or control a majority of its shares. Citing the example of *Alcatel-Lucent*, the *Resource Guide* cautions that under certain minority shareholder (43 percent) circumstances, for example, veto power over all major expenditures, "special shareholder" status, and continued control of operational decisions, the DOJ and SEC may still bring an action.[85]

b. Foreign Sovereign Immunities Act Precedent

Another foreign conduct-directed statute and the U.S. antiboycott regulations give some guidance on the likely breadth of the term "instrumentality." First, the Foreign Sovereign Immunities Act of 1976,[86] enacted one year before the FCPA, defines "an agency or instrumentality of a foreign state" as an entity that is "a separate legal person or otherwise," and "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign or political subdivision thereof."[87]

Second, under the U.S. antiboycott regulations, an SOE will be presumed governmental if:

- The foreign government entity owns or controls, directly or indirectly, more than 50 percent of the voting rights;
- The foreign government owns or controls 25 percent or more of the voting securities, and no other entity or person owns or controls an equal or larger percentage;
- A majority of members of the board are also members of the governing body of the government department;
- The foreign government has the authority to appoint the majority of the members of the board; or
- The foreign government has the authority to appoint the chief operating officer.

An entity majority-owned or controlled by a foreign government will very likely be considered an "instrumentality" for FCPA purposes.[88] The most relevant factor in determining whether a company, partnership, or joint venture is an instrumentality remains whether a foreign government exercises "effective control" over it.[89]

c. Sovereign Wealth Funds

A sovereign wealth fund (SWF) is a state-owned investment fund composed of financial assets such as stocks, bonds, property, precious metals, or other financial instruments. The original SWF is the Kuwait Investment Fund, an entity created in 1953 from vast oil revenues. SWFs are typically created for governments with surpluses and little or no international debt. Major SWFs include the Abu Dhabi Investment Authority, Government Pension Fund of Norway, Government of Singapore Investment Corporation, Kuwait Investment Authority, China Investment Corporation, Singapore's Temasek Holdings, and Qatar Investment Authority. For FCPA purposes, investment goals, internal checks and balances, due diligence of placement agents, and disclosure of relationships raise issues for SWFs.

The SEC has reportedly looked into whether financial institutions, including banks, private equity firms, and hedge funds that have sought investments from partnerships with SWFs, have violated the FCPA. Possible issues include whether these financial institutions have "made (or promised) payments or conferred other

benefits, including travel or entertainment, in connection with efforts to transact business with SWFs or foreign, state-owned pension funds."[90] The DOJ and SEC no doubt broadly view the latter as government "instrumentalities" and their employees as "foreign officials" for purposes of the FCPA. Payments or in-kind benefits, such as travel and lodging not directly related to the promotion of products or services or the execution of contracts, to SWF or pension fund employees are prohibited. Equally important, payments to placement agents, consultants, or third parties, while knowing or disregarding that the payee will pass monies to a foreign official to secure access to benefits such as an investment or asset purchase for the SWF, are prohibited.[91] Finally, allowing a state-owned entity's employee or related party to co-invest could be considered an illicit benefit to the employee.[92]

9. Authorization

The FCPA prohibits the "authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value"[93] to foreign officials for improper purposes. This language applies to issuers, domestic concerns and individuals, and foreign firms or individuals who engage in acts in furtherance of improper payments while in the territory of the United States. The statute does not define "authorization," but the legislative history makes clear that authorization can be either implicit or explicit. Authorization issues frequently arise when U.S. companies fund overseas operations, approve budgets, and take similar actions with respect to foreign subsidiaries or joint ventures. In suspicious circumstances, U.S. directors and managers should disavow any possible improper payments and take affirmative steps to avoid even the appearance of acquiescence.[94]

10. Permissible Payments and Affirmative Defenses

a. Facilitating-Payment Exception for Routine Governmental Actions

As a result of the 1998 amendments, the FCPA provides an exception for so-called "facilitating," "expediting," or "grease" payments to low-level foreign officials who perform "routine governmental actions."[95] The purpose of this exception is to avoid FCPA liability where small sums are paid to facilitate certain routine, non-discretionary government functions such as the processing of permits, licenses, visas, work orders, or other official documents; providing police protection, power and water supply, cargo handling, or protection of perishable products; and scheduling inspections associated with contract performance or transit of goods across the country.[96] "Routine governmental actions" do not include decisions by foreign officials to award new business or to continue business with a particular party.[97]

The *Resource Guide* points out that a routine government action does not include acts that are within an official's discretion or that would constitute misuse of an office—offering as an example that paying an official a small amount to have the power turned on at a factory is a facilitating payment while paying an inspector to allow a company without a permit to operate is not.[98] The DOJ-SEC Guidance cautions that this exception focuses on the *purpose* of a payment rather than its *value*, but concedes that the size of a payment can be telling as "a large payment is more suggestive of corrupt intent to influence a non-governmental action."[99] The *Resource Guide* also warns that "labeling a bribe as a 'facilitating payment'" in a company's books and records does not make it so.[100]

Conversely, the rules cite three factors the SEC will consider in determining whether to decrease an award:[254]

1. Culpability, including the whistleblower's role in the securities violation; the whistleblower's education, training, experience, and position of responsibility at the time the violations occurred; the whistleblower's scienter, both generally and in relation to others who participated in the violations; his or her personal financial benefit from violations; whether the whistleblower is a recidivist; the egregiousness of the underlying fraud committed by the whistleblower; and whether the whistleblower knowingly interfered with the SEC's investigation;
2. Unreasonable reporting delay, including whether there was a legitimate reason for the whistleblower to delay reporting violations;
3. Whether the whistleblower undermined the integrity of internal compliance or reporting systems.

F. Confidentiality

In general, the SEC will not disclose information that reasonably could be expected to reveal the identity of the whistleblower.[255] The rules provide for anonymous submission of information but in such circumstances a whistleblower must have an attorney represent him or her in connection with both the submission of information and claim for an award. The attorney's contact information must be provided at the time a whistleblower submits information to the SEC.

G. SEC Whistleblower Report to Congress (2014)[256]

On November 18, 2014, the SEC published its 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program.The highlights from the report included:

- A majority of the award recipients were not represented by counsel when they submitted their tip or complaint to the Commission. However, a majority of the recipients were represented by counsel when they applied for an award.
- In fiscal year 2014 the SEC authorized rewards to nine whistleblowers, out of a total of 14 since the program's inception in August 2011.
- Of the award recipients who were current or former employees, over 80 percent raised their concerns initially to their supervisors or compliance personnel before reporting the information to the Commission.
- On August 14, 2014, a Final Order of the Commission was issued denying an individual's claims for awards in 143 different Notices of Covered Action (NoCA).[258] The SEC had already found the individual ineligible for an award in 53 other matters. It found that individual ineligible for an award in the 196 matters or in any future covered or related action.
- On August 29, 2014, the Office of the Whistleblower announced a whistleblower award of $300,000 to a company employee with audit and compliance responsibilities who reported a securities violation internally and then reported the violation to the SEC after the company failed to take appropriate, timely action in response to the information.
- On June 13, 2014, the Commission awarded $875,000 to be divided equally by two whistleblowers who acted in concert to voluntarily furnish information and assistance to the SEC that resulted in a successful enforcement action.
- On June 16, 2014, the SEC brought its first enforcement action under the antiretaliation provisions of the Dodd-Frank Act. The head trader of Paradigm Capital Management reported to the SEC that his company had engaged in prohibited principal transactions. After learning the trader had reported the potential misconduct, Paradigm changed the whistleblower's job function, stripping him of supervisory responsibilities and otherwise marginalizing his role. The SEC ordered the firm to pay $2.2 million to settle the retaliation and other charges.[257]
- On July 22, 2014, the Commission awarded three whistleblowers collectively 30 percent of the recoveries in an SEC action. Based on the level of assistance each whistleblower provided to the SEC staff, one whistleblower received 15 percent, another 10 percent, and the third received 5 percent
- On July 31, 2014, a whistleblower aggressively worked internally to bring a securities law violation to the attention of company personnel. Only after the company failed to take action did the individual bring the matter to the SEC's attention and receive a $400,000 reward.
- On September 22, 2014, the Commission authorized an award of more than $30 million—the largest to date—to a whistleblower who provided key original information that led to a successful enforcement action.
- The number of whistleblower tips annually has increased since the program's inception with 334 in FY 2011 (a partial year), 3001 in FY 2012, 3,238 in FY 2013, and 3620 in FY 2014. Over 150 FCPA tips were filed in 2014; California, Florida, New York, and Texas were the top states for whistleblower tips in 2014.
- The SEC has given awards to four whistleblowers living in foreign countries. In the Commission's view, there is sufficient U.S. territorial nexus whenever a claimant's information leads to the successful enforcement of a covered action brought in the United States, concerning violations of the U.S. securities laws, by the Commission.
- The SEC's very first award recipient has seen his whistleblower award grow from an initial payout of nearly $50,000 to over $385,000, or over seven times the amount of the original payout.
- To date, over 40 percent of the individuals who received rewards were current or former employees. An additional 20 percent of the award recipients were consultants, contractors, or were solicited to act as consultants for the company committing the securities violation. The remaining award recipients obtained their information because they were investors who were victims of the fraud, or were professionals working in the same or similar industry or had a personal relationship with one of the defendants.

H. Practical Whistleblower Advice for Multinational Companies and Counsel

The final whistleblower rules can have a significant effect on various aspects of a company's business and operations. Consequently, companies should carefully

C. Canada

In June 2011, the Royal Canadian Mounted Police (RCMP) International Anti-Corruption Unit concluded a six-year bribery investigation of Niko Resources Ltd., a Calgary-based oil and gas company.[58] Specifically, the company was charged with bribery under section 3(1)(b) of the Corruption of Foreign Public Officials Act (CFPOA), 1999, for conduct during the period February 1 to June 30, 2005. The RCMP alleged that in May 2005, Niko Resources, through its subsidiary Niko Bangladesh, provided the use of a vehicle that cost C$190,984 to the former Bangladesh State Minister for Energy and Mineral Resources in order to influence the Minister in dealings with Niko Bangladesh. In June 2005 the parent company paid travel and lodging expenses for the same minister to travel from Bangladesh to attend the GO EXPO oil and gas exposition. Niko is alleged to have improperly paid approximately $5,000 for nonbusiness travel to New York and Chicago so the Minister could visit his family.

Justice Brooker of the Court of Queens Bench accepted the Crown's recommendation of a fine of C$8.2 million and the victim surcharge for a total of nearly C$9.5 million. Niko is subject to the court's supervision for a period of three years pursuant to a probation order to ensure that audits are completed to examine Niko's compliance with the CFPOA. The RCMP acknowledged the cooperation of the Bangladesh Anticorruption Commission, the DOJ Fraud Section, and the FBI International Corruption Unit, along with law enforcement agencies in Switzerland, Japan, the United Kingdom, and Barbados.[59] The Niko Resources case was the first foreign bribery prosecution brought by Canada under the CFPOA.

In January 2013, Griffiths Energy International Inc. (GEI), another Calgary-based energy company, pleaded guilty to CFPOA charges and agreed to pay a C$10.35 million penalty.[60] GEI's chairman and cofounder, Brad Griffith, and a business partner, Naeem Tyab, spent six months in 2008 pursuing opportunities to acquire blocks in Chad. After a Canadian advised the pair against making payments to Chad's Ambassador to Canada, GEI paid a $2 million consulting fee to a company owned by the Ambassador's wife. Following Griffith's death in a boating accident in July 2011, new management learned of the payments, conducted an investigation, and voluntarily disclosed the results of the investigation to the RCMP. Notwithstanding its "full and extensive"[61] cooperation and the first Canadian bribery voluntary disclosure, the privately held company had to plead guilty to a felony and agreed to pay the largest CFPOA fine ever.[62]

In August 2013, an Ontario Superior Court convicted Nazir Karigar of conspiring in 2005 and 2006 to bribe Air India officials and an Indian Minister of Aviation in order to land a government contract for a facial recognition security system. Karigar, a Canadian, became the first person convicted under the CFPOA. [63] In May 2014 Judge Hackland sentenced Karigar to three years in jail. [64]

D. People's Republic of China

In early 2013 the People's Republic of China (PRC) Ministry of Public Security (MPS) began investigating suspicious activity involving a Shanghai travel agency and potential money laundering to funnel bribes to doctors, hospitals, medical

associations, foundations, and government officials. According to Chinese investigators, the payoffs led to drug sales and allowed British pharmaceutical giant GlaxoSmithKline to sell its products for higher prices in the PRC.[65]

In July 2013 Beijing authorities accused Glaxo's China operations of "organizing fictitious conferences, overbilling for training sessions, and in various other ways filing sham expenses for which the cooperating travel agencies would issue bogus receipts."[66] This practice allegedly allowed GSK executives to be reimbursed while travel agencies took some of the monies for themselves. The Chinese government detained four GSK executives following a raid of the company's offices in China in late June. In July 2013, GSK issued a conciliatory statement that said, "Certain senior executives of GSK China who know our systems well appear to have acted outside of our processes and controls, which breaches Chinese law. We have zero tolerance for any behavior of this nature."[67] Glaxo vowed to continue to cooperate with the MPS and stated that the scandal involved only a few rogue Chinese-born employees.

In September 2014, after a one-day trial held in secrecy, the Changsha Intermediate People's Court in Hunan Province found that Glaxo's Chinese subsidiary had, according to Chinese law, offered money or property to nongovernment personnel in order to obtain commercial gain and had been found guilty of bribing nongovernment personnel.[68] In an unusual practice, Chinese authorities prosecuted the foreign-born former GSK country manager Mark Reilly and four other company managers who faced potential prison terms of two to four years. All five were given reprieves,[69] and Reilly is expected to be deported. The bribes reportedly led to illegal revenues of more than $150 million. In imposing the biggest fine ever by a Chinese court, the People's Court said, "[The firm] bribed, in various forms, people working in medical institutions across the country, and the amount of money involved was huge. Five senior executives actively organized, push forwarded and implemented sales with bribery."[70]

In addition to publishing a statement of apology to the Chinese government, Glaxo stated that it had taken comprehensive steps to rectify the issue, including fundamentally changing the incentive program for its sales forces (decoupling sales targets from compensation); significantly reducing and changing engagement activities with healthcare professionals, and expanding processes for review and monitoring of invoicing and payments.[71]

E. Mexico

In June 2012 Mexico enacted a Federal Law against Corruption in Public Procurement (Ley Federal Anticorrupción en Contrataciones Públicas or the Anticorruption Law) (FCPA). The Anticorruption Law holds individuals and companies accountable for offering money or gifts to obtain or maintain a business advantage in the procurement of public contracts with the Mexican government.[72] Violators are subject to administrative sanctions, including the imposition of monetary fines that are roughly $5,000 to $250,000 for individuals and $50,000 to $10 million for companies, and corporations are subject to suspension or debarment from federal procurement contracts for up to ten years. Signally, fines may be reduced by up to 70 percent for offenders who self-report violations to Mexican authorities.

ethical "tone at the top." In the United Kingdom, this quality is most often referred to by Serious Fraud Office authorities as "top level commitment."[48] Senior executives who adopt this key value regularly emphasize it in annual reports, in employee newsletters, on intranets, and at management conferences, retreats, and large employee gatherings. As important, they take firm, decisive action when employees or colleagues blur or cross ethical lines. Of course, they must hold themselves accountable to the same high ethical standards.

Many public company CEOs and CFOs claim that they embrace "tone at the top." In FCPA investigations, seasoned prosecutors, enforcement attorneys, and law enforcement agents are not hesitant to explore that commitment in interviews of senior officers, to examine employee perceptions of the actual "tone at the top," or to dissect the company's existing compliance program and personnel and budgetary commitment. Prudent multinational companies can demonstrate a strong "tone at the top" by conducting FCPA training for the boards of directors and annually reviewing how often and effectively the company and its senior executives and country managers have communicated the importance of compliance to employees and other important constituents such as third parties. They can also demonstrate "tone at the top" by having active antibribery and anticorruption oversight by a board committee such as an audit, compliance or ethics committee; establishing related management committees, for example, a compliance group that meets quarterly; employing one or more full-time compliance officers; and having an engaged internal audit staff or program that is committed to an antibribery and anticorruption component and has direct access to an audit or other board committee. It is important to memorialize and maintain all records of "tone at the top" such as board and committee minutes reflecting compliance oversight, board PowerPoint training slides, and third-party certifications.

E. Codes of Conduct

Effective codes of conduct both will provide an organizational compliance structure and will inform employees, officers, and directors of proscribed antibribery conduct in plain terms. An introductory message from the chief executive officer or chief compliance officer can convey the company's commitment to ethical values and the importance of adherence to the code of conduct by all employees, and thereby establish a correct "tone at the top" and promote values and leadership among managers.

Some codes are formal, adopting statutory language, while others are conversational. The best codes of conduct are custom-made for the company and its business and recognize the particular challenges that officers, employers, and business units face in the industries, countries, and regions where the company conducts business. They invariably address conflicts of interest, related-party interests, reporting of unusual activity, safety, accuracy of books and records, and disciplinary consequences. For multinational companies, antibribery law and export and import violations should be covered. Organizations can offer employees examples of problematic situations and appropriate guidance through short case studies or frequently asked questions.

Codes of conduct should provide a clear reporting mechanism and guidance to employees on how to seek advice. They should be made available and distributed

to all employees, officers, and directors, and be translated into the languages of the countries where the company has significant operations. Most public companies require an annual certification that each employee has read and understands the code and is unaware of any violations in the past year.[49] Many require such certifications by major third parties such as distributors, large resellers, and foreign agents.

While broad and wide-ranging codes of conduct have become salutary and commonplace for U.S. companies, they can create risks for multinational companies in other jurisdictions. Global employment law expert Cynthia L. Jackson has cautioned that in order to mitigate against foreign legal liabilities, U.S. multinationals should:

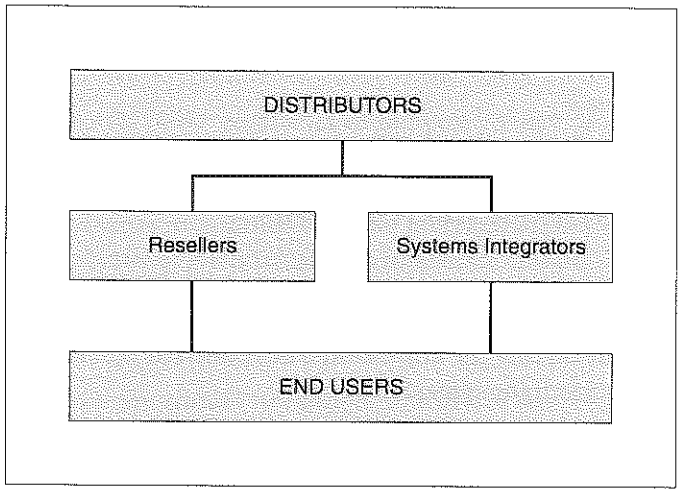
- Draft non-U.S.-centric codes of conduct and related policies and procedures.
- Distinguish legally mandated from voluntary provisions in a Code of Conduct. If the company determines that voluntary policies are critical to its stakeholders, it should commit sufficient time and money to monitor, train, and ensure compliance.
- Understand and monitor for compliance with local legal requirements (e.g., wage and hour and other employment regulations, bribery, environmental, import-export, data privacy, and other local laws).
- Observe all local employment and privacy procedural prerequisites before rolling out a Code of Conduct.
- Not assume that "cause" to discipline in the United States will constitute "cause" in a local jurisdiction.
- Recognize that some countries, particularly within the European Union, restrict the types of violations that can be reported to the United States to, for instance, accounting, internal accounting controls, auditing matters, government bribery, banking, and financial matters.
- Recognize that most European Union countries permit, but discourage, anonymity. Some countries, such as Spain, prohibit anonymous hotlines.
- Consider deleting voluntary "feel good" policies, unless they are truly core to the company's culture and ingrained into corporate practice. In some jurisdictions, such as China, merely requiring compliance with local law may require "raising the bar" significantly and constant training and reinforcement.
- Review the Code of Conduct with the same precision as a proxy statement. Better to underpromise and overdeliver than the opposite.[50]

F. Anticorruption Policies

Companies that operate in foreign jurisdictions, or employ a significant number of foreign nationals, or conduct business in countries perceived to be corrupt usually conclude that a detailed stand-alone anticorruption policy is necessary both to emphasize the importance of compliance and to give employees more detailed operational guidance.

Practical anticorruption policies will consider and address the countries or regions in which a company operates, the nature of a company's foreign government interface, and the risks of the particular industry. If a company operates in countries with a Transparency International Corruption Perception Index score of less than 50 and its employees have regular interface with foreign government

distributors, resellers, subcontractors, and agents, and a manufacturer must know the transaction flow. It is helpful to diagram the parties to a sale and to understand what benefits each received as a channel partner. For example, a channel indirect sales model in the software industry might have the following transaction flow:



If the distributors, resellers, subcontractors, or agents receive a discount or a marketing development fund from the manufacturer, as is often common, then some level of due diligence is appropriate, including inquiry into the ownership structure, compensation, government, anticipated invoice detail, and audit rights. Too often, the principal inquiry is the financial condition and wherewithal of the third party and not its integrity.

B. Liability

Because of distributors' general independence and the customary transfer of title of goods from the manufacturer to the distributor, many companies mistakenly assume that distributors pose little or no risk to them under the FCPA. The fact is that the FCPA prohibits the use of an agent to violate the statute.[15] A distributor can itself be an "agent" of the manufacturer or supplier and thus subject the company to criminal liability if the company corruptly gives the distributor anything of value, for example, goods or a price discount, knowing that all or some of the things of value will be offered, given, or promised, directly or indirectly, to a foreign official to obtain or retain business.

If a distributor receives a substantial discount and the controlling company or supplier knows with a "high probability" that an improper payment may take place or has taken place, the latter may be held criminally liable. Under such circumstances, the independence of the distributor or the passage of title from the company to the distributor are irrelevant.[16] However, where a distributor makes payments to a foreign official to obtain or retain business, the DOJ will face a substantial burden to prove a "high probability of knowledge" on the part of the manufacturer. Similarly, a significant reseller can create FCPA liability for a manufacturer under select circumstances.

C. Risk Reduction

To minimize FCPA exposure, many multinational companies recite and incorporate relevant FCPA or antibribery language in their distributor and reseller agreements. Others require mandatory FCPA training for Tier 1 parties such as distributors or large resellers. Some also impose audit rights whereby independent auditors may annually examine the distributor's or reseller's books and records in whole or in part.

Counsel should review the traditional red flags for third parties to determine whether they prove or corroborate the requisite high standard of knowledge that establishes a violation in the distributor context. Recent DOJ or SEC FCPA distributor cases have included AGA Medical Corporation, DPC (Tianjin) Co. Ltd., Fiat, and Johnson & Johnson (see chapter 10).

D. Subagents, Subcontractors, and Subdistributors

Many companies perform adequate due diligence for direct agents, contractors, and distributors. However, problems can arise when vetted and approved agents, contractors, and distributors engage and contract with subagents, subcontractors, and subdistributors unbeknownst to the client. These subparties can create liability for a multinational client. For this reason, agent, contractor, and distributor contracts must be explicit about agent, contractor, and distributor vetting and approval obligations with respect to any subdistributors and subagents.

E. Business Partner Compliance Risk

Recent FCPA resolutions portend increased responsibility and liability for third-party conduct. As a result, professional firms are designing compliance systems for companies that gather information from business partners; evaluate the risks with which deep risk analytics lead to modification of audit plans, processes, and controls; and instituting increased oversight. The best programs[17] gather and analyze not just FCPA data, but third-party background, ethical, and export compliance infrastructures and employ embedded risk ranking by question and between questions. Business partners will increasingly be asked to absorb compliance program costs; those who decline are likely not profitable or compliance-oriented business partners.

VI. MERGER, ACQUISITION, AND INVESTMENT DUE DILIGENCE

A. Reasons to Conduct Merger, Acquisition, and Investment Due Diligence

A company contemplating an acquisition, merger, or investment should promptly conduct sufficient due diligence to assure itself that the target's employees or agents have not engaged in making and/or do not intend to make improper payments to government officials in the performance of company business. A "check the box" approach or broad target representation that the company is unaware of any bribery-type conduct is simply no longer adequate. Justifications for thorough due diligence include good corporate citizenship; prosecution of the acquiring

entertainment and supporting invoice(s) were next featured in a front-page story of *The New York Times?* In essence, one must ascertain whether under the particular travel, lodging, and entertainment facts and circumstances, there is a quid pro quo. Thoughtful, stand-alone written company travel and entertainment policies with examples are more likely to provide a safe haven for a company and its employees alike. In such policies, "reasonableness" (borrowing from the FCPA's travel and entertainment language relating to certain marketing and contracting activities) or "reasonable and proportionate" (borrowing from the U.K. Bribery Act Guidance[3]) should be the governing standard and is best met and assured under policies where prior written approval is required.

Because the FCPA expressly affords protection for certain types of travel and lodging, but does not directly address gifts anywhere, the topics are next addressed separately.[4]

II. GIFTS

Most business gifts are simply that: gifts designed to promote products or services and thus business and business relationships. Under the FCPA, the term "corruptly" connotes an evil motive or purpose, and only a gift with an intent to wrongfully influence the recipient in awarding or retaining business or gaining an improper business advantage should provide the basis for an FCPA bribery charge. The FCPA does not state a minimum dollar threshold for corrupt gifts. A gift or entertainment that is provided to create a favorable business climate with only a generalized hope or expectation of ultimate benefit to the donor lacks the benefit of a quid pro quo for the award of business.[5]

A. The Gift Spectrum and the *Resource Guide*

Gifts can range from modest to extravagant, and the more extravagant the gift, the more likely it was given with an improper purpose. The DOJ and SEC *Resource Guide* recognizes that a small gift or token of esteem or gratitude is an appropriate way to display respect in a business setting. Accordingly, reasonable meals and entertainment expenses or company promotional items (free pens, hats, T-shirts) are unlikely to draw FCPA enforcement action.[6] On the other hand, the *Resource Guide* points out that gifts of sports cars and fur coats as well as widespread gifts of smaller items as part of a pattern of bribes cross the line.[7] The *Resource Guide* highlights several extravagant gifts, for example, sports cars, as improper and conversely offers multinationals comfort with respect to small gifts of nominal value; it, however, leaves a wide spectrum uncertain in the middle. The guidance below is intended to address that gulf. Not surprisingly, side trips, discussed *infra*, to tourist attractions such as Las Vegas, Disney World, Universal Studios, Napa, and the Grand Canyon can be very risky.

The following value questions may be relevant:

- Is the gift extravagant (e.g., sports car, fur coat, and other luxury items) and likely to be interpreted as able to influence the recipient?

- Is the value of the gift consistent or at odds with the donor company's domestic gift policy?
- Is the value of the gift substantial when compared to the annual income of the recipient or the annual per capita income of the country of the recipient?

In addition to its value, whether an item in the middle of the spectrum presents risk will frequently turn on the nature and transparency of the gift.

B. Nature of the Gift

In general, the nature of a gift to a non–U.S. government official can determine whether the gift is *corruptly* motivated. The following questions and factors should be considered in determining whether a gift is proper under the FCPA:

- Is the gift business-appropriate?
- Would a donor be at all embarrassed if the fact of the gift were to be publicly disclosed?
- Is the gift something a donor would be comfortable accurately describing on an expense voucher?
- Is the gift a memento of a business occasion, for example, a bowl with an engraved corporate logo to commemorate a joint venture opening?
- Is the gift cash or one involving something not appropriate for a business, for example, adult entertainment?
- Is the gift a one-time event to a recipient, or has the recipient received repeated gifts over time? That is, is there a widespread pattern of gifts?
- Does the recipient or a close friend or relative of the recipient have any decision-making authority with respect to the donor's business, bid, award, or contract?

C. Transparency of the Gift

Transparency questions include the following:

- Will the gift be given openly to the intended recipient, for example, presented to the intended recipient at a group setting rather than one-on-one?
- Is the gift to be presented directly to the intended recipient?
- Has the intended recipient requested the gift?
- What is the intended recipient's role in any current or upcoming business or contract award or approval process?
- Has the donor provided multiple gifts of value to one recipient for that recipient to distribute to other recipients?
- Is the gift reciprocal (e.g., has a visiting group presented a gift to the host, and is it a custom and practice in the country in question for the host to reciprocate and present a similar gift)?
- Does the recipient's government, company, or organization have any written policies governing or prohibiting gifts, and does the gift in question conform to or violate that policy?

comisión confidencial, *caisse noire*), identify books-and-records and internal controls issues, and assist in recommending and formulating improved internal controls and other remedial measures. These forensic specialists should normally be independent and not the company's regular outside accounting or auditing firm. The retention of qualified forensic accountants under the direction of investigation counsel can provide regular outside auditors an increased level of comfort about the thoroughness of the investigation, the forensic component, and the status of internal controls.

Since there is no federal accountant-client privilege, investigation counsel—not the client—should retain the forensic accounting firm under a clearly defined scope of work set forth in an engagement letter. Investigation counsel should carefully monitor the scope of the accountant or investigation engagement, the work plan, interviews, and progress. Whenever nonlawyers are assigned responsibilities, they should perform under the direction of and report to counsel in order to maintain the attorney-client privilege and work-product protection.[3] Counsel should determine early on what types of memoranda forensic accountants or investigations will prepare and if they will remain in draft form.

E-mails are the primary form of internal and external communications for many multinational corporations (MNCs) in almost all industries today and frequently provide the DNA in white-collar criminal investigations. Indeed, some lawyers contend the "e" in e-mail stands for evidence. As a result, thorough e-mail searches are standard and a must for virtually any significant internal investigation to be credible. Sometimes companies resist conducting detailed electronic searches by internal auditors, inside counsel, or outside investigation counsel, considering them too expensive, invasive, and time-consuming. E-mail searches have proven very telltale in anticorruption investigations, and the discovery of highly relevant e-mails has led the DOJ and SEC to benefit from and expect, if not insist upon, thorough e-mail searches in any credible internal investigation. Oftentimes, a company's outside auditor will shadow an internal investigation because the audit firm wants to know how deep and wide any potential problems may be and, in particular, to know if past financial statements are accurate and whether it can rely on the representations of the company's senior management. For these reasons, it is common to share planned search terms with shadow auditors and to provide an overview of the investigation work plan. (See also section II.E.)

The following employee e-mail, which was uncovered in Tenaris, S.A.'s FCPA investigation into payments to an Uzbekistan agent to influence the bidding process with a state-controlled oil company, illustrates the potential minefield from electronic searches:

> So dirty game is when . . . [p]eople from the [OAO, a wholly owned subsidiary of the state holding company of Uzbekistan's oil and gas industry] tender department . . . [c]an carefully open required bids and check the prices and deliveries of competitors and advise for where you need to be lower and where you need to be higher. . . . And if you decide to revise your prices & delivery, it can be done and physically your commercial offer will be replaced by a revised offer and envelope will be sealed again. But this is very risky for them also, because if people get caught while doing this they will go automatically to jail. So as [OAO] agent said, that's why this dirty service is expensive.[4]

There are numerous forensic software programs and narrowing techniques available to investigation counsel and forensic accountants that can substantially reduce the number of e-mails that need to be searched. This in turn substantially reduces attorney and investigator review time, which usually constitutes the bulk of the expense of electronic searches.

Focused interviews, preferably in the country in question, are the sine qua non of any corporate internal investigation and are particularly challenging in an FCPA investigation given the typical cultural and language challenges. It is useful for counsel to have all relevant documents, including e-mails, and to prepare and update a comprehensive working chronology that not only tracks and analyzes key underlying conduct and meetings but identifies key players (and their counsel), questionable payments, hot electronic and hard documents, false books and records, potential red flag issues, due diligence steps, disciplinary actions, disclosure to one or more agencies, cooperation efforts, internal controls issues, remedial measures, and other important events or mitigating factors. Without a continuously updated chronology, it is usually difficult to recall and understand the relationships and timing of key events and documents in a lengthy or complex multicountry investigation. Chronologies can be particularly helpful in tracking the activities of employees or agents in several countries, regions, ventures, or operations. Finally, they are helpful in recalling key documents, preparing for important interviews, and drafting internal reports, position papers, Wells submissions, PowerPoint presentations, and remedial recommendations for companies, boards of directors, and government authorities.

Legal issue development will obviously focus on the statutory provisions, the legislative history, the FCPA case law, FCPA national or territorial jurisdiction over a company and individuals, FCPA criminal prosecutions, SEC enforcement actions,[5] deferred prosecution agreements (DPAs), nonprosecution agreements (NPAs), foreign or local law, and any relevant FCPA opinions issued by the DOJ. It can include a review of analogous statutes such as domestic bribery statutes, applicable conventions (as implemented), and related case law.

D. Investigations Likely to Be Disclosed to and Shared with U.S. Government Law Enforcement Authorities and SEC Criticism of Investigative Tactics

Increasingly, companies, boards of directors, or audit committees authorize internal investigations, knowing there is a reasonable likelihood that any report or results may be shared in some fashion with the DOJ or SEC. This practice is especially common where the client seeks voluntary disclosure and cooperation credit. Whether counsel actually shares the contents of a PowerPoint presentation or a report with the government as part of disclosure or cooperation, there is a strong probability that government attorneys will examine the thoroughness and

- Expanding, enhancing, and, where appropriate, centralizing its worldwide legal, accounting, and international audit functions;
- Issuing an enhanced, stand-alone FCPA policy and conducting worldwide training upon implementation of that policy;
- Retaining new senior management with substantial international experience and understanding of FCPA requirements;
- Acknowledging responsibility for the misconduct; and
- Delaying pursuit of civil remedies against certain former employees so as not to prejudice the DOJ's criminal investigation of the individuals.

The above cooperative and remedial steps were specifically recognized in the Willbros DPA and represented the most comprehensive list of remedial or cooperation steps to date by a midsize company discovering and promptly investigating FCPA misconduct. Likely because of its efforts to promptly disclose and cooperate fully with the DOJ, it obtained DPAs for the parent and subsidiary notwithstanding the delivery of a million dollars in cash by a country manager during the investigation. The Willbros resolution offers important guidance on how midsize companies uncovering serious misconduct by senior management can promptly institute strong remedial measures and manage to avoid a felony conviction for the parent company and subsidiaries.

Because FCPA settlements with the DOJ and the SEC have featured independent monitors for terms of three years—in the case of Siemens, four years—some companies under investigation have attempted to line up independent consultants to review and oversee their compliance reforms in advance and thereby avoid or at least influence the government's selection of a monitor in a DOJ or SEC settlement.[56]

XIV. LOGISTICAL ADVICE IN CONDUCTING FOREIGN INVESTIGATIONS[57]

There is no substitute for conducting FCPA interviews, if at all possible, in-country at the site of the alleged wrongful conduct. An interview of a foreign national tied to a gratuity to a foreign tax official or an informal meeting with U.S. Department of Commerce officers at a U.S. embassy can enable company counsel to obtain and paint a vivid picture and possibly persuade DOJ prosecutors or SEC regulators that an FCPA bribery charge is inappropriate.

The opportunity to interview (let alone reinterview) foreign witnesses is usually limited, and many foreign nationals, unaccustomed to the detailed nature of U.S. litigation or white-collar criminal investigations, will understandably seek to avoid a second meeting. When counsel is considerate of overseas witnesses and staff and well prepared in initial interviews, the likelihood of a productive follow-up meeting or telephone conference is greatly enhanced. As often as not, company counsel will have earlier and greater access to documents and witnesses than U.S. authorities will.

A. Logistics

In representing a corporate client and coordinating logistics, investigation counsel will want to work closely with the general counsel, an assistant general counsel, or

his or her designate. Usually the client will have an in-country manager or regional counsel who can facilitate document preservation and imaging, and line up document reviews and interviews a week or two before the trip. This person often has helpful insights into the matters under review and the factual perspectives of certain practices and potential witnesses. He or she can often provide useful documents in advance, such as the local organization chart, accounts payable procedures, the audit plan, or the storage plan, and can also guide investigation counsel on what to wear at interviews or on a plant tour. An overseas contact can normally secure work space on company premises or another convenient location such as a law office or quality hotel conference room.

An unnecessarily broad request from American counsel to review every in-country file or transaction and interview dozens of employees can create a crisis atmosphere before counsel even arrives. While the company should take all appropriate steps to preserve all relevant documents—hard and electronic—at the outset, it usually helps to narrow initial interview and document requests and expand the requests after counsel has a better on-the-ground understanding of the value of witnesses and scope of relevant records. In planning meetings, counsel should be mindful of foreign holidays and travel schedules of interviewees. The order of the document review and witness interviews, as well as their location, can be important.

Foreign counsel can be very helpful in familiarizing U.S. counsel with local laws and customs. They also can advise where necessary on how to deal with third-party sources of information or local government officials and policies. Logistics will also customarily include visa procurement, transportation, lodging reservations, airport and customs assistance, copying and fax services, and arrangements for weekend and evening support services.

B. Documents

U.S. and foreign document reviews will normally precede in-country interviews. This process can often take weeks or even months depending on the volume or translation requirements. This review should search hot or key documents and sort them by witness and topic and incorporate them into each witness's interview outline. Important documents—particularly e-mails—are found through a quality electronic search with carefully thought-out search terms. Of course, any relevant U.S.-based documents should be addressed in the outline and interview, as well. Key domestic and foreign documents will usually be described and analyzed in a privileged working chronology, *supra*.

Many foreign-based corporate documents are in English. If there are key documents in foreign languages, counsel must plan ahead for translation services. Particularly where documents are sensitive, one should retain a trustworthy interpreter. Many multinational companies have experienced translators on call. If work product and copies of documents may be couriered back to the States, counsel should determine the legality of the transfer of documents outside the country, what overseas services are available, and the delivery schedules for time-sensitive documents. Counsel will want to consider whether there are compelling legal reasons—American or foreign—for not copying or removing documents from distant locations.

Jennings consented, without admitting or denying the SEC's allegations, to the entry of a final judgment that permanently enjoins him from violating sections 30A and 13(b)(5) of the Securities Exchange Act of 1934 and Rules 13a-14, 13b2-1, and 13b2-2 thereunder, and from aiding and abetting Innospec's violations of Exchange Act sections 30A, 13(b)(2)(A), and 13(b)(2)(B). Jennings agreed to disgorge $116,092 plus prejudgment interest of $12,945, and to pay a penalty of $100,000 that took into consideration his cooperation in this matter.

AB. *SEC v. IBM Corp.*[74]

▶ **Misconduct Category:**	Improper cash payments, gifts (cameras, computers, and computer equipment), and payments of travel and entertainment expenses government officials by IBM Korean subsidiaries and IBM joint venture in order to secure the sale of IBM products; use of joint venture partners to funnel bribes; absence of training program, expense accounts controls
▶ **Countries:**	China, South Korea
▶ **Foreign Government Officials:**	Officials of South Korean government entities and unspecified Chinese government officials
▶ **Improper Payment Dollar Value:**	$207,000
▶ **Combined Penalties:**	$10 million (disgorgement: $5.3 million; prejudgment interest: $2.7 million; and civil penalty of $2 million)
▶ **Other:**	Shopping bags of cash delivered to Korean government officials in parking lots; payments to the bank account of a "hostess in a drink shop"; joint venture liability: IBM had a 51 percent majority interest while LG Electronics Inc. had a 49 percent interest; widespread practice by over 100 employees of providing overseas trips, entertainment, and improper gifts to government officials; deficient internal controls allowed employees of IBM's subsidiaries and joint venture to use local business partners and travel agencies as conduits for bribes or other improper payments over ten-year period
▶ **Related Matter:**	*SEC v. IBM* (2000): IBM settled FCPA violations with the SEC that related to bribes by an Argentine subsidiary and was fined $300,000. The large fine of $10 million in 2011 likely reflects a recidivist factor. SDNY Judge Richard Leon insisted upon stringent court and SEC reporting requirements.

In March 2011, the SEC charged IBM with violating the books-and-records and internal controls provisions of the FCPA as a result of the provision of improper cash payments, gifts, and travel and entertainment to government officials in South Korea and China.

As alleged in the SEC's complaint in the Southern District of New York, from 1998 to 2003, employees of IBM Korea, Inc., an IBM subsidiary, and LG IBM PC Co., Ltd., a joint venture in which IBM held a 51 percent interest and LG Electronics of Korea held a 49 percent interest, paid cash bribes and provided improper gifts and payments of travel and entertainment expenses to various government officials in South Korea in order to secure the sale of IBM products. The foreign officials worked for 16 South Korean government entities. Payments were disguised as "payments for installation services" and "reimbursements." IBM's Korean joint venture partner provided free computers to key decision makers to entice them to purchase products or provide them information to assist in the bidding process. Entertainment payments included payments to the bank account of a "hostess in a drink shop."

It was further alleged that, from at least 2004 to early 2009, employees of IBM (China) Investment Company Limited and IBM Global Services (China) Co., Ltd. (collectively, IBM-China), both wholly owned IBM subsidiaries, engaged in a widespread practice of providing overseas trips, entertainment, and improper gifts to Chinese government officials. IBM-China entered into contractual agreements with government-owned or government-controlled customers in China for hardware, software, and other services. The contracts contained provisions requiring IBM-China to provide training to customer employees. In some cases, IBM held this training off-site and required the customers to travel. In advance of training, IBM-China employees were required to submit a delegation trip request (DTR). IBM-China's policies required customers to pay for side trips and stopovers unrelated to training and for IBM-China managers to approve all DTRs.

IBM's internal controls failed to detect over a six-year period at least 114 instances in which (1) IBM employees and its local travel agency worked together to create fake invoices to match approved DTRs; (2) trips were not connected to any DTRs; (3) trips involved unapproved sightseeing itineraries for Chinese government employees; (4) trips had little or no business content; (5) trips involved one or more deviations from the approved DTR; and (6) trips were per diem payments and were provided to Chinese government officials.

IBM-China also used its official travel agency in China to funnel money that was approved for legitimate business trips to fund unapproved trips. IBM-China personnel utilized the company's procurement process to designate its preferred travel agents as "authorized training providers." IBM-China personnel then submitted fraudulent purchase requests for "training services" from those "authorized training providers" and caused IBM-China to pay these vendors. The money paid to these vendors was used to pay for unapproved trips by Chinese government employees.

IBM consented to the entry of a final judgment that permanently enjoined the company from violating the FCPA's books-and-records and internal controls provisions. IBM also agreed to pay disgorgement of $5.3 million, $2.7 million in prejudgment interest, and a $2 million civil penalty. Judge Richard Leon, as part of his oversight responsibility, required IBM to submit to him and to the SEC annual

▶ **Other:**	DPA for Swiss parent company and guilty plea by U.S. subsidiary; Panalpina spawned industry-wide investigation focusing primarily on Nigeria Customs Service abuses; government theory in essence charged that Panalpina aided and abetted select issuer-customers by paying bribes to customs officials to avoid duties and expedite imported goods; no monitor requirement despite six-year multicountry misconduct due to Panalpina's significant commitment to build a compliance department during the government investigation
▶ **Related Matters:**	Noble, *United States v. Pride International, United States v. Shell Nigeria Exploration & Production Co., United States v. Tidewater, United States v. Transocean; SEC v. GlobalSantaFe Corp.*; Panalpina and these companies agreed to pay combined DOJ criminal penalties and SEC disgorgement of profit amounts of over $236 million.

In November 2010 Panalpina World Transport (Holding) Ltd., a global freight-forwarding and logistics services firm based in Basel, Switzerland, and its U.S.-based subsidiary, Panalpina Inc., admitted that the companies, through subsidiaries and affiliates (collectively Panalpina), engaged in a scheme to pay bribes to numerous foreign officials on behalf of many of its customers in the oil and gas industry. They did so in order to circumvent local rules and regulations relating to the import of goods and materials into numerous foreign jurisdictions. Panalpina admitted that between 2002 and 2007, it paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan; the company provides global freight-forwarding and logistics services in approximately 160 jurisdictions. In November, Panalpina's customers, including Shell Nigeria Exploration and Production Company Ltd. (SNEPCO), Transocean Inc., and Tidewater Marine International Inc., admitted that they approved of or condoned the payment of bribes on their behalf in Nigeria and falsely recorded the bribe payments made on their behalf as legitimate business expenses in their corporate books, records, and accounts.

The government theory was that Panalpina, through its subsidiaries, made improper payments to Nigerian Customs Service (NCS) officials in the course of providing a variety of shipping, freight-forwarding, and logistics services, including customs service and transportation services, on behalf of issuer-customers, including express courier service and temporary importations. The charges for the improper payments were later invoiced to the issuer-customers with descriptions intended to aid the issuer-customers in concealing the nature of the improper payments in their books, records, and accounts. False descriptions included "local processing fees," "interventions," "special handing," and "administration/transport

charges."[340] Between 2002 and 2007, Panalpina Nigeria paid over $30 million in improper payments to Nigerian government officials. The company admitted that it engaged in similar misconduct during roughly the same period in Angola, Azerbaijan, Brazil, Kazakhstan, Russia, and Turkmenistan.[341]

As part of the resolution, the DOJ filed a criminal information charging Panalpina World Transport with conspiring to violate and violating the antibribery provisions of the FCPA. The DOJ and parent company Panalpina World Transport agreed to resolve the charges by entering into a DPA. The DOJ also filed a criminal information charging Panalpina Inc. with conspiring to violate the books-and-records provisions of the FCPA and with aiding and abetting certain customers in violating the books-and-records provisions of the FCPA and Panalpina Inc. agreed to plead guilty. The agreements require the payment by Panalpina of a $70.56 million criminal penalty.

Under the terms of the three-year DPA, Panalpina World Transport is required to fully cooperate with U.S. and foreign authorities in any ongoing investigations of the company's corrupt payments. In addition, it is required to implement and adhere to a set of enhanced corporate compliance and reporting obligations. In a related civil enforcement action brought by the SEC, Panalpina Inc. agreed to pay approximately $11.3 million in disgorgement of profits.

The DOJ criminal penalty of $70.56 million was slightly less than the minimum prescribed by the USSG. In reaching an agreement with Panalpina World Transport (PWT), the DOJ considered that (1) PWT conducted comprehensive antibribery compliance investigations of operations of PWT's subsidiaries in seven countries, as well as separate investigations related to U.S. and Swiss operations; (2) PWT conducted a review of certain transactions and operations conducted by its subsidiaries or agents in another 36 countries; (3) PWT promptly and voluntarily reported its findings from all investigations to the DOJ, including arranging to provide information from foreign jurisdictions that significantly facilitated the DOJ's access to such information; (4) PWT mandated employee cooperation from the top down and ensured the availability of more than 300 employees and former employees for interviews during the following the investigations; (5) PWT instituted a limited employee amnesty program to encourage employee cooperation with the investigations; (6) PWT expanded the scope of the investigations where necessary to ensure thorough and effective review of potentially improper practices, and promptly and voluntarily reported any improper payments identified after internal and DOJ investigations had begun; (7) after initially not cooperating with the investigation for several months, PWT fully cooperated with the DOJ's investigation of this matter, as well as the SEC's investigation, and on the whole exhibited exemplary cooperation with the DOJ investigation; (8) PWT provided substantial assistance to the DOJ and the SEC in its investigation of its directors, officers, employees, agents, lawyers, consultants, contractors, subcontractors, subsidiaries, and customers relating to violations of the FCPA; (9) PWT agreed to continue to cooperate with the DOJ in any ongoing investigation of the conduct of PWT and its directors, officers, employees, agents, lawyers, consultants, subcontractors, subsidiaries, and customers relating to violations of the FCPA; and (10) PWT undertook substantial remedial measures, including

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NOTES

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6. Robert W. Tarun & Peter P. Tomczak, *Introductory Essay for the 25th Anniversary White Collar Crime Survey: A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 Am. Crim. L. Rev. 153 (Spring 2010).

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8. *See* 15 U.S.C. § 78dd-1(a).

9. *See* 15 U.S.C. § 78dd-3(a).

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13. *See, e.g.*, United States v. ABB Vetco Gray Inc.; United States v. Statoil Inc.; United States v. SSI Int'l Far E. Ltd.; United States v. Siemens AG; United States v. Willbros Group Inc.; United States v. York Int'l Group.

14. Criminal Information, United States v. Monsanto Co., No. 05-CR-00008 (D.D.C. filed Jan. 6, 2005).

15. *See, e.g.*, Admin. Proceeding Order, *In re* Delta & Pine Land Co. & Turk Deltapine, Inc., SEC Release No. 56,138, Admin. Proceeding File No. 3-12712, Litig. Release No. 20,214 (July 26, 2007).

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23. Steven L. Skalak et al., A Guide to Forensic Accounting Investigation (2d ed. 2011).

24. U.S. Dep't of Justice, Foreign Corrupt Practices Act, http://www.justice.gov/criminal/fraud/fcpa; U.S. Sec. & Exch. Comm'n, Spotlight on Foreign Corrupt Practices Act, http://www.sec.gov/spotlight/fcpa.shtml.

25. http://www.shearman.com.

26. Admin. Proceeding Order, SEC v. Int'l Bus. Machs. Corp., Litig. Release No. 16,839, 73 SEC Docket 3049 (Dec. 21, 2000).

27. Securities Exchange Act of 1934 § 13(b)(2)(A).

28. Admin. Proceeding Order, *In re* Baker Hughes Inc., Exchange Act Release No. 44,784, 75 SEC Docket 1808 (Sept. 12, 2001).

29. No. 01-CV-3105 (S.D. Tex. 2001).

diligence, the costs associated with the same and defer it—too often indefinitely. For these important constituents, counsel will need to emphasize that due diligence can fully shield a company from criminal liability.

The Antibribery Due Diligence for Transactions Guide is republished in its entirety in appendix 18. The first section—the Bribery Due Diligence process—carries an especially important lesson: begin the bribery portion of the due diligence process at the very beginning, as it may require more time and investigation than other parts of a due diligence review. If the bribery portion is placed near the end of the due diligence exercise or is delayed, there is a real risk that it will not be completed or given adequate attention, and a company may acquire a target with serious bribery issues and not receive, if later discovered, a sympathetic reception from anticorruption prosecutors and regulators in the United Kingdom, the United States, or elsewhere.

Transparency International U.K. has identified six reasons why investments in companies that have committed bribery represent an ongoing risk:

1. The target or purchaser may face criminal, civil, and financial sanctions;
2. Corrupt partners are unreliable and may be involved with or obligated to dubious entities and people;
3. Deals are at great risk of collapse;
4. Market value may be distorted;
5. Associates of the target may make a purchaser liable to investigation and prosecution; and
6. A corrupt target may introduce dishonesty and corruption to the purchaser's own activities.[49]

The Antibribery Transaction Guide has also identified five consequences of prior bribery by a target company and the associated costs:

1. Diminished asset value and returns
   - Reduced investment and portfolio valuations
   - Acquisition of an overvalued asset
2. Investigations and convictions
   - Criminal, civil, and financial proceedings against the company
   - Stringent settlement agreements
   - Appointment of court monitors
   - Diversion of management and board time
   - Extensive professional fees
3. Business instability
   - Aborted deals
   - Reputational damage and media attention
   - Acquired business proves dysfunctional
   - Diminished exit opportunities
   - Debarment from government contracts
   - Director disqualification
   - Regulatory authority restrictions
   - Employee demotivation
   - Loss of key people in investee companies if they are convicted of an offense

4. Liability of directors, partners, and officials
   - Criminal and civil penalties
   - Debarment from office
   - Professional damage
5. Media attention[50]

Many businesspersons who have not been involved in a government anticorruption investigation dismiss the above consequences as exaggerated while those who have undergone the experience can quickly attest to their toll.

c. Due Diligence Process

The Antibribery Transaction Guide offers a six-step due diligence process from the initiation of the purchase idea to postcompletion monitoring. The six steps are

1. initiating the process;
2. initial screening;
3. detailed analysis;
4. decision;
5. postacquisition due diligence; and
6. postacquisition integration and monitoring.[51]

Among this guidance's many excellent signposts is one that addresses initial screening: "Don't rely upon someone else's due diligence work. Risk approaches and risk circumstances are never the same. Each transaction is a fresh start."[52]

d. Transparency International U.K. Due Diligence Checklist

In 2012 Transparency International U.K. issued a final report titled *Anti-Bribery Due Diligence for Transactions* that provides a useful Mergers and Acquisitions Due Diligence Checklist.[53] Specifically, the anticorruption organization cautions that this checklist should not be used as a "tick-box approach" for due diligence, but, rather, to prompt thinking about the areas to be considered during mergers and acquisitions due diligence. The checklist poses 59 questions to consider in due diligence for mergers, acquisitions, and investments broken into 11 categories. Many questions will be familiar to transactional and anticorruption counsel, but the ones italicized below by category are those that can offer particular value to standard due diligence questions and are perhaps not necessarily intuitive.

Bribery due diligence process:

1. *Is the bribery due diligence integrated into the due diligence process from the start?*
2. *Have milestones been set for the bribery due diligence?*
3. Is the timetable adequate for effective antibribery due diligence?
4. Have the deal and due diligence teams been trained in their company's antibribery program including the significance of relevant legislation?
5. *Have the deal and due diligence teams been trained in antibribery due diligence?*
6. Is there a process implemented for coordination across functions?
7. Has legal privilege been established with use of general counsel and external legal advisors?

Have agreed as follows:

ARTICLE 1 – THE OFFICIAL BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official, shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official."
4. For the purpose of this Convention:
   a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;s
   b. "foreign country" includes all levels and subdivisions of government, from national to local;
   c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorized competence.

ARTICLE 2 – RESPONSIBILITY OF LEGAL PERSONS

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

ARTICLE 3 – SANCTIONS

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

ARTICLE 4 – JURISDICTION

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

ARTICLE 5 – ENFORCEMENT

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

ARTICLE 6 – STATUTE OF LIMITATIONS

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

ARTICLE 7 – MONEY LAUNDERING

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

ARTICLE 8 – ACCOUNTING

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies

enjoining it from future violations of the books and records and internal controls provisions and paid a civil penalty of $1,500,000. Complaint, *SEC v. Lucent*, *supra* note 97. Additionally, the company entered into a non-prosecution agreement with DOJ and paid a $1,000,000 monetary penalty. Non-Pros. Agreement, *In re Lucent*, *supra* note 97.

[100] United States v. Liebo, 923 F.2d 1308, 1311 (8th Cir. 1991).

[101] Judgment, United States v. Liebo, No. 89-cr-76 (D. Minn. Jan. 31, 1992), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/liebor/1992-01-31-liebor-judgment.pdf.

[102] Complaint, SEC v. Schering-Plough Corp., No. 04-cv-945 (D.D.C. June 9, 2004), ECF No. 1, *available at* http://www.sec.gov/litigation/complaints/comp18740.pdf; Admin. Proceeding Order, In the Matter of Schering-Plough Corp., Exchange Act Release No. 49838 (June 9, 2004) (finding that company violated FCPA accounting provisions and imposing $500,000 civil monetary penalty), *available at* http://www.sec.gov/litigation/admin/34-49838.htm.

[103] FCPA opinion procedure releases can be found at http://www.justice.gov/criminal/fraud/fcpa/. In the case of the company seeking to contribute the $1.42 million grant to a local MFI, DOJ noted that it had undertaken each of these due diligence steps and controls, in addition to others, that would minimize the likelihood that anything of value would be given to any officials of the Eurasian country. U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 10-02 (July 16, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf.

[104] U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 95-01 (Jan. 11, 1995), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1995/9501.pdf.

[105] *Id.*

[106] *Id.*

[107] U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 97-02 (Nov. 5, 1997), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 06-01 (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf.

[108] U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 06-01 (Oct. 16, 2006).

[109] *Id.*

[110] *Id.*

[111] *See* Section 30A(a)(1)-(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(1)-(3); 15 U.S.C. §§ 78dd-2(a)(1)-(3), 78dd-3(a)(1)-(3).

[112] Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1)(A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

[113] Under the FCPA, any person "acting in an official capacity for or on behalf of" a foreign government, a department, agency, or instrumentality thereof, or a public international organization, is a foreign official. Section 30A(f)(1)(A), 15 U.S.C. § 78dd-1(f)(1)(A); 15 U.S.C. §§ 78dd-2(h)(2)(A), 78dd-2(f)(2)(A). *See also* U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE No. 10-03, at 2 (Sept. 1, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1003.pdf (listing safeguards to ensure that consultant was not acting on behalf of foreign government).

[114] *But see* Sections 30A(b) and f(3)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(b) & (f)(3); 15 U.S.C. §§ 78dd-2(b) & (h)(4), 78dd-3(b) & (f)(4) (facilitating payments exception).

[115] Even though payments to a foreign government may not violate the anti-bribery provisions of the FCPA, such payments may violate other U.S. laws, including wire fraud, money laundering, and the FCPA's accounting provisions. This was the case in a series of matters brought by DOJ and SEC involving kickbacks to the Iraqi government through the United Nations Oil-for-Food Programme. *See, e.g.*, Complaint, *SEC v. Innospec*, *supra* note 79; Criminal Information, *United States v. Innospec*, *supra* note 79; Complaint, SEC v. Novo Nordisk A/S, No. 09-cv-862 (D.D.C. May 11, 2009), ECF No. 1, *available at* http://www.sec.gov/litigation/complaints/2009/comp21033.pdf; Criminal Information, United States v. Novo Nordisk A/S, No. 09-cr-126 (D.D.C. May 11, 2009), ECF No. 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/nordiskn/05-11-09novo-info.pdf; Complaint, SEC v. Ingersoll-Rand Company Ltd., No. 07-cv-1955 (D.D.C. Oct. 31, 2007), ECF No. 1, *available at* http://www.sec.gov/litigation/complaints/2007/comp20353.pdf; Criminal Information, United States v. Ingersoll-Rand Italiana SpA, No. 07-cr-294 (D.D.C. Oct. 31, 2007), ECF No. 1, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ingerand-italiana/10-31-07ingersollrand-info.pdf; Complaint, SEC v. York Int'l Corp., No. 07-cv-1750 (D.D.C. Oct. 1, 2007), ECF No. 1 [hereinafter *SEC v. York Int'l Corp.*], *available at* http://www.sec.gov/litigation/complaints/2007/comp20319.pdf; Criminal Information, United States v. York Int'l Corp., No. 07-cr-253 (D.D.C. Oct. 1, 2007), ECF No. 1 [hereinafter *United States v. York Int'l Corp.*], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/york/10-01-07york-info.pdf; Complaint, SEC v. Textron Inc., No. 07-cv-1505 (D.D.C. Aug. 23, 2007), ECF No. 1 [hereinafter *SEC v. Textron*], *available at* http://www.sec.gov/litigation/complaints/2007/comp20251.pdf; Non-Pros. Agreement, In re Textron Inc. (Aug. 23, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/textron-inc/08-21-07textron-agree.pdf. DOJ has issued opinion procedure releases concerning payments (that were, in essence, donations) to government agencies or departments. *See* U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 09-01 (Aug. 3, 2009) (involving donation of 100 medical devices to foreign government), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 06-01 (Oct. 16, 2006) (involving contribution of $25,000 to regional customs department to pay incentive rewards to improve local enforcement of anti-counterfeiting laws), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf.

[116] The United States has some state-owned entities, like the Tennessee Valley Authority, that are instrumentalities of the government. McCarley v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 411 n.18 (6th Cir. 2006) ("[T]here is no question that TVA is an agency and instrumentality of the United States.") (internal quotes omitted).

[117] During the period surrounding the FCPA's adoption, state-owned entities held virtual monopolies and operated under state-controlled price-setting in many national industries around the world. *See generally* WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF GOVERNMENT OWNERSHIP, WORLD BANK POLICY RESEARCH Report at 78 (1995); SUNITA KIKERI AND AISHETU KOLO, STATE ENTERPRISES, THE WORLD BANK GROUP (Feb. 2006), *available at* http://rru.worldbank.org/documents/publicpolicyjournal/304Kikeri_Kolo.pdf.

[118] *Id.* at 1 ("[A]fter more than two decades of privatization, government ownership and control remains widespread in many regions—and in many parts of the world still dominates certain sectors.").

[119] To date, consistent with the approach taken by DOJ and SEC, all district courts that have considered this issue have concluded that this is an issue of fact for a jury to decide. *See* Order, United States v. Carson, 2011 WL 5101701, No. 09-cr-77 (C.D. Cal. May 18, 2011), ECF No. 373 [hereinafter *United States v. Carson*]; United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); Order, *United States v. Esquenazi*, *supra* note 44, ECF No. 309; *see also* Order, United States v. O'Shea, No. 09-cr-629 (S.D. Tex. Jan. 3, 2012), ECF No. 142; Order, United States v. Nguyen, No. 08-cr-522 (E.D. Pa. Dec. 30, 2009), ECF No. 147. These district court decisions are consistent with the acceptance by district courts around the country of over 35 guilty pleas by individuals who admitted to violating the FCPA by bribing officials of state-owned or state-controlled entities. *See* Government's Opposition to Defendants' Amended Motion to Dismiss Counts One Through Seven of the Indictment at 18, *United States v. Carson*, *supra* note 119, ECF No. 332, Exhibit I, *United States v. Carson*, *supra* note 119, ECF No. 335 (list of examples of enforcement actions based on foreign officials of state-owned entities).

[120] Jury Instructions, *United States v. Esquenazi*, *supra* note 44, ECF No. 520; Order at 5 and Jury Instructions, *United States v. Carson*, *supra* note 119, ECF No. 373 and ECF No. 549; *Aguilar*, 783 F. Supp. 2d at 1115.

[121] Criminal Information, United States v. C.E. Miller Corp., *et al.*, No. 82-cr-788 (C.D. Cal. Sept. 17, 1982), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ce-miller/1982-09-17-ce-miller-information.pdf.

[122] *See* Complaint, SEC v. Sam P. Wallace Co., Inc., *et al.*, No. 83-cv-1915 (D.D.C. Aug. 31, 1982); Criminal Information, United States v. Sam P. Wallace Co., Inc., No. 83-cr-34 (D.P.R. Feb. 23, 1983), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/sam-wallace-company/1983-02-23-sam-wallace-company-information.pdf; *see also* Criminal Information, United States v. Goodyear Int'l Corp., No. 89-cr-156 (D.D.C. May 11, 1989) (Iraqi Trading Company identified as "instrumentality of the Government of the Republic of Iraq"), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/goodyear/1989-05-11-goodyear-information.pdf.

[123] *See* Complaint, *SEC v. ABB*, *supra* note 48; Criminal Information at 3, United States v. ABB Inc., No. 10-cr-664 (S.D. Tex. Sept. 29, 2010), ECF No. 1 [hereinafter *United States v. ABB*], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-20-10abbinc-info.pdf; Constitución Política de los Estados Unidos Mexicanos [C.P.], as amended, art. 27; Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); Ley Del Servicio Publico de Energía Electrica, as amended, art. 1, 3, 10; Diario Oficial de la Federación [DO], 22 de Diciembre de 1975 (Mex.).

[124] *See* Indictment at 2, *United States v. Esquenazi*, *supra* note 44, ECF No. 3; Affidavit of Mr. Louis Gary Lissade at 1-9, *id.*, ECF No. 417-2.

[125] Criminal Information at 30-31, *United States v. Alcatel-Lucent France*, *supra* note 56, ECF No. 10.

[126] *Id.*

[127] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366 § 2, 112 Stat. 3302, 3303, 3305, 3308 (1998).

[128] Section 30A(f)(1)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(1)(B); 15 U.S.C. §§ 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

[129] Third parties and intermediaries themselves are also liable for FCPA violations. Section 30A(a) of the Exchange Act, 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), and 78dd-3(a).

[130] Section 30A(a)(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3).

[131] *See, e.g.*, Complaint, SEC v. Johnson & Johnson, No. 11-cv-686 (D.D.C. Apr. 8, 2011) [hereinafter *SEC v. Johnson & Johnson*] (bribes paid through Greek and Romanian agents)), *available at* http://www.sec.gov/litigation/complaints/2011/comp21922.pdf; Criminal Information, United States v. DePuy, Inc., No. 11-cr-99 (D.D.C. Apr. 8, 2011), ECF No. 1 [hereinafter *United States v. DePuy*] (bribes paid through Greek agents), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-info.pdf; Complaint, *SEC v. ABB*, *supra* note 48 (bribes paid through Mexican agents); Criminal Information, *United States v. ABB*, *supra* note 123 (same); Criminal Information, United States v. Int'l Harvester Co., No. 82-cr-244 (S.D. Tex. Nov. 17, 1982) (bribes paid through Mexican agent), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/international-harvester/1982-11-17-international-harvester-information.pdf.

[132] *See* Criminal Information, United States v. Marubeni Corp., No. 12-cr-22 (S.D. Tex. Jan. 17, 2012), ECF No. 1 [hereinafter *United States v. Marubeni*], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-information.pdf; Criminal Information, *United States v. JGC Corp.*, *supra* note 60, ECF No. 1; Criminal Information, *United States v. Snamprogetti*, *supra* note 60, ECF No. 1; Complaint, SEC v. ENI, S.p.A. and Snamprogetti Netherlands B.V., No. 10-cv-2414 (S.D. Tex. July 7, 2010), ECF No. 1, *available at* http://www.sec.gov/litigation/complaints/2010/comp-pr2010-119.pdf; Criminal Information, United States v. Technip S.A., No. 10-cr-439 (S.D. Tex. June 28, 2010), ECF No. 1 [hereinafter *United States v. Technip*], *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/technip-u/06-28-10-technip-%20information.pdf; Complaint, SEC v. Technip, No. 10-cv-2289 (S.D. Tex. June 28, 2010), ECF No. 1 [hereinafter *SEC v. Technip*], *available at* http://www.sec.gov/litigation/complaints/2010/comp-pr2010-110.pdf; Indictment, *United States v. Tesler*, *supra* note 50; Complaint, *SEC v. Halliburton and KBR*, *supra* note 90; Criminal Information, *United States v. KBR*, *supra* note 90; Criminal Information, *United States v. Stanley*, No. 08-cr-597 (S.D. Tex. Sept. 3, 2008), ECF No. 1, *available at* http://justice.gov/criminal/fraud/fcpa/cases/stanleya/08-29-08stanley-info.pdf.

[133] *See* Criminal Information, United States v. AGA Medical Corp., No. 08-cr-172, ECF No. 1 (D. Minn. June 3, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/agamedcorp/06-03-08aga-info.pdf.

[134] Complaint, *SEC v. Innospec*, *supra* note 79; Criminal Information, *United States v. Innospec*, *supra* note 79; Superseding Criminal Information, *United States v. Naaman*, *supra* note 50, ECF No. 15, *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/naamano/06-24-10naaman-supsersed-info.pdf; Complaint, *SEC v. Turner*, *supra* note 50.

[135] *See* sources cited *supra* note 68.

[136] *See* sources cited *supra* note 68.

[137] Section 30A(a)(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(3); 15 U.S.C. §§ 78dd-2(a)(3), 78dd-3(a)(3).

[138] *See* Section 30A(f)(2)(A) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(A); 15 U.S.C. §§ 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

[139] *See* Section 30A(f)(2)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(2)(B); 15 U.S.C. §§ 78dd-2(h)(3)(B), 78dd-3(f)(3)(B). The "knowing" standard was intended to cover "both prohibited actions that are taken with 'actual knowledge' of intended results as well as other actions that, while falling short of what the law terms 'positive knowledge,' nevertheless evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act." H.R. REP. No. 100-576, at 920; *see also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1423-24 (1988).

[140] H.R. REP. No. 100-576, at 920 (1988).

[141] Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

[142] H.R. REP. No. 100-576, at 922. The conferees also noted that "[i]n interpreting what is 'lawful under the written laws and regulations' . . . the normal rules of legal construction would apply." *Id.*

[143] *See* United States v. Kozeny, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008). Likewise, the court found that a provision under Azeri law that relieved bribe payors of criminal liability if they were extorted did not make the bribe payments legal. Azeri extortion law precludes the prosecution of the payor of the bribes for the illegal payments, but it does not make the payments legal. *Id.* at 540-41.

[144] Section 30A(c)(2)(A), (B) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. §§ 78dd-2(c)(2), 78dd-3(c)(2).

[145] For example, the Eighth Circuit Court of Appeals found that providing airline tickets to a government official in order to corruptly influence that official may form the basis for a violation of the FCPA's anti-bribery provisions. *See Liebo*, 923 F. 2d at 1311-12.

[146] *See generally* U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 11-01 (June 30, 2011) (travel, lodging, and meal expenses of two foreign officials for two-day trip to United States to learn about services of U.S. adoption service provider), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 08-03 (July 11, 2008) (stipends to reimburse minimal travel expenses of local, government-affiliated journalists attending press conference in foreign country), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-02 (Sept. 11, 2007) (domestic travel, lodging, and meal expenses of six foreign officials for six-week educational program), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 07-01 (July 24, 2007) (domestic travel, lodging, and meal expenses of six foreign officials for four-day educational and promotional tour of U.S. company's operations sites), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-04 (Sept. 3, 2004) (travel, lodging, and modest per diem expenses of five foreign officials to participate in nine-day study tour of mutual insurance companies), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0404.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-03 (June 14, 2004) (travel, lodging, meal, and insurance expenses for twelve foreign officials and one translator on ten-day trip to three U.S. cities to meet with U.S. public sector officials), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0403.pdf; U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan. 6, 2004) (seminar expenses, including receptions, meals, transportation and lodging costs, for one-and-a-half day comparative law seminar on labor and employment law in foreign country), *available at* http://www.justice.gov/criminal/fraud/fcpa/

APPENDIX
Endnotes

agreements, there have been provisions pertaining to an independent corporate monitor.[3] The corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism of corporate crime and the protection of the integrity of the marketplace.

The purpose of this memorandum is to present a series of principles for drafting provisions pertaining to the use of monitors in connection with deferred prosecution and non-prosecution agreements (hereafter referred to collectively as "agreements") with corporations.[4] Given the varying facts and circumstances of each case—where different industries, corporate size and structure, and other considerations may be at issue—any guidance regarding monitors must be practical and flexible. This guidance is limited to monitors, and does not apply to third parties, whatever their titles, retained to act as receivers, trustees, or perform other functions.

A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct, and not to further punitive goals. A monitor should only be used where appropriate given the facts and circumstances of a particular matter. For example, it may be appropriate to use a monitor where a company does not have an effective internal compliance program, or where it needs to establish necessary internal controls. Conversely, in a situation where a company has ceased operations in the area where the criminal misconduct occurred, a monitor may not be necessary.

In negotiating agreements with corporations, prosecutors should be mindful of both: (1) the potential benefits that employing a monitor may have for the corporation and the public, and (2) the cost of a monitor and its impact on the operations of a corporation. Prosecutors shall, at a minimum, notify the appropriate United States Attorney or Department Component Head prior to the execution of an agreement that includes a corporate monitor. The appropriate United States Attorney or Department Component Head shall, in turn, provide a copy of the agreement to the Assistant Attorney General for the Criminal Division at a reasonable time after it has been executed. The Assistant Attorney General for the Criminal Division shall maintain a record of all such agreements.

This memorandum does not address all provisions concerning monitors that have been included or could appropriately be included in agreements. Rather this memorandum sets forth nine basic principles in the areas of selection, scope of duties, and duration.

This memorandum provides only internal Department of Justice guidance. In addition, this memorandum applies only to criminal matters and does not apply to agencies other than the Department of Justice. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

3. Agreements use a variety of terms to describe the role referred to herein as "monitor," including consultants, experts, and others.

4. In the case of deferred prosecution agreements filed with the court, these Principles must be applied with due regard for the appropriate role of the court and/or the probation office.

II. SELECTION

1. Principle: Before beginning the process of selecting a monitor in connection with deferred prosecution agreements and non-prosecution agreements, the corporation and the Government should discuss the necessary qualifications for a monitor based on the facts and circumstances of the case. The monitor must be selected based on the merits. The selection process must, at a minimum, be designed to: (1) select a highly qualified and respected person or entity based on suitability for the assignment and all of the circumstances; (2) avoid potential and actual conflicts of interests; and (3) otherwise instill public confidence by implementing the steps set forth in this Principle.

To avoid a conflict, first, Government attorneys who participate in the process of selecting a monitor shall be mindful of their obligation to comply with the conflict-of interest guidelines set forth in 18 U.S.C. § 208 and 5 C.F.R. Part 2635. Second, the Government shall create a standing or ad hoc committee in the Department component or office where the case originated to consider monitor candidates. United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally. Third, the Office of the Deputy Attorney General must approve the monitor. Fourth, the Government should decline to accept a monitor if he or she has an interest in, or relationship with, the corporation or its employees, officers or directors that would cause a reasonable person to question the monitor's impartiality. Finally, the Government should obtain a commitment from the corporation that it will not employ or be affiliated with the monitor for a period of not less than one year from the date the monitorship is terminated.

Comment: Because a monitor's role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance. For example, the corporation may select a monitor candidate, with the Government reserving the right to veto the proposed choice if the monitor is unacceptable. In other cases, the facts may require the Government to play a greater role in selecting the monitor. Whatever method is used, the Government should determine what selection process is most effective as early in the negotiations as possible, and endeavor to ensure that the process is designed to produce a high-quality and conflict-free monitor and to instill public confidence. If the Government determines that participation in the selection process by any Government personnel creates, or appears to create, a potential or actual conflict in violation of 18 U.S.C. § 208 and 5 C.F.R. Part 2635, the Government must proceed as in other matters where recusal issues arise. In all cases, the Government must submit the proposed monitor to the Office of the Deputy Attorney General for review and approval before the monitorship is established.

Ordinarily, the Government and the corporation should discuss what role the monitor will play and what qualities, expertise, and skills the monitor should have. While attorneys, including but not limited to former Government attorneys, may have certain skills that qualify them to function effectively as a monitor, other individuals, such as accountants, technical or scientific experts, and compliance experts, may have skills that are more appropriate to the tasks contemplated in a given agreement.