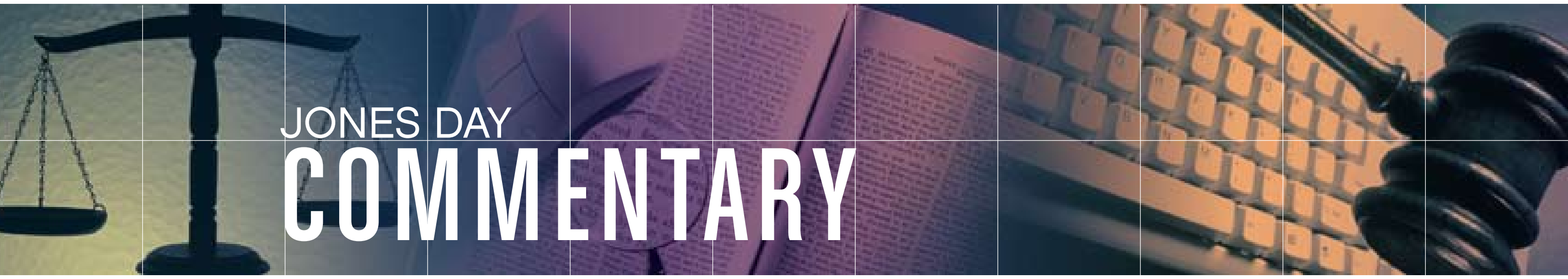

THE FOREIGN CORRUPT PRACTICES ACT: WALKING THE FINE LINE OF COMPLIANCE IN CHINA

Congress enacted the Foreign Corrupt Practices Act ("FCPA" or "the Act")[1] in 1977 in response to the Watergate scandal. Extensive media exposure of unreported campaign contributions and potentially illegitimate payments to foreign officials prompted the Securities and Exchange Commission ("SEC") to initiate an investigation. The SEC's investigation ultimately revealed that more than 400 U.S. companies had paid bribes to foreign governments and politicians, totaling more than $300 million.[2] Congress held hearings at which a consensus developed: These payments were not just unethical, but they were bad business and undermined confidence in U.S. business.[3] Thus, the FCPA came into being as the primary law enforcement tool to stop the bribery of foreign officials and to restore confidence in corporate America.[4]

This *Commentary* explores the FCPA's far-reaching impact on U.S. companies doing business in China, and the ways in which the FCPA's application in China differs in important ways from other countries. The *Commentary* ends with four specific suggestions for how a company may proactively avoid FCPA violations while doing business in China.

THE FCPA: AN OVERVIEW OF THE LAW AND THE ISSUES IT PRESENTS IN CHINA

The FCPA has had an enormous impact on how U.S. companies do business abroad. Violations of the Act have resulted in companies paying fines of more than $44 million,[5] while individuals have gone to prison for the maximum term of five years.[6] Potential sanctions also include disqualification from U.S. government procurement contracting and denial of export licenses.[7] Furthermore, the Department of Justice ("DOJ") or SEC may bring a civil action to enjoin an act or practice whenever it appears the company is in violation of the antibribery provisions.[8]

The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm, and any stockholder acting on behalf of a firm,[9] and generally

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prohibits the payment of bribes to foreign officials to obtain business. Specifically, under the FCPA, it is unlawful to "corruptly [do an act] in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to "any foreign official . . . to assist . . . in obtaining or retaining business."[10] Thus, the elements of an FCPA offense are to (1) corruptly (2) pay (3) a foreign official (4) to assist in obtaining or retaining business.

The main obstacles U.S. companies face when trying to comply with the FCPA while doing business in China relate to (i) the elements of corruption that may exist in Chinese business dealings,[11] (ii) the Chinese government's extensive involvement in the economy, and (iii) certain Chinese business practices that may be inconsistent with Chinese or U.S. law.

The "Corruption" Prong and Business Practices in China. An FCPA violation requires that an action be taken with a corrupt intent. The word "corruptly" connotes "an evil motive or purpose, an intent to wrongfully influence the recipient" of the payment or offer "to misuse his official position or to influence someone else to do so."[12] The Act does not require that the corrupt act be successful in its purpose; it merely requires that there is an "offer" or "promise" intended to influence a foreign official, or to induce a foreign official to misuse his position to secure an improper advantage.[13]

Although China has made great efforts to combat elements of corruption—through enactment and enforcement of stringent antibribery laws and penalties—it still remains a cause of concern in the China business market.[14] For example, in 2005, 11,071 members of the Communist Party of China ("CPC") were expelled from the party as punishment for corruption.[15] Furthermore, Chinese courts dealt with 120,000 cases of embezzlement, bribery, and dereliction of duty over the past five years.[16] Given the size and importance of China's economy, these issues also cause concern for U.S. companies doing business in China.

Importantly, the FCPA provides an exception to liability for payments that are "lawful under the written laws or regulations" in the recipient's country.[17] Companies should not assume, however, that customary (albeit possibly questionable) business practices in the host country are necessarily legal. Indeed, even though other countries typically are subject to constraints similar to those imposed by the FCPA, the antibribery laws of many countries—including China—may be underenforced, which can create an uneven playing field for companies from countries that strictly enforce their antibribery laws. Because Chinese and other foreign companies may make illegal payments in China with limited risks, U.S. companies doing business in China may feel commercial pressure to violate the Act to avoid finding themselves at a competitive disadvantage to companies that are not subject to the same laws or similar enforcement. For this reason, U.S. companies operating in China need a solid FCPA compliance program to avoid prosecution for FCPA violations and to avoid becoming entangled in China's domestic bribery and corruption laws.

The "Payment" Prong and China's Traditions of Gift Giving. The FCPA prohibits the payment, offer, gift, or authorization of the giving of money or of "anything of value."[18] The payment need not actually be made in order to violate the Act; rather, an offer, promise, or authorization of payment is sufficient. For example, promising to "make some gestures" if a contract is approved may violate the Act.[19]

Furthermore, the payment need not be monetary. The FCPA prohibits the payment or offer of payment of "anything of value."[20] "Anything of value" may include transporting supporters of the ruling party to vote in a close election in order to ensure renewal of a government contract,[21] as well as paying travel and entertainment expenses of a foreign official and his family.[22]

China has a long tradition of gift giving. This may be problematic for U.S. companies seeking to do business in China. Government officials and business contacts at state-owned enterprises may expect U.S. corporations to follow local custom, even when this custom may be at odds with Chinese regulations that cap the value of gifts that Chinese officials may legally accept at RMB 200 (US$24).[23] Thus, although local Chinese companies may ignore these gift-giving limitations, U.S. companies are faced with the quandary of potentially violating Chinese law and the FCPA, or possibly losing business.[24]

These issues came into focus by looking at specific Chinese customs. One example is the Chinese tradition of giving "red envelopes" that contain money at social events, such as during Chinese New Year or at weddings. This practice reportedly has been exploited by officials who solicit payments in exchange for services and benefits.[25] The choice is between making the payment and getting the business, or refusing to pay and losing the business, which may make the payment a part of doing business in China.[26]

Business entertainment is another part of Chinese culture. The entertainment of state-owned-enterprise business partners is a sound business practice that is a matter of common courtesy, just as is treating clients and potential clients to nice dinners. Hosting entertainment that is consistent with Chinese business culture, but not so generous as to trigger FCPA liability, however, may prove difficult. Although business courtesies are not categorically corrupt, the DOJ's broad reading of the FCPA permits entertainment expenses only to the extent permitted by the "written laws and regulations" of China. However, China's RMB 200 (US$24) cap on such expenses is likely to conflict with China's culturally accepted entertainment practices.[27]

In enacting the FCPA, Congress recognized that companies have a legitimate interest in bringing clients and potential customers to their facilities to demonstrate products. Accordingly, the FCPA exempts from liability payments for "reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . directly related to . . . the promotion, demonstration, or explanation of products or services."[28] Just what expense reimbursements are "reasonable and bona fide" and "directly related" to the "promotional" activities is another question, however. For example, the DOJ's broad reading of the FCPA may require that officials pay personally for any side trips and spousal costs.[29]

An example of this issue can be seen in *U.S. v. Metcalf & Eddy*,[30] where the government alleged that travel advances and expenses of a foreign official, his wife, and two children for trips to the United States were intended to influence the official rather than for legitimate promotional expenses.[31] Thus, the U.S. enforcement authorities took the view that payment for travel and entertainment expenses that included payment for first-class airfare was not reasonable and was therefore improper. Ultimately, expenses need to be reasonable in light of their stated purpose. To minimize the risk of potential FCPA violation, companies should consult their legal department before offering to pay for any travel-related expenses.

The "Foreign Official" Prong and the Impact of China's Government-Controlled Businesses. A payment may constitute an FCPA violation only if the recipient of the illegal payment, offer, or gift is a "foreign official."[32] The FCPA defines "foreign official" to mean "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, . . . or any person acting in an official capacity for or on behalf of any such . . . instrumentality."[33] This definition is sufficiently broad that it may cover any person in a position to make or influence a decision.[34]

State-Owned Enterprises. China's socialist market economy inextricably links governmental bureaucracy with Chinese businesses in what are known as state-owned enterprises ("SOEs"). The predominance of these SOEs transforms business dealings that are private in most countries into quasi-governmental relationships with potential FCPA risks. Notably, the financial services and telecom industries are business sectors where foreign investment is limited; thus, businesses within these industries often partner with an SOE. These partnerships can be complicated, with numerous and significant financial transactions, some of which may be in cash. If a U.S. investor does not carefully review these financial records, arguably improper payments may be made to government or SOE officials, thus potentially subjecting the company to the risk of alleged FCPA violations.

Additionally, the Chinese government's large role in the economy may make it difficult for U.S. businesses to distinguish between a "foreign official" and a nonofficial. Application of the definition of "foreign official" under the FCPA to officers and employees of SOEs is consistent with Chinese law and DOJ interpretations of "foreign official."[35] For this reason, U.S. companies with Chinese operations or business dealings in China should be aware that those individuals acting on behalf of an SOE may be considered to be a "foreign official" for purposes of the FCPA.[36]

Joint Ventures. Much of the U.S. direct investment in China takes the form of joint ventures with SOEs. Investment in joint ventures creates a risk of exposure to potential FCPA liability for the business operations of the joint venture, as liability may be imposed based on knowledge of the FCPA violations, not limited to control or majority ownership.[37] Thus, even for equity joint ventures in which the U.S. company lacks control of the business operations, the U.S. company may face potential FCPA exposure for the actions of third parties if the U.S. company knows or suspects a high probability that the intermediary will engage in corrupt practices.

Agents, Distributors, and Third-Party Intermediaries. The FCPA prohibits any payment made by U.S. companies to third parties with the knowledge that "all or a portion" of the payment will go "directly or indirectly" to a foreign official."[38] The elements are the same as for direct payments as discussed above,[39] except the recipient of the money is a third party who then makes the payment to the "foreign official." The knowledge requirement concerning the acts of the third party may be established if a person is "aware of a high probability" that the third party will commit a potential FCPA violation.[40] The knowledge requirement is designed to deter corporations from taking a "head-in-the-sand" attitude toward the practice of foreign bribery and prevents a company from doing indirectly through a third-party intermediary what it cannot do directly.[41]

The FCPA's restrictions on payments made to third parties can put U.S. companies at risk of FCPA liability when they engage the services of foreign agents or distributors to navigate foreign markets. U.S. companies should be aware that they could be held responsible for the actions of their agents under the theory of vicarious liability. For this reason, U.S. companies operating abroad also should be aware that the actions and conduct of their foreign agents may expose them to potential FCPA liability.

Relationships with distributors are more complex than relationships with agents. Distributors are independent parties, and many Chinese distributors resist entering into agreements to be bound by U.S. laws when the contract is to be performed entirely in China.[42] As a result, U.S. companies may have a difficult time controlling the actions of distributors operating in the Chinese market. Nonetheless, potential vicarious liability may attach for a distributor's alleged FCPA violations if a company is "aware of a high probability" that its local agent or distributor is making arguably improper payments to government officials to secure a business advantage.[43]

For example, Paradigm B.V. reported that it had uncovered potential FCPA violations of its employees and agents during pre-public-offering due diligence. Specifically, Paradigm discovered that its agent in China made commission payments to representatives of a subsidiary of the China National Offshore Oil Company ("CNOOC") to secure contracts for the sale of Paradigm's software products to the CNOOC subsidiary. Paradigm also acknowledged that it hired employees of other Chinese national oil companies as "internal consultants" so that these "consultants" would cause their employers' procurement divisions to purchase Paradigm products.[44] Paradigm disclosed this information to U.S. enforcement authorities and ultimately entered into a nonprosecution agreement with the DOJ and paid a $1 million penalty.

Successor Liability. U.S. companies also may be at risk for successor liability for alleged FCPA violations of the companies they acquire, which makes mergers and acquisitions another area for potential FCPA problems. U.S. enforcement authorities do not always view a merger or acquisition—whether by way of stock or asset purchase—as extinguishing liability for past unlawful conduct.[45] Thus, if one company acquires another, it may become responsible for the prior FCPA violations of the business it acquires. Thorough due diligence prior to an acquisition is critical to mitigating any risk of potential FCPA violations.

The "Business Advantage" Prong and the Purpose of the Payment in China. A payment may violate the antibribery provisions of the FCPA only if it is prompted by an improper purpose. The payment must be intended to induce a foreign official to act in consideration of a payment for the purpose of obtaining or retaining business, or for directing business to another person.[46] U.S. enforcement authorities have interpreted this language broadly and have applied it to a wide range of transactions, including payments for the purpose of obtaining favorable tax treatment,[47] payments to obtain tax refunds,[48] and payments to obtain favorable pipeline tariff rates.[49] Notwithstanding the broad reading given the business advantage prong, the DOJ has indicated that it may decline to take enforcement action with respect to proposed payments to a foreign official if it is satisfied that the foreign official will not be improperly influenced by such payments.

Examples of prospective payments where the DOJ elected not to take enforcement action include payments for the education of an "honorary official's" children,[50] payment of fees to the foreign directors in a joint venture of a U.S. company with a state-owned and controlled entity,[51] as well as payment of consulting fees to a member of the British Parliament.[52]

The FCPA contains an exception for facilitating payments, or "grease payments," where the purpose of the payment is "to secure performance of a routine governmental action."[53] The exception is intended to apply only to small sums paid to low-level officials to perform existing, nondiscretionary duties; the exception does not authorize small bribes.[54] "Routine governmental action" is defined as any "action ordinarily and commonly performed by a foreign official."[55] Such actions include obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; providing phone service, power, and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and actions of a "similar nature."[56] "Routine governmental action" does not include any discretionary decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party.[57] Instead, the purpose of a "facilitating payment" must be to prompt an official to do what that official is legally bound to do and not to make a discretionary decision in favor of the payor.[58]

Determining exactly what conduct qualifies under this exception is not straightforward, which makes reliance on the "facilitating payments" exception risky. The limitations of this exception are illustrated by *U.S. v. Vitusa Corp.*, where Vitusa had entered into a lawful contract with the Dominican Republic's government to sell milk powder. There was no dispute over the money owed to Vitusa, but the Dominican government did not pay promptly. After various attempts to collect, Vitusa eventually agreed to pay a "service fee" to a senior Dominican official in order to receive payment for the balance due. Vitusa was prosecuted for paying the "service fee" because the DOJ believed the decision of whether to pay the debt was a discretionary act, and the payment of a "service fee" was intended to influence the government official to exercise that discretion.[59]

FOUR SUGGESTIONS FOR AVOIDING FCPA COMPLICATIONS IN CHINA

Any company seeking to avoid potential FCPA problems in China, or elsewhere, should start by developing a rigorous internal compliance program. A good compliance program will include clear standards and procedures and will provide thorough training for all employees that have business dealings with China or any other foreign nation. Compliance materials and training should be targeted to the employees receiving them; thus, employees in China should be trained by local staff that understand the FCPA and can take into account the likely cultural issues—*e.g.*, the long-standing Chinese tradition of gift giving—that may have an impact on proper compliance.

In addition, companies can limit exposure to potential FCPA problems through vigilant adherence to corporate due diligence. As noted above in the section on successor liability, U.S. enforcement authorities do not always view a merger or acquisition as extinguishing liability for past unlawful conduct. Thus, a company planning to merge with or acquire a company that has done business in China will need to do its due diligence on the target company's business dealings, including those of its partners, agents, and distributors, to ensure FCPA compliance.

A third suggested practice to limit FCPA exposure is to negotiate and draft contracts that minimize FCPA risks. A company can do this by incorporating standard representations, warranties, and covenants in contracts with agents and distributors wherein they affirm their understanding of the FCPA and their commitment to comply with its requirements. Appropriate oversight of these agents and distributors, via inspection of business records and financial reports, may also prove helpful to ensuring a company's overarching compliance with the FCPA.

Finally, a company's potential FCPA liability can be minimized by forming an investigative team that can respond quickly when potential FCPA issues arise. The first part of this process requires that employees feel comfortable raising potential issues as they come up—compliance training can be particularly helpful here in assuring employees that the company wants to know of these concerns. Typically it is best for in-house counsel to be responsible for receiving such reports and for managing the resulting investigations. Lawyers usually can best assess the potential for liability (and thus the need for a complete and thorough investigation), and they can take appropriate precautions to keep the identity of the reporting employee confidential. Where notice of potential FCPA liability comes from U.S. enforcement authorities, it often is best to have in-house counsel work closely with outside counsel to provide a certain level of independence and objectivity throughout the investigation as well as to cooperate with enforcement authorities, if needed.

CONCLUSION

U.S. companies doing business or seeking to do business in China face potential obstacles. On the one hand, companies must do everything possible to effectively participate in the dynamic Chinese marketplace. On the other hand, U.S. companies must comply with the FCPA, which may seem to conflict with local business practices. FCPA compliance requires a proactive approach when navigating China's business environment, or that of any foreign nation where the government owns or controls businesses. Knowledge and preparation will go a long way toward full compliance with the FCPA.

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ENDNOTES

1 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78ff (1998).

2 *See* Jyoti N. Prasad, Impact of the Foreign Corrupt Practices Act on U.S. Export 35-36 (1993).

3 *See* S. Rep. No. 105-277, at 1-2 (1998) (discussing FCPA historical background).

4 Prasad, *supra* note 2, at 35-37; *see also* Gregory C. Ott, *China's Accession Into the WTO: The Practice of International Bribery and the Issues it Presents for American Counsel Whose Clients Are Doing Business Within the Confines of the Great Wall*, 15 Temp. Int'l & Comp. L.J. 147, 157 (2001).

5 Companies may be fined up to $2 million per violation. 15 U.S.C. §§ 78dd-2(g), 78dd-3(e).

6 *U.S. v. Kay*, C.R. No. 4-01-914 (S.D. Tex. 2005), *petition for cert. filed*, 76 U.S.L.W. 3569 (U.S. Apr. 9, 2008) (No. 07-1281) (sentencing former president of American Rice to 63 months for FCPA violations, which included three months for obstruction of justice). 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff (c). An employer may not pay fines imposed on an individual either directly or indirectly. 15 U.S.C. § 78dd-2(g)(3).

7 Patrick M. Norton, *The Foreign Corrupt Practices Act: A Minefield for U.S. Companies in China*, 18 China Law & Practice 15 (2004).

8 15 U.S.C. §§ 78dd-1(d), 78dd-2(d)(1), 78dd-3(d)(1), 78ff(b), (c). There is no private cause of action for violations of the FCPA. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990). However, conduct that would violate the FCPA has formed the basis for private causes of action under other statutes. For example, alleged Travel Act violations can be based upon conduct that violates the FCPA. *U.S. v. Young & Rubicam*, 741 F. Supp. 334, 337 (D. Conn. 1990). Furthermore, conviction of an FCPA offense can be a RICO predicate act. *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 292-93 (9th Cir. 1990). Also, acts in violation of the FCPA have been the basis of lawsuits alleging securities fraud and breach of fiduciary duty. *In re Faro Tech. Sec. Litig*. No. 6:05-cv-1810-Orl-22DAB, slip op. at 9 (M.D. Fla. Feb. 3, 2007); *In re Syncor ERISA Litig.*, 351 F. Supp. 2d 970, 975 (C.D. Cal. 2004).

9 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

10 15 U.S.C. §§ 78dd-1(a, g), 78dd-2 (a, i), 78dd-3(a).

11 The DOJ has a list of so-called "red flags" that a U.S. company should be aware of when entering into a foreign business relationship. These "red flags" include unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal to certify they will not do any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer. Some of these same circumstances may be present in Chinese business relationships. *See* Lay-Person's Guide to FCPA, http://www.usdoj.gov/criminal/ fraud/docs/dojdocb.html.

12 *U.S. v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) ("[A]n act is 'corruptly' done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.").

13 *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 182 (2d Cir. 2003) (analyzing legislative history to interpret "corruptly" element of FCPA).

14 Ott, *supra* note 4, at 151. The most significant piece of international antibribery legislation is the Organization for Economic Cooperation's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). The OECD Convention requires that signatories ratify their own domestic laws against the bribery of foreign public officials, similar to the FCPA. *Id.* at 161-62. In 2007, to better enforce their antibribery laws, China established the National Bureau of Corruption Prevention ("NBCP"), a corruption-prevention body responsible for drawing up guidelines on corruption prevention for companies and public undertakings.

Transparency International 2007 Global Corruption Report, http://www.transparency.org/ publications/gcr. In this annual report, a ranking of 1 is least corrupt, and a ranking of 163 is most corrupt. China ranked 70 out of a total of 163 nations surveyed in Transparency International's 2008 Global Corruption Report, which reflects a substantial improvement (*i.e.,* decrease in corruption) over the last 10 years.

15 *See* Chinadaily.com, *Former Top Statistician Expelled From Party*, Xinhua, Jan. 23, 2007, http:// www.chinadaily.com.cn/china/2007-01/23/content_890635.htm.

16 *See* Xie Chuanjiao, *Graft War Yields Success, Challenges*, chinadaily.com, March 11, 2008, http://www. chinadaily.com.cn/china/2008npc/2008-03/11/content_6524793.htm.

17 15 U.S.C. §§ 78dd-1(c)(2)-78dd-2(c)(2).

18 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

19 *Liebo*, 923 F.2d at 1309.

20 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

21 *U.S. v. Kenny Int'l Corp.*, FCPA Rptr. 649 (D.D.C. 1979).

22 *U.S. v. Metcalf & Eddy*, C.V. No. 99-12566-NG (D. Mass. Dec. 14, 1999).

23 Norton, *supra* note 7. Recently, Chinese officials have attempted broad and sweeping reforms in SOE management. *See, e.g.*, State-owned Assets Supervision and Administration Commission of the State Council (SASAC), *China State-owned Assets Management System Reform Entering New Stage*, May 22, 2003, http://www.sasac.gov.cn/eng/eng_qygg/ eng_qygg_0001.htm.

24 Norton, *supra* note 7.

25 *See* Sim Chi Yin, *Shades of Grey in China's Widening Income Gap*, The Straits Times, July 18, 2007; *See also Curse of Red Envelope Strikes Chinese*, Xinhua, Feb. 26, 2007, http://www.chinadaily.com.cn/china/ 2007-02/26/content_814345.htm.

26 Norton, *supra* note 7.

27 Norton, *supra* note 7. *See also* L. Tjoa, O. Jianyu, and L. Pykstra, *Complying With PRC Anti-Bribery Laws: A Clarification of China's Criminal and Commercial Anti-Bribery Statutes*, China Bus. Rev., http://www. chinabusinessreview.com/public/0503/wong.html.

28 15 U.S.C. § 78dd-1(c).

29 *See, e.g.*, DOJ Opinion Release No. 04-04 (September 3, 2004).

30 C.V. No. 99-12566-NG (D. Mass. Dec. 14, 1999).

31 However, the DOJ has upheld the payment of travel expenses by state agricultural departments for foreign officials to visit the United States for the purpose of promoting their state's products. *See* DOJ Opinion Release No. 82-01 (January 27, 1982).

32 15 U.S.C. §§ 78dd-1(f)(1)-2(h)(2).

33 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). The definition of "foreign official" also includes employees of international organizations.

34 *See U.S. v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 350 n.14 (D. Conn. 1990) (Jamaican businessman with political ties to the Prime Minister, who acted as a consultant to the Jamaican Tourist Board and worked for a private travel company that was considered to be an instrumentality of the government, was a "foreign official" under the Act).

35 DOJ Opinion Release No. 08-01 (January 15, 2008) (minority owner and Chairman of a foreign company whose majority owner is a government-owned enterprise considered "foreign official" for purposes of FCPA where, in addition to his role as Chairman of the foreign company, he also was General Manager and formal legal representative of government-owned enterprise); DOJ Opinion Release No. 94-01 (May 13, 1994) (general director of state-owned enterprise considered "foreign official" despite determination by foreign attorney that individual would not be considered government employee or public official under that nation's laws); Norton, *supra* n.7; *see also* Tjoa, Jianyu, and Pykstra, *supra* note 27.

36 Norton, *supra* note 7.

37 Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 Fordham J. Corp. & Fin. L. 285, 304 (2007) ("The plain text of the FCPA does not distinguish between a controlling and non-controlling affiliation.").

38 15 U.S.C. § 78dd-1(a).

39 *I.e.*, to (1) corruptly (2) pay (3) a foreign official (4) to assist in obtaining or retaining business.

40 15 U.S.C. § 78dd-1(f).

41 Ott, *supra* note 4, at 159.

42 Norton, *supra* note 7.

43 15 U.S.C. § 78dd-1(f); *see also* Delia Poon, *Exposure To The Foreign Corrupt Practices Act: A Guide For U.S. Companies With Activities In The People's Republic Of China To Minimize Liability*, 19 Hastings Int'l & Comp. L. Rev. 327, 336-37 (1996).

44 Press Release, DOJ, Paradigm B.V. Agrees To Pay $1 Million Penalty To Resolve Foreign Bribery Issues In Multiple Countries (Sept. 24, 2007).

45 *See, e.g.*, *In re Syncor ERISA Litig.*, 410 F. Supp. 2d 904, 907 (C.D. Cal. 2006) (stock-for-stock merger).

46 15 U.S.C. § 78dd-1(a)(1).

47 *See U.S. v. Kay*, 359 F.3d 738, 743-56 (5th Cir. 2004) (discussing business advantage element of offense); *see also U.S. v. Vitusa Corp.*, C.R. No. 94-253-MTB (D.D.C. July 28, 1994).

48 *SEC v. Triton Energy Corp.*, C.V. No. 1:97CV00401 (RMU) (D.D.C.), Lit. Release No. 15396, HBB 6.1(b) Release No. AE-931, 64 S.E.C. Docket 2115, 1997 WL 348996.

49 *Id*.

50 U.S. Department of Justice, Review Procedure Release No. 80-01 (October 29, 1980) (official's duties largely ceremonial and no indication any preferential treatment would be granted).

51 DOJ Opinion Procedure Release No. 93-01 (April 20, 1993) (fees paid approximated foreign directors' regular income from employment by foreign partner; fees reimbursed to U.S. company by foreign partner; foreign directors educated regarding FCPA).

52 DOJ Review Procedure Release No. 86-01 (July 18, 1986) (official had no special position of influence; abstained from voting or other legislative activity benefiting company; compensation considered reasonable).

53 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

54 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).

55 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A).

56 15 U.S.C. §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A).

57 15 U.S.C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B).

58 *See Vitusa Corp.*, C.R. No. 94-253-MTB (D.D.C. July 28, 1994) (corporation prosecuted for bribing government official to get government to repay a debt owed to the company, not considered "facilitating payment").

59 *Id.*

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