MANAGING FCPA RISKS & PITFALLS IN TODAY'S REGULATORY ENVIRONMENT

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Although first enacted in 1977, the Foreign Corrupt Practices Act ("FCPA") has reemerged on the corporate landscape and in board rooms around the globe through a string of high profile cases brought by the Securities and Exchange Commission and the Department of Justice. Once thought of as perhaps more relevant to certain industry segments (*e.g.,* defense, natural resources, etc.) operating in geographic markets with a history of corruption, the recent surge in both civil and criminal law enforcement of the anti-bribery, books and records, and internal control provisions of the FCPA demonstrates that the risks presented in today's marketplace are real, far-ranging, potentially catastrophic and, at first look, not necessarily obvious or readily detectable.

As compliance executives and in-house counsel explore responses to FCPA challenges posed by doing business on a global basis, recent SEC and DOJ enforcement actions have underscored the benefits of being vigilant, proactive and well prepared to identify FCPA risk, mitigate it and respond to questions encountered in every day business activities. No two cultures, businesses or industries are alike. In building and/or refining an FCPA compliance program, various component parts are worthy of study. This article reviews several fundamental FCPA compliance building blocks, starting first with an overview of the statutory framework, identifying trends in FCPA enforcement and positing areas to consider in developing a program designed to promote and achieve compliance objectives. By understanding and mitigating FCPA risks, executives can gain and secure access to attractive global markets, while avoiding the pitfalls of "buying the business."

I. FCPA STATUTORY OVERVIEW

The FCPA has two enforcement triggers—(a) the anti-bribery provisions and (b) the books and records and internal control provisions. It also provides a narrow exception for payments to secure routine government action and contains two affirmative defenses, specifically for payments that are lawful under the written local laws or for certain "reasonable and bona fide expenditures." While the FCPA does not contain a private right of action, the SEC and DOJ, as discussed *infra,* are vigorously investigating and bringing enforcement actions under the FCPA.

A. Anti-Bribery Provisions

The anti-bribery provisions of the FCPA prohibits a U.S. "issuer" of securities; "domestic concerns"; officers, directors, employees of U.S. issuers or domestic concerns; and "any person"

acting on their behalf; and foreign nationals and entities that commit any act utilizing any instrumentality of U.S. commerce or U.S. territory in furtherance of an offer, promise or payment of anything of value directly or indirectly to any foreign official, political party or candidate for the purposes of "corruptly" influencing official actions or securing an improper business advantage in order to obtain or retain business for, or with, any person.[2] The anti-bribery provisions also prohibit payments, offers to pay, promises to pay, or the giving of anything of value to any person "while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, foreign political party or official thereof, or any candidate for foreign political office."[3] The knowing standard covers not only actual knowledge, but also willful blindness or deliberate ignorance to facts that reasonably place an individual on notice of the existence of a violation.[4] Accordingly, an individual or entity cannot avoid the FCPA's prohibitions by making an improper payment through use of a third party intermediary.

To violate the anti-bribery provisions, a person must act "corruptly." The term goes beyond simple negligence, covering acts with the intent to influence, induce action or inaction, and the use of public positions to "obtain or retain business" in exchange for the payment.[5] The legislative history evidences that Congress intended the term "corruptly" to follow in the legacy of the domestic bribery statutes. The Senate Report described the "corrupt" element of the FCPA to "connote[] an evil motive or purpose, an intent to wrongfully influence the recipient."[6] The House of Representatives spoke of "corruptly" as "used in order to make clear that the offer, payment, or gift, must be intended to induce the recipient to misuse his [or her] official position."[7] Further, the legislative history of the House of Representatives offered context through its reference to the fact that "the word 'corruptly' connotes an evil motive or purpose such as required under 18 U.S.C. 201(b) which prohibits domestic bribery."[8]

At the time of the FCPA's enactment, *United States v. Brewster* was the seminal case defining corrupt intent under domestic bribery law.[9] In *Brewster*, a former U.S. Senator was being prosecuted under the bribery and gratuity sections of then-existing domestic bribery law. The issue before the Court was whether the gratuity section should be considered a lesser included offense of the bribery section.[10] In interpreting the domestic bribery statute, the Court wrote that "'corruptly' bespeaks a higher degree of criminal knowledge and purpose than does 'otherwise than as provided by law for the proper discharge of official duties'" and that the term corruptly "makes necessary an explicit *quid pro quo* which need not exist if only illegal gratuity is involved; the briber is the mover or producer of the official act."[11] *Brewster* teaches that for a payment to made "corruptly" under domestic bribery, it must be *in exchange for* an official act. Other Circuits have either adhered to this interpretation of "corruptly" or formulated similar

requirements.[12] Therefore, following Congressional intent and case law analyzing domestic bribery, the term "corruptly" under the FCPA contemplates an offer, promise or payment with the intent to influence, induce any act or omission to act, or use of influence over foreign government action "in exchange for the payment."[13] In addition to a *quid pro quo* arrangement, the anti-bribery provision focuses on the briber's intention (in making, promising or offering payments) and not the would-be recipient's (action, inaction or inappropriate use of influence over official duties) state of mind.[14]

B. Accounting Provisions

The FCPA added the books and records and internal control requirements to the Exchange Act, Sections 13(b)(2)(A) and (B), respectively. Section 13(b)(2)(A) requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." Section 13(b)(B) imposes an obligation on issuers to design and maintain "a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorizations; (ii) transactions are recorded as necessary (I) to permit preparation of [GAAP compliant financial statements] and to (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences." The accounting provisions do not detail *how* an issuer should maintain its books and records or structure its internal controls, leaving financial and compliance management with discretion to create systems that "reasonably meet[] the statute's specified objectives."[15]

An individual or entity can be prosecuted criminally for violating the accounting provisions.[16] The DOJ thus far appears to have exercised prosecutorial discretion when considering criminal charges for stand-alone violations of the books and records and/or internal accounting controls provisions. As discussed below, the SEC has pursued civil actions against entities for inaccurately recording illicit payments on their financial statements, even when the jurisdictional basis for a bribery charge is not present.[17] An illicit payment that is immaterial to an issuer's financial statements can also form the predicate basis for civil charges under Sections 13(b)(2)(A) and (B).[18]

C. Exceptions and Affirmative Defenses

1. Facilitating Payments

Section 30A contains a carve out for "any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine government action by a foreign official, political party, or party official."[19] The statute narrowly defines what payments are permissible under this exception, namely actions "ordinarily and commonly performed by a foreign official in (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country; (ii) processing governmental papers, such as visas and work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance, or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature."[20]

The statute expressly notes that the routine government action exception "does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party."[21] In essence, when read together (*i.e.,* Section 30A(f)(3)(A) and (B)), the "routine government action" exception is not to be used as an end-round to indirectly circumvent the spirit of the law. Accordingly, while the FCPA permits "facilitating" or "grease" payments, those payments must not be used to secure new business or ensure a continuation of existing business. While the statute does not quantify or provide guidance on the amount of what constitutes a permissible facilitating payment, a rule of reason appears to have evolved.[22]

2. Affirmative Defenses

The FCPA's two affirmative defenses are likewise narrowly defined, with the burden of establishing their requirements resting with the party asserting either defense. The first affirmative defense recognizes payments, gifts, offers, or promises to pay anything of value that are permissible under "the written laws and regulations" of the foreign country.[23] Reliance on this affirmative defense is advisable only when it can be contemporaneously documented that the written local laws expressly permits the type, character and underlying purpose of the payment at issue. The opinion of local counsel cannot serve as a substitute for the written laws of a country (*e.g.,* in cases where local laws are silent or inconclusive). However, obtaining the advise of

counsel to confirm that a would-be payment falls under the express terms of "written laws and regulations" is worthy of consideration and could serve to build the framework to defend a payment in reliance of this defense.

The second affirmative defense preserves "reasonable and bona fide expenditure[s], such as travel and lodging expenses, incurred by or on behalf of a foreign official . . . 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."[24] The DOJ has issued several advisory opinions that provide useful guidance on the limits of this defense.[25] To satisfy this defense, an individual must establish that the payment lacks a corrupt purpose and is "directly related" to either a product demonstration or execution/performance of a contract. The defense does not detail what qualifies as "reasonable" in value. And while there are no bright lines, an evaluation of the underlying context, character and type of payment, local business practices, written business travel policies and the laws of the host country are warranted as a prudential matter.[26]

II. FCPA ENFORCEMENT TRENDS

Historically, the SEC and DOJ have acted jointly, in parallel actions, and separately, in stand-alone cases, to enforce the FCPA. The level of coordination between these two enforcement bodies appears, however, to be at an all-time high as they have brought joint actions in a number of reported cases during the past three years, with the number of investigations in the pipeline likely to continue that trend.[27] These actions underscore that the FCPA is a priority area for both the SEC and DOJ. And while the existence of an illicit payment is almost certainly to raise enforcement interest, enforcement trends have emerged that underscore the need for issuers to dedicate resources and skilled compliance professionals to manage and mitigate risk in this area.

The U.S. government is imposing significant monetary penalties against issuers for violations of the FCPA and, since the SEC's action against *ABB Ltd* in 2004, has regularly required disgorgement of profits earned through illicit payment schemes. On April 17, 2006, the SEC brought a settled civil action against Tyco International and obtained a $50 million civil penalty for a billion dollar accounting fraud that included, among other allegations, violations by employees of its Earth Tech Brazil Ltd subsidiary for making illicit payments to Brazilian government officials.[28] The SEC's complaint also detailed various accounting and improper financial reporting schemes that likely contributed to the size of the civil penalty imposed. The U.S. government also obtained sizable monetary penalties in other actions involving illicit payments, including against *Vetco Int'l* ($26 million), *ABB Ltd.* ($10.5 million),[29] *Schnitzer Steel* ($7.5 million) and *El Paso Corp.* ($2.25 million),[30] and obtained disgorgement of profits from

ABB Ltd. ($5.9 million), as noted above, as well as from *Baker Hughes* ($23 million), *Schnitzer Steel* ($7.7 million), *DPC Tianjin* ($2.8 million) and *InVision* ($589,000).[31] The size of the civil penalties and the fact the government is now seeking disgorgement of profits on a regular basis in settlements underscores the fact that improper practices to gain new business or product access will not only result in personal liability, but will almost always have significant financial consequences to the bottom line and for shareholders.

The SEC and DOJ are also reacting harshly toward repeat offenders. In April 2007, the SEC fined *Baker Hughes* $10 million for violating a 2001 administrative action brought for conduct involving the FCPA's accounting provisions. Moreover, as noted above, *Vetco Int'l* paid a total of $26 million in fines and civil penalties less than three years after the government brought an action against its predecessor, *ABB Ltd.* The message from these two cases is unequivocal: the government has little patience for recidivists.

The role of independent compliance monitor has become another tool used by the government to prospectively combat bribery. While taking the position that monitors are not required in every situation, the SEC and DOJ have required at least a dozen public companies to, as a condition of settlement (through undertakings), retain monitors to address FCPA compliance needs.[32] The period of retention can last for years, with the cost borne by the issuer. Compliance monitors are also commonly required to *be* independent and *act* independently from management, accordingly the protections afforded by the attorney client privilege are generally not available. Moreover, the government has also retained an active role in the process through reporting requirements and other open channels of communication. For example, the independent consultant in *Schnitzer Steel* was expressly given the power to report to the government other FCPA violations discovered during the course of the engagement. By imposing compliance monitors, the government appears to be sending the message that management need address FCPA compliance proactively or the government will require the retention of an independent professional to do it for you.

At least one issuer appears to have proactively addressed this trend and, not insignificantly, received credit from the SEC for its remedial acts. In February 13, 2007, The Dow Chemical Company agreed to settle to an administrative cease-and-desist order with the SEC for violations of the FCPA's anti-bribery and accounting provisions.[33] The SEC's administrative order noted that *Dow Chemical* retained an independent auditor to perform certain forensic procedures and report back to the Audit Committee of the Board of Directors as well as provide FCPA training to certain employees.[34] In addition, the SEC credited *Dow Chemical* with retaining an independent consultant to evaluate its FCPA compliance program.[35] These proactive measures not only demonstrated good corporate governance practices but also sound

business decision making as the report-back requirements imposed in other situations were not a precondition (in the form of undertakings) imposed on *Dow Chemical*. By not imposing a report-back obligation against *Dow Chemica*l, the SEC appears to be encouraging public companies to take proactive measures, such as self-policing and retaining skilled FCPA practitioners to perform similar assessments, to demonstrate commitment to FCPA compliance.

As noted above, another recent trend is the SEC's practice of bringing cases against issuers for violations of the FCPA accounting provisions, without directly charging violations of the anti-bribery provisions. In the first case of its kind, on December 21, 2000, the SEC filed a settled administrative proceeding against IBM for violating the FCPA's books and records provisions.[36] In a companion federal court action, the company also agreed to pay a $300,000 civil penalty.[37] The SEC did not allege internal controls failures, but sanctioned IBM for the actions of former senior management of IBM-Argentina, S.A., a wholly owned subsidiary, for entering into a sub-contractual arrangement that resulted in the transfer of at least $4.5 million to a third party.[38] According to the SEC's administrative order, the former senior management provided fabricated documentation, including a backdated authorization letter and a document providing incomplete reasons for the retention of the sub-contractor.[39] The SEC alleged that IBM-Argentina recorded the payments to the sub-contractor as legitimate third-party contractor expenses.[40] Since bringing its case against IBM, the SEC has brought other actions against issuers for violations of the FCPA accounting provisions.[41] Through this line of cases, the SEC has demonstrated that it will pursue actions for violations of the FCPA's accounting provisions, even absent the jurisdictional nexus for imposing an anti-bribery charge under Section 30A. Public companies therefore should expect to be held accountable for improper payments made by their foreign affiliates and subsidiaries, even where the amounts at issue are immaterial to the company's financial statements.[42] Accordingly, compliance initiatives and messages should be directed across boarders to significant subsidiaries and affiliates to ensure that the FCPA compliance message is both delivered and understood.

Finally, the U.S. government is proactively pursuing misconduct in circumstances where there are limited connections to U.S. territories. In *U.S. v. Syncor Taiwan, Inc.*, the DOJ charged Syncor Taiwan employees for making illicit payments to doctors at public hospitals in Taiwan for purposes of selling goods.[43] The DOJ alleged that Syncor Taiwan employees, among other things, sent facsimiles to the U.S. in order to obtain payment authorization. Moreover, a member of senior Syncor Taiwan management allegedly authorized a transaction while physically present in a U.S. territory. As the government's FCPA enforcement agenda continues, the SEC and DOJ are likely to continue to push the envelop in developing facts to support the jurisdictional nexus to impose bribery charges, including in situations where the jurisdictional hook involves isolated acts by non-U.S. nationals.

III. BUILDING BLOCKS FOR FCPA COMPLIANCE PROGRAMS

The messages from recent SEC and DOJ enforcement actions underscores that the FCPA is a key program area for the U.S. government. U.S. issuers (whether located domestically or aboard) should continue to dedicate the time and resources needed to proactively self-evaluate their FCPA policies and compliance programs. Given the government's imposition of significant monetary penalties, disgorgement of profits obtained through illicit activities and use of independent monitors as enforcement tools, self-initiated compliance assessments will prove especially valuable should situations arise that bring an entity before regulators. When conducting these self-assessments, in-house counsel and compliance professionals should step-back and look at the big picture to identify areas of potential exposure. And in fashioning compliance solutions, it is imperative that the mechanism be carefully designed to address the deficiency at issue and, at the same time, be workable from a programmatic perspective. While each industry, market and company will undoubtedly have their own particular challenges, the following questions are a starting point to spur dialogue and raise awareness of potential FCPA risks present in today's regulatory environment.

1. Does my business interact with foreign government officials? If so, how? In selling, promoting or marketing products? Obtaining licenses, permits or registrations? Paying or negotiating taxes or tariffs? Gaining access to markets in regulated industries?

2. Do we hire agents? What due diligence do we perform before their retention? Do we have written agreements with all of our agents? Do these agreements include FCPA representations and warranties? Termination and claw back provisions? Prohibitions on the use of subcontractors without prior written authorization? Audit rights? Do we ask our agents to regularly certify compliance with the FCPA and other anti-corruption requirements?

3. Do we know our business partners? Can we be held liable for their acts? If so, how do we manage this risk through the course of our dealings (*e.g.,* bench-marking their margins, understanding their sales channels and confirming whether they have instituted policies that promote FCPA and local anti-corruption requirements)?

4. Do our employees know what is expected of them? Do we have FCPA policies that are readily identifiable and easily understood? Do we provide training to our employees (both foreign and domestic) on anti-bribery compliance? How might we better deliver our compliance message?

5. Who is responsible for FCPA compliance at our company? What is the role of the Chief Compliance Officer? General Counsel? Internal Audit? Executive Management? Financial Management?

6. Can our employees report allegations of misconduct? Can they do so anonymously and in all of the markets that we do business? In their native language? Does our FCPA compliance function have visibility into such reports?

7. Does our business have checks and balances in place to aid in the detection of isolated acts of misconduct?

8. What internal controls have we adopted to mitigate the potential for FCPA abuses? Are those controls regularly visited to ensure that they are state of the art? In keeping with our current business model/systems?

9. Does our business have a self-monitoring or internal audit function specifically designed to address FCPA issues? Does it look at the substance of transactions? Does it look at contemporaneous evidence of communications between the parties to ensure compliance?

10. Do we regularly emphasize our compliance message and otherwise deliver appropriate messages to employees to underscore a commitment to FCPA compliance?

11. What do our outside auditors think about our FCPA compliance program?

12. What does our Audit Committee charter say about the FCPA? Does our Audit Committee play a role in FCPA compliance?

13. Have we taken steps to protect ourselves in commercial transactions? Business acquisitions?

14. Do we have access to internal and external FCPA experts?

15. Do we have FCPA contingency plans in the event that we learn of a potential illegal act by one of our employees? Business partners? Customers?

16. Have we analyzed our industry to identify patterns of potential abuses that could result in a compliance issue? Have we communicated these "red flags" to our business units as part of our ongoing FCPA educational efforts?

17. Do our policies permit facilitating payments? If so, how do we manage the associated risks? How do we ensure that our policies are uniformly being applied?

18. Do our policies allow us to make charitable donations to foreign organizations? What due diligence do we perform beforehand to ensure that there is no direct or indirect tie between the organization and a government official who is in a position to help us obtain or retain business?

19. Do we require key employees to certify their compliance with our FCPA policies on a regular periodic basis?

20. Have we thought about the affects of local data privacy laws and how they might hamper our right to gain access to key information in the event we need to investigate the acts of our employees? Are there mechanisms that we should put into place now before we need to gain access to employee email and other potentially sensitive information?

ENDNOTES

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2. Section 30A of the Securities Exchange Act of 1934 ("Exchange Act"); 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) and 78dd-3(a).

3. Section 30A(a)(3); 15 U.S.C. § 77dd-3(a)(3).

4. The FCPA defines what constitutes a "knowing" state of mind "with respect to conduct, a circumstance, or a result" as including (i) actual awareness, (ii) "a firm belief that such circumstances exists or that such result is substantially certain to occur", and (iii) awareness "of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." Section 30A(F)(2)(A) and (B); §§ 78dd-3(f)(3)(A) and 3(B). *See also,* H.R. Rep. No. 100-576, 920 (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1953 ("'[K]nowing' standard . . . covers both prohibited actions taken with 'actual knowledge' . . . as well as other actions that . . . evidence a conscious disregard or deliberate ignorance of known circumstances that should reasonably alert one . . . to violations" of Section 30A.)

5. Don Zarin, Doing Business Under the Foreign Corrupt Practices Act 4-17 (Practicing Law Institute 1995).

6. S. Rep. No. 95-114, at 10 (1977).

7. H.R. Rep. No. 95-640, at 8 (1977).

8. *Id.*

9. 506 F.2d 62 (D.C. Cir 1974).

10. *Brewster*, 506 F.2d at 68.

11. *Id.* at 71 and 72.

12. *See e.g.*, *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) ("It is this element of quid pro quo that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violations of the gratuity sections."); *United States v. Traitz*, 871 F. 2d 368, 396 (3d Cir.) (quoting *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980)), *cert. denied*, 493 U.S. 821 (1989) ("Corrupt intent" element of the bribery section "required the government to show that the 'money was knowingly offered to an official with the intent and expectation that, in exchange for the money, some act of a public official would be influenced.'")

13. Zarin, *supra* note 2, at 4-17. *See also* Gary M. Elden & Mark S. Sablemann, *Negligence Is Not Corruptive; The Scienter Requirement of the Foreign Corrupt Practices Act*, 40 Geo. Wash. L. Rev. 819 (1981) for other cases that interpret "corruptly" in the domestic bribery context similarly to *Brewster*'s interpretation.

14. *Id.* ("The focus is upon the subjective intent of the briber—the defendant's intention in making the payment, rather than the recipient's intent in carrying out official acts. A party can be convicted of bribery despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.")

15. Speech by SEC Chairman Williams (Jan. 13, 1981), *reprinted at* 46 Fed. Reg. 11544 (Feb. 9, 1981). *See also,* Zarin, *supra* note 2, Chapter 3 for a review of the FCPA's accounting provisions.

16. In the 1988 amendments to the FCPA, Congress amended the accounting provisions by including Section 13(b)(4) and (b)(5), which taken together affirm that criminal liability will not be imposed unless a person "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account." 15. U.S.C. §§ 78m(b)(4) and (b)(5).

17. *See e.g., SEC v. In the Matter of International Business Machines Corporation*, 34 Rel. No. 43761 (Dec. 21, 2000); *In the Matter of Schering-Plough Corp.*, 34 Rel. No. 49838 (June 9, 2004); *In the Matter of The Dow Chemical Company*, 34 Rel. No. 55281 (Feb. 13, 2007).

18. *See e.g., Schering-Plough*, *supra n.* 17, (Payment of approximately $76,000 to a charitable foundation founded by a Polish government official).

19. Section 30A(f)(3)(A); 15 U.S.C. §§ 78dd-1(c), 78dd-2(c) and 78dd-3(c).

20. Section 30A(f)(3)(B); 15 U.S.C. §§ 78dd-1(b), 78dd-2(b) and 78dd-3(b).

21. *Id.*

22. *See* Arthur F. Matthews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements*, 18 Journal Int'l Bus. 303, 315 (1998) (Noting that facilitating payments less than $1,000 have been allowed). *See also*, Stephen F. Black and Roger Witten, *Complying with the Foreign Corrupt Practices Act*, Business Law Monographs Series No. 51, 1997, at § 4-8 (Reviewing routine government action exception).

23. Section 30A(c)(1); 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1) and 78dd-3(c)(1).

24. Section 30A(c)(2); 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2) and 78dd-3(c)(3).

25. *See* Andrea Dahms and Nicolas Mitchell, *Foreign Corrupt Practices Act*, American Criminal Law Review, Vol 44:605, p. 618 at n. 84, *citing* U.S. Dep't of Justice, Foreign Corrupt Practice Act Review: Review Procedure Release Nos. 04-03 (June 14, 2004), 04-01 (Jan. 6, 2004) and 2001-01 (Jan. 2000). *See also*, DOJ Opinion Procedure Release No. 07-02 (September 11, 2007) (Concerning lodging, meal and other incidental expenses, including a four-hour sightseeing tour).

26. *Id.* (*citing* H.R. Conf. Rep. No. 100-579) ("The final amendments to the FCPA did not include a provision under affirmative defenses for 'nominal payments, which constitute a courtesy, a token or regard of esteem, or return for hospitality.' Addressing those nominal payments, the Banking Committee stated its belief that in litigating this particular point, the 'issue to be decided would be whether *the value was appropriate in the context of the type of transaction being undertaken, local custom and business practices, and the laws and regulations of the host country*.'" Citations omitted. Emphasis added.)

27. *See e.g., In the Matter of Diagnostic Products Corporation*, 34 Rel. No. 51724 (May 20, 2005) and *U.S. v. DPC (Taijin) Company, Ltd.*, CR-05-482-DSF (C.D. Cal. May 20, 2005); *In the Matter of Statoil, ASA*, 34 Rel. No. 54599 (Oct. 13, 2006) and *U.S. v. Statoil, ASA*, 06-CR-960-RJH (S.D.N.Y. Oct. 13, 2006); *In the Matter of Schnitzer Steel Industries, Inc.*, 34 Rel. No. 54606 (Oct. 16, 2006) and *U.S. v. SSI Int'l Far East, Ltd*., CR-3:06-398-KI (U.S.D.C. Ore. Oct. 16, 2006); *SEC v. ABB Ltd.*, 04-CV-1141-RBW (U.S.D.C., D.D.C. 2004) and *U.S. v. ABB Vetco Gray, Inc. et al*, No. 04-CR-279-01 (S.D. Tx. 2004); *SEC v. El Paso Corporation*, 07-CV-899 (S.D.N.Y. 2007); SEC v. Textron Inc., CV-No., (U.S.D.C., D.C.C. 2007) and DOJ Press Rel., *Textron Inc. Agrees to $1.15 Million Fine in Connection with Payment of $600,000 in Kickbacks by its French Subsidiaries under the U.N. Oil for Food Program* (Aug. 23, 2007).

28. *SEC v. Tyco Int'l*, 06-CV-2942 (S.D.N.Y. April 17, 2007).

29. On July 6, 2004, the SEC and DOJ announced joint actions against ABB Ltd, with the SEC obtaining $5.9 million in disgorgement of profits and a $10.5 million civil penalty that was satisfied

through payment of a $10.5 million criminal penalty imposed by the DOJ. SEC Lit. Rel. No. 18775, *SEC Sues ABB Ltd In Foreign Bribery Case*, July 6, 2004.

30. On February 7, 2007, the SEC and DOJ announced settled actions against El Paso Corporation in connection with the payment of illicit surcharges to Iraqi officials under the U.N.'s Oil for Food Program, with the SEC obtaining $5.4 million in disgorgement of profits (which the Commission agreed would be satisfied through forfeiture of that amount pursuant to a non-prosecution agreement with the DOJ) and a $2.5 million civil penalty. SEC Lit. Rel. No. 19991, *SEC Files Settled Books and Records and Internal Controls Charges Against El Paso Corporation*, February 7, 2007.

31. SEC Lit. Rel. No. 19078, *SEC Settles Charges Against InVision Technologies for $1.1 million for Violations of the Foreign Corrupt Practices Act*, (Feb. 14, 2005).

32. *See e.g., Schering Plough*, 34 Rel. No. 49838 (June 9, 2004) (Requiring retention of independent consultant to review FCPA compliance and report results to SEC); *SEC v. ABB Ltd*, supra n. 27 (Ordering ABB to retain an independent consultant to review FCPA policies and procedures, cooperate fully with the Consultant, including making non-privileged documents available, and report back to the SEC Staff); *SEC v. GE InVision*, C-05-0660-MEJ (N.D.C.A. 2005) (Undertaking to retain an independent consultant to ensure FCPA compliance); *SEC v. The Titan Corporation*, CV-05-0441-JR (D.D.C. 2005) (Consenting to the retention of an independent consultant to review compliance with FCPA anti-bribery and accounting provisions and submit a report to the SEC Staff); *In the Matter of Diagnostic Products Corporation,* 34 Rel. No. 51724 (May 20, 2005) (Imposing retention of an independent compliance consultant, who expressly shall not have an attorney-client relationship with the issuer); *In the Matter of Statoil, ASA,* 34 Rel. No. 54599 (October 13, 2006) (Undertaking to retain a compliance consultant and "no attorney-client relationship shall be formed"); *Schnitzer Steel*, supra n. 27 (Requiring retention of independent consultant with powers to report "criminal or regulatory violations discovered in the course of performing his or her duties"); *Vetco*, supra n. 27 (Hiring of an independent monitor to oversee FCPA compliance enhancements).

33. *In the Matter of The Dow Chemical Company*, 34 Rel. No. 55281 (Feb. 13, 2007).

34. *Id.*

35. *Id.*

36. *IBM*, supra n. 17.

37. *SEC v. International Bus. Machs. Corp.*, 00-CV-3040-JR (D.D.C. Dec. 21, 2000).

38. *IBM,* supra n. 17.

39. *Id.*

40. *Id.*

41. *See e.g., SEC v. Chiquita Brands Int'l, Inc.*, DICV02079 (D.D.C. Oct. 3, 2001) and SEC Lit. Rel. No. 34-17169 (Oct. 3, 2001); *Schering-Plough*, supra n. 17; *Dow Chemical*, supra n. 17; *In the Matter of Oil States International, Inc.,* 34 Rel. No. 53732 (April 27, 2006).

42. This is particularly the case when an issuer holds more than fifty percent of the voting power of a domestic or foreign firm. Under Section 13(b)(6), an issuer that holds fifty percent or less of the voting power of such entities must act in "good faith to use its influence, to the extent reasonable . . ., to cause the . . . foreign firm to devise and maintain a system of internal accounting controls consistent" with Section 13(b)(2)(B). *See e.g., SEC v. BellSouth Corp.*, 02-CV-0113 (N.D. Ga. 2002) and *In the Matter of BellSouth Corp.*, 34 Rel. No. 45279 (Jan. 15, 2002) (Charging issuer who owned a fifty-nine percent stake in foreign firm, with option to purchase an additional forty percent, accountable for actions of the foreign firm.)

43. *U.S. v. Syncor Taiwan, Inc.,* 02-CR-1244-SVW (C.D. Cal. 2002).