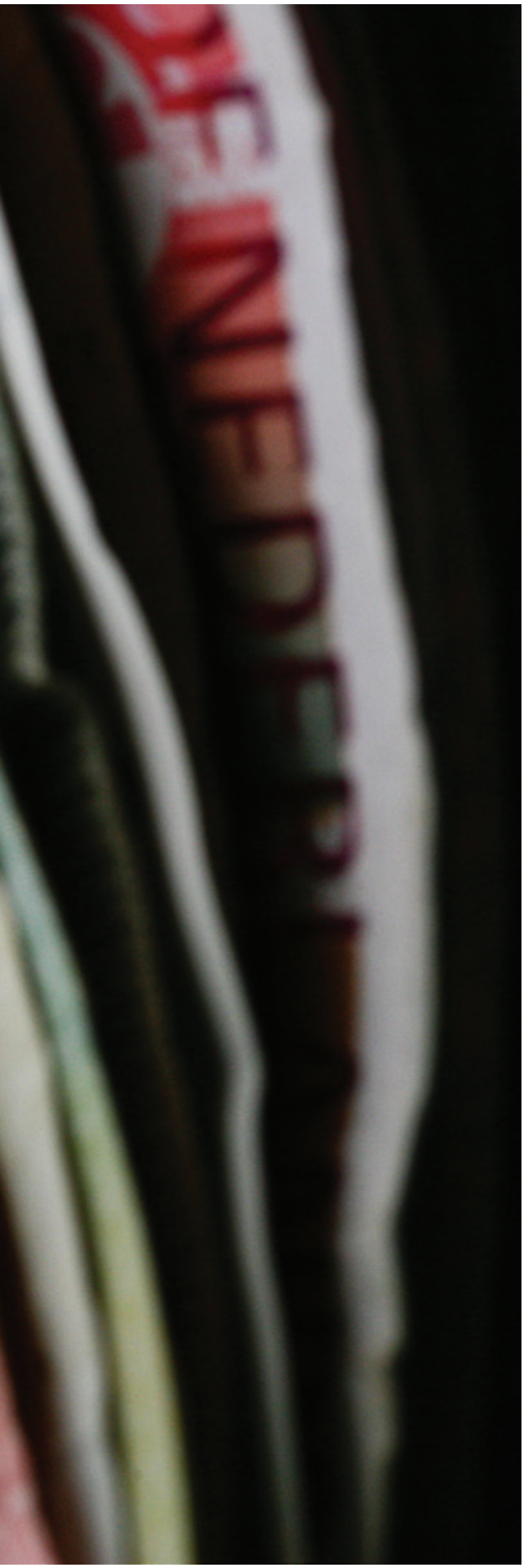
FCPA COMPLIANCE

What You Need to Know



Authors

R. CHRISTOPHER COOK
PARTNER
Jones Day

Chris has more than 20 years of experience in corporate investigations, white-collar defense and civil litigation. His practice is focused on international investigations, the Foreign Corrupt Practices Act and health care litigation, as well as a wide range of disputes between private parties and against the government.

KEVIN M. COMEAU
ASSOCIATE
Jones Day

Kevin has represented clients in civil, criminal and regulatory disputes. He regularly works on matters arising under the Foreign Corrupt Practices Act.

With the US government increasing its enforcement of the Foreign Corrupt Practices Act (FCPA) and the release by the DOJ and SEC of non-binding FCPA guidance, management and boards of multinational corporations must reassess their current efforts to ensure FCPA compliance. This article outlines how corporations can minimize the risks posed by foreign bribery, avoid enforcement actions and develop effective compliance programs.

Corruption poses a significant legal and economic risk for corporations doing business around the world, particularly in developing and transitioning countries. The US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are fighting corruption by increasing the number of investigations, settlements and prosecutions for violations of the FCPA.

To assist corporations with FCPA compliance, the DOJ and SEC released non-binding FCPA guidance in November 2012, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Guide). The Guide provides information on the FCPA enforcement approach and priorities of the DOJ and SEC.

>> For a quick summary of the Guide, search New FCPA Guidance Released by the DOJ and SEC on our website.

The government's increased FCPA enforcement activity has caused the management and boards of multinational corporations to become more concerned about their compliance efforts. A corporation can minimize the risks posed by foreign bribery by:

- Understanding the practices prohibited by the FCPA and other applicable laws.
- Remaining up to date on FCPA enforcement trends.
- Recognizing "red flags," circumstances under which the risk of corrupt practices is high and enforcement authorities expect corporations to be particularly vigilant.
- Evaluating the most appropriate systems to achieve corporate compliance.

With this knowledge and a commitment to ethical business practices, a corporation can implement an effective compliance program to avoid the pitfalls of international corruption.

FCPA OVERVIEW

The FCPA includes two key elements:

- **Anti-bribery provisions.** These prohibit giving or offering money, gifts or anything of value to a foreign government official to obtain or retain business.
- **Accounting requirements.** These seek to prevent accounting practices designed to hide corrupt payments by requiring corporations to maintain accurate books and records and adequate internal accounting controls (see *Box, Importance of Keeping Good Records*).

The FCPA is enforced by the DOJ and SEC. This article focuses on the anti-bribery provisions of the FCPA.

WHO IS COVERED BY THE FCPA

The FCPA applies to two broad categories of persons:

- Those with formal ties to the US.
- Those who take action in furtherance of a violation while in the US.

Recently, foreign companies in both categories have been the focus of an increasing number of enforcement actions (see below *FCPA Enforcement Trends*).

Formal Ties to the US

Those with formal ties to the US include:

- **Issuers.** These include any company that has securities registered in the US or is otherwise required to file periodic reports with the SEC (*15 U.S.C. § 78dd-1(a)*). US issuers may be prosecuted under the FCPA for conduct both inside and outside the US. Specifically, US issuers are liable under the FCPA if they use any US mails or any other means of interstate commerce in furtherance of a corrupt payment to a foreign official. This includes placing a phone call or sending an e-mail from, to or through the US, as well as sending a wire transfer from or to a US bank and traveling from or to the US.

Importance of Keeping Good Records

In complying with the FCPA, a corporation cannot neglect its books and records. For those corporations that issue US securities, the FCPA explicitly imposes recordkeeping and internal control requirements that extend to the corporation's foreign and domestic subsidiaries. It is, for example, a separate and independent violation for a corporation to book as "consultant fees" money paid to a third party for other reasons, regardless of whether the funds actually can be traced to a foreign official. Most FCPA enforcement actions brought by the SEC arise from accounting violations, not bribery per se.

Although the FCPA's accounting provisions apply only to issuers of securities in the US, all corporations should focus on maintaining accurate financial records to avoid risky or suspicious payments.

- **Domestic concerns.** This is a broader category, encompassing any individual who is a citizen, national or resident of the US. The domestic concerns category also includes any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship with its principal place of business in the US, or organized under the laws of a state of the US or a territory, possession or commonwealth of the US (*15 U.S.C. § 78dd-2(h)(1)*). US corporations and nationals can be held liable for bribes paid to foreign officials even if no actions or decisions take place within the US.

Actions in Furtherance of a Violation While in the US

The DOJ and SEC interpret the FCPA to confer jurisdiction whenever a foreign company or foreign national directly or indirectly engages in any act in furtherance of a corrupt payment while in the territory of the US. The Guide notes that the action:

- May be taken by an agent of the foreign person or entity.
- May be directed at either US or non-US government officials.
- Can implicate co-conspirators, even if the co-conspirators did not take any actions in the US.

WHAT THE FCPA PROHIBITS

A person or organization is guilty of violating the FCPA if the government can prove the existence of five elements:

- A payment, offer, authorization or promise to pay money or anything of value.
- The involvement of a foreign government official (including a party official or manager of a state-owned concern), or any other person, knowing that the payment or promise will be passed on to a foreign official.

The FCPA prohibits the offer, authorization or promise to make a corrupt payment in addition to the actual payment.

- A corrupt motive.
- Having the purpose to:
  - influence any act or decision of the person receiving the payment or promise;
  - induce that person to do or omit any action in violation of his lawful duty;
  - secure an improper advantage; or
  - induce that person to use his influence to affect an official act or decision.
- Assisting in obtaining or retaining business for or with, or directing any business to, any person.

(*15 U.S.C. §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).*)

The DOJ may criminally charge any covered individual or entity that violates the FCPA. Punishments may include imprisonment or a fine, in addition to penalties by the SEC not to exceed the greater of $500,000 or the amount by which the entity profited from the offense.

Payment to a Foreign Official

The definitions of "payment" and "foreign official" are sufficiently broad to cover virtually any benefit conferred on someone in a position to affect a person's business dealings with a foreign government. Non-monetary benefits, including travel and entertainment, fall within the FCPA's definition. Under the terms of the FCPA, a person or organization need not actually pay a bribe to violate the law. Rather, the FCPA prohibits the offer, authorization or promise to make a corrupt payment in addition to the actual payment.

In addition, the DOJ has taken the position that employees of state-owned business enterprises are foreign officials for purposes of the FCPA.

There is no monetary threshold to prohibited bribes. The Guide explains that what may be considered a modest payment in the US could have significant value outside the US. It notes, however, that the DOJ and SEC are unlikely to investigate the provision of items of nominal value, such as cups of coffee, taxi fare or company promotional items.

Corrupt Motive

The FCPA prohibits payments made with a corrupt motive. The legislative history of the statute describes this as an "evil motive or purpose, an intent to wrongfully influence the recipient" (*S. Rep. No. 95-114, at 10 (1977)*).

The US Supreme Court reinforced the notion that a criminal prohibition against corrupt conduct requires a consciousness of wrongdoing, although the court declined to provide an all-encompassing definition of the statutory term (*Arthur Andersen LLP v. United States, 125 S.Ct. 2129 (2005)*).

Corporations should note that, while innocent mistakes are not illegal under the FCPA, they will be held liable for ignoring signs of corruption in connection with the actions of one of its agents (see *Box, Knowledge Proven by Willful Blindness*).

Take Action to Benefit the Payor's Business Interest

To constitute an FCPA violation, the payor must intend a payment to cause an official to take an action or make a decision that would benefit the payor's business interest. The business the payor seeks to obtain or retain with the corrupt payment need not be with the government or a government-owned entity. Rather, a person or organization violates the FCPA if it makes a corrupt payment to aid in improperly obtaining or retaining any business with a third party.

For example, after a lengthy appeals process, the US Court of Appeals for the Fifth Circuit held that payments made by David Kay and Douglas Murphy, two executives at American Rice Incorporated (ARI), to Haitian officials to reduce ARI's tax liabilities were indeed designed to obtain or retain business as prohibited by the FCPA (*U.S. v. Kay, 513 F.3d 432 (5th Cir. 2007)*). The two executives were indicted in 2002 but argued that, because of the nature of their payments, their actions did not fall under the scope of the FCPA prohibition against payments to obtain or retain business under the conventional understanding of that language.

The court held that Kay's and Murphy's intent to reduce ARI's tax liabilities constituted an intent to obtain and retain business because, contrary to Kay's and Murphy's arguments, Congress did not intend that the FCPA would apply only to the procurement of government contracts or government business.

Kay and Murphy moved to dismiss and arrest judgment based on lack of fair notice, a motion that the Fifth Circuit rejected after concluding that their convictions met the various standards of fair notice. The US Supreme Court denied their petition for *writ of certiorari* on October 6, 2008.

OTHER RELEVANT LAWS

Other statutes that complement the FCPA also reach allegedly corrupt activities, such as:

Knowledge Proven by Willful Blindness

Although the FCPA prohibits only a knowing violation, knowledge can be proved by evidence of willful blindness. When it amended the FCPA in 1988, Congress indicated that it intended to prohibit actions that "demonstrate evidence of a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to high probability of violations of the Act" (*HR Conf. Rep. No. 100-579, at 919-20 (1988)*).

However, the DOJ may take an expansive view of the FCPA under which liability could be based solely on a failure to investigate, regardless of the reason (see *U.S. v. Green, No. 08-59(B)-GW (Aug. 18, 2009), proposed instruction 31* (noting that the knowledge requirement may be satisfied if a person is aware of a high probability of the existence of a particular fact and "fails to take action to determine whether it is true or not")). The Guide notes that to be guilty, a defendant must act with a bad purpose, knowing generally that its conduct is unlawful. It need not know, however, that its actions violate the FCPA.

In 2011, the US Court of Appeals for the Second Circuit upheld the conviction of Frederic Bourke, a private investor, for FCPA violations, relying on evidence that Bourke had consciously avoided confirming that his business associate, Viktor Kozeny, had promised millions of dollars to Azerbaijani officials if they advanced the privatization of Azerbaijan's state-owned oil company (*U.S. v. Kozeny, No. 05-cr-518 (S.D.N.Y. 2005)*). As evidence to support Bourke's conviction on conscious avoidance grounds, the court cited Bourke's:

- General awareness of pervasive corruption in Azerbaijan.
- Knowledge of Kozeny's reputation as the "Pirate of Prague," a nickname given to him for his role in a massive fraud involving the privatization of state-owned industries in the Czech Republic.
- Participation in the Azerbaijani investment scheme through intermediary companies in an attempt to insulate himself and other investors from FCPA liability.
- Taped phone conversations in which he voiced concerns about whether Kozeny was paying bribes.

- Conspiracy.
- Racketeering.
- Mail fraud.
- Wire fraud.
- Money laundering.

For example, federal money laundering laws list FCPA violations as predicate offenses and can be used to prosecute the funding of unlawful transactions (*18 U.S.C. § 1956(c)(7)(B)(iv)*). In 2008, the DOJ demonstrated its willingness to use forfeiture actions to target the proceeds of bribery overseas when it filed a forfeiture action against accounts totaling nearly $3 million alleged to be part of a conspiracy to bribe officials in Bangladesh (see *Department of Justice Seeks to Recover Approximately $3 Million in Illegal Proceeds from Foreign Bribe Payments*, available at *justice.gov*).

This was a significant development, given that the recipients of bribes are excluded from prosecution under the FCPA and the US general conspiracy statute. Federal money laundering laws cover transactions that flow through the US involving proceeds of foreign offenses, including foreign bribery and extortion. The DOJ claimed the US had jurisdiction over the accounts because the illicit funds flowed through financial institutions in the US before being deposited in bank accounts in Singapore.

PENALTIES FOR VIOLATIONS

Individuals face up to five years' imprisonment for each violation of the anti-bribery provisions of the FCPA, or up to 20 years for certain willful violations (*15 U.S.C. §§ 78dd-1 and 78ff*). Corporations and other business entities may be fined up to $2 million for each violation, and individuals up to $100,000 (*15 U.S.C. § 78dd-1 and 18 U.S.C. § 3571*). The maximum fine may be increased to $25 million for corporations and other business entities and $5 million for individuals in the case of certain willful violations (*15 U.S.C. § 78ff(a)*).

All criminal fines, including those imposed under the FCPA, may be increased to twice the gain obtained by reason of the offense or twice the loss to any other person (*Alternative Fines Act, 18 U.S.C. § 3571(d)*). Both the DOJ and SEC may seek a court order enjoining violations of the FCPA (*15 U.S.C. § 78dd-1*).

Indemnification is Prohibited

The FCPA prohibits issuers (see above *Who is Covered by the FCPA*), including all public corporations, from paying the criminal and civil fines that may be imposed on:

- Officers.
- Directors.
- Employees.
- Agents.
- Stockholders.

(*15 U.S.C. § 78ff(c)(3)*.)

Collateral Consequences

Individuals and corporations found to have violated the FCPA may suffer collateral consequences, such as:

- Exclusion or debarment from certain federal programs.
- Ineligibility to receive export licenses.
- Suspension or debarment from the securities industry.

Because violation of the FCPA is also a predicate act under the Racketeer Influenced and Corrupt Organizations Act (RICO), a corporation or individual may be subject to additional civil or criminal actions, including a private RICO

action by an aggrieved competitor or forfeiture proceedings by the government.

EXCEPTIONS AND DEFENSES

The FCPA contains several provisions that exempt certain conduct from its anti-bribery provisions.

Facilitating Payments for Routine Governmental Actions

The FCPA contains a narrow exception permitting facilitating or expediting payments made to foreign officials for the purpose of causing them to perform routine governmental actions (*15 U.S.C. §§ 78dd-1(b), 78dd-2(b) and 78dd-3(b)*). This provision is commonly referred to as the "grease payment" exception. To qualify for this exception, payments must relate to the performance of routine, nondiscretionary governmental functions, such as:

- Issuing routine licenses.
- Providing phone, power and water service.
- Providing police protection or mail delivery.
- Scheduling inspections associated with contract performance or the shipment of goods.

The FCPA provides that a routine governmental function does not include any decision by a foreign official to award new business or to continue business with a party. This exception also does not grant permission to make small bribes. The Guide notes that the purpose of the payment, and not its size, determines whether a payment falls within the facilitating payment exception. Relying on this exception is risky, however, as a facilitating payment that is permitted under the FCPA may still be unlawful under other laws, including those of the country in which the payment was made.

Payments Permitted by Written Laws

The FCPA does not prohibit payments that are lawful under the written laws and regulations of the foreign official's country (*15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) and 78dd-3(c)(1)*). This exception would arguably apply, for example, if a corporation followed a foreign country's written guidelines regarding permissible financial arrangements with managers of a state-owned business, provided the payments were not made in exchange for corrupt actions by the recipient. There do not seem to be any countries with written laws that permit bribery.

Reasonable and Bona Fide Expenditures

It is not a violation of the FCPA if the person charged can prove that the payment in question:

- Constituted a reasonable and bona fide expenditure, such as travel and lodging expenses.
- Was directly related to either the:
  - promotion, demonstration or explanation of products or services; or

- execution or performance of a contract with a foreign government or agency.

(*15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2) and 78dd-3(c)(2)*.)

Despite this affirmative defense, travel and lodging expenses intended to influence a foreign official's actions can violate the FCPA. For example, the DOJ has taken the position that luxury or recreational travel provided for government officials can form the basis for FCPA prosecution.

Foreign Subsidiaries

Corporations cannot insulate themselves from liability under the FCPA for actions taken overseas merely by moving foreign operations to a subsidiary. While the FCPA's anti-bribery provisions do not explicitly make a parent corporation liable for violations committed by a foreign subsidiary, enforcement authorities may employ other legal theories to hold parents responsible for their subsidiaries' actions.

The books and records provisions of the FCPA require parent corporations to ensure their subsidiaries' compliance (see *Box, Importance of Keeping Good Records*). Of course, corporations almost never record corrupt payments accurately on their books, making every anti-bribery case a potential books and records case.

Therefore, corporations that fall within the SEC's jurisdiction should implement comprehensive policies to ensure the accuracy of recordkeeping at the subsidiary level. The US increasingly has pursued a number of foreign subsidiaries for FCPA violations (see *In the Matter of Schnitzer Steel Industries, Inc., US Securities and Exchange Commission Administrative Proceeding File No. 3-12546 (Oct. 16, 2006)*; *In the Matter of Diagnostics Products Corp., SEC Litigation Rel. No. 51724 (May 20, 2005)* and *In the Matter of Syncor International, SEC Litigation Rel. No. 46979 (Dec. 10, 2002)*).

Generally, a parent corporation is potentially liable for the actions of its subsidiaries to the extent that the parent controls in any way the operations of the subsidiary. Prosecutors can use several legal theories to bring an action against a parent for its subsidiary's actions. The prosecutor might seek to establish that:

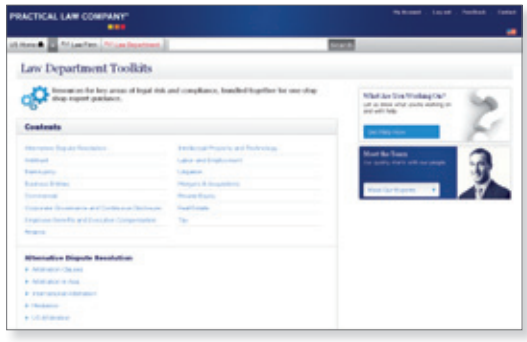
- The subsidiary was the "alter ego" of the parent.
- The parent and subsidiary formed a single "integrated enterprise."
- The corporate veil should be pierced, destroying the corporate separateness between the organizations.

If employees of the parent are directly involved in the affairs of the subsidiary, the government may seek to attribute to the parent responsibility for the actions of those employees under the legal theory of *respondeat superior*. Under this doctrine, responsibility can be attributed to a corporation for an employee's illegal actions when the employee acted within the scope of his duties and for the benefit of the corporation. The act of any employee within a corporation, not just high-level officials, can trigger criminal responsibility.

BRIBERY AND CORRUPTION TOOLKIT

The Bribery and Corruption Toolkit available on practicallaw.com is designed to assist in-house counsel in complying with anti-bribery and corruption laws and regulations, including the FCPA. It features a range of continuously maintained resources, including:

- The Foreign Corrupt Practices Act: Overview
- M&A Due Diligence: Assessing Compliance and Competition Risk
- Foreign Corrupt Practices Act Anti-Corruption Compliance Policy
- Underwriting Agreement: FCPA Representation
- Policy for the Use of Third-party Agents Outside of the United States
- The Foreign Corrupt Practices Act Compliance Checklist



For all of these reasons, corporations should ensure that their foreign subsidiaries have in place adequate corporate compliance policies and procedures to prevent illegal activity.

OBTAINING ADVISORY OPINIONS

The DOJ has created procedures, which it details in the Guide, for issuers and domestic concerns to seek and obtain an opinion of the Attorney General on whether certain specified, prospective (not hypothetical) conduct conforms with the DOJ's present enforcement policy regarding the anti-bribery provisions of the FCPA (*28 C.F.R. § 80.1 (1992)*).

Opinions issued by the Attorney General are published without specifically naming the corporations and persons involved. While the opinions only bind the requestor, the government's approach to specific fact situations can be a valuable resource for any corporation evaluating a similar proposed course of action. The DOJ does not offer advisory opinions related to the FCPA's books and records provisions.

FCPA ENFORCEMENT TRENDS

Recently, US enforcement authorities have charged and prosecuted a number of foreign companies, issuers and non-issuers, for bribing non-US officials and have imposed record-breaking sentences on individuals involved in bribery schemes.

In 2012, Tyco International Ltd. (Tyco), a Swiss company with a class of securities that trades on the New York Stock Exchange (NYSE), pled guilty to a DOJ criminal charge and related SEC civil charges for conspiring to violate the FCPA (see *Tyco Entities Agree to More Than $26 Million in Penalties*, available at *justice.gov*).

Tyco agreed to pay more than $26 million to resolve the charges, which stemmed from separate bribery schemes in a number of countries, including China, Thailand, Turkey, France and Germany, over a ten-year time period. Tyco admitted that the schemes involved:

- Using third parties to make illicit payments to foreign officials and companies owned by state employees.
- Inflating expense reports.
- Fabricating invoices for travel and entertainment that did not occur.

In 2011, a judge in the District Court for the Southern District of Florida imposed the longest sentence ever in an FCPA prosecution. In *US v. Esquenazi*, two former executives of Terra Telecommunications were convicted of conspiracy to violate the FCPA and commit money laundering for bribing employees of Telecommunications D'Haiti S.A.M., a state-owned company in Haiti (*U.S. v. Esquenazi, 1:09-cr-21010 (S.D.Fla. 2009)*). The judge sentenced one defendant to 15 years and the other defendant to seven years in prison. The 15-year sentence was more than twice as long as any prior sentence for FCPA violations. The court also ordered the defendants to forfeit $3.09 million.

In addition, in 2008, a US district court sentenced a French executive of Alcatel, a French company whose depositary receipts were traded on the NYSE, to 30 months in prison for making more than $2.5 million in corrupt payments to Costa Rican officials to obtain a mobile telephone contract from a state-owned telecommunications authority (see *Former Alcatel CIT Executive Sentenced for Paying $2.5 Million in Bribes to Senior Costa Rican Officials*, available at *justice.gov*).

RECOGNIZING RED FLAGS

Corporations and individuals may be subject to prosecution for corrupt payments even if they have no actual knowledge that bribes are being paid. The FCPA imposes criminal sanctions on persons who pay money to third parties with a reckless disregard

for circumstances that suggest the money is being used for corrupt purposes (see *Box, Knowledge Proven by Willful Blindness*). Therefore, if an executive agrees to pay a consultant, who in turn gives some of that money to a government official in exchange for official actions that benefit the corporation, the DOJ may target the executive and the corporation for violating the FCPA even without actual knowledge of the corrupt payment.

Whether the government believes that a corporation and its employees should be held liable for these indirect bribes largely depends on whether the circumstances should have put the corporation on notice that corrupt payments were likely to occur. The government has provided the following guidance regarding circumstances it considers to be red flags for FCPA violations, which include:

- Unusual financial arrangements for the payment of services.
- Doing business in a country with a reputation for public corruption.
- The refusal by a foreign business partner to agree to anti-corruption provisions in its contract.
- Requests to pay unusually high commissions.
- A lack of transparency in expenses and accounting records.
- A joint-venture partner or representative that does not appear capable of performing the services offered.
- A recommendation by a government official to hire a particular third party.

UNUSUAL PAYMENT PATTERNS OR ARRANGEMENTS

Although the methods of making bribes have become increasingly sophisticated, improper payments made to foreign officials almost always involve an unusual payment arrangement. Corporations should be vigilant when asked to make payments for services in a bank account not located in either the country where the services were provided or the country where the recipient of the funds is located. Similarly, the use of shell entities or aliases should trigger heightened scrutiny of the transaction to ensure that it is not a vehicle for corrupt payments.

HISTORY OF CORRUPTION IN THE COUNTRY

Although bribes may be paid or demanded in all countries, certain countries (many of those in the developing world) suffer from more corruption than others. When doing business in a country with a reputation for public corruption, corporations must be particularly suspicious of any activity that may suggest that their employees or agents are paying bribes. Enhanced compliance and training efforts are often necessary.

At a minimum, corporations doing business abroad should be familiar with the annual Corruption Perceptions Index published by Transparency International (available at *transparency.org*). Additional resources regarding the prevalence of corruption in a particular country are available from the US State Department. International legal counsel can provide further details regarding the likelihood of officials or agents demanding or soliciting bribes in particular circumstances.

REJECTION OF ANTI-CORRUPTION PROVISIONS

A corporation subject to the FCPA often asks a foreign business partner to warrant that it will not take any action:

- To further an unlawful offer, promise or payment to a foreign public official.
- That would cause the corporation to violate the FCPA.

To the extent that a prospective business partner refuses to agree to this type of contract provision or other written certification, the corporation should be on alert that the partner may not intend to meet those standards.

UNUSUALLY HIGH COMMISSIONS

Because commissions have historically been a vehicle through which bribes can be funneled to government officials, a request to pay unusually high commissions is a warning sign of possible corruption. A request to deposit commissions in multiple bank accounts, perhaps in offshore banks, also justifies additional scrutiny.

LACK OF TRANSPARENCY IN EXPENSES AND ACCOUNTING RECORDS

As demonstrated by the books and records provisions of the FCPA, Congress and enforcement authorities view accurate books and records as a critical restraint against corrupt payments. Lack of transparency in the books and records of a foreign business partner is a possible indicator of corrupt activity. A foreign business partner seeking to shield expenses, accounting records and other financial information from view could be trying to hide improper payments to government officials.

APPARENT LACK OF QUALIFICATIONS OR RESOURCES

Corporations doing business abroad should be suspicious if a joint-venture partner or representative does not appear capable of performing the services offered. Numerous enforcement actions have resulted from sham service contracts, under which corrupt payments are disguised using a consulting agreement or other arrangement. Similarly, persons or organizations doing business in a foreign country should be particularly cautious of anyone who claims to have the ability to obtain licenses or other government approval without providing a description of the legitimate manner in which those goals will be accomplished.

RECOMMENDATION BY A GOVERNMENT OFFICIAL

Government officials need not demand a bribe directly to create potential FCPA liability for a person or organization. Instead of demanding a bribe outright, a government official

who is not a potential customer but exercises authority over a transaction may suggest that a particular third party be hired as a consultant or in some other capacity. Numerous enforcement actions have resulted from payments to third parties at the request of foreign government officials. Therefore, any person or organization doing business in a foreign country must be cautious when a government official suggests in any way that it pay or hire a particular third party.

CORPORATE COMPLIANCE PROGRAMS

Any corporation seeking to do business lawfully and ethically in a foreign country should implement and maintain a compliance program designed to detect and prevent corrupt payments to government officials. This has the benefit of:

- **Educating employees.** An effective corporate compliance program reduces the risk of employees breaking the law out of ignorance or in the mistaken belief that paying bribes, although unlawful, is in the best interest of the corporation.

>> For more information on training employees, search Beyond Reproach: Achieving Best Practice in FCPA Compliance on our website.

- **Demonstrating good faith efforts.** If an individual pays a bribe despite the corporation's best efforts, a compliance program serves as tangible evidence of the corporation's good faith. The DOJ and SEC have identified the existence of a corporate compliance program in the US as one factor in deciding whether to bring charges against a corporation for the illegal actions of an employee (for more information, search GC Agenda: June 2012: Commercial on our website). Likewise, corporations convicted of criminal charges in the US are eligible to pay lower fines if they have corporate compliance programs in place.

According to the Guide, the hallmarks of an effective compliance program include:

- Commitment from senior management and a clearly articulated policy against corruption.
- A code of conduct and compliance policies and procedures.
- Oversight, autonomy and resources.
- Risk assessment.
- Training and continuing advice.
- Incentives and disciplinary measures.
- Third-party due diligence and payments.
- Confidential reporting and internal investigation.
- Continuous improvement with periodic testing and review.

The precise details of a corporation's compliance program can vary from one corporation to another, depending on factors such as:

- The size of the organization.
- The nature and location of its operations.
- The degree to which its employees interact with government officials.

Typically, a corporation with significant overseas operations will include specific procedures for conducting due diligence of foreign consultants, agents and business partners in its FCPA compliance program. The compliance program also should set a policy regarding the use of contract terms relating to FCPA compliance, providing model language where appropriate.

>> For a list of issues a corporation should consider when seeking to comply with the FCPA, search Foreign Corrupt Practices Act Compliance Checklist on our website.

DECIDING WHETHER TO SELF-DISCLOSE

If a corporation learns of a possible FCPA violation, perhaps through its compliance program, it must decide whether to alert the authorities. Corporations are increasingly self-reporting to enforcement authorities the activities of employees and business partners that may violate the FCPA, due to several factors, including:

- The whistleblower requirements of the Sarbanes-Oxley Act of 2002, which make it more likely that an employee will report potential violations (for more information, search Whistleblower Protections under Sarbanes-Oxley and the Dodd-Frank Act on our website).
- The DOJ's policies, which now identify "timely and voluntary disclosure of wrongdoing" as a key consideration in deciding whether to prosecute a corporation.
- The likelihood of enforcement authorities discovering violations that are not disclosed. Enforcement agencies have committed considerable resources to investigating and prosecuting corporate misconduct over the last several years.

When deciding whether to self-disclose, corporations must be cautious. While disclosure may reduce penalties and avoid negative publicity, it is only one of many factors used to determine the penalty for foreign corruption offenses. Some corporations escape serious consequences when they self-disclose, but there is no guarantee of leniency from the DOJ or SEC when corporations report voluntarily. In short, corporations often are subject to enforcement actions even after self-disclosure. Corporations must be aware that the practical consequences of disclosure remain unpredictable.