

THE FOREIGN CORRUPT PRACTICES ACT: SET ASIDE THE MORAL AND ETHICAL DEBATES, HOW DOES ONE OPERATE WITHIN THIS LAW?

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I. INTRODUCTION

The recent Fédération de Internationale de Football Association (“FIFA”) bribery scandal has brought the United States’ attention back to ethics in business, and how overseas companies and entities ethically operate.¹ In addition, the FIFA bribery scandal has brought to the world’s attention that the United States acts differently when it gets its way versus when it does not.² Some have argued that the United States’ efforts in going after FIFA officials were initiated by the fact that American bribes were not accepted and Russia got the World Cup instead.³

Countries around the world deal with bribery in different areas of business as does the United States, but how much we want to look at

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1. For an excellent breakdown of the scandal and the events leading up to it, see Austin Knoblauch & Barry Stavro, *A Timeline on the FIFA Scandal*, L.A. TIMES (June 2, 2015, 4:40 PM), <http://www.latimes.com/sports/soccer/la-sp-fifa-scandal-timeline-20150603-story.html>. For additional information, see Laura Wagner, *Mob Museum Unveils FIFA Corruption Exhibit*, NPR (Sept. 1, 2015, 5:44 PM), <http://www.npr.org/sections/thetwo-way/2015/09/01/436670649/-mob-museum-unveils-fifa-corruption-exhibit> (disclosing the addition to the Las Vegas Mob Museum).

2. See, e.g., Anna Arutunyan, *FIFA Corruption: Vladimir Putin Accuses U.S. of Meddling*, USA TODAY (May 28, 2015, 6:02 PM), <http://www.usatoday.com/story/sports/soccer/2015/05/28/putin-russia-fifa/28058777>.

3. See, e.g., Mark Porubcansky, *Why the FIFA Investigation Had to Be Conducted by U.S. Officials*, MINNPOST (May 28, 2015), <https://www.minnpost.com/foreign-concept/2015/05/why-fifa-investigation-had-be-conducted-us-officials>.

bribery in these cases can make many feel uncomfortable.⁴ This is because we all want to win and compete for the prize, whatever that prize may be, and that leads to questionable ethical behavior. As we have seen with the International Olympic Committee and FIFA, bribery is a world issue.⁵

Questions of ethical practices become cloudy because of the complexities of competition in international business and politics. In 1977, Congress passed the Foreign Corrupt Practices Act (“FCPA”) to attempt to curb the unethical behavior of American businesses doing business overseas.⁶ Since then, the U.S. Department of Justice (“DOJ”) and U.S. Securities & Exchange Commission (“SEC”) have governed adherence to the law by American businesses. Over time, the agencies have become more strident in their enforcement of the law and thus have defined its parameters.⁷ Nonetheless, the World Bank estimates that more than one trillion dollars in bribes occur every year, and yes, that is “t” as in trillion.⁸ That is about 3% of the world’s economy.⁹

However, the U.S. government continues to pursue its goal. Since the DOJ and SEC issued their latest Resource Guide for the FCPA in November 2012,¹⁰ there has been much written about the morals and

4. See, e.g., Leonid Bershidsky, *Stop Bribery by Legalizing It*, BLOOMBERG (Aug. 31, 2015, 10:58 AM), <https://www.bloomberg.com/view/articles/2015-08-31/stop-bribery-by-legalizing-it> (discussing Romania’s discussion on whether to legalize bribery of doctors); Aaron Bornstien, *On the Ground in Cambodia: Was My Antibribery Fight Just Dust in the Wind?*, FCPA BLOG (Aug. 31, 2015, 9:18 AM), <http://www.fcpablog.com/blog/2015/8/31/on-the-ground-in-cambodia-was-my-antibribery-fight-just-dust.html> (discussing rampant bribery in Cambodia); Richard Partington, *U.K. Looks to Relax Money Laundering Rules to Help Businesses*, BLOOMBERG (Aug. 28, 2015, 7:15 AM), <http://www.bloomberg.com/news/articles/2015-08-28/u-k-looks-to-relax-money-laundering-rules-to-help-businesses> (discussing the United Kingdom’s efforts to assist businesses in money-laundering controls).

5. For a breakdown of corruption around the world, see *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2014/results> (last visited Aug. 1, 2017).

6. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified in relevant part as amended at 15 U.S.C. §§ 78dd-1 to -3 (2012)).

7. See *infra* Part III.B.

8. Matthew Stephenson, *Where Does the “\$1 Trillion in Annual Bribes” Number Come From?*, GLOBAL ANTICORRUPTION BLOG (Apr. 22, 2014), <https://globalanticorruptionblog.com/2014/04/22/where-does-the-1-trillion-in-annual-bribes-number-come-from/>; see also Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice., Remarks at the Organisation for Economic Co-operation and Development (May 31, 2010), <https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-organisation-economic-co-operation-and> (referencing the same one trillion number in bribes in 2010).

9. Nathaniel B. Edmonds & Daniel Darsky, *Advanced Anti-Corruption/Bribery Program Practice: Challenges, Trends, and Effectively Managing Risk*, SOC’Y OF CORP. COMPLIANCE & ETHICS (Oct. 7, 2013), http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2013/101_AdvancedAntiCorruptionBriberyProgramPractice_2slides.pdf.

10. U.S. DEP’T OF JUSTICE & U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S.

ethics of bribery and how the FCPA can be used to eradicate it.¹¹ Many American authors are stating how the world should work and how much better the economies of the world would work without bribery.¹² They may all be right; however, these are American perspectives—cast upon another country’s morals, ethics, and culture. This is a dangerous way of thinking even if it is the proper attitude. Placing our values of right and wrong on another country and culture is a reason why many countries and their business people are cautious of Americans.¹³

The purpose of this Article is not to state, advocate, or cast any value judgments on the provisions of the FCPA. Neither is it to take any moral or ethical stance, but to provide a roadmap for those who want to become acquainted with the FCPA and how the United States government has enforced it. The problem is that every region of the globe presents different issues and sometimes the separate countries within that region present different issues. This is why the FCPA is sometimes vague—it has to be. To restrict the provisions within the FCPA would be to restrict the ability to conduct international business. The U.S. government is well equipped to define and administer the FCPA. As with any law, as more cases are decided, the law becomes more defined. As a result, one can look into the U.S. government’s enforcement of the FCPA and begin to assemble a guide to the FCPA.

This Article focuses on the Anti-Bribery Provisions of the FCPA and cases that the SEC and DOJ have been involved with over the past two years. The question is who the FCPA’s Anti-Bribery Provisions cover, and what exactly is a bribe? The answer is framed as follows:

In general, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.¹⁴

FOREIGN CORRUPT PRACTICES ACT (2012), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [hereinafter RESOURCE GUIDE].

11. See, e.g., Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT’L & COMP. L. REV.* 1, 3-5 (2013); Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 *GA. L. REV.* 489, 560-62, 566-71 (2011).

12. See, e.g., Spahn, *supra* note 11, at 4.

13. For an example comparing two cultures, see Dennis A. Pitta et al., *Ethical Issues Across Cultures: Managing the Differing Perspectives of China and the USA*, 16 *J. CONSUMER MARKETING* 240 (1999).

14. RESOURCE GUIDE, *supra* note 10, at 10, 106 n.44 (citing several cases in which the U.S. government used this phrasing for jury instructions).

II. BACKGROUND

When the FCPA was enacted in 1977,¹⁵ it was the result of the SEC's investigations into more than 400 U.S. companies, including 20% of Fortune 500 companies.¹⁶ These companies had made illegal, or at least questionable, payments to foreign government officials, politicians, and political parties.¹⁷ These payments ranged from what would later be referred to as "grease" payments to ensure that government officials performed their mandatory duties (issuance of business licenses, for example), to outright bribery of high-ranking foreign officials to secure favorable action by a foreign government, and totaled over \$300 million.¹⁸ Congress reacted to the SEC's investigation by enacting the FCPA to "bring a halt to the bribery of foreign officials" and "to restore public confidence in the integrity of the [international] American business system."¹⁹

In 1998, the FCPA was amended by the International Anti-Bribery and Fair Competition Act,²⁰ and again in response to the Organization of Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed in 1997.²¹ This effort with the OECD began in 1988 when the U.S. government began working to get other countries, which were major U.S. trading partners, to enact similar legislation.²² By the time the 1998 OECD Amendment was enacted, thirty-three countries had signed the OECD agreement.²³ These amendments expanded the FCPA to cover any person—not just issuers or domestic concerns.²⁴

One can argue that this effort by the U.S. government was to prevent the loss of business that American companies would face if only

15. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified in relevant part as amended at 15 U.S.C. §§ 78dd-1 to -3 (2012)).

16. RESOURCE GUIDE, *supra* note 10, at 3.

17. Pedro Fabiano, *Panel on Domestic/International Initiatives*, 3 SANTA CLARA J. INT'L L. 247, 247 (2005). The payments totaled over \$300 million, and that was in 1970-dollars and not adjusted to any current values. *Id.*

18. *Id.*

19. *Id.*

20. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 122 Stat. 3302 (1998) (codified in relevant part as amended in 15 U.S.C. §§ 78dd-1 to -3 (2012)).

21. *United States v. Kay*, 200 F. Supp. 2d 681, 686 (S.D. Tex. 2002). For the full OECD provision, see OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 6-14 (2011), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

22. Fabiano, *supra* note 17, at 248.

23. *Id.*

24. *Id.* at 249.

the U.S. passed such legislation. If only U.S. companies had to abide by such legislation, they would operate at a competitive disadvantage. Thus, obtaining the cooperation of these thirty-three countries was critical to the survival of the FCPA.

Armed with the cooperation of thirty-three countries, the 1998 Amendments reflected Congress's will to reach conduct outside the U.S., in spite of the presumption against legislative extraterritoriality.²⁵ Now, any American citizen or entity in violation of the FCPA is subject to prosecution under a broad jurisdictional scope, as are their foreign agents.²⁶

However, foreign officials who receive bribes are not covered by the FCPA, nor can they be prosecuted for conspiracy to violate it.²⁷ This is very important for the practitioner to understand because the foreign official has nothing to risk by implying a bribe, or assuming one will be given. Thus, the foreign organization may be operating under fewer restrictions, and thus may or may not be sympathetic to its partner's situation. As international business develops, many more countries are beginning to enact laws similar to the FCPA.²⁸ In addition, the FCPA has been translated into many different languages so that businesses in other countries can study the limits of the law as well.²⁹

III. WHO IS PAYING?

Even with the 1998 Amendments to the FCPA, it is still good to understand the basic question of who is a payer under the law.³⁰ Upon reading the FCPA, one must define who is paying, or providing the money, gift, or other item of value. Under the FCPA the one who is paying the money is called (1) an issuer,³¹ (2) a domestic concern,³² or (3) a certain other person or entity.³³ In civil enforcement, issuers fall

25. See H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L & COM. REG. 239, 288-97, 303 (2001) (discussing all of the changes the law made).

26. *Id.* at 296-97.

27. *United States v. Castle*, 925 F.2d 831, 831 (5th Cir. 1991).

28. Joseph Warin et al., *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1, 4-8, 14-19 (2010).

29. *Alert: FCPA Translated into 14 Languages*, SQUIRE PATTON BOGGS: ANTICORRUPTION BLOG (Dec. 15, 2010), <http://www.anticorruptionblog.com/foreign-corrupt-practices-act/alert-fcpa-translated-into-14-languages>.

30. See Sonila Themeli, *FCPA Enforcement and the Need for Judicial Intervention*, 56 S. TEX. L. REV. 387, 391-92 (2014) (breaking down the definition with the FCPA).

31. 15 U.S.C. § 78dd-1(a) (2012).

32. *Id.* § 78dd-2(a).

33. *Id.* § 78dd-3(a).

under the authority of the SEC, while domestic concerns and other entities fall under the authority of the DOJ.³⁴ The DOJ has exclusive authority to enforce the criminal aspects of the FCPA in all situations.³⁵ Thus, determining where the company or entity falls within this legal definition could involve different federal agencies. Since the concerns addressed in this Article fall under possible criminal sanctions and civil sanctions, both agencies will be discussed.

A. Issuers

The first category of covered persons mentioned in the FCPA are the issuers.³⁶ Essentially any company that has securities registered under section 12 of the Exchange Act³⁷ or files required reports with the SEC³⁸ will be considered an issuer.³⁹ As a result, foreign companies will also be considered issuers if they list depositary receipts on any U.S. exchange.⁴⁰ As seen from the cases discussed below, this language has given the U.S. government the ability to pursue foreign companies and their transactions, both civilly and criminally, even if those transactions never touched U.S. soil. Lastly, included within this definition is that any officer, employee, or agent working on behalf of the company, foreign or domestic, is considered an issuer and thus subject to prosecution under the FCPA.⁴¹ Agents working on behalf of the company seem to be a familiar description of the ones that get companies into trouble with the FCPA. This will be discussed in more detail later in the Article.⁴²

B. Domestic Concerns and Other Entities

A place to begin to define a domestic concern is the case *Chevron Corp. v. Donziger*.⁴³ A domestic concern is “any individual who is a citizen, national, or resident of the United States” and “any corporation, partnership, association, joint-stock company, business trust,

34. *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 996 (M.D. Tenn. 2012).

35. *Id.*

36. *See Themeli, supra* note 30, at 391 (citing 15 U.S.C. § 78dd-1(a)).

37. *Id.*

38. *Id.*

39. *Id.*; *see also S.E.C. v. Straub*, 921 F. Supp. 2d 244, 250 (S.D.N.Y. 2013) (stating that the defendant company’s securities were traded through American depositary receipts listed on the New York Stock Exchange, therefore the defendant was considered an issuer under the law).

40. *Straub*, 921 F. Supp. 2d at 250.

41. *Themeli, supra* note 30, at 291.

42. *See infra* notes 109-10 and accompanying text.

43. 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

unincorporated organization, or sole proprietorship which has its principal place of business in the United States.”⁴⁴ In *Chevron Corp.*, the defendant was a U.S. citizen and an attorney with membership in the New York State Bar.⁴⁵ The defendant’s office was also in the United States.⁴⁶ As a result, establishing the defendant as a domestic concern under the FCPA was rather easy for the court to conclude.⁴⁷

Establishing a violation of the FCPA was just about as easy.⁴⁸ Under the FCPA, “a domestic concern must ‘make use of the mails or any means or instrumentality of interstate commerce’ in furtherance of the payments.”⁴⁹ In this case, the defendant’s use of the Internet for e-mails in furtherance of the bribery scheme was sufficient to satisfy the interstate commerce requirement of the FCPA.⁵⁰ The court also stated that his transfer of funds was sufficient to satisfy the requirement.⁵¹ The court concluded that the defendant’s acts were corrupt and intended to influence official action.⁵² What made this an easy case for the court was the fact the defendant went by a code name and used a secret account.⁵³

Lastly, the court concluded the payments made were of value.⁵⁴ The FCPA prohibits corrupt payments of money and other items of value.⁵⁵ This has been construed broadly to include many different things that could be of value to the person being bribed.⁵⁶ Thus, the statute prohibits cash bribes and also other nonconventional quid pro quo transactions.

44. 15 U.S.C. § 78dd-2(h)(1)(A)–(B) (2012); *see also* *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1027-28 (6th Cir. 1990) (stating that agents of domestic concerns are included as issuers).

45. *Chevron Corp.*, 974 F. Supp. 2d at 596.

46. *Id.*

47. *See id.*

48. *See id.* at 596-99.

49. *Id.* at 596 (quoting 15 U.S.C. § 78dd-2(a) (2012)).

50. *Id.* at 596-97. The facts of the bribery scheme in this case were so complex the court referred to them as “things that normally come only out of Hollywood.” *Id.* at 384; *see also* *S.E.C. v. Straub*, 921 F. Supp. 2d 244, 262-64 (S.D.N.Y. 2013) (discussing how e-mail is sufficient to establish the use of interstate commerce under the FCPA bribery requirements).

51. *See Chevron Corp.*, 974 F. Supp. 2d at 596 (citing *Compl.* at 9, 17-19, *United States v. Brown*, No. 4:06-cr-00316 (S.D. Tex. Sept. 11, 2006)) (alleging that a transfer of funds to a bank account for use as improper payments for PetroEcuador officials satisfied the interstate commerce element).

52. *Id.* at 597.

53. *See id.*

54. *Id.*

55. *Id.* (citing 15 U.S.C. § 78dd-2(a) (2012)).

56. *See, e.g., United States v. Liebo*, 923 F.2d 1308, 1310-11 (8th Cir. 1991) (finding that paying foreign officials’ travel expenses to obtain or retain business constitutes a violation under the bribery provisions of the FCPA); *Rotec Indus., Inc. v. Mitsubishi Corp.*, 163 F. Supp. 2d 1268, 1278-79 (D. Or. 2001) (stating that an offer of employment is considered “giving something of value”); *Schering-Plough Corp.*, Exchange Act Release No. 49838, 82 S.E.C. Docket 3644 (June 9, 2004), <https://www.sec.gov/litigation/admin/34-49838.htm> (finding that charitable contributions also qualify as something of value).

IV. THE THREE QUESTIONS

The real issues for practitioners and companies come down to three questions. The first question is, “Is it illegal in a given foreign country to receive this form of payment?” The second is, “Did the payment influence an act or decision?” This is the most complicated of the questions and this Article spends the most time addressing this issue. The last question is, “What is the amount or the value of the payment in question?” These are the grey areas that many of us in international business concern ourselves with, but the focus of the concern is on question number two. These questions, however, are the areas in which those who deal in a black-and-white world may struggle with. If a practitioner or company understands these three questions and asks them every time a payment is made, they should be in a position to stay easily within the law and be able to protect themselves if there are questions about the transaction.

Thus, to understand the FCPA is to understand these three questions. The statutory vagueness embedded in the word “value,” and how it must influence an act or decision is further explained in the FCPA as follows:

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or (2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.⁵⁷

As one can see, there are some permissible situations where gifts and payments are legal, provided that they fit under these exceptions. However, the three questions remain. The first question is: “Are the payments legal in the foreign official’s country?”⁵⁸

57. 15 U.S.C. § 78dd-1(c) (2012).

58. See, e.g., *S.E.C. v. Jackson*, 908 F. Supp. 2d 834, 849, 858 (S.D. Tex. 2012) (stating that the SEC showed enough evidence to establish that the defendants violated Nigerian law); *United States v. Lockheed Corp.*, No. CRIM.A.1:94-CR226MHS, 1995 WL 17064093, at *1, *5 (N.D. Ga. Jan. 3, 1995) (stating the fact that under Egyptian law, it would be illegal for an Egyptian official to accept payments from a U.S. corporation that influences his acts and decisions).

A. Is It Legal in that Foreign Country?

If the law of the foreign country does allow for this type of payment to occur, then the company would be protected under the FCPA as long as the other two questions are addressed and answered in the same manner. However, this is a good place to start. If the company is making payments that are illegal in the foreign country, those payments need to be prevented—period.

Thus, the payments must be legal in that foreign country where the payment took place and technicalities cannot provide protection. For example, in *United States v. Kozeny*,⁵⁹ the court stated that while the defendant was relieved of criminal responsibility in the foreign country based upon a technicality, it did not excuse him from the violation of the FCPA in the United States.⁶⁰ The court stated a company could not be guilty of violating the FCPA if the payment made by the company was legal in that country.⁶¹ However, there is no defense under the FCPA if the company cannot be prosecuted in a foreign country based on a technicality or its being excused from the criminal behavior.⁶²

If the payments violate the foreign country's law, there is no defense afforded under the FCPA. It follows that a defendant may assert that a payment was lawful under the laws of the foreign country in which the payment was made. However, as anti-corruption legislation has spread throughout the world, this defense is not often available. Furthermore, many American businesses have been entangled by the ambiguity or conflicts in the laws of other nations, quite common in the developing world.⁶³ Determining whether a payment was lawful under the written laws of the foreign country may be difficult or problematic at best. Extreme caution is suggested if the only available recourse would be using this defense to avoid prosecution under the FCPA.

B. Did the Payment Influence an Act or Decision?

The next question to address is: "What kind of payment was it?" The FCPA does contain an exception to the anti-bribery provisions for facilitating payments for routine governmental actions, otherwise known

59. 582 F. Supp. 2d 535 (S.D.N.Y. 2008).

60. *Id.* at 539.

61. *Id.*

62. *Id.*

63. For a site that addresses the conflict of laws in an international setting, see CONFLICT OF LAWS .NET, www.conflictoflaws.net (last visited Aug. 1, 2017) (containing current issues and stories in international law conflicts).

as grease payments, gifts, or tips.⁶⁴ Congress intended to include a defense for payments made in facilitation of non-discretionary acts of mid or lower-level officials.⁶⁵ When Congress enacted the FCPA, the House of Representatives noted language in the law that would allow facilitating payments, or grease payments.⁶⁶

Those not exposed to the FCPA may not believe that Congress explicitly used the term “grease payments” in defining federal law in the context that such payments are legal, but that is the phrase Congress used.⁶⁷ The FCPA expressly permits “facilitating” or “grease payments” to foreign officials to “expedite or to secure the performance of routine governmental action[s]”⁶⁸ as long as the payments are not used to encourage a foreign official “to award new business or to continue business with a particular party.”⁶⁹ Even with that distinction, there are grey areas that can cause companies to make mistakes.

The language of the FCPA intends to distinguish between payments that cause foreign officials to act contrary to, or not in conformity with, their normal pattern in making a decision—or committing an illegal act within their country—as opposed to those payments that are limited to non-discretionary decisions.⁷⁰ Congress also included a similar note stating the law does not cover the aforementioned “grease payments” and included a list of acceptable payments to foreign officials such as expediting shipments through customs, placing a transatlantic telephone call, securing required permits, obtaining adequate police protection, and other transactions which may involve the proper performance of the

64. 15 U.S.C. § 78dd-2(b) (2012).

65. See, e.g., Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 436, 444-45 (2009) (discussing the differences between levels of officials).

66. H.R. REP. NO. 95-640, at 4 (1977); see also *United States v. Kay*, 359 F.3d 738, 750-51 (5th Cir. 2004). Congress has carefully limited this exception. See *id.* at 750 (“We agree with the position of the government that these 1988 amendments illustrate an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply. A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions.”).

67. *Id.*

68. §§ 78dd-1(b), -2(b), -3(b); see also *United States v. Giffen*, 326 F. Supp. 2d 497, 501 (S.D.N.Y. 2004) (citing § 78dd-2(b)). The Senate Committee on Banking, Housing and Urban Affairs wrote the statute does not “cover so-called ‘grease payments’ such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties.” S. REP. NO. 95-114, at 10 (1977).

69. §§ 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B); see also Arthur F. Matthews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 NW. J. INT’L L. & BUS. 303, 316 (1998) (arguing that money intended to expedite undisputed debt is a facilitating payment).

70. See §§ 78dd-1(f)(3)(B), -2(h)(4)(B), -3(f)(4)(B).

foreign officials' original duties.⁷¹ Even with this clarification, grey areas exist. For example, the author has had experiences with customs in various countries where it has been common to provide payments to local custom agents to expedite shipments through customs, to have them essentially do their job. It would become illegal if that payment was made to ensure the shipment's ability to pass through customs—if the shipment would not have passed Customs without the payment.

Although the 1988 amendments to the FCPA added the exception for “facilitating payments,” Congress was sure to explain that the amendment was only to clarify ambiguities, not to change the original intent of the law.⁷² Thus, the legislative history of the FCPA is clear in its intent to provide an exception for certain types of payments if they are considered facilitating.⁷³ The facilitating payment exception is limited to allow for bribes to mid- or low-level foreign officials to expedite or secure the performance of a routine government action.⁷⁴ That is correct—a payment that most Americans would consider a bribe is not considered a bribe or illegal payment under those circumstances. However, the courts have determined that while the FCPA includes obtaining permits as an exception to the bribery definition, it is limited to those permits that the company is already properly entitled to obtain from that official.⁷⁵

Congress was trying to accomplish the prohibition of bribes that would induce foreign officials to misuse their authority and bribes that would disrupt economic efficiency and foreign relations of the United States.⁷⁶ However, protecting the “payments,” to expedite minor ministerial actions, is to be kept outside the scope of the FCPA anti-bribery provisions.⁷⁷ Congress has stated:

While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments.⁷⁸

71. S. REP. NO. 95-114, at 10.

72. *See Kay*, 359 F.3d at 750 (citing S. REP. NO. 100-85, at 54 (1987) and H.R. REP. NO. 100-40, pt. 2, at 76-77 (1987)).

73. *Kay*, 359 F.3d at 750.

74. § 78dd-1(b); *Kay*, 359 F.3d at 750-51.

75. *S.E.C. v. Jackson*, 908 F. Supp. 2d 834, 857-58 (S.D. Tex. 2012) (citing H.R. REP. NO. 95-640, at 8 (1977)).

76. *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028-29 (6th Cir. 1990).

77. *See H.R. REP. NO. 95-640*, at 8 (1977).

78. *Id.*

Routine governmental actions are non-discretionary actions that a foreign official ordinarily performs in his daily business.⁷⁹ This is the provision that causes so many ethical concerns in the U.S. and for many American businesses. It is difficult for many people and businesses in the U.S. to understand the nature of this provision and accept the reality of the situation.

This is where understanding and accommodating the culture of the foreign nation that the company is doing business in, and complying with its customs becomes important. There is no need to have to agree with the necessity of providing grease payments or bribing in this situation, but understand also that the other country is not the United States, and does not necessarily want to be. In my experience, many Americans have a really hard time with that concept. Bribery has been the business norm in many countries for decades or centuries,⁸⁰ and forcing U.S. values into their system can be insulting and may deter future business; Congress recognized this. Simply put, if a U.S. company does not agree on how business takes place in a foreign country, then it should not do business there.

The facilitating payments exception, however, never applies when a foreign official has discretion to award or continue business with a party.⁸¹ As more U.S. businesses are conducting business in foreign markets in all corners of the globe—especially in developing countries (and those with a history of bribery as a part of doing business)—they need to know what is acceptable in the foreign country may still amount to a violation of the FCPA.

Nevertheless, those payments meant to encourage the performance of a routine governmental action by an official, political party, or candidate are exempt.⁸² The FCPA provides some examples of routine governmental actions, such as obtaining official documents to qualify a person to do business in a foreign country or processing governmental papers, including visas and work orders.⁸³ Routine governmental actions also include: providing police protection, transporting mail, scheduling

79. See §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A); see also H.R. REP. NO. 100-85, at 53-54 (1987) (describing the FCPA's routine governmental action exception). Examples include obtaining permits, licenses, or documents needed to do business in a foreign country; processing governmental papers, such as visas and work orders; scheduling inspections; providing police protection; mail pick-up or delivery; phone, power, and water service; and loading, unloading, or protecting perishable products or commodities. See §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A).

80. Spahn, *supra* note 11, at 1-6.

81. See Emily N. Strauss, "Easing Out" the FCPA Facilitating Payment Exception, 93 B.U. L. REV. 235, 241-42 (2013) (discussing the facilitating payment exception in detail).

82. *Id.* at 241.

83. §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A).

inspections associated with contract performance, inspections related to transit of goods across the country, providing phone service, power and water supply, loading and unloading cargo or protecting products from deterioration, and actions of a similar nature.⁸⁴

However, routine governmental actions do not include influencing a decision by an official to award business or to continue to do business between the company and the foreign government.⁸⁵ Because the distinction between a permissible facilitating payment and an improper bribe can be difficult to discern even amongst those experienced in international business, it is always important to consult with an attorney, compliance professional, or person in charge of internal protocols prior to making any payment for the first time.

Anyone who has worked in a country where corruption is commonplace knows how difficult it can be to get things done while avoiding payments completely. In fact, it cannot be avoided in some circumstances.⁸⁶ Thus, as a necessary result, the FCPA contains an exception to its anti-bribery provision for payments made to facilitate or expedite performance of a routine governmental action. Under the exception, making a payment to a government official to do something he or she should have been doing anyway is permissible.⁸⁷ The author found this extremely common in the former Soviet Union after its collapse in 1990. In many of the former republics, the governments were trying to figure out how to operate under a post-Soviet communistic government.

In addition, within the FCPA, making a payment to a government official to expedite something that must be processed is permissible.⁸⁸ The first example is providing that government official with a payment to do what her job already entails, while the second example is a payment to get the government official to speed up. However, if during the processing a government official is paid to move an application or request in front of others, then the actor is essentially paying to change the outcome of the situation. This result goes against both the written language and the intent of the FCPA. Nonetheless, one can see how grey the line can be between operating within the law and outside the law.

84. §§ 78dd-1(f)(3)(A), -2(h)(4)(A), -3(f)(4)(A).

85. *See* *United States v. Kay*, 359 F.3d 738, 750-51, 755-56 (5th Cir. 2004).

86. *See, e.g.,* *Baghdasaryan v. Holder*, 592 F.3d 1018, 1020-25 (9th Cir. 2010) (discussing widespread corruption in Armenia); *United States v. Kozeny*, 582 F. Supp. 2d 535, 536-37 (S.D.N.Y. 2008) (explaining defendant's argument that corrupt conditions exist regarding payments to encourage privatization in Azerbaijan).

87. *See* §§ 78dd-2(b), (h)(4)(A).

88. *See* §§ 78dd-2(b), (h)(4)(A).

C. *What Is the Amount?*

This defense is only available if the business can show: (1) the bona fide expenditure lacks a corrupt purpose; and (2) the amount is not excessive.⁸⁹ However, the expenditure must be either directly related to “the promotion, demonstration, or explanation of products and services” or to “the execution or performance of a contract with a foreign government or agency.”⁹⁰ Limited travel expenses, for example, would likely be permissible under the FCPA, while unnecessary and lavish expenditures almost certainly violate it. Similarly, travel expense reimbursements for an official to evaluate a product would likely be permissible, but travel expense reimbursements for his accompanying family would not.⁹¹

The DOJ Opinion Procedure Releases help to define the parameters of this defense because case law has not fully defined it as of yet.⁹² Although the courts will continue to rule, the DOJ has released opinions indicating that expenditures are more likely to be considered reasonable and bona fide if two conditions are met: (1) payments are made directly to the service provider like a travel agency, as opposed to the government official; and (2) the company making the payments does not have pending business with the government agency whose employees are receiving the benefits of the expenditures.⁹³ The burden of establishing whether a payment meets these requirements rests with the defendant because this is an affirmative defense.⁹⁴

89. See Elizabeth S. Shingler, Note, *The Foreign Corrupt Practices Act: A New Approach to the Reasonable and Bona Fide Expenditure Defense*, 7 BROOK. J. CORP. FIN. & COM. L. 537, 545-46 (2013) (discussing the bona fide expenditure defense).

90. §§ 78dd-1(c)(2)(A)–(B), -2(c)(2)(A)–(B), -3(c)(2)(A)–(B).

91. See §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2).

92. See U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE No. 07-01 (July 24, 2007), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf> (stating the requesting company’s willingness to pay for a six-member foreign official delegation visit to view a U.S. domestic operations site fits within the terms of the “promotional expenses” affirmative defense of §§ 78dd-1(c)(2)(A), -2(c)(2)(A)); U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE No. 04-03 (June 14, 2004), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0403.pdf> (stating the DOJ does not intend to take action against a company for sponsoring foreign officials on a trip to the U.S. to meet with public-sector officials on the regulation of employment issues).

93. See *supra* note 91 and accompanying text; see also Thomas R. Fox, *Not Draconian – Gift, Travel and Entertainment Under the FCPA*, FCPA COMPLIANCE & ETHICS (July 19, 2013), <http://fcpacompliancereport.com/2013/07/not-draconian-gift-travel-and-entertainment-under-the-fcpa> (discussing DOJ Opinion Releases approving companies’ expenditures).

94. Kyle P. Sheahan, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464, 469, 478 (discussing the burdens of proof for the affirmative defenses under the FCPA).

The DOJ has noted some expenditures that are considered reasonable and bona fide in its “FCPA Reviews.”⁹⁵ A DOJ FCPA Review in 2004 stated that the Fraud Section does not intend to take action against a business for providing seminar fees, including transportation costs, meals, and lodging for foreign government officials.⁹⁶ In another release, the DOJ stated that it does not intend to take action against a law firm that will be providing group rate health insurance and guarantees of future employment to a partner taking a leave of absence to work for a foreign government.⁹⁷ It was proposed that the final amendments to the FCPA include a provision under affirmative defenses for “nominal payments, which constitute a courtesy, a token or regard of esteem, or in return for hospitality,” in other words, tips.⁹⁸

Thus, the real issue within the grease or illegal payment concept is the amount of the payment. Currently there is no statutory amount provided that says no more than *this* amount is permitted.⁹⁹ However, from known payments that have occurred, payments under \$1000 are generally safe.¹⁰⁰ Further complicating this is that the courts have not set any standard.¹⁰¹ The author believes this is in part due to the American uneasiness of addressing how much money constitutes a legal bribe. There is even an uneasiness of using the word “bribe” in this Article and using “payment” instead. Bribery is against everything we are taught in the U.S.; yet this law prescribes when that very act is acceptable.

Thus, companies and individuals must scrutinize every payment to a foreign official and avoid acting in a manner that may be perceived as

95. See U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE No. 04-01 (Jan. 6, 2004), <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0401.pdf>; *supra* note 91.

96. U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW, OPINION PROCEDURE RELEASE No. 04-01, *supra* note 95.

97. U.S. DEP’T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT, OPINION PROCEDURE RELEASE No. 2000-01 (Mar. 29, 2000), <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2000/0001.pdf>.

98. Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 588 n.83 (2006). Although this provision was ultimately not adopted, some companies have incorporated this language into their codes of ethics. See, e.g., AM. MEDIA OPERATIONS, INC., AMENDED AND RESTATED CODE OF ETHICS AND CORPORATE CONDUCT FOR THE PRINCIPAL EXECUTIVE OFFICER AND SENIOR FINANCIAL OFFICERS 13-16 (June 2006), http://www.americanmediainc.com/sites/americanmediainc.com/files/fin_reports/CodeofConductfinal.pdf; HEXAGON, CODE OF BUSINESS CONDUCT AND ETHICS 6 (May 2016), <http://www.hexagon.com/downloads/HexagonCodeOfBusinessConductEthics.pdf>.

99. See, e.g., Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer*, CURRENTS, Winter 2008, at 3, 6 (describing the fact there are not set statutory limits).

100. See, e.g., Matthews, *supra* note 69, at 314-15 (discussing the permissible size of facilitation payments).

101. *Id.* at 314.

trying to influence the decisions and actions of those officials, regardless of the amount. Businesses and individuals must also ensure that a rigorous system of internal compliance is in place to mitigate the fines and penalties imposed by the FCPA in the event that a violation of the FCPA may occur. Even though small payment amounts that have been interpreted as bribes to foreign officials have been the subject of criminal and civil enforcement actions, such bribes can also be subject to criminal prosecution under the FCPA.¹⁰² The result of these payments can range from enormous fines to the temporary or permanent exclusion from federal procurement contracting.¹⁰³ To avoid such consequences, businesses should enact a detailed compliance program intended to detect and prevent improper payments of any amount by all levels of employees and their agents.

V. ESTABLISHING INTERNAL COMPLIANCE PROTOCOLS

It is important for businesses to establish FCPA internal compliance protocols. These protocols are important because of the various potential legal protections they could provide and violations they can prevent. For example, even if a business unknowingly violates the FCPA, it can still be penalized by the DOJ.¹⁰⁴ Then, the possible loss of the business's reputation can be seriously damaging, and thus possibly affect how well a business operates afterwards with the public. As discussed in the cases below, this generally has not been an issue for companies that have violated the FCPA, but nevertheless it is a large concern.

Lastly, if it gets to this point, the federal sentencing guidelines acknowledge the importance of a business possessing an internal compliance program and rewards those businesses that have such a compliance program in place with reduced penalties even if it is found in violation of the FCPA.¹⁰⁵ The United Kingdom ("U.K.") for example,

102. See, e.g., Stamm Florian, *The Foreign Corrupt Practices Act*, SMITH, GAMBRELL & RUSSELL, LLP (2006), http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl15/836 (discussing the various criminal and civil penalties in the FCPA).

103. Jessica Tillipman, *The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences*, BRIEFING PAPERS, Aug. 2011, at 1, 6-8.

104. See *S.E.C. v. World-Wide Coin Invest., Ltd.*, 567 F. Supp. 724, 749 (N.D. Ga. 1983) (stating that, just as the degree of error is not relevant to responsibility for any inaccuracies in companies' compliance, the motivations of those who erred are not relevant). However, for aiding and abetting, knowledge of participation is relevant. *S.E.C. v. Autocorp Equities, Inc.*, 292 F. Supp. 2d 1310, 1331 (D. Utah 2003).

105. See Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 505-08 (2005) (citing U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2004)) (discussing that the companies who receive the maximum benefit from robust compliance programs are those that appear to comply with the guidelines but that do not actually detect or deter wrongful conduct).

takes a similar approach. The U.K.'s Serious Fraud Office ("SFO") recognized that the objective of their similar Bribery Act "is not to bring the full force of the criminal law to bear upon well run commercial organizations that experience an isolated incident of bribery on their behalf."¹⁰⁶ The SFO will take the existence of a company's compliance program into account when determining whether to prosecute in situations where a company had an effective compliance system but neither detected nor deterred rogue employee nor agent activity.¹⁰⁷

If a business is interested in implementing an internal compliance program, then it needs to address both internal and external protocols of the business. The business should provide to its officers, directors, and all of its employees the business's FCPA compliance protocol and an outline of the provisions of the FCPA. This protocol should include the business's policy regarding payments to foreign officials, and—this part is very crucial—what should be done if the employee or director suspects questionable payments or discovers that questionable payments were made.¹⁰⁸ All levels of employees should receive periodic training on FCPA compliance, depending on the amount of foreign interaction, at least once a year. As mentioned above, if a company enacts these procedures, it will be better protected against a rogue employee's actions.

The company should emphasize the risk to the employee and to the company if violations of the FCPA are ever found by the U.S. government, and consider past violations by others that have been prosecuted. It is strongly suggested that employment agreements, where applicable, should contain agreements by the prospective employee to adhere to the FCPA and the business's internal compliance protocol. This will create an environment of awareness within the business to prevent accidental violations of the FCPA. As mentioned above, even inadvertent violations of the FCPA can still be charged, but having a strong internal compliance protocol will show the U.S. government that a company has at least attempted to make its employees aware of the protocols.¹⁰⁹ Depending on the employees' exposure to international situations, more training and emphasis should be provided by the company. This reduces the risk of any accidental violations.

106. U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010, at 8 (2010), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

107. *See id.*

108. For an example of a company's internal protocols, see PARETEUM CORP., CODE OF BUSINESS CONDUCT 5-6 (2015), <http://www.pareteum.com/corporate-governance> (follow the "Code of Business Conduct" hyperlink).

109. *See* Matthews, *supra* note 69, at 52-53; *supra* note 103 and accompanying text.

Within the company's internal protocol, the company must emphasize and promote open and easy lines of communication. This allows employees to report any suspicious payment made by other employees of any level, to determine whether a proposed payment might violate the FCPA. To ensure effective compliance, it is suggested that companies appoint an internal compliance officer to manage the protocol and be the contact person for any employee's question about proposed payments possibly violating the FCPA, and reporting any violations that have been made. Obviously, this person must be very knowledgeable about the FCPA and serve the interest of the company, not of any one individual employee or group of employees. Depending on the size of the company, this may consist of an existing employee taking on this responsibility, but it is important to have someone that is the point person for any FCPA issues to be able to act independently of supervisory control that may have interests contrary to the FCPA.

A company's internal compliance protocol can get complicated where the company uses outside consultants or foreign agents. In addition, doing business through joint ventures or partnerships with foreign business entities can complicate compliance. The use of foreign agents and entities by companies expands each year and will continue to do so as the economies of the world continue to intertwine.¹¹⁰ Many of the cases that will be discussed below involve this very situation; whether each company knew of the violations and allowed them to continue is a matter of debate, but conducting business with foreign agents and entities caused many of the issues.¹¹¹

It may not always be easy to accomplish, but all companies need to ensure that their foreign partners are FCPA compliant. Ignorance of the law is not an excuse, and neither is the ignorance of a business partner's violations of the FCPA as per DOJ interpretations of the law.¹¹² A company's foreign partner's violation of the FCPA does not protect the company from being found in violation itself.¹¹³ Because a company may be held liable for the actions of its foreign partners, each needs to conduct due diligence to establish FCPA compliance of potential foreign partners before entering into the relationship. This can be accomplished

110. See Daniel J. Grimm, *Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act*, 9 VA. L. & BUS. REV. 91, 97-100 (2014).

111. See *supra* Part IV.

112. There is some debate to this statement. Under the FCPA, an individual cannot be punished criminally unless he acts "willfully." 15 U.S.C. § 78dd-2(g)(2)(A) (2012). However, Congress did not define the term in the Act, and subsequent court decisions have failed to analyze the willfulness provision rigorously. See *id.*

113. See Grimm, *supra* note 110, at 16-43 (discussing the different concerns of foreign partners).

easily when conducting investigations of the partner before doing business with them.

It is suggested that a company complete a thorough background investigation into its potential new foreign business partner. This includes running all parties through the Office of Foreign Assets Control (“OFAC”) sanctions list and all other officially maintained blacklists.¹¹⁴ Any proposed foreign partnership or venture should be preceded by a period of due diligence in relation to the FCPA.¹¹⁵

In the course of due diligence, the company should answer some questions before proceeding with the relationship. For example, does the local entity have any relationships with government officials? If it does, in what capacity? Will the entity be in a position where its staff might be tempted to offer a bribe? The company must consider whether the entity will be capable of complying with the FCPA in relation to the permissibility of facilitating payments and prohibited bribes. This includes reputation of the entity as well as any possible violations that entity may have committed in the past.¹¹⁶

Furthermore, disclosing a business’s internal compliance protocol and making the relationship contingent upon written guarantees from the organization to adhere to the same protocol is suggested.¹¹⁷ This can be simply included in any contractual relationship between the company and the foreign partner.¹¹⁸ If the compliance of the internal protocols were emphasized in any business relationship contract, this would show the government that best efforts were exercised to be compliant with the FCPA, and would show employees commitment to adhere to the FCPA. In addition, if the partnership could result in a long-term relationship, the initial background check of the entity should be updated at least yearly to ensure continued compliance by the entity under the FCPA.

Additionally, requiring that the foreign entities keep accurate accounting records makes it more difficult to mask improper payments that could be made. Insisting upon accurate accounting, receipts, and annual audits by certified public accountants will help discourage bribes from being paid, and bring to light improper payments if they do happen.

114. See *Office of Foreign Assets Control (OFAC)*, U.S. DEP’T OF THE TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited Aug. 1, 2017).

115. See Jaime Guerrero, *Regulatory: 7 Points to Consider in Regard to FCPA Due Diligence*, INSIDE COUNSEL (Apr. 25, 2012), <http://www.insidecounsel.com/2012/04/25/regulatory-7-points-to-consider-in-regard-to-fcpa> (discussing how to protect a company from joint venture partners and agents).

116. *Id.*

117. *Id.*

118. *Id.*

This will provide a company with an opportunity to correct the situation and possibly self-report the incident if the event requires it. If it is necessary for the foreign entity to make a payment that a compliance officer believes would qualify for the facilitating payments exception, then both parties should identify it accordingly in their accounts. This is an important and often overlooked aspect of the FCPA.¹¹⁹ If proper records of the facilitating payments have been kept, it will provide protection in any U.S. government investigation, or in another country that may have similar laws where both parties are doing business.

Lastly, companies should establish a reliable structure to maintain regular oversight. Companies that are operating in foreign countries while keeping management mostly in the U.S. must scrutinize their foreign activities carefully. If the operations rely on foreign entities to operate, then the oversight becomes even more critical.

VI. RECENT CASES: 2016

The following cases show what action the U.S. government has taken in 2016 in enforcing the FCPA.¹²⁰ The Article provides a brief synopsis of some of the cases, illustrating the behavior that got the company in trouble. The companies that did not address the “three questions” discussed above paid heavily for it. All figures are presented in U.S. dollars.

A. SAP SE

In February 2016, the SEC found that SAP SE violated the FCPA by allowing Vicente E. Garcia, a SAP SE executive, to bribe a senior Panamanian government official, and offer bribes to two others.¹²¹ In addition to paying the bribe, Garcia hid the activity as large discounts—up to 82%—by easily falsifying approval forms.¹²² The SEC focused on the lack of internal FCPA controls to prohibit these questionable discounts.¹²³ This will be a recurring theme in these cases. SAP SE agreed to pay disgorgement of \$3.7 million in profits to the Panamanian

119. Strauss, *supra* note 81, at 251-58 (discussing how the SEC and DOJ have prosecuted parties for failing to have properly recorded facilitating payments).

120. See *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited Aug. 1, 2017). This Article discusses only those cases from 2016 listed by the SEC. See *infra* Part VI.A–Y.

121. Vicente E. Garcia, Exchange Act Release No. 75684, 112 S.E.C. Docket 3 (Aug. 12, 2015).

122. *Id.*

123. *Id.*

government plus prejudgment interest of \$188,896 to settle the charges.¹²⁴

B. Ignacio Cueto Plaza

Also in February 2016, the SEC alleged that Ignacio Cueto Plaza, chief executive officer of LAN Airlines, based in South America, violated the FCPA by allowing a third-party consultant to use \$1.15 million to bribe union officials. The union was to take a lower wage increase and stop a labor dispute instead of using the money to study the air routes in Argentina.¹²⁵ Cueto Plaza violated the internal controls, books and records, and false records provisions of the FCPA.¹²⁶ He neither admitted nor denied the charges, but did agree to pay a \$75,000 penalty and become certified with the airline's internal policies and procedures on FCPA protocols.¹²⁷ Since he was the president and chief operating officer at the time, the SEC went after him directly since he was leading the company.¹²⁸ This is different from the other cases because this was not an employee, subsidiary, or associate of the company, but the head officer of the company.

C. SciClone Pharmaceuticals

Again in February 2016, the SEC settled with SciClone Pharmaceuticals, Inc. ("SciClone"), alleging improper conduct during the previous five years, including giving money, gifts, and other things of value to health care professionals in China.¹²⁹ These bribes "led to several million dollars in sales of pharmaceutical products to China's state health institutions."¹³⁰ SciClone failed to accurately record these bribes and lacked an effective anti-corruption compliance program.¹³¹ Without admitting or denying the findings, SciClone agreed to pay \$9.43 million in disgorgement plus \$900,000 in prejudgment interest and a \$2.5 million penalty.¹³²

124. *Id.*

125. Ignacio Cueto Plaza, Exchange Act Release No. 77057, 113 S.E.C. Docket 8 (Feb. 4, 2016).

126. *Id.*

127. *Id.*

128. *Id.*

129. Press Release, U.S. Sec. & Exch. Comm'n, SciClone Charged with FCPA Violations (Feb. 4, 2016), <http://www.sec.gov/litigation/admin/2016/34-77058-s.pdf>.

130. *Id.*

131. *Id.*

132. *Id.*

In addition to the monetary settlement, SciClone must report to the SEC for the next three years on anti-corruption compliance measures.¹³³ This company did not have internal protocols in place to prevent this from happening.¹³⁴ This should be a wake-up call for all companies doing international business to have strong internal protocols in place before conducting business overseas.

D. PTC

In another case from February 2016, the SEC found that PTC Inc. bribed Chinese government officials in order to win business.¹³⁵ The bribes included improper travel, gifts, and entertainment totaling nearly \$1.5 million.¹³⁶ Not only did the company bribe the officials, but it disguised the payments as legitimate commissions or business expenses,¹³⁷ which is a common theme in these cases.

In this case, the company's subsidiaries were the entities making the bribes.¹³⁸ PTC Inc. agreed to pay \$11.86 million and \$1.76 million in prejudgment interest; its two China subsidiaries also agreed to pay a \$14.54 million fine in a non-prosecution agreement.¹³⁹ Subsidiaries in foreign countries should have protocols in place to monitor their activities on the same level as their parent company.

E. VimpelCom

In what was the fifth case in February 2016, the SEC alleged that VimpelCom bribed an Uzbek government official who was related to the President of Uzbekistan.¹⁴⁰ The company paid at least \$114 million in bribes disguised as charitable donations to organizations that were directly associated with the Uzbek official.¹⁴¹ The SEC and VimpelCom agreed on a settlement.¹⁴² The resolution, which is large, states the company needs “to pay \$167.5 million to the SEC, \$230.1 million to the [DOJ], and \$397.5 million to Dutch regulators.”¹⁴³

133. *Id.*

134. *Id.*

135. PTC Inc., Exchange Act Release No. 77145, 113 S.E.C. Docket 10 (Feb. 16, 2016).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Press Release, U.S. Sec. & Exch. Comm'n, VimpelCom to Pay \$795 Million in Global Settlement for FCPA Violations (Feb. 18, 2016), <https://www.sec.gov/news/pressrelease/2016-34.html>.

141. *Id.*

142. *Id.*

143. *Id.*

The actions by the company were considered so egregious that the SEC ordered the company to retain an independent monitor to ensure FCPA compliance for at least three years.¹⁴⁴ This case shows that if a company does not follow its own protocols or refuses to install them, the consequences could include an independent entity watching the business and making sure it follows the rules. Most businesses would not like this form of monitoring, so it is best to make sure internal protocols are established and are being followed.

F. *Qualcomm*

In March 2016, the SEC brought a case against Qualcomm, which allegedly bribed Chinese officials to obtain business.¹⁴⁵ The bribes were not just limited to gifts, travel, and entertainment, but also included hiring Chinese officials' family members.¹⁴⁶ Each family member was referred to during the hiring process as a "must place" or "special" hire.¹⁴⁷ All of these bribes were misrepresented in the books and records of Qualcomm as legitimate business expenses.¹⁴⁸

Qualcomm agreed to pay \$7.5 million and self-report on FCPA compliance to the SEC for the next two years.¹⁴⁹ This means the company has to establish strong internal FCPA protocols and show it is following its own design.

G. *Nordion and Gourevitch*

In March 2016, the SEC charged Mikhail Gourevitch for bribing Russian officials to approve the distribution of a liver cancer treatment called TheraSphere.¹⁵⁰ In Gourevitch's attempt to hide the bribe, he filed false documentation to conceal it.¹⁵¹ In addition to charging Gourevitch, the SEC also charged Nordion, Inc. ("Nordion") which lacked internal FCPA protocols, and thus the company was unable to detect and stop any actions revolving around bribes.¹⁵² Mikhail Gourevitch has been terminated from his job at Nordion.¹⁵³

144. *Id.*

145. Qualcomm Inc., Exchange Act Release No. 77261, 113 S.E.C. Docket 12 (Mar. 1, 2016).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Mikhail Gourevitch, Exchange Act Release No. 77288, 113 S.E.C. Docket 12 (Mar. 3, 2016).

151. *Id.*

152. *Id.*

153. *Id.*

Nevertheless, Gourevitch agreed to pay \$100,000 in disgorgement, \$12,950 in prejudgment interest, and a \$66,000 penalty.¹⁵⁴ Nordion has agreed to pay \$375,000 due to its lack of basic internal FCPA protocols in detecting such activities.¹⁵⁵ This case shows again the importance of having internal FCPA protocols in place.

H. *Novartis*

In the last case in March 2016, the SEC found that two China-based subsidiaries of Novartis AG, a pharmaceutical company, were bribing health care professionals which led to several million dollars of sales for each.¹⁵⁶ The company did not have internal FCPA protocols in place to detect and stop these bribes from happening.¹⁵⁷ Novartis AG agreed to pay \$21.5 million in disgorgement, plus \$1.5 million in prejudgment interest and a \$2 million civil penalty.¹⁵⁸ In addition to the monetary penalties, the pharmaceutical company must report back to the SEC for two years on its implementation of an internal FCPA protocol and its compliance with the program.¹⁵⁹

I. *Las Vegas Sands*

In April 2016, Las Vegas Sands was found to have paid a consultant in Asia \$62 million more than what was recorded in its internal books.¹⁶⁰ The money was used to separate company purchases from purchases by the consultant.¹⁶¹ The purchases were a basketball team and a building in China.¹⁶² The reason behind these deceptive purchases is that the Chinese government prohibited casino gambling.¹⁶³ The company agreed to pay \$9 million and have an independent consultant review its internal FCPA protocols for two years to ensure compliance with the FCPA.¹⁶⁴

154. *Id.*

155. *Id.*

156. Novartis AG, Exchange Act Release No. 77431, 113 S.E.C. Docket 15 (Mar. 23, 2016).

157. *Id.*

158. *Id.*

159. *Id.*

160. Las Vegas Sands Corp., Exchange Act Release No. 77555, 113 S.E.C. Docket 17 (Apr. 7, 2016).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

J. Nortek and Akamai Technologies

On June 7, 2016, the SEC announced that two unrelated companies entered into non-prosecution agreements with the SEC because they bribed Chinese officials via foreign subsidiaries.¹⁶⁵ The companies were Akamai Technologies, a Massachusetts-based Internet Service Provider, and Nortek Inc., a Rhode Island-based residential and commercial building products manufacturer.¹⁶⁶ Each company self-reported to the government in the early stages of their own internal investigations.¹⁶⁷

As a result of their self-reporting, the SEC agreed to non-prosecution agreements.¹⁶⁸ Akamai Technologies agreed to pay \$652,452 in disgorgement plus \$19,433 in interest, while Nortek Inc. agreed to pay \$291,403 in disgorgement plus \$30,655 in interest.¹⁶⁹ Even though these companies' internal FCPA protocols did not prevent the illegal actions, monitoring practices saved the company money in avoiding SEC prosecution.

K. Analogic and Lars Frost

In June 2016, the SEC, Analogic Corp., and Lars Frost (chief financial officer of BK Medical ApS (“BK Medical”), an Analogic subsidiary) agreed to a \$15 million dollar settlement for FCPA violations.¹⁷⁰ Analogic used its Danish subsidiary, BK Medical, to funnel \$20 million to individuals in Russia and to shell companies in Belize, the British Virgin Islands, Cyprus, and Seychelles.¹⁷¹ The \$20 million came from BK Medical distributors, at Analogic Corp.'s request, to fictitiously inflate its invoices to the distributors and direct the overpayments to the requested third parties.¹⁷²

BK Medical had no knowledge of whether these payments had any business purpose, and it was able to sign a non-prosecution agreement and pay \$3.4 million.¹⁷³ Analogic Corp., being the parent of said bribery, has agreed to pay \$7.67 million in disgorgement and \$3.8 million in prejudgment interest.¹⁷⁴ The fines were mitigated by the fact the

165. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Two Non-Prosecution Agreements in FCPA Cases (June 7, 2016), <https://www.sec.gov/news/pressrelease/2016-109.html>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Analogic Corp., Exchange Act Release No. 78113, 114 S.E.C. Docket 8 (June 21, 2016).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

company self-reported, took remedial measures, and cooperated with the government investigation.¹⁷⁵

L. *Johnson Controls*

In July 2016, the SEC settled with Johnson Controls, Inc. (“Johnson Controls”) for \$14 million over FCPA violations.¹⁷⁶ Johnson Controls’s fully-owned Chinese subsidiary was using fake vendors to bribe government-owned shipyards, ship owners, and others.¹⁷⁷ These bribes were made hoping to obtain future business, to retain current business, and to help itself.¹⁷⁸ The subsidiary is called China Marine, which Johnson Controls acquired in 2005.¹⁷⁹ Prior to the acquisition, China Marine was using agents to funnel money to the government and others.¹⁸⁰

When Johnson Controls took over the company it implemented rules to limit using agents, and the managing director started using fake vendors.¹⁸¹ Johnson Controls did not admit or deny the findings but did report the misdeeds to the SEC and had to pay back the amount of profits obtained by this illegal transaction of \$11.8 million plus prejudgment interest of \$1.38 million and a civil penalty of \$1.18 million.¹⁸² Johnson Controls also needs to report to the SEC for a year on the status of remediation and implementation of anti-corruption compliance measures.¹⁸³ This is another example of a company not having a strong enough protocol in place to prevent this type of incident.

M. *LAN Airlines*

In a July 2016 corporate enforcement action, following the individual action against Ignacio Cueto Plaza, LAN Airlines settled charges that it used a consultant that made payments to third parties.¹⁸⁴ The company was inculcated for its role in creating a contract knowing full well that it was not intended to pay a purported consultant \$1.15

175. *Id.*

176. Johnson Controls, Inc., Exchange Act Release No. 78287, 114 S.E.C. Docket 11 (July 11, 2016).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. LAN Airlines S.A., Exchange Act Release No. 78402, 114 S.E.C. Docket 13 (July 25, 2016).

million in studying the existing air routes in Argentina.¹⁸⁵ The money instead went to third parties to squash the union's disputes.¹⁸⁶ LAN Airlines agreed to pay \$9.4 million in illegally gained profits and a \$12.75 million penalty.¹⁸⁷ In addition to the fines, LAN Airlines agreed to have an independent company monitor its activities for the next twenty-seven months.¹⁸⁸

N. Key Energy Services

In August 2016, the SEC settled a case with Key Energy Services, Inc. ("Key Energy") for \$5 million.¹⁸⁹ Key Energy, a Houston-based company, had a Mexican subsidiary called Key Mexico pay a contracted employee at Petroleos Mexicanos ("Pemex") for advice, assistance, and inside information.¹⁹⁰ Key Mexico officials falsified those records to keep Key Energy out of the loop.¹⁹¹ Through an internal investigation in 2014, Key Energy discovered the relationship between the Pemex employee and Key Mexico.¹⁹² Key Energy did not admit to or deny the violations of the FCPA but agreed to pay \$5 million in illegally attained profits.¹⁹³ No penalty was charged due to Key Energy's current financial situation, which means the SEC did not want to impose a fine that would force the company to close.¹⁹⁴

O. AstraZeneca

Near the end of August 2016, the SEC settled with AstraZeneca plc ("AstraZeneca") for its FCPA violations.¹⁹⁵ Subsidiaries of AstraZeneca were bribing foreign officials in both China and Russia.¹⁹⁶ These bribes included cash, gifts, and many other items.¹⁹⁷ The bribes lasted for several years and were even condoned by multiple levels of

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Key Energy Services, Inc., Exchange Act Release No. 78558, 114 S.E.C. Docket 15 (Aug. 11, 2016).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. AstraZeneca PLC, Exchange Act Release No. 78730, 114 S.E.C. Docket 18 (Aug. 30, 2016).

196. *Id.*

197. *Id.*

management.¹⁹⁸ AstraZeneca also had no anti-corruption compliance program during the period of the bribery.¹⁹⁹ Again, it is essential that a company have an established program.

The company did not admit or deny the findings but agreed to pay \$4.33 million in illegally obtained profits, \$822,000 in prejudgment interest, and a civil penalty of \$375,000.²⁰⁰ As the company created an anti-corruption compliance program after these incidents occurred, no mandate to create one is within the SEC's order.²⁰¹

P. Jun Ping Zhang

Jun Ping Zhang, a former subsidiary executive at an international communications and information technology company, Harris Corporation, located in China, agreed to settle charges that it bribed Chinese government officials in an effort to acquire new business and maintain current business.²⁰² In addition, Ping Zhang falsified records to hide the expenses and hoped not to be caught.²⁰³ Harris Corporation acquired the subsidiary and took immediate action to fix the error.²⁰⁴ Ping Zhang will pay a \$46,000 civil penalty, while Harris Corporation will not need to pay because of the self-reporting, remediation and cooperation with the SEC.²⁰⁵

Q. Nu Skin Enterprises

The SEC found that a Chinese subsidiary of Nu Skin Enterprises, Inc., a Provo, Utah-based company, made a payment to a charity in order to influence a high-ranking Chinese Communist party official in order to quell an investigation into their company.²⁰⁶ The SEC's investigation noted that the Chinese subsidiary, Nu Skin (China) Daily Use & Health Products Co. Ltd. was being threatened with a \$431,088 fine from an internal Chinese investigation.²⁰⁷ The Chinese subsidiary approached a government official and asked for his intervention on the fine in

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Jun Ping Zhang, Exchange Act Release No. 78825, 114 S.E.C. Docket 20 (Sept. 13, 2016).

203. *Id.*

204. *Id.*

205. *See id.*

206. Nu Skin Enterprises, Inc., Exchange Act Release No. 78884, 115 S.E.C. Docket 1 (Sept. 20, 2016).

207. *Id.*

exchange for a charitable donation in the same amount to his charity.²⁰⁸ Nu Skin Enterprises Inc., without admitting or denying the findings, agreed to a cease-and-desist order to disgorge illegally gained profits of \$431,088, pay a prejudgment interest of \$34,600, plus a civil penalty of \$300,000.²⁰⁹

R. *Anheuser-Busch InBev*

Anheuser-Busch InBev, a Leuven, Belgium-based company, was using third-party sales promoters to bribe government officials in India.²¹⁰ Not only did it bribe government officials, but it had a separation agreement that put heavy financial penalties on anyone who would report these bribes to the SEC.²¹¹ Anheuser-Busch InBev has agreed to pay \$2.71 million in illegally obtained profits, prejudgment interest of \$292,381, and a \$3 million penalty.²¹² In addition to the financial settlement, the company must cooperate with the SEC and stop prohibiting employees from contacting the SEC.²¹³ It is hard for a company to claim any form of ignorance when it punishes employees for contacting the SEC.

S. *Och-Ziff*

Och-Ziff Capital Management Group (“Och-Ziff”) bribed high-level government officials in Africa to persuade the Libyan Investment Authority sovereign wealth fund (“SWF”) invest in Och-Ziff.²¹⁴ The bribes also included mining rights to government officials in Libya, Chad, Niger, Guinea, and the Democratic Republic of the Congo.²¹⁵ Not only did Och-Ziff violate the Exchange Act, but Oz Management, an associated investment consultant, violated the anti-fraud provisions of the Investment Advisers Act of 1940.²¹⁶ The companies have agreed to disgorge \$173.2 million in illegally gained profits and \$25.86 million in interest, without admitting or denying the findings.²¹⁷ The criminal

208. *Id.*

209. *Id.*

210. Anheuser-Busch InBev SA/NV, Exchange Act Release No. 78957, 115 S.E.C. Docket 2 (Sept. 28, 2016).

211. *Id.*

212. *Id.*

213. *Id.*

214. Och-Ziff Capital Mgmt. Grp. LLC, Exchange Act Release No. 78989, 115 S.E.C. Docket 2, (Sept. 29, 2016).

215. *Id.*

216. *Id.*

217. *Id.*

penalty is expected to be \$213 million after both parties agreed to enter a deferred prosecution agreement (“DPA”).²¹⁸

T. *GlaxoSmithKline*

The SEC claims that GlaxoSmithKline plc transferred money, gifts, and other things to health care professionals in China that led to increased sales.²¹⁹ GlaxoSmithKline plc has agreed to settle the charges by paying a \$20 million civil penalty and providing the SEC with status reports of remediation and anti-corruption compliance measures.²²⁰

U. *Embraer*

Embraer S.A., an aircraft manufacturer, was using third-parties to bribe government officials in the Dominican Republic, Saudi Arabia, Mozambique, and India.²²¹ These bribes led to the company securing contracts in said countries.²²² The bribes included payments of \$3.52 million to an official in the Dominican Republic, \$1.65 million to an official in Saudi Arabia, an alleged \$800,000 to an official in Mozambique, and about \$5.76 million to an agent in India.²²³ The settlement includes that Embraer S.A. must pay \$107 million in a DPA, and \$98 million in disgorgement and prejudgment interest.²²⁴ If the Brazilian authorities charge Embraer S.A. in civil proceedings, Embraer S.A. may receive a credit up to \$20 million.²²⁵ Not only does Embraer S.A. need to pay the penalty, but it needs to have an independent monitor for at least three years.²²⁶

V. *JPMorgan Chase*

JPMorgan’s subsidiary in Asia bypassed its normal hiring process to create a client referral hiring program in order to influence government officials to achieve new business and maintain business relationships.²²⁷ Across a seven-year period, about 100 interns or full-

218. *Id.*

219. GlaxoSmithKline plc, Exchange Act Release No. 79005, 115 S.E.C. Docket 2 (Sept. 30, 2016).

220. *Id.*

221. Press Release, U.S. Sec. & Exch. Comm’n, Embraer Paying \$205 Million to Settle FCPA Charges (Oct. 24, 2016), <https://www.sec.gov/news/pressrelease/2016-224.html>.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. JPMorgan Chase & Co., Exchange Act Release No. 79335, 115 S.E.C. Docket 9 (Nov. 17,

time employees were hired at the request of Asia-Pacific government officials.²²⁸ As there was no FCPA protocol or any kind of anti-corruption plan in place, the record showed that JPMorgan started separating revenue they received from the government officials' referral hires from other revenue.²²⁹ JPMorgan has agreed to pay \$105.51 million in illegally obtained profits plus \$25.08 million in interest to settle the case.²³⁰

W. Braskem

Braskem S.A., a Brazillian-based petrochemical manufacturer, settled with the U.S., Swiss, and Brazillian governments in the amount of \$957 million as a result of bribing Brazillian government officials to win or retain business.²³¹ The company did not have adequate internal protocols to prevent such payments from occurring.²³² The settlement amounted to paying back \$325 million in illegal profits made from the bribes and \$632 million in criminal penalties and fines.²³³ The company will be overseen by an independent monitor for three years.²³⁴

X. Teva Pharmaceutical

Teva Pharmaceutical Industries Ltd. agreed to pay \$519 million in civil and criminal penalties for its actions of bribing government officials in Russia, Ukraine, and Mexico.²³⁵ The company failed to "devise and maintain" the proper internal protocols that may have prevented these types of bribes.²³⁶ As with many other cases, the bribes were concealed as proper payments in record keeping.²³⁷

2016).

228. *Id.*

229. *Id.*

230. *Id.*

231. Press Release, U.S. Sec. & Exch. Comm'n, Petrochemical Manufacturer Braskem S.A. to Pay \$957 Million to Settle FCPA Charges (Dec. 21, 2016), <https://www.sec.gov/news/pressrelease/2016-271.html>.

232. *Id.*

233. *Id.*

234. *Id.*

235. Press Release, U.S. Sec. & Exch. Comm'n, Teva Pharmaceutical Paying \$519 Million to Settle FCPA Charges (Dec. 22, 2016), <https://www.sec.gov/news/pressrelease/2016-277.html>.

236. *Id.*

237. *Id.*

Y. *General Cable Corporation*

The Kentucky-based General Cable Corporation, agreed to pay \$81.5 million across three different actions taken by the U.S. government.²³⁸ The improper payments were made to various countries around the world and continued for twelve years.²³⁹ In addition, employees of the company had to pay various amounts in settle separate actions with the U.S. government.²⁴⁰

VII. RECENT CASES: 2015

The following cases show what action the U.S. government took in 2015 in enforcing the FCPA. Like the 2016 cases, these companies did not follow the “three questions” discussed earlier, these companies ignored them and paid for it. All figures are in U.S. dollars.

A. *Bristol-Myers Squibb*

The New York-based pharmaceutical manufacturer, Bristol-Myers Squibb Company, agreed to pay \$14 million in fines to the American government.²⁴¹ The settlement was a result of the company not responding to red flags indicating its employees were making bribes.²⁴² The company also did not investigate claims by its employees that bribes had been made, and was slow to fix internal protocols when issues were discovered.²⁴³ For two years, the company must report to the U.S. government its efforts to install and fix existing FCPA measures.²⁴⁴

B. *Hitachi*

The SEC charged Tokyo-based conglomerate Hitachi, Ltd. with violating the FCPA when it did not properly record payments to South Africa’s ruling political party.²⁴⁵ The improper payments were disguised

238. General Cable Corp., Exchange Act Release No. 79702, 115 S.E.C. Docket 15 (Dec. 29, 2016).

239. *Id.*

240. *Id.*

241. Bristol-Myers Squibb Co., Exchange Act Release No. 76073, 112 S.E.C. Docket 11 (Oct. 5, 2015).

242. *Id.*

243. *Id.*

244. *Id.*

245. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Hitachi With FCPA Violations (Aug. 18, 2015), <http://www.sec.gov/news/pressrelease/2015-212.html>; see also Compl. at 1-3, S.E.C. v. Hitachi, Ltd., No. 1:15-cv-01573 (D.D.C. Sept. 28, 2015).

in an attempt to hide that they were made in order to obtain contracts to build two multi-billion dollar power plants in South Africa.²⁴⁶

As a result, Hitachi agreed to pay a \$19 million civil penalty to settle the claim.²⁴⁷ This type of violation is difficult to prevent because it was orchestrated at the highest levels of the company and thus possibly above a compliance officer's ability to detect.

C. BNY Mellon

The SEC announced that The Bank of New York Mellon Corporation ("BNY Mellon") agreed to pay \$8.3 million in disgorgement, \$1.5 million in interest, and a \$5 million penalty for a total of \$14.8 million.²⁴⁸ The amount was paid to settle FCPA violations by BNY Mellon for providing student internships to family members of government officials, who were not otherwise qualified, connected to a Middle Eastern-based SWF from 2010 to 2011 in return for business.²⁴⁹

The company offered the student internship positions to the SWF family members, but not through the normal, existing, highly competitive internship program process that BNY Mellon used.²⁵⁰ As a result, the SWF family members did not meet the normal rigorous criteria but were still hired in an attempt to influence the SWF officials and win or retain contracts with the SWF.²⁵¹

The government claimed there were insufficient internal protocols to control the hiring process at BNY Mellon, which as a result could not detect the hiring of the family members of the SWF.²⁵² The U.S. government emphasized that BNY Mellon's human resources personnel were not properly trained to detect potentially problematic hires, including these interns.²⁵³ BNY Mellon's internal protocols were "insufficiently tailored to the corruption risks inherent in the hiring of client referrals, and therefore was inadequate to fully effectuate BNY Mellon's stated policy against bribery of foreign officials."²⁵⁴

246. *Id.*

247. *Id.*

248. The Bank of New York Mellon Corp., Exchange Act Release No. 75720, 112 S.E.C. Docket 4 (Aug. 18, 2015).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BNY Mellon with FCPA Violations (Aug. 18, 2015), <https://www.sec.gov/news/pressrelease/2015-170.html>.

D. Vicente E. Garcia

The SEC announced that Vicente E. Garcia, a former vice president at worldwide software manufacturer, SAP SE, agreed to settle charges that he violated the anti-bribery provisions of the FCPA in a deal with Panamanian government officials in an attempt to obtain software license sales for his company and receive kickbacks on those deals at the same time.²⁵⁵ The investigation found that Garcia, who was fired from SAP SE in April 2014, orchestrated a scheme from 2009 to 2013, to pay \$145,000 in bribes to Panamanian government officials in order to obtain contracts to sell SAP SE's software to the Panamanian government and receive kickbacks at the same time.²⁵⁶

Garcia caused SAP SE, a Germany based company, to "sell software to a partner in Panama at discounts of up to 82%."²⁵⁷ Garcia avoided his company's internal protocols by submitting falsified forms stating the reasons for the discounts and their approvals.²⁵⁸ This action by Garcia however, insulated SAP SE from FCPA violations.²⁵⁹ The excessive discounts enabled his partner in Panama to establish a slush fund for the purpose of bribing Panamanian government officials so SAP SE could then sell the software.²⁶⁰ This arrangement allowed Garcia to receive kickbacks into his personal bank account.²⁶¹

Garcia used both his company and personal e-mail accounts to "communicate details of the bribery scheme and even identify the government officials and intended monetary amounts."²⁶² In one e-mail, Garcia attached a letter on company letterhead falsifying details of a meeting in Mexico to acquire between \$5 and \$10 million.²⁶³ Garcia agreed to pay "\$85,965, which is the total amount of kickbacks he received, plus prejudgment interest of \$6,430 for a total of \$92,395" to the U.S. government.²⁶⁴

255. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Software Executive with FCPA Violations (Aug. 12, 2015), <https://www.sec.gov/news/pressrelease/2015-165.html>.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

E. Mead Johnson

The SEC charged Mead Johnson Nutrition Company, an Illinois-based company, with violating the FCPA's books and records and internal controls provisions when "its Chinese subsidiary made improper payments to health care professionals (HCP) at government-owned hospitals to recommend the company's infant formula to patients who were new or expectant mothers."²⁶⁵ Mead Johnson has internal protocols prohibiting improper payments and gifts to health care professionals, but failed to follow them.²⁶⁶ As a result, the company agreed to pay \$12 million to settle the U.S. government's finding.²⁶⁷ The \$12.03 million consisted of \$7.77 million in fines, \$1.26 million in interest, and a \$3 million civil penalty.²⁶⁸

The company had internal protocol procedures in place, but its lackadaisical environment enabled its subsidiary to use off-the-books funds to pay doctors and other health care professionals in China to recommend its baby formula and give the company marketing access to mothers.²⁶⁹ The government's order reflecting a settled administrative proceeding found that the company violated the books and records and internal control provisions of the FCPA.²⁷⁰

F. BHP Billiton

The SEC has charged BHP Billiton, a mining and natural resource company based in England and Australia, with violating the FCPA when it invited 176 foreign government officials and their families to the 2008 Summer Olympics in Beijing, China; many of them accepted and went to China at BHP Billiton's expense.²⁷¹ The company agreed to pay a penalty of \$25 million in civil fines to settle the FCPA violations, without admitting or denying any of the allegations.²⁷²

The company was an official sponsor of the 2008 Olympics and supplied the raw materials to make the medals.²⁷³ The U.S. government's investigation discovered that the company failed to (1)

265. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Mead Johnson Nutrition with FCPA Violations (July 28, 2015), <https://www.sec.gov/news/pressrelease/2015-154.html>.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. BHP Billiton Ltd., Exchange Act Release No. 74998, 111 S.E.C. Docket 11 (May 20, 2015).

272. *Id.*

273. *Id.*

develop sufficient internal protocols to prevent what happened in China; and (2) maintain sufficient internal controls over its actions connected to the company's sponsorship of the Olympic Games.²⁷⁴

The result was that the company paid for sixty people of the original 176 invited as well as twenty-four spouses and others who attended the Olympics along with them.²⁷⁵ The guests that did accept BHP Billiton's invitation to attend received "three-and-four-day hospitality packages that included event tickets, luxury hotel accommodations, and sightseeing excursions valued at \$12,000 to \$16,000 per package."²⁷⁶

As part of the settlement, in which the company neither admitted nor denied the government's findings, the company agreed to report back to regulators on the operation of its FCPA and anti-corruption compliance program for a one-year period.²⁷⁷ The U.S. government noted five areas specifically: (1) the company did not require independent compliance review; (2) the information on the application forms were at times inaccurate or incomplete; (3) even though the company had internal protocols in place, the company failed to train employees on them; (4) the company, within its protocols, did not have a means of updating or reassessing the appropriateness of the applications; and (5) the company's protocols did not require communication between various business units.²⁷⁸

G. FLIR Systems

The SEC charged the U.S. based company, FLIR Systems Inc. ("FLIR"), with violating the FCPA by financing a "world tour" of personal travel and gifts such as watches and entertainment for government officials from Saudi Arabia and Egypt who were in position to make decisions to purchase FLIR products.²⁷⁹ The company earned more than \$7 million in profits from sales influenced by the world tour provided to Saudi Arabian officials from the Ministry of Interior.²⁸⁰

The company settled the charges by paying more than \$9.5 million, which included disgorgement of \$7.53 million, interest of \$1 million,

274. *Id.*

275. *Id.*

276. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges BHP Billiton with Violating FCPA at Olympic Games (May 20, 2015), <https://www.sec.gov/news/pressrelease/2015-93.html>.

277. *Id.*

278. *Id.*

279. FLIR Systems, Inc., Exchange Act Release No. 74673, 111 S.E.C. Docket 5 (Apr. 8, 2015).

280. *Id.*

and a penalty of another \$1 million.²⁸¹ Furthermore, the company had to report its FCPA compliance efforts to the U.S. government for the next two years.²⁸² This included the requirement of building strong internal protocols and training, but this company has a history of violating the FCPA.²⁸³ A year earlier, the government charged two FLIR employees, stemming from this same case.²⁸⁴

According to the government's order against FLIR, the company had few internal protocols concerning travel out of its foreign sales offices as compared to its domestic operations.²⁸⁵ FLIR also had few internal protocols addressing gift-giving to clients. For example, two employees in its Dubai office provided expensive watches to government officials from Saudi Arabia for \$7123 and labeled the submission executive gifts.²⁸⁶ The same two employees arranged for the company to pay for world trips by these government officials which included stops in North Africa, the Middle East, Europe, and the U.S., costing over \$43,000.²⁸⁷ If the gifts were not already a clear violation of the FCPA, it also falsely recorded the value of the gifts and the extent and nature of the travel.²⁸⁸ The SEC order stated that the travel expenses, watches, and other gifts were given to Saudi government officials.²⁸⁹ The government also found that FLIR accepted "cursory invoices" from a partner, who the company reimbursed for a non-essential visit to France, which included amounts paid for Egyptian officials without any supporting documentation.²⁹⁰

The company self-reported the misconduct of two of its employees, but it only reported to the U.S. government and cooperated with the investigation after a complaint letter was received from a third-party.²⁹¹ As a result, the company agreed to provide periodic updates on its implementation of compliance measures for two years.²⁹² The company decided to arrange for all future travel through a single vendor to ensure a better means of watching the payments and arrangements being made.²⁹³

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

H. Goodyear Tire & Rubber

The SEC charged Goodyear Tire & Rubber Company (“Goodyear”), an Ohio-based company, with violating the FCPA for transactions initiated by its subsidiaries to acquire sales in Africa.²⁹⁴ Goodyear agreed to pay more than \$16 million to settle the U.S. government’s charges of accounting violations.²⁹⁵

According to the government’s investigation, the company’s internal protocol failed to prevent or detect more than \$3.1 million in bribes during a four-year period due to an inadequate internal FCPA compliance protocol.²⁹⁶ The improper payments were disguised as legitimate expenses in the subsidiaries’ books, which were then “consolidated into Goodyear’s books.”²⁹⁷

The U.S. government’s order found that the company violated the books and records and internal control provisions of the FCPA.²⁹⁸ The settlement with the U.S. government included Goodyear’s self-reporting and prompt remedial acts, which includes the company creating new positions to monitor compliance and other means of strengthening internal protocols; its significant cooperation with the investigation was considered.²⁹⁹ Goodyear must pay a little over \$14.1 million, which comprises the company’s illicit profits in Kenya and Angola, plus prejudgment interest of \$2.1 million.³⁰⁰ Goodyear also must report its FCPA remediation efforts to the U.S. government for a three-year period, which means showing what it is doing to stop the previous payments and what protocols are being implemented to prevent future issues from arising.³⁰¹

This was not the first time Goodyear has violated the FCPA. In 1989, Goodyear plead guilty to charges of paying an advertising firm bogus expenses that the company then conveyed to Iraqi government officials in order to influence the Iraqi government to buy Goodyear tires.³⁰² One must wonder if the penalties being levied by the U.S. government are enough to stop companies from violating the FCPA.

294. Goodyear Tire & Rubber Co., Exchange Act Release No. 74356, 110 S.E.C. Docket 19 (Feb. 24, 2015).

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. Plea Agreement at 698.1601, 698.17 to .19, United States v. Goodyear Int’l Corp., Criminal No. 698.1601 (D.D.C. May 11, 1989).

I. *PBSJ and Walid Hatoum*

The SEC charged Walid Hatoum, a former engineer and president at PBSJ Corporation (“PBSJ”), a Florida-based company, with violating the FCPA by offering and authorizing improper payments and employment to foreign officials to secure government contracts in Qatar.³⁰³ The U.S. government also announced a DPA³⁰⁴ with PBSJ that defers FCPA charges “for a period of two years and requires the company to comply with certain undertakings.”³⁰⁵ As a part of this agreement, the company had to pay a fine of \$3.4 million.³⁰⁶

An investigation found that Hatoum offered to provide improper payments to a local company owned and controlled by a foreign official to secure multi-million Qatari government contracts for PBSJ.³⁰⁷ As a result of the improper payments, the foreign official provided Hatoum and PBSJ’s international subsidiary “with access to confidential sealed-bid and pricing information” that enabled the PBSJ subsidiary to tender winning bids for a hotel resort development project in Morocco and a light-rail transit project in Qatar.³⁰⁸ The light-rail project alone was worth \$35.6 million dollars to PBSJ and the project in Morocco was worth another \$25 million.³⁰⁹ “Hatoum offered and authorized nearly \$1.4 million in bribes disguised as ‘agency fees’ intended for a foreign official who used an alias to communicate confidential information that assisted PBSJ.”³¹⁰ The company ignored its own internal protocols that should have alerted it to the improper payments being made earlier.³¹¹ However, once the improper payments were discovered by the company, it self-reported the FCPA violations and began to cooperate with the government.³¹²

As a result, the company agreed to pay approximately \$3 million to return the illegal profits, and an additional penalty of \$375,000.³¹³ The penalty was small because PBSJ acted quickly to end the improper

303. Walid Hatoum, Exchange Act Release No. 74112, 110 S.E.C. Docket 14 (Jan. 22, 2015). PBSJ is an acronym for Post, Buckley, Schuh & Jernigan, Inc. See Terri L. Bryson, *Recent Developments*, 33 STETSON L. REV. 667, 759 (2004).

304. Walid Hatoum, Exchange Act Release No. 74112, 110 S.E.C. Docket 14 (Jan. 22, 2015).

305. Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Former Executive at Tampa Based Engineering Firm With FCPA Violations, (Jan. 22, 2015), <https://www.sec.gov/news/pressrelease/2016-34.html>.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

relationship and “voluntarily made witnesses available for interviews and provided factual chronologies, timelines, internal summaries, and full forensic images to cooperate with the SEC’s investigation.”³¹⁴ The government found that Hatoum “violated the anti-bribery, internal accounting controls, books and records, and false records provisions” of the FCPA.³¹⁵ As a result, Hatoum paid a penalty of \$50,000.³¹⁶

VIII. THE CHANGING WORLD

As can be seen from the cases discussed above, China has been involved in many of the United States’ FCPA actions. However, China is changing. In 2014, China punished a total of 7826 individuals accused of bribery, which was up 37.9% from 2013.³¹⁷ In 2013, the Chinese prosecuted 5515 individuals, which was an increase of 18.6% from 2012.³¹⁸ Thus, it is not just the United States involved in preventing bribes.

In October 2015, Chinese anti-corruption investigators were looking at deals by one of China’s biggest energy companies in Angola.³¹⁹ The Chinese company allegedly overpaid for rights to tap offshore oil fields.³²⁰ As seen from the cases discussed above, this type of transaction is often indicative of bribes.³²¹ Other Chinese oil companies are under investigation for transactions from all over the world.³²²

Russia, another jurisdiction implicated in many of the cases above, began an investigation into Deutsche Bank for a possible money-laundering scheme.³²³ This is a combined effort between the U.S., U.K., and Russia.³²⁴ They are investigating whether Germany’s largest bank properly vetted \$6 billion in transactions that may have been involved in

314. *Id.*

315. *Id.*

316. *Id.*

317. Jainwei (Jerry) Fang, *China Punished 7,826 Bribe Payors in 2014, and Other Facts You Need to Know*, FCPA BLOG (Aug. 10, 2015, 7:18 AM), <http://www.fcpablog.com/blog/2015/8/10/china-punished-7826-bribe-payors-in-2014-and-other-facts-you.html>.

318. *Id.*

319. Brian Spegele, *China Probes Oil Deals in Angola*, WALL ST. J., Oct. 25, 2015, at A8.

320. *Id.*

321. *See supra* Parts VI–VII.

322. Spegele, *supra* note 319.

323. Gavin Finch & Ambereen Choudhury, *Deutsche Bank Sets Aside \$1.3 Billion, Mostly for Russia Probe*, BLOOMBERG (Oct. 29, 2015, 1:31 PM), <http://www.bloomberg.com/news/articles/2015-10-29/deutsche-bank-russian-equity-probe-unearts-policy-violations->

324. *Id.*

money laundering.³²⁵ This could result in one of the largest fines ever imposed on a company.³²⁶

In Egypt, there is a website titled “I Paid a Bribe” which is aimed at combatting the widespread corruption.³²⁷ This website allows people to report when they had to pay a bribe and for how much.³²⁸ The ongoing results will be relayed to the Egyptian government and hopefully punish those that pay the bribes.³²⁹

IX. CONCLUSION

So, what do all of these cases tell us? It is important to look at these examples in whole to see where companies are failing under the FCPA. The following table is a summation of the nine cases from 2015 and the twenty-five cases from 2016.³³⁰ The SEC determinations of FCPA violations break down as follows:

325. *Id.*

326. See Mary Plunkett, *Busted for Billions: 10 Biggest Corporate Fines Ever*, *THERICHEST* (Jan. 8, 2014), <http://www.therichest.com/rich-list/the-biggest/busted-10-biggest-corporate-fines-ever>.

327. *Egyptians Expose Corruption by Reporting Bribery in Online Initiative*, *EGYPTIAN STREETS* (Oct. 29, 2015), <http://egyptianstreets.com/2015/10/29/egyptians-expose-corruption-by-reporting-bribery-in-online-initiative>.

328. *Id.*

329. *Id.*

330. See *infra* Table 1.

TABLE 1: FCPA ENFORCEMENT SUMMARY STATISTICS

Instances where the company had no internal FCPA protocols in place, or very minimal protocols	4	In these cases, the U.S. government determined the internal protocols were so minimal that their existence was not effective.		
Instances where the U.S. government found the FCPA internal protocols to be insufficient	14	In these cases, the company had a protocol in place which was determined to be inadequate.		
Instances where the company/employees ignored internal protocols	18	In these cases, either the executives initiated the behavior or condoned it.		
Penalties when the company did not self-report ³³¹	Total fines \$1,500,677,955	20 parties	Average fine \$75,033,898	
Penalties when the company self-reported ³³²	Total Fines \$59,982,000	12 parties	Average Fine \$4,998,500	
Instances when employees circumvented FCPA protocols	20	Employees range from salespeople to executives.		
Instances when a subsidiary circumvented FCPA protocols	16			
Instances when a company was required to report to the SEC on compliance efforts; and the corresponding term	16	2 cases 1-year monitor	7 cases 2-year monitor	7 cases 3-year monitor

331. "Penalties" are the money above disgorgement and prejudgment interest that the company agreed to pay either criminally or civilly. In two cases, the companies did not have to pay penalties specifically because they self-reported. *See supra* Part VI.K, P. In one case where the company did not self-report, it did not have to pay penalties because it could have made the business go under, so it is excluded from the table above. *See supra* Part VI.N.

332. *See supra* Parts VI.F, J-K, P, VII.G, H-I.

Upon examining the results of the 2015 and 2016 cases, key takeaways begin to emerge. It is in the interest of the company to self-report violations. Fines paid by companies were \$71 million less on average for those who self-reported FCPA violations. Every company should take notice of this fact, if nothing else. The total fines for companies that did not self-report was over \$1.5 billion.

It is also startling that in 50% of all cases the company or its employees ignored the existing FCPA protocols and still made illicit payments. These were made at all levels of company employees, but most were from executives or other high ranking employees at the companies. In many of these cases, the American government required the companies to hire independent monitors to ensure their compliance with the FCPA. As you can see, this monitoring could extend to three years. The vast majority of companies that self-reported did not have this requirement.

It also was surprising that in over 10% of cases, the companies had very minimal protocols in place. With the increased scrutiny from the SEC and the DOJ in such matters, it is amazing that Fortune 500 companies are ignoring this requirement. Following the results of these cases, those companies have had to implement FCPA protocols.

Thus, the lessons to be learned from 2015 and 2016 are that companies must have solid FCPA protocols in place and appoint someone with the authority to enforce that protocol. This leads to the next lesson learned, which is self-reporting. If the company has solid FCPA protocols in place, and someone with the authority to report any violation, it could save the company up to \$71 million as we have seen above. If a company does this, then it can prevent independent monitoring of its business and save millions in the long-run.