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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS

UNITED STATES: PHASE 2

REPORT ON APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

OCTOBER 2002

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A INTRODUCTION

a) Nature of the On-Site Visit

1. In March 2002, the United States became the second Party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to undergo the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions.

2. The team from the OECD Working Group was composed of lead examiners from France and the United Kingdom as well as representatives of the OECD Secretariat[1]. The meetings took place over the course of five days mostly at Department of Justice offices in Washington DC, and brought together officials from the following United States government departments and agencies: Department of Justice Criminal Division Fraud Section, Department of Justice Criminal Division Asset Forfeiture and Money Laundering Section, Department of Justice Public Integrity Section and Office of International Affairs, Department of State, Department of Commerce, Department of Defense, Federal Bureau of Investigation, US Sentencing Commission, Securities and Exchange Commission, Internal Revenue Service, US Agency for International Development, Overseas Private Investment Corporation and Export-Import Bank. Part of the team visited the Financial Crimes Enforcement Network of the Department of Treasury. Briefings were held with senior members of the Senate Foreign Relations Committee and with staff of the House International Relations Committee.

3. The OECD team met with representatives of the American Bar Association, the American Federation of Labor-Congress of Industrial Organisations (AFL-CIO), the American Institute of Certified Public Accountants, the Auditing Standards Board, the Compliance Systems Legal Group, the Conference Board, the Financial Executives Institute, Global Corporate Citizenship, the International Forum on Accountancy Development, the Institute of Internal Auditors, the Tax Executives Institute and Transparency International USA. Part of the team visited the World Bank. The team also met with senior representatives of the following corporations: the Boeing Company, DuPont, Lockheed Martin, Motorola, Raytheon International, and Schering-Plough Corporation. The examining team met with representatives of the following law and accounting firms: Clifford Chance; Covington & Burling; Dechert, Price & Rhoads; Dickinson Landmeier LLP; Foley & Lardner; KPMG; Miller & Chevalier Chartered; Shearman & Sterling; Troutman Sanders; Weil, Gotshal & Manges; and Wilmer, Cutler & Pickering.

4. Pursuant to the procedure agreed to by the Working Group for the Phase 2 self and mutual evaluation of the implementation of the Convention and the Revised Recommendation, the purpose of the on-site visit was to study the structures in place in the United States to enforce the laws and regulations implementing the Convention and to assess their application in practice, as well as to monitor the United

1 . France was represented by Mr. Noel Claudon, Directeur Départemental de la Direction Générale des Impôts, Ministère de l'Economie, des Finances et de l'Industrie (Director, General Tax Directorate, Ministry of Economy, Finances and Trade); Mr. Alexandre Draznieks, Adjoint du Chef de bureau, Système Monétaire et Finances Internationales, Ministère de l'Economie, des Finances et de l'Industrie (Deputy Head, Monetary System and International Finances Office, Ministry of Economy, Finances and Trade); and Mr. Jean-Claude Marin, Avocat Général à la Cour de Cassation, Ministère de la Justice, (Magistrate, Ministry of Justice). The United Kingdom was represented by Mrs. Claire Entwistle, Investigator, Companies Investigation Branch, Department of Trade and Industry; and Mr. John Ringguth, Head of Prosecution Policy, Crown Prosecution Service . The OECD Secretariat was represented by Mr. Rainer Geiger, Deputy Director, Directorate for Financial, Fiscal and Enterprise Affairs; Mr. Nicola Bonucci, Deputy Director, Directorate for Legal Affairs; Mr. Frédéric Wehrlé, Principal Administrator, Anti-Corruption Division, Directorate for Financial, Fiscal and Enterprise Affairs; Mrs. Martine Milliet-Einbinder, Head of Unit, International Co-operation, Exchange of Information and Harmful Tax Practices Division, Centre for Tax Policy Administration; and Ms. Frances Meadows, Consultant, Anti-Corruption Division, Directorate for Financial, Fiscal and Enterprise Affairs.

States' compliance in practice with the 1997 Recommendation. In preparation for the on-site visit, the United States provided the Working Group with answers to the Phase 2 questionnaire together with documentary appendices, which were reviewed and analysed by the visiting team in advance. Both during and after the on-site visit the United States authorities continued to provide the visiting team with follow-up information.

b) Methodology and Structure of the Report

5. The Phase 2 Review reflects an assessment of information obtained from the United States' responses to the Phase 2 questionnaire, the consultations with the United States government and civil society during the on-site visit, a review of all the relevant legislation and known case law, and independent research undertaken by the lead examiners and the Secretariat.

6. Since the purpose of Phase 2 of the monitoring process is to assess the implementation of the Convention and Revised Recommendation in practice, and most of the assessment is derived from the on-site visit, the Phase 2 Report is fact based and evaluative, identifying not only those features that work well, but also potential problems in the effective prevention, detection and prosecution of foreign bribery cases. It is therefore organised according to the issues identified by the examining team, rather than the sequence of questions in the Phase 2 questionnaire. The Phase 2 Report should be read in conjunction with the Phase 1 Report as, taken together, they provide an overall evaluation of the US legal and institutional framework in place for combating corruption of foreign officials.

7. The Phase 2 Report adopts the following structure: the introduction, Part A, explains the background and context with regard to the United States. Part B examines the various factors which, in the view of the lead examiners, have a bearing on the effectiveness of the measures available in the US for preventing and detecting foreign bribery. Part C reviews the workings of the system for prosecuting foreign bribery and money laundering offences, with specific reference to features which appear to have a pronounced impact, either positive or negative, on the effectiveness of the overall effort. Part D sets forth the specific recommendations of the Working Group, based on its conclusions, both as to prevention and detection and as to prosecution. It also identifies those matters which the Working Group considers should be followed up as part of the continued monitoring effort. In addition, tables showing sanctions imposed in criminal and civil cases brought under the FCPA in relation to bribery of foreign public officials are annexed to the Report for information.

c) General Observations about the On-Site Visit

8. The on-site visit was characterised in particular by the commitment and dedication of those officials of the United States Government, notably the Department of Justice (hereafter: the DOJ), with responsibility for enforcement of the Foreign Corrupt Practices Act. Their readiness to explain the legal and constitutional background against which the FCPA is implemented proved to be of great assistance to the lead examiners. It became clear in the course of the on-site visit that any objective assessment of the working of the FCPA requires an understanding of certain features inherent in the US legal system. In seeking to demonstrate why, taken in context, most features of the FCPA appear to function efficiently, as well as pointing up those areas which could be improved upon, the lead examiners hope that the present review will promote such understanding.

d) The Maturity of Foreign Bribery Legislation in the United States

9. The enactment of the Foreign Corrupt Practices Act (FCPA) in 1977 was a landmark in the effort to combat foreign bribery and attests to the pioneering role of the United States in this field. Now, with a history of substantive amendments in 1988 and 1998, and twenty-five years of practice built up around it, the Act can be evaluated as a mature piece of legislation. There is available not only a body of case-law (albeit mostly consisting of cases where the court has approved a negotiated plea agreement) but also a wealth of business practice, a cadre of experienced prosecutors and a developed specialist Bar, all contributing to an increasing level of public awareness.

10. Although, as will be seen, the number of prosecutions and civil enforcement actions for FCPA violations has not been great, the enforcement history demonstrates a willingness to prosecute large and medium-sized companies, and often high-level officers of those companies, alleged to have been involved in violations of the FCPA throughout the world. Those cases have arisen out of activities in over twenty different countries such as Argentina, Brazil, Canada, Colombia, the Cook Islands, Costa Rica, the Dominican Republic, Egypt, Germany, Haiti, Iraq, Israel, Italy, Jamaica, Mexico, Niger, Nigeria, Panama, Russia, Saudi Arabia, Trinidad and Tobago, and Venezuela. The illegal payments alleged have ranged from US$ 22,000 to US$ 10 million. These illegal payments represent varying percentages of up to 40 per cent of the business obtained. In most if not all prosecuted cases, the payments have taken the form of money, most often paid into third-country bank accounts.

11. Most of the criminal cases brought have involved direct and overtly corrupt payments to foreign government officials. The DOJ has prosecuted a variety of schemes, companies and individuals under the FCPA. Cases have involved industries such as the aircraft industry, the automotive industry, the construction industry, the energy industry, and the food and agriculture industry. For example, in one group of cases, the DOJ prosecuted a company and its high-level officers for bribing the officials of Pemex, the national oil company of Mexico, in order to gain several multimillion dollar contracts with Pemex. In another case, the DOJ prosecuted employees of a bus company for bribing officials of a provincial government in Canada to secure a contract to provide buses to the transit authority. Major companies like General Electric, Goodyear, IBM and Lockheed Corporation and their high-level employees have been the subject of criminal FCPA prosecution for various bribery schemes.

12. Over the years, there have been advances in the sophistication of the mechanisms used in bribery itself as well as in the techniques of enforcement. Generally, the pattern has changed from the classic suitcase filled with cash to more subtle scenarios involving intermediaries, complex transactions with government entities, and misstatements of business or promotional expenses. This has multiplied the suspicious indicators or so-called ‘red flags’ companies need to look for – especially in the joint venture context and in foreign mergers and acquisitions – and has led to the need for an increasingly broad array of safeguards to be deployed.

13. The ongoing monitoring process provides an opportunity to take stock of the FCPA in the light of the OECD Convention and also of the changes that have occurred in the international legal and business environment. Foremost among these is the extensive and growing exposure of US corporations and their foreign subsidiaries to sensitive business environments world-wide. U.S. trade with developing countries, while significantly smaller than trade with industrialised countries, is continuously increasing both in absolute value and as a proportion of total U.S. global trade. Growing at an average annual rate of 9.1per cent between 1988 and 1998, U.S. trade with developing countries accounted for more than 30 per cent of total US trade by 1998, with the Asia and Near East region and the region of Latin America and the Caribbean accounting respectively for 70 per cent and 23 per cent of total U.S. trade with developing countries. U.S. trade with OECD members accounted for 68 per cent of total US trade as compared with 71 per cent in 1988. These figures do not include sales by foreign affiliates of U.S. companies, which play a

determinant role in U.S. global business activities. Foreign direct investment (FDI) has become an integral part of U.S. corporate strategies, making the U.S. the most prominent home country of international investment; the recent trend owes much to major cross-border mergers and acquisitions (M&As), estimated to account for 80 per cent of U.S. FDI in late 1990.

14. In an era of increasing globalised trade, the Securities and Exchange Commission (hereafter: SEC) and Department of Justice investigations, prosecutions and civil enforcement actions for FCPA violations are expected to increase. Going forward, the lead examiners would encourage the United States to continue to build on the undoubted strengths of the FCPA which appear from this Report. At the same time, work could be done in order to make the FCPA a sharper and more focused instrument, better attuned to fighting foreign bribery on more and more fronts.

e) The Liability of Corporations under the FCPA and under US Law Generally

15. As a matter of background, one important factor when assessing the effectiveness of the FCPA is the nature of corporate liability under US law. According to the applicable theory, a company is liable for the acts of its directors, officers or employees whenever they act within the scope of their duties and for the benefit of the company. There is no additional requirement for a 'mental element' such as the involvement or approval of a certain level of management. The resulting standard, as acknowledged by panellists during the on-site visit, is virtually one of strict corporate liability. This feature of US law is general, and not confined to the FCPA. Its effect is not only to reinforce the effectiveness of the FCPA but also – without distinction between issuers and non-issuers as defined by the Act -- to encourage corporations to implement measures of deterrence throughout their organisations.

16. The FCPA also imposes liability for foreign bribery committed by third parties acting as agents. It is this ever-present threat of vicarious liability (liability for the acts of others) which, perhaps more than any other feature, has prompted the introduction of stringent 'due diligence' practices among many large multinationals in selecting their local agents, business partners and sales representatives, and in screening potential joint venture partners who might bring with them the risk of possible hidden exposures. The lead examiners heard from a senior in-house counsel of one major US defence contractor whose policy was to interview, in person, prospective sales representatives in foreign locations in order to assess their level of understanding of, and compliance with, required standards of corporate conduct, principally based on the FCPA.

17. The potential for liability for the acts of foreign subsidiaries is also significant in this context. A foreign subsidiary of a US corporation is a foreign legal person, having the nationality of its country of incorporation, and is thus not technically subject to the FCPA anti-bribery provisions except in respect of acts done by it within United States territory. However, a US parent company is itself at risk of liability if it is found to have authorised, directed or controlled a foreign subsidiary committing an act of bribery. Even a finding of 'wilful blindness' or 'reckless disregard' on the part of the parent company will suffice to trigger liability in the absence of express authorisation, though negligence alone will not. In the view of members of the Bar who regularly advise large corporate clients, this means that any form of effective control over the subsidiary's activities will probably be enough to expose the parent company to the risk of liability. As a result, companies with sufficient knowledge of the FCPA are aware of the risks, especially, as the examining team heard, in the case of industries such as defence, construction and civil engineering, which rely to a large extent on government contracts. A US issuer parent company is obliged to enforce the FCPA books and records provisions in foreign subsidiaries which it controls (see below, section B).

B DOES THE UNITED STATES HAVE EFFECTIVE MEASURES FOR PREVENTING AND DETECTING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS?

a) The Role of the DOJ Fraud Section and the SEC in Deterrence and Prevention

18. The Fraud Section of the Department of Justice's Criminal Division has had, since 1994, sole control over the criminal enforcement of the FCPA. The commonly-held view among the members of the Bar who met with the examiners was that the reputation for aggressive pursuit that the Fraud Section of the Department of Justice has developed over the years has been a major factor in deterring companies from bribery. The business community, or at least the large companies, view the Department of Justice as committed to deterring foreign bribery. In spite of the fact that over the past twenty-five years there have been relatively few prosecutions, the record of steady effort spread over the years clearly demonstrates continuing serious commitment and dedication on the part of the Department of Justice to detect, investigate and prosecute bribery cases. Resources have been consistently assigned to deal with allegations of FCPA violations. Prosecutorial expertise has been developed and applied.

19. The SEC, too, is perceived by the business community as committed in its enforcement policy. Historically, the SEC has targeted the sort of accounting practices that would make it easier to conceal bribery in violation of the FCPA, enforcing the laws under its jurisdiction, including those requiring companies to file appropriate proxy statements and make appropriate disclosures.

20. Despite the abundance of articles and commentaries on the subject, there is only a limited amount of authoritative or official guidance available on compliance with the twenty five-year old statute. There are few litigated cases – civil or criminal -- which test the outer limits of the FCPA or deal with the difficult questions raised by the "business purpose" test, payments to third party beneficiaries, the exercise of nationality jurisdiction, the scope of the definition of a foreign official, and other areas of uncertainty. Much of the authority or guidance regarding the Act comes from speeches from DOJ and SEC officials, DOJ opinions, DOJ and SEC complaints, settlements that have been filed, and informal discussions of issues between companies' counsel and the DOJ or the SEC. Some general publications are also available. There is an anti-corruption brochure issued by the Department of State and a brochure offering guidance on the FCPA published by the Departments of Justice and Commerce, as well as annual reports to Congress made by the Departments of Commerce and State, that also include a summary and analysis of laws, by country, that have been passed to implement the OECD Convention. These publications are produced in consultation and co-operation with the other agencies involved. There is also information on the tax deductibility of bribes. Lawyers and trade experts of the U.S. Departments of Justice, State and Commerce, as well as websites maintained by each Department, are also available to assist U.S. companies under the FCPA. The status of these various sources of information is however not always clear: there could be merit in regrouping and consolidating them in a single guidance document.

The DOJ Opinion Procedure and the Need for Further Guidance

21. The Department of Justice has long maintained an FCPA review mechanism (previously Review Letters, now Opinions) through which a company that is about to engage in a transaction which might potentially give rise to issues under the FCPA may ask the DOJ about its enforcement intentions. The DOJ will, if requested, issue an opinion stating whether, on the facts as presented, it would take enforcement action. These opinions do not have any value as binding precedent and are strictly limited to the facts of the particular proposed transaction, and the DOJ rarely explains its reasoning.

22. In practice, the procedure has been infrequently used. Since the procedure was started in 1980, the DOJ has averaged fewer than two of these opinions per year. As one might expect, the DOJ has been

somewhat conservative in providing "no action" assurances, although recent opinions have shown a readiness to adopt a practical approach in reviewing increasingly complex international transactions, even suggesting acceptable alternatives. In the absence of a significant body of case law or of any guidelines, Counsel with a specialist FCPA practice have regularly looked to the DOJ opinions for guidance, and their function and usefulness was the subject of much discussion during the on-site visit.

23. From the discussion with the large corporations and in-house counsel who addressed the examining team, it appears that companies evaluate benefits, costs and risks when filing an opinion request. First, if the transaction is not cleared, the requestor must, in all likelihood, decline to go forward with the proposed course of conduct: proceeding under these circumstances could be tantamount to admitting that the party had the requisite "knowledge" that a corrupt payment would be made. Hence a company is unlikely to request an opinion if it is not ready to refrain from the envisaged action in case of a "negative" indication. Second, DOJ rulings are technically not binding on other federal agencies (although the SEC has publicly stated that it will refrain from prosecuting issuers that have obtained a positive DOJ opinion, i.e. an indication that DOJ would not take enforcement action with respect to the matter raised in the opinion[2]). Third, in today's fast-paced commercial world, the thirty days within which the DOJ must render an opinion may be, in some circumstances, too long to make this a practical alternative; in fact, the opinion procedure can take longer than thirty days as the DOJ may request additional information after the initial request is filed. It is acknowledged that the DOJ has shown itself sensitive to the time constraints of a commercial transaction and has accelerated its review when appropriate, on one occasion taking only five days. Fourth, although the materials submitted are exempted from disclosure under the Freedom of Information Act, confidentiality cannot be assured because the DOJ retains the right to release a summary indicating, in general terms, the nature of the requestor's business and the foreign country in which the proposed conduct is to take place, and the general nature and circumstances of the proposed conduct. Fifth, the facts submitted, if acted upon, may raise the possibility of a DOJ investigation. Prosecution is still possible even after the issuance of a positive opinion, as obtaining clearance only establishes "a rebuttable presumption that a requestor's conduct… is in compliance with those provisions of the FCPA". The risk is greater if the facts change, and the transaction goes ahead in a form which does not correspond exactly with the description supplied to the DOJ and on which the opinion was based.

24. It is no surprise that few of the proposed transactions that have led to the DOJ giving an opinion that it does not intend to take enforcement action have been obvious "borderline" cases. As indicated to the examining team, no company will approach the DOJ to seek a review of a transaction that might clearly involve an illegal payment. As a result, the DOJ opinion procedure probably does not contribute greatly to the overall deterrent effort. The procedure was innovative at the time it was introduced, but deterrence as such was never its intended goal. Despite these considerations, experience with the procedure among large companies and their counsel is generally positive. Furthermore, anecdotal evidence suggests that officials in the Fraud Section are prepared to discuss issues and alternatives informally with counsel and company representatives in situations that involve grey areas, in order to provide a higher degree of comfort to companies facing questions under the FCPA. This factor, along with the desire of a growing number of companies to seek guidance in structuring international mergers, acquisitions and joint ventures in such a way as to minimise the risk of "inheriting" liability, may well encourage the broader use of the opinion process in the future. The emphasis placed by the DOJ on devising and implementing compliance programs, often set out in quite specific terms as a condition for a positive opinion, could be of great assistance in structuring prospective international partnerships. One would also expect the procedure to be popular with counsel in truly risky areas, as a 'negative' indication from the DOJ could relieve counsel

2. A 1980 interpretative release (No. 34-17099, Aug. 28, 1980) stated that the SEC would take no enforcement action with respect to which an issuer had obtained a Release Letter from the Department of Justice prior to May 31, 1981. A subsequent interpretative release (No. 34-18255, Nov. 12, 1981) extended this policy "until further notice." This statement of policy has not been revoked since 1981.

from responsibility for making potentially difficult decisions. However, given that a company facing a potential negative opinion may withdraw from the procedure and that there are no statistics available, it is difficult to evaluate if and to what extent the procedure is used for that purpose.

25. Although most, if not all, companies and their in-house counsel interviewed by the examining team would like to have greater clarity in interpreting the FCPA, none of them seemed however prepared to champion a clear call for the issuance of guidelines. It should be mentioned in this connection that when, in 1988, the DOJ invited submissions from the profession as to whether guidelines should be issued about the FCPA, very little interest was shown. In the United States' view, the FCPA's terms are straightforward and are grounded in the well-established jurisprudence of domestic bribery law. In those instances in which a company is uncertain about the application of the statute to a particular transaction, the DOJ Opinion Procedure is available; a company that fails to take advantage of this procedure assumes the risk that its conduct may violate the law. In fact, opinion among corporations and law firms appears to be divided as to whether general guidelines would be useful as a deterrent. One view is that guidelines would be a "road-map for evasion"; the other view is that guidelines would help, in particular for the purpose of planning future overseas transactions.

Commentary

In the view of the lead examiners, the time has come to explore the need for further forms of guidance, mainly to assist new players (SMEs) on the international scene, and to provide a valuable risk management tool to guide companies through some of the pitfalls which might arise in structuring international transactions involving potential FCPA exposures. Also, consideration should be given to issuing guidelines in areas where a clear policy or position has emerged so to ensure that the DOJ's existing expertise can thus be captured for the future.

b) Detection and Investigation

Sources of allegations

26. Across the board over the last 25 years, allegations of FCPA violations have come to the attention of the US authorities by a number of routes. No central mechanism exists for recording, tracking or compiling statistics about the initial complaints or who makes them. Sources of allegations include competitors, former employees, companies that have an internal audit process and have discovered suspicious payments, subcontractors, joint venture partners, agents, foreign government officials or party representatives, overseas representatives of the United States including FBI agents posted overseas, and newspapers and journalists. The very first FCPA case came about in the wake of a very short article in the *Los Angeles Times* about the Prime Minister of the Cook Islands, who was alleged to have received funding for his re-election campaign from an American businessman. Allegations are made in person, by telephone, facsimile transmission, mail, or through the bribery hotlines of the Departments of Justice and Commerce (although the Commerce hotline is primarily intended as a means for U.S. companies to report allegations of bribery by foreign companies), or the SEC Complaint Centre. Each federal agency's Inspector General also maintains confidential hotlines to report suspected fraud and abuse.

27. Anonymous complaints have been an increasing source of allegations of FCPA violations in recent years. Where the identity of the complainant is known, enforcement authorities cannot guarantee that it will not be disclosed during the course of an investigation or prosecution. Whistleblowers have brought their allegations directly to the DOJ Fraud Section, to the FBI, to the SEC or to other agencies.

28. According to a trade union representative who addressed the examining team, whistleblowers are however discouraged from reporting FCPA violations by the lack of protection inherent in US employment

law. The degree of protection afforded to an employee is at best a contractual matter and will depend upon whether the employee is covered by a collective bargaining agreement that provides for grievance procedures or whether she or he has an individual contract providing for termination with or without cause. In the vast majority of cases, however, the employment can be terminated at will and protection is minimal. By contrast, for federal employees, the Whistleblower Protection Act and the Inspector General Act of 1978 provide for civil protections against any reprisals for reporting conduct that "they reasonably believe evidences a violation of any law". Some states have passed similar laws to protect state employees.

29. FCPA allegations may arise in many other contexts, including federal agency audits such as those conducted by the Department of Defense, and by the Inspectors General of other agencies. For example, cases of FCPA violations involving foreign government procurement were brought to the attention of the DOJ by the Defense Contract Audit Agency in the course of the performance of routine audits on defence procurement contracts. Often, FCPA investigations also develop in the course of criminal investigations focusing on other matters such as antitrust violations.

30. It became clear during the course of the on-site visit that the sources of allegations of FCPA violations are many and varied. It also became clear that, because the sources of allegations are so numerous, the government potentially confronts problems of follow-up in the absence of any formal process centralising information or collating statistics about FCPA violation allegations, their number, their origin and actions taken if any. The Department of Justice acknowledged this in its *Attorney's Manual*, which requires that any information relating to a possible violation of the anti-bribery or record keeping provisions of the FCPA "should be brought immediately to the attention of the Fraud Section of the Criminal Division" (Dep't of Justice, United States Attorney's Manual, Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act, 9-47.110 (2000)). Developing and maintaining statistics about FCPA violation allegations could help in the detection of emerging or recurrent patterns or techniques of bribery, and the identification of vulnerable countries or industry sectors, and this in turn could assist in targeting investigative effort and resources to maximum effect.

Commentary

It is difficult to assess how effective the existing mechanisms have been in uncovering foreign bribery. The lead examiners believe that the investigation of foreign bribery cases would be enhanced by developing and maintaining statistics as to the origins of information about allegations of FCPA violations and what is done with it. In addition the lead examiners recognise that the issue of whistleblower protection is inextricably connected to the broader issue of witness protection and is not specific to the FCPA.

Investigations

31. The FCPA divides enforcement responsibilities between the Department of Justice and the SEC. However, because the FCPA casts such a wide net, FCPA violations may arise in a number of contexts. As a result, different agencies may get involved in the investigation of FCPA violations, in addition to the DOJ and the SEC.

32. Allegations of *criminal* violations of the FCPA are generally investigated by the Federal Bureau of Investigation (FBI), under the supervision of the Fraud Section of the DOJ Criminal Division. Located within the DOJ and required by its internal regulations to bring any allegation of a violation of the FCPA to the Criminal Division, the FBI is by far the most powerful of the federal law enforcement agencies, with broad powers to enforce the FCPA and an overall annual budget exceeding two billion dollars. The FBI currently employs nearly 25,000 people, including more than 12,000 special agents spread out over 50

field offices in the US and 20 foreign offices. FBI agents are trained and experienced in complex fraud investigations and use the most sophisticated methods of investigation in the form of witness protection programmes, informants and surveillance techniques. For example, in the *Tannenbaum* case (S.D.N.Y. 1998), the government used an undercover investigation to catch the defendant after it became aware that the defendant was likely to engage in actions to bribe foreign officials: the FBI and DOJ prosecutors obtained permission from the Argentine Ministry of Justice to permit an FBI agent to pose as an Argentine government official.

33. Allegations of *civil* violations of the FCPA anti-bribery provisions by *non-issuers* are also investigated by the DOJ[3]; allegations of civil violations of the record keeping and anti-bribery provisions of the FCPA by *issuers* are, on the other hand, investigated by the SEC. SEC investigations against issuers are conducted by attorneys assigned to the Division of Enforcement in Washington D.C. and by enforcement attorneys in SEC regional offices. By contrast to the DOJ Criminal Division which can rely on the greater evidence-gathering tools available to its criminal prosecutors, the examining team was told by SEC representatives that, in the light of other priorities, FCPA investigations by the SEC have until now been constrained by limited enforcement resources and, as a result, the SEC has pursued relatively few investigations of violations of the FCPA anti-bribery provisions.

34. Other investigative agencies than the FBI and the SEC Enforcement Division have participated or have taken the lead in some investigations, often when the FCPA allegation arose during a pending investigation. For example, the USAID Inspector General participated in the investigation of Metcalf & Eddy's bribing of an Egyptian official and the Criminal Investigative Division of the Environmental Protection Agency (EPA) was the lead agency in the investigation of Saybolt, Inc's bribes to Panamanian officials. In this latter case, Saybolt was under investigation by the EPA concerning data falsification allegations when the information regarding the improper payment was discovered.

35. The Internal Revenue Service (IRS) also plays a significant role in investigating illicit payments. Tax examiners are trained and experienced in detecting suspicious payments and, from the discussion with the tax experts who addressed the examining team, it appears that the US gives very detailed guidance to all tax examiners to assist them in the detection of suspicious payments as well as with investigative and interview techniques. The IRS can request a great deal of information in the course of an inquiry into the deductibility of payments to foreign public officials. Tax examiners will look at operating expenses, the use of foreign bank accounts, and the existence of slush funds. Audit guidelines also provide specific investigative techniques to enable examiners to detect illegal payments in particular industries. Furthermore, to obtain additional information related to slush funds, bribes, political contributions, and other tax-related information, the IRS has a special liaison with the SEC and the Financial Crimes Enforcement Network of the Department of Treasury. In addition, even though the U.S. does not, unlike some other Parties to the Convention, have tax legislation requiring a general yearly reporting of commissions paid to third parties, there is mandatory reporting to the State Department in the case of export of arms under the Export Control Act; this information is accessible to the IRS.

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3. Non-issuers, for the purpose of the application of the FCPA, are "domestic concerns other than issuers", i.e. any corporation, partnership, association, joint-stock company, business trust, unincorporated organisation, or sole proprietorship that has its principal place of business in the United States, or that is organised under the laws of the United States, or a territory, possession, or commonwealth of the United States, as well as "any person other than an issuer or a domestic concern", i.e. any business entity that is organised under the laws of foreign countries and does not trade on the U.S. stock exchange.

"Issuers" are essentially publicly-traded companies –any corporation (domestic or foreign) that has registered a class of securities with the SEC or is required to file reports with the SEC, e.g. any corporation with its stocks, bonds, or American Depository receipts traded on U.S. stock exchanges or the NASDAQ Stock Market, as well as their officers, directors, employees, agents and their shareholders acting on behalf of the issuer.

c) Importance of the Accounting Requirements of the FCPA and the Auditing Requirements of the Exchange Act

General observations

36. The requirements of the FCPA as to accounting (the 'books and records' provisions), which exist alongside the anti-bribery provisions, are an important complement in that they provide a powerful tool serving both as a deterrent to foreign bribery and a mechanism for its detection. The need for issuers to maintain records which accurately reflect transactions and the disposition of corporate assets, as well as the existence of mandatory internal accounting controls, appears to operate as a strong disincentive to the payment of bribes because it makes it less likely that they can be successfully disguised or concealed. Further, liability for failure to maintain books and records is independent of the bribery offence, does not require proof of intent and is punishable *per se*. It has been suggested that the deterrent effect could be strengthened by making it a formal requirement on management to report on internal controls in a report accompanying the financial statements, though the Financial Executives Institute indicated that many of their members already do this.

37. There are different rules regarding the applicability of the FCPA's record-keeping requirements to foreign subsidiaries of U.S. issuers. An issuer will be liable for enforcement of these requirements with regard to a subsidiary if it controls that subsidiary. As clarified by the then SEC Chairman Harold Williams in a formal statement of policy given in January 1981 and codified in section 78m(b) (6) in the 1988 amendments to the FCPA, the SEC applies practical tests in determining whether the issuer controls the subsidiary and is thereby bound to enforce the accounting provisions : "where the issuer controls more than 50 per cent of the voting securities of its subsidiary, compliance is expected. Compliance would also be expected if there is between 20 and 50 per cent ownership, subject to some demonstration by the issuer that this does not amount to control. If there is less than 20 per cent ownership, we will shoulder the burden to affirmatively demonstrate control."

38. Books and records violations are an invaluable source of information leading to the detection of foreign bribery, as well as providing an independent basis for liability in cases where the anti-bribery provisions cannot be invoked. In *SEC* v *International Business Machines Inc*., a penalty was imposed on a parent corporation for having consolidated into its financial statements an item appearing on the books of its Argentine subsidiary, described as a subcontract payment, which was revealed to be a bribe. Parallel investigations by the SEC and the Department of Justice had revealed no evidence of knowledge on the part of the US parent (i.e. that it authorised, directed or controlled the illegal act) that would have been necessary to found a charge under the anti-bribery provisions. The lead examiners were told of two other cases in which consolidation had opened the path to an action against a US parent corporation.

Accounting

39. It appeared to the lead examiners that there is relatively little focus among the accounting profession on the FCPA. The vast majority of accountants in the US (some 340,000) are bound by the Code of Ethics of Certified Public Accountants (AICPA), but this refers in general terms to 'integrity' and 'objectivity' and makes no specific mention either of bribery or of the FCPA. There are mandatory training programs on ethics and independence carried out by the Certified Public Accountants' societies in the different states, but training about fraud is voluntary. In cases where serious sanctions are imposed on individual accountants for breach of professional rules, their publication –already widespread-- should be standard practice so as to raise awareness within the profession.

40. An encouraging development is the progress being made in professional bodies which are working towards harmonisation of international accounting standards. Almost all speakers on the subject of accounting and auditing also commented on the longer-term implications of the unfolding history of the collapse of Enron: as the profession comes to terms with the lessons to be learned, the most likely outcome will be a tendency towards increased scrutiny and stringency in professional standards.

Auditing

41. The requirement that US public listed companies undergo independent auditing builds a further safeguard into the system of detection and deterrence of FCPA violations. The effectiveness of this is, however, subject to certain caveats. Audits must be conducted in accordance with applicable SEC rules and with Generally Accepted Auditing Standards (GAAS). However, there is a proliferation of standards, statements and guidelines emanating from the AICPA which have created confusion in the minds of the profession as to exactly which standards apply. The recent Statement on Auditing Standards (SAS 95) developed by the AICPA's Auditing Standards Board expressly requires the exercise of professional judgement on the part of the auditor in applying them. One encouraging development is the AICPA's recent issue of an Exposure Draft, 'Proposed Statement on Auditing Standards Consideration of Fraud in a Financial Audit', which specifically includes guidance on the detection of material misstatements arising from fraud, and it is hoped that, if adopted, this will prove helpful.

42. Under the Securities Exchange Act an auditor has an obligation to report suspected illegal acts to the management of the company, to escalate the matter to the board of directors if appropriate action is not taken, and to report his or her conclusions to the SEC only in the event that the board fails to act and that the illegality is material to the financial statement of the company and would result in a modification to the auditor's report. The lead examiners were concerned that the reporting requirement on auditors is both complicated and subjective. As to materiality, many bribe payments, illegal under the FCPA, might go undetected as the relatively small amounts involved would not be considered 'material' to the financial statements of a listed company. Whether or not they are caught will depend on how the audit program is designed. Informal guidance issued by the SEC staff offers some assistance in this respect. Staff Accounting Bulletin No. 99 issued in August 1999 expresses the views of SEC staff that exclusive reliance on quantitative benchmarks is inappropriate, and that materiality must be assessed by reference to all the surrounding circumstances. It states: 'Among the considerations that may well render material a quantitatively small misstatement of a financial statement are…. whether the misstatement involves concealment of an unlawful transaction.'

43. Further, the requirement for an auditor to report to the SEC only arises if no 'appropriate remedial action' has been taken by the board of directors, a test which could be open to a variety of interpretations. There may be cases which altogether escape the notice of the SEC. One senior member of the accounting profession observed that auditors are understandably reluctant to assume the role of first-line 'enforcers'. Their priority is to preserve an open relationship of disclosure with the client, and an important element of this relationship is the obligation of confidentiality.

44. As to supervision of auditors, the profession is currently regulated by the SEC, the AICPA and the state accountancy boards who license individuals and firms. Enforcement proceedings are few, but a notable recent instance was the SEC action against Arthur Andersen LLP resulting in a civil penalty of US$7 million for making materially false and misleading reports and engaging in improper professional conduct in connection with its audits of Waste Management Inc. Initiatives are in place at the SEC to complete the ongoing review of each of the five largest independent auditors' systems for compliance with the rules concerning independence. Further, Transparency International has proposed an annual quality monitoring process to replace the existing peer review system operated by the profession. It is the view of

the lead examiners that the effectiveness of the FCPA will most probably be enhanced as a result of upheavals in the auditing profession which have little or nothing to do with the workings of the Act itself.

45. The major concern of the lead examiners with regard to the accounting and auditing requirements is that they do not apply, as such, to non-issuers. All US corporations are required by federal tax laws to maintain books and records adequate to support deductions claimed in their tax returns. However, companies that are not 'issuers' for the purposes of the FCPA are governed by a patchwork of state corporate laws and accounting regulations, as well as by standards applied by the accounting profession. There is no single specified form in which records must be kept. The four examples of state laws provided by the United States showed variations from one state to another, and a lack of clarity as to the penalties for failing to keep adequate records. This means that there is an entire population of enterprises which falls outside the ambit of the FCPA accounting provisions and of federal auditing requirements, and escapes the controls they impose. Furthermore, the international operations of these enterprises are subject to the legal requirements of their country of incorporation. The applicable rules may not always require consolidation of accounts of the sort which would ensure that records of local transactions would ultimately appear on the US entity's books. While the United States has brought several enforcement actions against non-issuers for violation of the anti-bribery provisions of the FCPA, detection of such violations is unpredictable, at best, in the absence of accounting visibility, and it is not clear, in the view of the lead examiners, to what extent this might undermine the deterrent effect of the FCPA.

Commentary

The lead examiners are mindful of the vital role played by the accounting and auditing requirements in deterring and detecting violations of the FCPA among issuers, as well as in providing alternative legal remedies. This could be enhanced by taking steps to increase the focus on the FCPA among the accounting profession, and by the introduction of clearer auditing standards and more stringent controls over auditors. The lead examiners also invite the United States to consider placing independent auditors under a clear obligation, irrespective of materiality or actions taken by the board of directors, to report to the SEC any finding during an audit which indicates a possible illegal act of bribery, in line with Part V of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions. Most importantly, and despite concerns being raised about which would be the appropriate body to undertake enforcement, due consideration should be given to extending the FCPA books and records provisions, at least to those categories of non-issuers whose international business exceeds a certain level.

d) Sanctions and the 'collateral deterrent' effect

46. Another deterrent feature of the FCPA is that it prescribes criminal sanctions that can be potentially stiff[4]. For criminal violations of the FCPA's anti-bribery provisions, corporations and other business entities are subject to a fine of up to US$ 2 million per violation; officers, directors, stockholders, employees, and agents are subject to fine of up to US$ 100,000 and/or to imprisonment for up to five years. Furthermore, if the criminal offence causes a pecuniary gain or loss, U.S. law authorises alternative maximum fines equal to the greater of twice the gross gain or twice the gross loss, and fines for individual violators may be increased.

4 . Civil penalties in SEC enforcement proceedings show a somewhat different pattern and different considerations apply. See Section C as well as the Annex to this report which contains a table showing sanctions imposed in criminal and civil cases brought under the FCPA in relation to bribery of foreign public officials.

47. Applicable sentencing guidelines allow courts to increase the criminal penalties for FCPA violations, opening the way to heavy fines and the potential for mandatory incarceration. A point system is used to calculate the penalties under the guidelines, with certain mitigating factors serving to reduce the total number of points. Prior criminal history, efforts to obstruct justice, voluntary co-operation with the investigation, pleading guilty (accepting responsibility), and the size of the company can all affect the potential sanction on a company or an individual one way or the other. In the 1995 *Lockheed* case, the application of these provisions resulted in a combined fine totalling US$21.8 million. To date, this is the largest fine ever imposed under the FCPA.

48. A brief survey of the FCPA criminal prosecutions brought to date and that resulted in convictions under the FCPA or related charges indicates however that most of them have resulted in rather moderate fines for both corporations and individuals, and probation or confinement instead of imprisonment. Between 1977 and 2001, twenty-one companies and twenty-six individuals were convicted for criminal violations of the FCPA. Corporate fines have ranged from US$ 1,500 to US$ 3.5 million (the agreement by Lockheed in January 1995 to pay a record fine of US$ 21.8 million being the only instance in which this range was exceeded). Fines imposed on individuals have ranged from US$ 2,500 to US$ 309,000. Before the 1994 sentencing of a Lockheed executive and of a General Electric international sales manager to, respectively, 18 and 84 months of imprisonment, no director, officer or employee of a company had gone to jail for an FCPA violation. Since then, two individuals have been sentenced to jail, in *U.S. vs. David H. Mead and Frerik Pluimers (*four months of imprisonment) and in *U.S. vs. Herbert Tannebaum* (one year of imprisonment), both in 1998. The current proposal by the U.S. Sentencing Commission to raise the base level offence to correspond to that of domestic bribery is expected to have an impact in future prosecutions: fines will most probably increase and it is likely that more directors and officers will receive mandatory prison terms for their involvement in bribery. The new base level offence will take effect on 1 November 2002 unless Congress raises objections before that date.

49. In the view of the examiners, however, there is another factor -- the collateral consequences of an FCPA investigation or conviction – that should be taken into account in drawing conclusions from the penalties that have actually been imposed in FCPA cases. For businesses, adverse publicity, investigation, indictment and prosecution may be a more important deterrent than fines or imprisonment. News of an investigation can affect the ability of a company to do business and can prove embarrassing or damaging to relationships in the country where the alleged bribery has occurred. From a public relations standpoint, an allegation of bribery can be disastrous for a company once it emerges in the news media that an FCPA investigation is under way. The potential consequences of any criminal indictment are well illustrated by the ongoing action against Arthur Andersen LLP arising out of the criminal investigation into the affairs of Enron.

50. Beyond the public relations concerns, the costs in terms of legal fees and management time of having to defend an action are themselves far from negligible. Worse still, in the view of large private companies and their counsel, is the threat of suspension of export privileges, as happened to the Lockheed Corporation in 1994, or the withdrawal of eligibility to bid for government contracts or apply for government programs. A mere indictment for an FCPA violation is grounds for suspension, as happened to the Harris Corporation which was tried – and acquitted – on FCPA charges in 1991. Once an agency bars or suspends a company from federal non-procurement or procurement activities, other agencies in turn are required by the Code of Federal Regulations under its Title 48: “Federal Acquisition Regulations System” to exclude the company. Furthermore, the United States will not provide advocacy assistance unless the company certifies that it and its affiliates have not engaged in bribery of foreign public officials in connection with the matter, and maintain a policy prohibiting such bribery. Corporate violators of the FCPA may also be excluded from participating in trade missions.

51. Conduct that violates the bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.§§ 1962-1968 (1998), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract. In *W.S. Kirkpatrick v. Environmental Tectonics*, 110 S. Ct. 701 (1990), the Supreme Court held that the act of state doctrine does not bar a suit alleging that a bribe caused the defendant to win a foreign contract. Violating the FCPA may also invite costly lawsuits. For example, after the Department of Justice had prosecuted a company for bribing officials of Pemex, the national oil company of Mexico, the Mexican company itself filed a major civil action against some eighteen known defendants "and other unknown" conspirators seeking more than US$45 million in direct damages under the Sherman Act, the Robinson-Patman Act, RICO, and further counts of commercial bribery and fraud.

52. Taken together, the potential collateral consequences operate as a strong disincentive to having the corporation indicted, let alone contesting the case to trial. There are many compelling reasons for companies to settle with the Department of Justice and the SEC, and this may explain the high percentage of cases which end in plea agreements[5]. Given the commercial impact of an allegation of an FCPA violation, companies do not have much appetite to take on the risks of going to trial. Indeed, at least one member of the Bar expressed regret that this had resulted in a dearth of judicial decisions in contested cases.

Commentary

The lead examiners are mindful of the deterrent effect of the collateral consequences of an FCPA investigation or conviction. They take the view that it would be misleading to look only at the levels of fines and other sanctions available on the statute book.

e) The Role and Utility of Corporate Compliance Programs

53. An important effect of the FCPA is that it encourages the development of compliance programs. According to one member of the Bar with a specialist FCPA practice, corporate compliance programs are the single most important measure contributing to prevention and deterrence. The lead examiners noted the wealth of material available on the subject, both in print and on the internet, and the emphasis placed on promoting the use of compliance programs not only by in-house counsel and the private Bar, but also by the Department of Justice in its Opinions, the Department of Commerce in its publications, and in the case-law. A relatively recent practice has been the frequent imposition of a compliance program on the defendant corporation as a condition of a plea agreement. Beginning in the *Metcalf & Eddy* matter, the government has required annual certifications directed to the DOJ, and has also required the company itself to conduct a periodic review of its compliance program to ensure that it took into account any changes in the company's organisation and lines of business. In a case involving a violation of the FCPA, the existence of an effective corporate compliance programme is, according to the sentencing guidelines, a mitigating factor.

5 . In a plea agreement, the defendant agrees to plead guilty, often in exchange for an agreement on sentencing factors which provides greater certainty as to the ultimate sanction and/or a promise by the prosecutor not to seek the maximum penalty allowed by the law. Plea agreements take place within a range prescribed by the sentencing guidelines and are subject to the approval of the trial court. In most instances, the agreement is arranged by experienced and knowledgeable counsel on both sides and is readily approved by the court and the result is a formal finding against the defendant. The practice of plea agreements is widespread among American jurisdictions and seen by the Supreme Court as an essential component of the administration of justice.

54. As described to the lead examiners, the main features of a successful compliance program are strong commitment from senior management in creating and communicating a 'compliance culture', regular and thorough training, and consistent enforcement. The components of a compliance program might include internal controls coupled with review by an internal audit committee, implementation of a policy prohibiting discretionary payments, training and familiarisation of employees with the main provisions of the FCPA, a requirement that all employees regularly sign an undertaking to be bound by the corporate conduct policy, and the systematic screening ('due diligence') of the technical capability, background, connections, reputation and financial stability of any potential foreign business partner in order to reduce the likelihood of bribery by an agent for which the company would be liable. Among larger US corporations it is common for the FCPA compliance program to form part of an overall corporate compliance policy which also addresses insider dealing, antitrust and export regulations.

55. Compliance programs are by now well-developed and well-understood among large public companies, especially those operating in risk-averse industry sectors such as defence procurement, and others involved in government contracting for which there are stringent standards of eligibility and the risk of disbarment. The indirect or collateral damage that would be inflicted on such companies by an indictment for violation of the FCPA of itself operates as a powerful incentive to enforce compliance throughout the entire organisation. Indeed, the lead examiners were told that many larger companies insist on a single world-wide policy which they apply equally to their foreign subsidiaries and their U.S. operations.

56. The lead examiners were struck by the fact that all the private industry representatives who addressed them on this issue came from major multinational corporations in the defence or telecommunications sectors, where the practice of compliance programs is well-established and there is no shortage of resources – including lawyers – devoted to their implementation. FCPA compliance is an active, and growing, area of practice for the private Bar specialists. Members of law firms who had experience of representing smaller corporate clients commented that resources were less critical than management commitment, and that the instrument was capable of almost infinite adaptation to suit the needs and budget of a variety of businesses. However, the concern remains that such policies are more extensively and intensively taught, understood and implemented within the US than internationally, where the problem of bribery is most likely to arise: one member of the private Bar spoke of the 'enormous gap' between enforcement in the US and commitment outside it. A survey by Transparency International of leading practices in corporate governance revealed that companies generally performed less, not more, monitoring activity in their overseas operations than at home. It also found that only 52 per cent of respondents who had codes of conduct had multilingual versions available, and that only 19 per cent rated their code of conduct as extremely effective.

57. More important, in the view of the lead examiners, is the significant number of small companies operating in the international market – the large majority of SMEs, in the estimation of one Washington lawyer – who do business without a compliance program. The same speaker characterised this situation as 'an accident waiting to happen'. A lawyer from USAID who addressed the examiners explained that USAID did not deal with contractors who were not conversant with the FCPA, but that he was 'amazed' at the number of potential suppliers with no active compliance program. USAID had found it necessary to provide its own training to over 3000 such companies, who were operating in an environment of 'incredible vulnerability'. This scenario is viewed by the lead examiners as, at the very least, a risk factor which could undermine the effectiveness of the FCPA.

Commentary

The challenge of widening the use of compliance programs in those areas where they are most needed is only one aspect of the issues relating to SMEs and start-ups which will be addressed

below. The lead examiners would welcome the commitment of the United States to developing and promoting compliance programs, or guidelines for their design and implementation, specifically tailored to a wider, international, corporate population. Also, in cases where compliance programs are prescribed as a condition of a court-ordered settlement, the inclusion of formal procedures for periodic follow-up or monitoring, such as those recently put in place, is to be welcomed.

f) The FCPA, Small and Medium Sized Enterprises (SMEs) and Start-Ups

58. As the lead examiners built up an overall picture during the Phase 2 review of how the FCPA is implemented, a concern emerged with regard to small and medium sized US enterprises (SMEs) and start-ups. For present purposes it is not useful to attempt a precise definition of this term; nor is it possible to estimate their numbers. These companies might be issuers or non-issuers within the meaning of the FCPA; their size makes it likely that most SMEs will fall into the category of non-issuers. The particular problems they face came into sharper focus as a result of the discussions that took place during the on-site visit, which tended to confirm the impression that SMEs are a particularly vulnerable business category whose needs are not adequately addressed by the existing pattern of implementation. Many of the factors discussed in this report which contribute to the effective detection and deterrence of FCPA violations by larger organisations do not have the same impact on SMEs. Their very size – especially in the case of a start-up with severely limited resources -- will render them vulnerable. Yet such companies are engaging on an increasing scale in international business, sometimes in countries where bribery is an acknowledged risk. As an illustration of this problem, eighty-two percent of all U.S. exporters to China in 1997 were SMEs according to US official statistics.

59. Assuming that most SMEs are non-issuers, while they are subject to the anti-bribery provisions of the FCPA, they are not subject to its bookkeeping and accounting requirements or to the auditing requirements of the Exchange Act, and the SEC has no jurisdiction over them. The safeguards afforded by these regimes in terms of deterrence and detection, which have been discussed earlier in the present report, are not applicable to non-issuer SMEs. Compliance programs, which appear to work so well in major multinationals, are typically less well understood, less developed and inadequately implemented, or often completely absent, among smaller companies with less experience, less awareness and fewer resources. This problem is exacerbated in the foreign operations of SMEs – the very environments in which bribery is most likely to occur and least likely to be detected. The effect which has been described elsewhere in this report as "collateral deterrence" – the damage to the business resulting from an FCPA investigation or indictment – might be expected to be greater in the case of small companies for whom indictment could be tantamount to a corporate death sentence. In reality this is likely to be outweighed by a combination of ignorance and the unlikelihood of bribery ever being uncovered. Nor will all SMEs necessarily have ready access to, or the resources to spend on, specialist outside counsel, and they are most unlikely to be familiar with the DOJ opinion procedure or well-informed enough to use it.

60. It is at the level of non-issuer SMEs that the FCPA enforcement system may be at its least effective. For a combination of reasons these companies appear, as it were, to potentially slip through the net. The examiners could not avoid the conclusion that there may be a level of undetected foreign bribery taking place in the international operations of non-issuer SMEs, simply because there are insufficient compliance programs or other systems in place to deter it and insufficient book-keeping, auditing or other control mechanisms in place to detect it.

61. At this point it is appropriate to draw a distinction between the foreign subsidiaries of US corporations, as a separate category, and SMEs which may do business both inside and outside the United States. The foreign-incorporated subsidiaries of major US multinationals, though not technically subject to

the FCPA, are not immune from the special problems of doing business in a foreign environment. However, despite earlier concerns on the part of the examining team, it became apparent during the on-site visit that these entities often benefit via the US parent both from the visibility afforded by the accounting rules and auditing requirements, and from a frequently elaborate compliance program more or less rigorously enforced by corporate headquarters. The US parent has a strong interest in implementing such programs in any foreign entity over which it has effective control. And, at the very least, there will usually be a lawyer at hand, if not to advise in person, then to frame the problem and seek advice from a qualified source : these companies are the very ones who have ready access to, and can afford, the major specialist law firms with developed FCPA practices.

Commentary

The lead examiners invite the United States to consider ways in which the FCPA books and records provisions, currently binding only on issuers, could be extended to apply to those non-issuers whose international business activities exceeds a certain level. Further, the lead examiners would encourage the United States to pursue and reinforce the valuable "outreach" efforts undertaken by the Department of State and Department of Commerce to promote better levels of awareness of the FCPA and the Convention, targeting in particular smaller US enterprises doing business abroad. The Department of Justice has a major role to play here, by exploring what additional forms of guidance it could make available in order to ensure that SMEs and start-ups have access to its wealth of expertise. Those law firms with a significant FCPA practice in the US should ensure that lawyers in their foreign offices are thoroughly versed in the FCPA and able to give direct and relevant advice at local level. Those firms with an existing client base of SMEs are encouraged to extend their ongoing efforts to devise and publicise compliance programs suitably tailored to the needs of smaller companies.

g) The role of measures to prevent and detect the tax deductibility of bribes

62. The US regime designed to prevent the tax deductibility of bribes, which exists alongside the FCPA, complements the FCPA in that it provides an additional tool serving both as a deterrent to foreign bribery and a mechanism for its detection. The US has for many years had extensive tax provisions to deal with bribes paid by US companies as well as foreign subsidiaries of US companies. The principle of non-deductibility is found in Section 162(c)(1) of the Internal Revenue Code, disallowing deductions for illegal payments to officials or employees of *any* government. There are two exceptions: facilitation payments and payments that are legal under the local law of a foreign jurisdiction may be deducted for tax purposes. The Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA. However in case the taxpayer claims that the payment is a facilitation payment or is legal under the laws of the foreign country the burden of proof is shifted to the taxpayer.

63. With respect to foreign subsidiaries, under the subpart F provisions of the Internal Revenue Code, the anti-deferral rules apply to subpart F income, which includes any illegal bribes, kickbacks, or other payments (for which a tax deduction would be denied under provisions relating to illegal payments) paid by or on behalf of a Controlled Foreign Corporation to an official, employee, or "agent in fact" of a government (Internal Revenue Code §952(a)(4)). In addition, the earnings and profits of any corporation paying a foreign bribe that is not deductible (such as payments that would be unlawful under the Foreign Corrupt Practices Act if paid to a US person) are not to be reduced by the amount paid as a bribe. Pursuant to Section 941 IRC, "qualifying foreign trade income" is subject to favourable tax treatment. Under regulations prescribed by the Secretary of Treasury the "qualifying foreign trade income" does not include any illegal bribe kickback or other payment within the meaning of section 162 (c) paid by or on behalf of the taxpayer directly or indirectly to an official, employee, or "agent in fact" of a government.

64. Overall the lead examiners found that the United States has comprehensive tax provisions concerning the non tax deductibility of bribes to foreign public officials. It also addresses the issue of the payment of bribes by Controlled Foreign Corporations.

Specific Issue Related to Bribes Detected when a Taxpayer Has Requested an Advance Pricing Agreement

65. An Advance Pricing Agreement (APA) is an arrangement that allows for the determination in advance of the methodology to be used in setting inter-company transfer pricing in transactions between related parties. It requires negotiations between the taxpayer and one or more tax administrations. The taxpayer has to submit documentation to support the methodology presented to the tax administration. The examiners typically involved in an APA case are familiar with those issues and have received training, although no specific training on the subject of illegal bribes. If the APA group within the IRS has information that indicates an illegal bribe (or any criminal act) may have occurred, it will refer the information to the appropriate division. APA will not treat information regarding a criminal act in the same way that it treats other non-factual information received, i.e., the information regarding a criminal act would be referred internally, and APA would not seek to protect its use in non-APA proceedings.

Specific Issues Related to Bribes paid by Controlled Foreign Corporations

66. Turning to Controlled Foreign Corporations (CFC) legislation, both the IRS and the private sector indicated that it was difficult in practice to identify bribes paid by CFCs. Examiners basically rely on risk analysis and they have the possibility to request headquarters to perform a tax examination abroad which also makes it easier to get information on the foreign tax treatment of bribes. The representatives from the private sector stressed the importance of the internal policies and codes of conduct of companies as a deterrent to bribery, especially where local managers in subsidiaries are bound to the same standards as managers of the parent company.

h) The role of measures to prevent money laundering

67. The US regime designed to prevent money laundering, which exists alongside the FCPA, is a further complement in that it, too, provides an additional tool serving both as a deterrent to foreign bribery and a mechanism for its detection. Several changes have taken place to reinforce the existing legislation with the enactment of the Patriot Act on 26 October 2001 in response to the events of 11 September 2001. Significantly, provision is now made for Regulations prescribing the minimum standards for customer identification at the opening of an account by 'financial institutions', which term is understood to be broadly defined. Money transmitting agencies are now covered by anti-money laundering obligations. Additionally, securities companies and broker dealers will be made subject to anti-money laundering obligations during 2002. Casinos will be brought within the scope of the anti-money laundering regime, but it is understood that this will not take place before 2003. Insurance companies are understood not to be covered by suspicious activity reporting obligations.

68. The Patriot Act also provides for the prohibition of correspondent accounts in the U.S. with foreign banks that have no physical presence and makes provision for enhanced "due diligence" procedures both for correspondent banking and for private banking. Minimum standards for private banking will include ascertaining the identity of the nominal and beneficial owners, and the source of funds. These provisions are to be brought into force by Regulations under the Act later this year. The content of the Regulations was still under discussion at the time of the on-site visit. Similarly, provision is made for the prevention of indirect services to foreign shell banks. The Secretary of the Treasury has the

power to make Regulations to delineate "the reasonable steps necessary" to comply with this requirement, and the content of these Regulations is in the process of being drafted.

69. Another significant development, in the view of the examining team, is the imposition of new obligations on financial institutions to more closely scrutinise the accounts of foreign political figures as a result of issuance of guidelines last year and the enactment of the Patriot Act. In January 2001, the Treasury Department, as part of a multi-governmental agency task force, issued guidelines on enhanced scrutiny of transactions that might involve proceeds of foreign official bribery. The guidelines impose new responsibilities on financial institutions to stop or refrain from doing business with senior political officials unless they demonstrate the legality of what they are doing. Open accounts for such officials, and their immediate families or close associates who have the authority to conduct business on behalf of those officials, are to be scrutinised, and banks are to be proactive in informed compliance with respect to these types of accounts. Although the guidelines are not a federal law or a rule and thus it is not mandatory for an institution to comply, since the enactment of the Patriot Act financial institutions are now required to "conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption."

70. § 5322 of Title 31 of the U.S. Code, which provides for criminal and civil penalties in respect of the statutory obligation for domestic financial institutions to keep records of, and report on, "monetary instrument transactions", builds a further safeguard into the system of detection and deterrence. This provision is however understood to cover only wilful failure to make suspicious activity reports (SARS) or currency transaction reports. Although there have been few criminal prosecutions to date for failure to report, the lead examiners were told that some actions against financial institutions were currently under consideration as there is a growing understanding that more criminal prosecutions in this area would enhance the anti-money laundering regime. Full information about the level of penalties for failure to report suspicious activity does not appear to be available. However, from what the lead examiners saw in respect of prosecutions against financial institutions regarding failure to report suspicious activity, the monetary penalties imposed do not appear themselves to be very dissuasive.

71. Overall, the changes signalled in the Patriot Act appear to be significant steps in the deterrence and detection of foreign bribery. The concern remains however that many businesses --other than the corporations covered as issuers by the FCPA-- appear not to have a general obligation to maintain books and records sufficient to enable them to comply with requests from the competent authorities to reconstruct domestic transactions for investigative purposes, as required by FATF Recommendation No. 12. There appears to be power in the Patriot Act for the Secretary of the Treasury to make Regulations for record keeping and reporting of transactions primarily involving foreign jurisdictions. How wide this power is or how it may be implemented, and whether it will apply generally to medium range corporations conducting foreign business, was however unclear at the time of the on-site visit.

Commentary

The examiners encourage the U.S. authorities, in appropriate cases, to consider bringing more criminal prosecutions for failure to report suspicious activity, in order to underline the importance of complying with the reporting regime. Further consideration might also be given to criminalising negligent failure to report, given that the present "willful" "mens rea" standard places a high evidentiary burden on the prosecutor. The lead examiners further encourage the US authorities to compile the relevant statistical information for the purpose of a future assessment.

C DOES THE UNITED STATES HAVE ADEQUATE MECHANISMS FOR THE EFFECTIVE PROSECUTION OF FOREIGN BRIBERY OFFENCES AND THE RELATED ACCOUNTING AND MONEY LAUNDERING OFFENCES?

1. PROSECUTION OF FOREIGN BRIBERY

a) Working of the main enforcement agencies: the SEC and DOJ

Enforcement by the SEC

72. Enforcement responsibilities of the FCPA are divided between the Department of Justice and the SEC. The Department of Justice is responsible for all criminal enforcement of the FCPA provisions and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of both the anti-bribery and accounting provisions with respect to issuers. Generally speaking, it is the SEC that enforces the record-keeping and accounting provisions of the FCPA, while the DOJ enforces the anti-bribery part. In practice, the SEC enforces the laws against entities under its jurisdiction, including those requiring companies to file appropriate proxy statements and make appropriate disclosures. If, in the course of that enforcement, the SEC considers that the company has done something that amounts to an FCPA violation, it will add that count as an additional ground upon which to prosecute the company.

73. When the FCPA was enacted in 1977, the accounting and record-keeping provisions of the FCPA were incorporated into the Securities Exchange Act of 1934, thus making these standards part of the law applicable to all issuers, whether or not they have involvement with any transnational deals or with any foreign officials that could possibly be bribed. As a result, the majority of cases involving the FCPA accounting and record-keeping standards as incorporated into the Securities Exchange Act of 1934 do not have a transnational bribery component. They instead frequently involve various other schemes by which corporate employees or senior executives commit accounting fraud. However, after a hiatus of nearly ten years during which almost none of the cases brought under the accounting and record-keeping provisions of the FCPA involved bribery, the SEC prosecuted four such cases with a bribery component in relatively quick succession in 2000-2001[6]. Considering that there had been only seven such cases prior to 2000, many of the leading practitioners in the white-collar crime field stated during the on-site visit that they expect the pressure to continue as the US seeks international implementation of the OECD Convention.

74. As indicated above, the SEC does have authority, which it has used on occasion, to take civil action against a company solely on the basis of a violation of the anti-bribery provisions of the FCPA. These cases are quite rare: the SEC had sought injunctions under section 30A, the anti-bribery provision of the Securities Exchange Act, on five occasions by 2002[7]. For example, in the *Katy Industries* case (1978), although there were some books-and-records elements, the SEC's primary focus was on the allegations that Katy, who employed a consultant in connection with an oil-production sharing contract who was a close friend of an Indonesian government official, knew or had reason to know that payments made to the consultant would be passed on to the official.

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6 . See *SEC v. International Business Machines. Corp.* (D.D.C. 2000); *In the Matter of American Bank Note Holographics, Inc.* (2001); *United States and SEC v. KPMG-Siddharta Siddharta & Harsono and Sonny Harsono* (1999); *SEC v. Chiquita Brands International*, Inc. (D.D.C. 2001).

7 . See *SEC v. Katy Indus., Inc* (N.D. 1978), *SEC v. Sam P. Wallace Co., Inc.*, (D.D.C. 1981), SEC v. Ashland Oil, Inc. (D.D.C. 1986), *SEC v. Triton Energy Corp.*, (D.D.C. 1997) and *United States and SEC v. KPMG-Siddharta Siddharta & Harsono and Sonny Harsono* (1999).

75. The relevant standard for SEC enforcement is set forth in the authoritative speech made in 1981 by then Chairman Harold Williams of the SEC. Seeking to defuse business concerns that the accounting provisions of the FCPA could result in inadvertent violations, the Chairman stated that "The goal [of the Commission] is to allow a business, acting in good faith, to comply with the Act's accounting provisions in an innovative and cost effective way and with a better sense of its legal responsibilities… No system of adequate records and controls –no matter how effectively devised or conscientiously applied- could be expected to prevent all mistaken and improper dispositions of assets". He concluded that penalising inadvertent record-keeping violations is not the primary goal of the SEC. When the SEC encounters accounting problems that do not involve improper payments, it typically seeks an injunction that orders the company to comply with the accounting and record-keeping requirements of the federal securities laws.

Commentary

The lead examiners were encouraged by the stronger degree of focus now placed by the SEC on prosecuting substantive violations of the FCPA. However, in the absence of any recent definitive statements, there is a certain lack of transparency surrounding the prosecution policy and priorities applied within the organisation. This, coupled with the recent high levels of staff turnover at the SEC, might in time undermine the consistency and effectiveness of its vital role in the enforcement of the FCPA.

Enforcement by the DOJ

76. Since the enactment of the FCPA, the Department of Justice has brought a relative small number of enforcement actions and these typically allege violations of Sections § 78dd-1 and § 78dd-2 of the FCPA (i.e. corrupt payments by an issuer or domestic concern) : approximately 32 criminal prosecutions and seven civil enforcement actions have been brought by the DOJ under the anti-bribery provisions of the FCPA. Only in a few cases has the Department of Justice brought prosecutions for violations of the accounting and record-keeping provisions, aside from its role in prosecuting violations of the bribery provisions of the FCPA. Cases not involving bribery include *United States v. Duquette* (D. Conn 1984), *United States v. Lewis* (S.D.N.Y. 1988), *United States v. UNC/Lear Services* (W.D. Ky. 2000) and *United States v. Daniel Rothrock* (W.D. Tex. 2001). Since only some thirty separate alleged bribery schemes have been prosecuted during 25 years under the FCPA, it is difficult to draw broad conclusions about enforcement. There are no statistics or other information available which would reveal the number of allegations received, the number of investigations commenced, terminated or abandoned, or that might shed light on the reasons which led to decisions not to proceed.

77. Despite the relatively few prosecutions over the past 25 years the continuing commitment by the DOJ to prosecute bribery cases was readily apparent to the examining team during the on-site visit. It is further borne out by the willingness to use the opportunity to prosecute corporations for violations of the FCPA, recognising, in the words of the guidelines for prosecutors, that the prosecution of corporations provides 'a unique opportunity for deterrence on a massive scale'.

78. In 1994, criminal enforcement of FCPA violations was centralised under the sole overall control of the Criminal Division Fraud Section, in order to achieve consistency in the way such cases were handled. It has also ensured that a cadre of highly trained FCPA prosecutors is available to lead the prosecution team in each case. This is especially important for prosecutions conducted in federal courts outside the capital, where local Assistant US Attorneys will have the benefit of working on each occasion with an experienced specialist.

79. As to resources, the Fraud Section consists of approximately sixty attorneys. Eleven were working on FCPA cases at the time of the on-site visit, many of whom were handling non-FCPA cases as well. Others with relevant expertise are also available. The examining team was told that FCPA cases are given priority when allocating staff, and that steps are taken to ensure that younger attorneys have exposure to the FCPA. Prosecutorial expertise has been developed through regular training in complex white-collar crime prosecution techniques. The cohesiveness of the Fraud Section has benefited from a low level of staff turn-over. The Fraud Section's budget is large enough to permit travel to judicial districts around the country as well as international travel to gather evidence. The lead examiners were told by DOJ officials that they had never had to drop a case concerning a potential FCPA violation because of lack of human or financial resources.

80. The situation with regard to enforcement priorities is less clear. DOJ prosecutors told the examining team that, despite suggestions to the contrary in the prosecutors' manual detailing principles of prosecution, there were in fact no established priorities within the DOJ which determined which cases they chose to pursue. Generally, the DOJ, in deciding to charge a company or individuals, will weigh, above all other considerations, the sufficiency of the evidence and the likelihood of winning the case. It follows that the principal standard for indictment applied by Fraud Section prosecutors across the board is whether the prosecutor believes, on the basis of the evidence, that the defendants will be convicted.

81. However, the picture is somewhat clouded by the existence of an early statement of prosecution priorities which appears to run counter to the firmly-held position of the present prosecutors. In November 1979, not long after the FCPA came into force, a public statement was made by the then Assistant Attorney General, Mr. Philip Heymann, of the "enforcement priorities" to be applied by the Department of Justice with respect to the anti-bribery provisions of the FCPA. In it, he identified a number of factors that "increase the likelihood" of investigation or prosecution, including (i) the making of prohibited payments or gifts in countries where the only other competitors are American companies; (ii) situations in which there are no American competitors, but an American company is the only company engaging in corrupt practices; and (iii) the fact that a foreign nation is making an effort to eliminate corrupt practices. Other circumstances identified as affecting the likelihood of prosecution were: the size of the payment; the size of the transaction; the past conduct of the persons or entities involved; the involvement of senior management officials; and the strength of the available evidence.

82. The Heymann statement of FCPA prosecution priorities was made over twenty years ago, at a time when there had been few significant FCPA prosecutions, and in a context that pre-dated the negotiation and implementation of the OECD Convention. However, at the time it was made it carried the weight of authority, and it is still referred to among members of the Bar[8]. The lead examiners note that it has never been formally rebutted or superseded by a clear statement of the criteria which now govern the choice of which cases are pursued. Representatives of the DOJ told the examining team that each bribery allegation is evaluated primarily on the quality and quantity of evidence that is available, and the likelihood of a conviction if the matter were presented to a court, and that the only reason for the US to decline a prosecution is lack of sufficient or available evidence. A statement to this effect to a wider public could serve as timely clarification of what is, at the present time, the view of the DOJ as to enforcement priorities.

83. The strong overall impression gained by the lead examiners was that the system for criminal prosecution of FCPA violations appears to be working well. However, its present successful functioning would seem to be, perhaps, too dependent on subjective criteria which have little objective structural framework to back them up. In the absence of a clear statement of current prosecution priorities, the

8. See Donald R. Cruver, *Complying With the Foreign Corrupt Practices Act. A Guide for U.S. Firms Doing Business in the International Market Place* (Chicago, Illinois: American Bar Association, 1999), p. 61.

examining team had only the assurances of the present prosecutors. The same concern could be expressed with regard to questions as to how allegations of FCPA violations are received and processed, why investigations are launched and why some are discontinued, how expertise is shared and transmitted within the department, and how interaction with other agencies, especially the SEC, is handled (see, below, the section on inter-agency co-operation). As noted earlier in this report, there is an almost complete absence of internal statistics as to how allegations are processed, and thus few tools to facilitate case management analysis, internal auditing and assessment of budget needs.

84. As long as the present team of dedicated and experienced prosecutors remains in place, the lead examiners are confident that the system of enforcement of the FCPA by the Fraud Section should continue to function well. But as a matter of organisational principle and accountability, there are inherent dangers in allowing a situation to develop where the bulk of the intellectual capital of a prosecuting unit – not simply in terms of expertise, but, more critically, in terms of detailed, long-term institutional memory -- resides in a small team of specialists and is not underpinned by objective statistics, documentation or process.

Commentary

The lead examiners invite the United States to state publicly its current enforcement priorities with regard to the FCPA in the light of the OECD Convention. The examiners also invite the United States to consider what techniques, whether in the form of policy statements, internal practice guidelines, statistics or otherwise, might be used in order to capture, secure and maintain, in a suitably objective and visible form, the wealth of institutional memory and expertise with regard to FCPA prosecution that is currently available in the team of Fraud Section prosecutors, in order to reinforce the organisational infrastructure necessary to carry on the fight against corruption, and to ensure continuity .

Inter-Agency co-operation

85. The prosecution of the anti-bribery and record-keeping provisions of FCPA depends in large measure on communication, co-operation and exchange of information between the different government agencies. Because the FCPA covers such a broad spectrum of activities, the government potentially confronts complex enforcement problems and issues of jurisdiction. As noted earlier, the FCPA divides enforcement responsibilities between the Department of Justice and the SEC.

86. The DOJ and SEC, as a result of their overlapping jurisdiction, co-operate and share information where possible. The SEC routinely passes any information to the DOJ that is not actual work product generated in the course of an investigation. The DOJ does likewise. In fact, in *SEC v. Dresser Industries, Inc.* (D.C. Cir. 1980), the U.S. Court of Appeals for the District of Columbia Circuit held that the SEC and the Department of Justice were unconstrained in sharing the fruits of their investigation "at the earliest stage of any investigation". The exception is where it has been necessary to empanel a federal grand jury, in a matter prosecuted by the DOJ. Evidence given to the grand jury is subject to strict confidentiality and cannot be shared with other agencies, except where the DOJ obtains a court order permitting disclosure. The commencement of a grand jury investigation does not restrict the SEC from furnishing information or evidence to the DOJ. In other cases, the DOJ may, and does, invite the SEC to participate in joint witness examinations.

87. Forms of co-operation between DOJ and the SEC also occur in dealing with foreign prosecutors and foreign authorities to whom the DOJ and the SEC must go in order to obtain evidence located overseas. The SEC has worked out arrangements to obtain and share information with criminal authorities

in some countries. However, in others, the SEC must rely on mutual legal assistance treaties and agreements that exist between the Department of Justice and other foreign criminal authorities; in these situations, the DOJ usually attempts to obtain the co-operation of the foreign authorities, *e.g.*, by trying to secure their agreement that it may share with the SEC information obtained in the course of an investigation. Co-ordination may also occur in bringing an action, as happened in the *American Banknote Holographics, Inc.* case in 2001 where the filing of a major SEC financial fraud action that included allegations of foreign bribery was co-ordinated with criminal charges filed by the Department of Justice.

88. It became clear during the course of the on-site visit that the extent of the co-operation between the DOJ and the SEC goes well beyond what is suggested by the fact that the two agencies have only brought one joint formal action, in the *Baker Hughes* case. However, the lead examiners remarked that this interaction is largely informal, is not supported by any documented process, guidelines, or memorandum of understanding, and depends heavily on the long-standing personal relationships that have grown up over years of working together. In meeting with representatives from the SEC, they noted that there was some lack of awareness of the published statement of policy in which the SEC stated its intention to refrain from pursuing an investigation in a case where the DOJ had given a positive opinion through its Opinion Procedure. The informal nature of these inter-agency exchanges may be contrasted with the existence, according to the SEC's 2001 Annual Report, of over 30 Formal Information Sharing Agreements between the SEC and its foreign counterparts. Some of the processes employed in international co-operation might, in the view of the lead examiners, usefully be adapted to serve in the domestic sphere.

89. All the representatives from the different government agencies, including tax authorities, who addressed the examining team said they would, and do, report any suspected FCPA violations to the DOJ, but they admitted that this was based on the general duty incumbent on all federal employees to report suspected crimes, and not on any statutory or documented reporting requirements. It appears that, apart from the formal obligation on the FBI to refer all foreign bribery cases to the DOJ, reporting is done on an informal, *ad hoc* basis and there is no underlying inter-agency procedure such as memoranda of understanding, either between the DOJ and the SEC or between the DOJ and any of the other agencies. The DOJ has explained that the FCPA, though important, carries no special status and that its enforcement must be viewed in the context of the general practice of the agencies concerned with respect to any criminal violations. This, in the view of the lead examiners, fails to take into account one important dimension of the enforcement effort: that, since the OECD Convention, FCPA enforcement has become a matter of international, as well as domestic, obligation. Indeed, the examiners were informed that an informal inter-agency group has been put in place to evaluate the implementation of the anti-bribery legislation adopted by the other Parties to the OECD Convention.

Commentary

The lead examiners noted that there are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA. It is suggested that the efficiency of inter-agency co-operation might be enhanced by the introduction of clearer processes, while acknowledging that the US does not favour the use of formal guidelines for this purpose. Further, the overall system might benefit from the creation of a mechanism to periodically review the process of FCPA enforcement from prevention to prosecution. Such mechanism, without forming part of the decision-making function, could provide the means to identify criteria for demonstrating objectively that the system is working, and to identify where in the enforcement system there is a need for meaningful statistics to be kept.

b) Mechanisms for gathering evidence located abroad

90. FCPA investigations and proceedings on both the criminal and the civil side often depend on evidence that is located overseas. In almost every situation that the Department of Justice has examined, it has found that much, if not almost all, the critical evidence lay outside the jurisdiction of the United States. This means that effective co-operation with foreign prosecutors and foreign authorities is crucial.

91. Although the DOJ and the SEC appear to be well-practised in availing themselves of mutual legal assistance under existing bilateral treaties, SEC Formal Information Sharing Agreements, memoranda of understanding and enforcement contacts overseas, the chief difficulty in investigating and prosecuting foreign bribery cases has until now been the lack of co-operation in obtaining evidence located outside the United States. In some instances, to overcome a perceived lack of mutuality or the absence of a Mutual Legal Assistance Treaty, the Department of Justice has developed so-called "Lockheed Agreements", or Mutual Legal Assistance Agreements (MLAAs), which are case-specific. Nevertheless, although some countries, e.g. Niger and Syria, have provided access to witnesses and extradited defendants, other countries have not provided evidence for use in FCPA prosecutions, citing lack of mutuality. The United States has also encountered problems of dual criminality when attempting to obtain evidence from foreign financial institutions. For instance, in the *U.S. v. General Electric Company* case (Cr. No. 1-92-87, S.D. Ohio 1992), the Swiss government, which at the time had no foreign bribery law, declined to provide evidence, citing the lack of dual criminality; the United States revised its request and its grounds of prosecution to focus on a related fraud upon the U.S. government involving the non-disclosure of "commissions" paid by the company, and the Swiss government provided the evidence for use in a prosecution of that offence. Since the signing and subsequent ratification of the OECD Convention by some of these countries, mutuality has become less of an issue, although it is clearly still relevant when seeking evidence from countries which are not Parties to the Convention.

92. The Convention is indeed seen as opening up new sources of evidence to both the U.S. Department of Justice and the Securities and Exchange Commission in their efforts to enforce the FCPA, as the Convention requires signatories to provide "prompt and effective legal assistance" to each other for the purpose of criminal and civil proceedings (Article 9). As law enforcement co-operation under the OECD Convention is now expanding, the ability to gather evidence from abroad is increasing. According to the DOJ authorities, the result of the adoption of the OECD Convention by 35 countries is an increasing ability of U.S. prosecutors to obtain from foreign authorities business records, bank records, and testimonies from companies and individuals located overseas. With Parties to the Convention, the United States will likely be able to extradite those who are wanted for violations of the FCPA, any requirement of dual criminality will be satisfied, and it will be able to obtain evidence without much impediment.

93. The US government is also increasingly willing to bring bribes to the attention of other Parties to the Convention. Not only is the United States exerting substantial pressure to encourage other Parties to bring anti-bribery cases, but the Department of Justice is now increasingly using Article 9 of the Convention to provide evidence to law enforcement authorities of other Parties to the Convention regarding the bribery of foreign officials. When the Department of Justice becomes aware of credible information indicating that a foreign company has violated another country's foreign bribery law, it will usually provide that information to foreign law enforcement agencies. This is done through a variety of channels, including spontaneous transmissions under bilateral or multilateral assistance treaties or through law enforcement contacts overseas. The Government has established for this purpose a working group consisting of representatives from the Departments of State, Commerce and Justice, and other agencies, to ensure that all complaints of misconduct by foreign companies, regardless of which agency initially receives the report, are passed to the Department of Justice for possible referral to foreign law enforcement agencies.

c) Statute of Limitations

94. The FCPA's anti-bribery provisions contain no period of limitations for criminal actions. As a result, the general five-year federal limitation period provided by 18 U.S.C para. 3282 applies for the filing of an indictment. The period can be extended for up to three years, upon a request by a prosecutor and upon a finding by a court that additional time is needed to gather evidence located abroad. However, the period is not suspended by any act of investigation prior to the indictment.

95. In response to concerns expressed about the shortness of the limitation period under US federal law by comparison with those applicable in some other Parties to the Convention, the lead examiners were told by the DOJ prosecutors that, in cases where foreign evidence was likely to be needed to support an indictment under the FCPA, it was the automatic practice at the outset to file a motion seeking a three-year extension to the five-year limitation period. Such an extension is invariably granted as it is not discretionary. Indeed, in ruling on an application to extend or toll the statute of limitations, a court need not make any finding as to the importance of the evidence to the prosecution's case. The statute requires only that the court find two elements: that the prosecution has made an official request and that it appears that evidence is, or was, in a foreign country. The statute is silent on whether the court needs to determine that the evidence is material, substantial, or otherwise important.

96. The Department of Justice went on to point out that, in practice, bribes are usually paid in instalments, which prolongs the time when the last act in furtherance of the bribe was committed, which is the date from which the limitation period starts to run. According to the DOJ, the limitation period has never, so far, proved an obstacle to bringing an indictment. While no prosecutor will risk filing an indictment in the absence of sufficient evidence to secure a conviction, the time available has, to date, been sufficient to allow the indictment to go forward. Interestingly, the DOJ prosecutors recalled that the defence has been known to enter into an agreement with the DOJ to toll the statute of limitations, thereby waiving the right to raise the statute as a bar to any subsequent prosecution, in order to avoid the risk of an imminent indictment where the deadline is looming, and to avoid the collateral consequences that would result. The DOJ prosecutors did however concede that the five-year period could "conceivably" give rise to problems in the future.

Commentary

The length and modalities of statutes of limitations have been identified in Phase 1 as a generic problem for many signatories of the Convention. The lead examiners noted the DOJ assurances that the relatively short limitation period for the filing of an indictment has not, to date, presented problems in practice in the U.S. However, there is no basis on which this situation can be monitored or verified in the absence of any statistical data about how prosecution cases under the FCPA are prepared, and of what types of evidentiary difficulty most commonly arise. With the increased sophistication of the techniques deployed in paying and concealing bribes, the possibility that evidence might remain concealed for several years is obvious, and this could impact the effectiveness of enforcement of the legislation.

d) Elements of the Offence

97. As noted earlier, there are few litigated cases – civil or criminal – which test the outer limits of the FCPA or resolve questions about the relationship between "improper advantage" and "obtaining or retaining business", the treatment of payments to third party beneficiaries, the exercise of nationality jurisdiction, the interstate nexus requirement, or the scope of the definition of a "foreign public official". Many of these were explored in the Phase 1 Review but continue to give rise to uncertainty, mostly

because their effect has not yet been tested in court decisions, with the exception of the FCPA language concerning "obtaining or retaining business".

"Obtaining or Retaining Business"

98. Influencing governmental decisions raises potential FCPA issues. For example, if a US company pays foreign officials in order to obtain a reduction in customs duties or taxes, is there an FCPA violation? This question implicates one of the key elements of an FCPA violation, the business purpose test. Under the statute, the ultimate objective of a corrupt payment must be to obtain, retain or direct business to any person. It has been argued among the Bar that an attempt to influence general governmental decisions is too removed from the obtaining of business to be covered by the FCPA.

99. Congress focused on this ambiguity in its debate on the 1988 FCPA amendments. The final language specifically rejected a House proposal that would have prohibited payments to procure "legislative, judicial, regulatory or other action in seeking more favourable treatment by a foreign government", although the conference report stated that the FCPA prohibits corrupt payments for the "carrying out of existing business, such as for… obtaining more favourable tax treatment. See, e.g., the *United Brands* case". (In the pre-FCPA *United Brands* case, there had been bribery of a Honduran minister to obtain a reduction in a general export tax that would benefit the US. company. The SEC obtained a consent injunction based on failure to disclose the bribes in the company's reports, and the case was an important factor leading to the enactment of the FCPA.) The 1998 Amendments to comply with the OECD Convention did little to clarify the issue. Article 1 of the Convention prohibits bribery of a foreign public official "in order to obtain or retain business or other improper advantage in the conduct of international business". But Congress did not insert the "improper advantage" language of the Convention as an alternative to the "obtain or retain business" provision of the FCPA; instead Congress added the "improper advantage" language into the clause of the statute setting out the alternative types of *quid pro quo* covered by the FCPA. In other words, the law prohibits the making of payments to a foreign official for purposes of: "… (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage… in order to assist [such person] in obtaining or retaining business for or with, or directing business to, any person".

100. Congress inserted the "any improper advantage" language in the *quid pro quo* element apparently because US enforcement officials were reluctant to modify the "obtaining or retaining business" element of the FCPA, which they have always contended is to be construed broadly, as indicated, for example, by the Complaint and Undertakings in *Sec v. Triton Energy Corp*. (D.D.C. Feb. 27, 1997) or by the government's arguments in *US v David Kay and Douglas Murphy* (Ap. 16, 2002).

101. The risk that the language of the FCPA might prove ambiguous, and that it could be interpreted to produce an offence narrower in scope than that envisaged by the Convention, was raised at the time of the Phase 1 Review and has been confirmed by the decision of 16 April 2002 in *US v David Kay and Douglas Murphy*, in which the US District Court of the Southern District of Texas favoured the narrower interpretation. That court --whose decision is not binding on any other court in the United States --ordered the dismissal of criminal charges under the FCPA on the grounds that payments made by the defendants to a customs official in Haiti in order to obtain a reduction in customs duties did not constitute payments made for the purpose of "obtaining or retaining business". The court found – rejecting the prosecution argument in favour of a broad interpretation – that, both in 1988 and at the time of the relevant amendment in 1998, Congress had "considered and rejected statutory language that would broaden the scope of the FCPA to cover the conduct in question." The United States has filed a Notice of Appeal in this matter, and further developments will be kept under review as the monitoring process goes forward.

102. The same issue has arisen in *SEC v Mattson*, an unrelated civil case pending before the same court. The SEC has alleged that two former officers of Baker Hughes Incorporation violated the anti-bribery provisions of the FCPA by authorising an Indonesian entity controlled by Baker Hughes to make an illicit payment to a local tax official in exchange for a promise to reduce the Indonesian entity's tax assessment. The defendants have argued that the expression "obtaining or retaining business" does not encompass payments made to obtain a reduced tax assessment. Whatever the outcome in this second case, the examiners note that the historically broad interpretation favoured by the DOJ and the SEC, which would conform with the requirements of the Convention, has now been called into question by a district court.

Interstate Nexus Requirement

103. The Act requires, in the case of "issuers" and "domestic concerns", or their agents, who bribe within the U.S, that there be an element of interstate commerce. Generally, this includes trade, commerce, transportation, or communication among the states, or between any foreign country and a state or between any state and any place or ship outside of the state. This requirement, which is known as the "interstate nexus" requirement, does not apply to non-U.S. nationals and businesses bribing in the U.S., or to U.S. nationals and businesses bribing abroad, as in such cases there is, by definition, an element of international commerce. The OECD Working Group on Bribery identified the "interstate nexus" requirement in Phase 1 as a potential evidentiary problem in a case where a bribe is offered in person.

104. In the view of the U.S. authorities there is no serious difficulty in meeting the "interstate nexus" requirement: the interstate nexus can be as slight as a single letter, fax, cable, phone call, or airline ticket, in the furtherance of the effort to make a prohibited payment. In *Sam P. Wallace Co.* (D.P.R. 1983), for instance, the mailing of checks was deemed "uses of means and instrumentalities of interstate commerce, that is, interstate and foreign bank processing channels". In *United States v. Harry G. Carpenter* (Criminal Information No. 85-353 1985), a Western Union international telex was cited as the use of a means and instrumentality of interstate commerce for the purposes of the FCPA. In *United States v. Reitz* (W.D. Mo, 2001), the plea stated that in furtherance of the bribery act the defendant and other conspirators corresponded via e-mail and facsimile transmission and engaged in numerous telephone conversations. The lead examiners were told by the U.S. authorities that in all these cases, which were settled by plea agreement, the government was required to proffer proof of the interstate nexus before the court would accept the plea agreement and enter a judgement of conviction. For those cases that proceeded to trial, the government also proved the existence of an interstate nexus. For instance, in *U.S. v. Mead* (D.N.J. 1998), the requisite interstate nexus was proven by the use of emails and international travel.

105. There has been however at least one instance where the prosecution was not able to proffer proof of the interstate nexus. In *SEC v. Montedison* (D.D.C. 1996), the SEC did not charge the company with a violation of the FCPA's anti-bribery provisions as "the complaint did not allege that Montedison used the mails or any means or instrumentality of interstate commerce in furtherance of bribing a foreign public official" under the FCPA[9]. The SEC filed a civil injunctive action charging Montedison, an Italian corporation listed on the New York Stock Exchange, with committing financial fraud by falsifying documents to hide bribes totalling nearly US$400 million. It would also appear that in at least two other, hypothetical, cases the "interstate nexus" requirement might not be satisfied, as recognised by DOJ and SEC attorneys : when an e-mail is not sent until long after a bribe has been paid even where it discusses the now-completed bribe, and in the case when a private mail carrier is used, if it does not cross state lines and does not qualify as an "interstate facility". The United States' view is however that, even in such instances,

9 . See Arthur Aronoff, Senior Counsel for International Trade and Finance in Antibribery Provisions of the FCPA (http://www.ita.doc.gov/legal/fcpa.htlm).

it would be highly unlikely that the bribery of a foreign official could have been accomplished without some use of another interstate facility.

Payments to Third Party Beneficiaries

106. Another area of uncertainty is the situation where a benefit is directed to a third party by a foreign public official. The FCPA does not expressly cover the situation and there are no cases supporting the contention of the U.S. that it would be covered in practice. In Phase 1, the Working Group was concerned about the lack of clarity in this regard and recommended that this issue be re-examined in Phase 2. In *U.S. v. Kenny* (U.S. Dist. Crt., 1979) the personal representative of the Prime Minister of the Cook Islands solicited a payment for the benefit of the Cook Islands Party (of which he was the leader) in order to ensure renewal of Kenny International's stamp distribution agreement with the government. Instead of prosecuting the case as one in which the benefit was directed to a third party (the Cook Islands Party) by a foreign public official (the Prime Minister), the Department of Justice chose to proceed under the political party provision. However, it is not clear from the plea agreement that the political party influenced the Prime Minister.

Definition of "Foreign Public Official"

107. A "foreign public official" is defined quite broadly by the FCPA and includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government, department, agency or instrumentality". By contrast with Article 1 of the OECD Convention, the definition of "foreign public official" in the FCPA does not mention persons holding judicial office in a foreign country. In Phase 1, the U.S. authorities stated that, nevertheless, the definition would cover judges. Although there are no cases addressing this issue, this remained the position of the Department of Justice prosecutors at the time of the Phase 2 on-site visit.

108. Another area of potential uncertainty under the FCPA involves officials of public enterprises. Such enterprises are covered in U.S. law as "instrumentalities", making their officers, directors, employees, etc., "foreign officials" under the FCPA. Neither the statute nor its history define the term "instrumentality", thus leaving it to U.S. companies to determine whether an enterprise is an instrumentality or not. This can be difficult in some cases. For instance, are "instrumentalities" only enterprises that are wholly or majority-owned by the foreign government? Does the term "instrumentality" cover enterprises that are controlled by the government, or entities in the process of privatisation? While other U.S. laws may contain some clues to a possible definition, most are however in the domestic context and thus may be of limited relevance. For instance, the Foreign Sovereign Immunities Act (FSIA) defines an agency or instrumentality of a foreign state as an entity, "a majority of whose shares or other ownership interest is owned by a foreign state or political division".

109. The examining team was provided with examples of FCPA enforcement actions where bribes were paid to officials of state-owned oil companies, state-owned bus companies, utilities commissions, state-owned trading companies, state-owned banks and tax authorities. However these cases do not reveal whether, in conformity with Commentary 14 on the Convention, the FCPA applies where there is indirect foreign control of the enterprise in question, or in the case where the foreign government exercises *de facto* control over an enterprise, but does not, for example, hold in excess of 50 per cent of the voting shares. In Phase 1, the DOJ explained that among the factors that it considers are the foreign state's own characterisation of the enterprise and its employees and the degree of control exercised over the enterprise

by the foreign government. The DOJ has favoured a broad interpretation and has treated entities owned or controlled by a foreign government as "instrumentalities" of the foreign government.

Nationality Jurisdiction

110. The FCPA establishes nationality jurisdiction over "issuers" and "any United States person" under provisions entitled " alternative jurisdiction". The US authorities believe that the FCPA also covers acts by a U.S agent on behalf of a domestic concern, i.e. a non-issuer, and acts by a U.S. person acting abroad on behalf of a foreign company. It remains however unclear at this stage whether in practice the nationality jurisdiction established by the 1998 amendments to the FCPA will be interpreted as covering the two situations, as the U.S. has not yet brought prosecutions in such circumstances.

Absence of Sanctions

111. Whether sanctions are available in practice under the FCPA for persons who are "domestic concerns" (i.e. U.S. nationals) and have not bribed on behalf of a "domestic concern" or an "issuer" remains unclear, as no penalties, criminal or civil, are prescribed by the FCPA for this type of situation. In other words, if a U.S. national bribes a foreign public official on his or her own behalf and is not acting as an agent, sanctions are not provided, although the act is still an offence. According to the U.S. authorities, it is highly unlikely that this fact pattern would occur, given the broad definition of "domestic concern". There are however no litigated cases that deal with this question.

Use of Other Statutes

112. The U.S. authorities who addressed the examining team explained that potential lacunae in the offences in the FCPA can usually be compensated for by filing indictments under different statutes. They explained that, for instance, the Mail Fraud Statute, Wire Fraud Statute, Interstate and Foreign Travel or Transportation in aid of Racketeering Enterprises Act (ITAR) and RICO have been used in addition to the FCPA to address foreign bribery. It would appear, however, that these statutes would only partly supplement the potential lacunae in the FCPA as they are not themselves comprehensive in their application to foreign bribery. For instance, these statutes import a different *mens rea* from that required under the offences in the FCPA (e.g. the Mail and Wire Fraud statutes require a fraudulent intent). Moreover, these statutes do not appear to provide for nationality jurisdiction.

Commentary

The present definition of the offence of bribery under the FCPA has been recently interpreted by a court as requiring that the acts be done for the purpose of "obtaining or retaining business", and that seeking to obtain an improper advantage is not of itself an alternative ground for indictment. That decision is under appeal. If it were upheld, the result would be to exclude from the scope of the offence any illicit payment which is directed to securing some advantage – such as favourable tax or customs treatment – to which a company is not clearly entitled. Such an interpretation would be narrower than that prescribed by the Convention. The DOJ has confirmed that the United States will consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business".

As regards the other areas of potential uncertainty identified above in the offences under the FCPA, the lead examiners recommend that these be kept under review as the case law

develops. In particular, the need to prove an "interstate nexus" in respect of US nationals and companies is of some concern given that nationality jurisdiction (which does not require this element) has as yet not been tested. Also, for the reasons given above, reliance on other statutes may not always be sufficient to complement the FCPA in these areas.

e) Interpretation of exceptions and defences

113. The FCPA provides one exception that permits "facilitation payments" to foreign public officials and two affirmative defences to possible violations. A great deal of compliance counselling under the FCPA involves the interpretation of these exceptions and defences, which did not appear in the original FCPA but were introduced in 1988. As a result they were discussed at length during the on-site visit.

The Facilitation Payments Exception

114. The language in the FCPA, which excludes from the definition of bribery those payments which are necessary to facilitate the performance of routine administrative actions, is not limited to 'small' facilitation payments as in the Convention. It should be further noted that this exception is not provided for in the statute governing domestic bribery (18 U.S.C. § 201). To the extent that the exception is open to interpretation, it may be regarded as an area of risk and open to misuse as noted in Phase 1 evaluation of the United States.

115. There is an absence of any clear, published guidance as to what the words mean and where the limits are. The Act contains no *per se* limit on the size of the payment, focusing instead on the purpose of the payment. No court has interpreted the application of this exception and there are no settled cases to assist in delineating the boundary between acceptable and unacceptable payments. There are also no relevant DOJ Opinions. If a company asks the DOJ for informal advice or reports a payment, the lead examiners were told that the DOJ will sometimes determine straight away, on the basis of judgement and experience, whether it falls within the exception and if so, take no further action. This operates as a sort of informal, undocumented '*de minimis*' rule.

116. Companies have developed different strategies to deal with facilitation payments. At least one major company interviewed imposes a policy, applicable world-wide, that irrespective of the existence of the exception, no discretionary payments are to be made without express approval, as a way of reducing the scope for misjudgement by local employees. The high level of concern was also demonstrated by another in-house counsel, who said that when teaching the FCPA he carefully omits all reference to the existence of the exception.

Commentary

The lead examiners suggest that there may be a case for guidance to be issued by the DOJ to explain the tests it applies in practice to assist in the interpretation of this exception. Alternatively, consideration should be given to amending the wording of the statute to clarify, for the benefit of all, that only minor payments are allowable.

The Affirmative Defence of 'reasonable and bona fide expenditure'

117. Travel and lodging expenditures on behalf of foreign officials are another recurring difficulty for companies and US nationals dealing with foreign officials. Unlike the OECD Convention, where there is no express provision allowing for the payment of non-excessive expenses, the FCPA permits the payment

of reasonable and bona fide expenses to enable foreign officials to learn about the host company or in direct relation to the "execution or performance of a contract". The view of the DOJ is that the defence neither derogates from the strict requirements of the FCPA nor undermines that statute's compliance with the Convention : rather, it amplifies the *mens rea* requirement that is common to all laws implementing the Convention, that of corrupt intent. However, to the extent that the language of the defence is open to interpretation, it is regarded by companies and in-house counsel who spoke to the examining team as an area potentially open to abuse.

118. This exception is in a certain sense not a true affirmative defence because it cannot, by definition, apply where the basic elements of the offence of bribery have been met. As suggested by the legislative history of this provision and confirmed by the DOJ to the team of examiners, it only allows reasonable and bona fide promotional payments where no corrupt intent is present. Thus the test is one of distinguishing truly corrupt payments provided to obtain or retain business, from legitimate promotional expenses involving no corrupt intent. In 1981, for example, the DOJ approved a proposal by an American manufacturer of packaged meat to provide samples of its products to officials of the Soviet Government agency responsible for procurement of such products. The DOJ noted that the purpose of the sample was to allow for inspection and testing and that the value of the sample was small relative to the value of the potential contract.

119. Yet, sensitive cases may arise when companies plan promotional tours for visiting foreign officials and include recreational activities in the agenda. Although the DOJ, through its opinion release procedure, has approved promotional trips on several occasions, including payments for the entertainment of a foreign official and his wife, it has not commented on the nature or cost of the entertainment: these opinions suggest only that the DOJ recognises the business purpose of including some entertainment in promotional activities. Nor has any court interpreted the application of the defence. The *Metcalf & Eddy* case (S.D. Ohio, 1998), in which the Department of Justice interpreted the provision of airfare, travel expenses, and pocket money to an Egyptian official and his family during business trips to the United States as exceeding the legitimate levels for bona fide promotional expenses, suggests only that the DOJ would allow such expenses where the level of the expense is reasonable and the payments are accurately documented and subject to audit.

120. In addition to promotional activities, bona fide expenditures directly related to the "execution or performance of a contract with a foreign government or agency" may also be a difficult issue for companies. DOJ opinions related to this provision include the approval of a proposal by a U.S. business to bring French officials to the United States to show them a plant similar to the one proposed for construction in France, and the approval of a proposal by an American petroleum company to provide training to employees of a foreign government, where that training was required by local law. In neither case, however, does the Opinion Release reveal what tests or standards were applied by the DOJ in deciding not to take any enforcement action.

121. That there is concern as to what the words mean and where the limits are, is demonstrated by the fact that considerable corporate resources are devoted to seeking counsel's opinion on this issue. In-house and outside counsel have chosen to proceed with caution when interpreting the provision, advising companies to act 'reasonably', i.e. to ensure that the provision of airfare, travel expenses, accommodation, per diems, samples, recreational activities, etc. is incidental to the promotional purpose of the activity and is reasonable and not extravagant. As this is not a true affirmative defence --because it does not apply where the mental element of the bribery offence has been established and, as such, is already inherent in the wording of the statute -- at least one in-house counsel questioned whether this defence serves any useful purpose.

Commentary

The lead examiners are of the view that the defence is not legally necessary and that the scope it allows for interpretation introduces some uncertainty. If it is maintained, the lead examiners suggest that there is a case for guidelines or guidance to be issued by the DOJ to explain in more detail the tests it applies in practice and to assist in the interpretation of the defence.

The Affirmative Defence of 'lawfulness under the written laws of the foreign country'

122. The FCPA provides that it shall be an affirmative defence that the payment, gift, or offer of payment was **'**lawful under the written laws and regulations of the foreign official's country'. This seemingly broad defence leaves open the issue of what is "lawful" under the written laws of a country. The defence was introduced into the FCPA when it was amended in 1988, with the intention of "codifying" previous DOJ practice as evidenced by a series of Review Letters issued to companies who had raised the question under the then-existing review procedure. An examination of several of these review releases dating from the 1980s shows that the language most frequently used by the DOJ in explaining its decision not to take enforcement action was that the conduct in question did "not violate" or was "not in violation of" the local law. This does little to resolve the ambiguity. Nor is the Department of State in a position to provide specific guidance. Its brochure, "Fighting Global Corruption – Business Risk Management", produced in consultation with the other government departments concerned, says, at page 28 of the current edition, "Whether a payment was lawful under the written laws of a foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilising the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment."

123. In practice, companies and their counsel have avoided using this defence in seeking to escape liability: the DOJ prosecutors were not aware of any FCPA prosecution in which it had been raised. There might be several reasons for this. It would be rare for a country's law to sanction such payments even where bribery is commonplace. No one who discussed this defence with the examining team could identify a country whose written laws permit bribery of its government officials. Also, particularly in the case of some developing countries where laws might be in a state of flux, to rely on constantly changing and uncertain local laws, even with the benefit of local counsel's opinion, would be extremely risky for the company. Indeed, the amount of legal debate generated around this defence appears to be out of all proportion to its actual use.

2. PROSECUTION OF MONEY LAUNDERING

124. Foreign official bribery became a specified foreign predicate offence for a money laundering violation in the United States with the enactment of the Patriot Act on October 26, 2001. Nevertheless, prior to that date, the United States had mechanisms in place to prosecute the laundering of foreign official bribery. The addition of bribery of a foreign public official and misappropriation of public funds as a foreign predicate offence for money laundering in the United States has clarified the ability of US law to combat money laundering in such cases.

125. There appear, at present, to be few on-going money laundering cases involving foreign bribery, though it is clear that the money laundering/confiscation aspects of foreign bribery cases would be pursued by investigators in cases where there were thought to be available assets. The United States has had a system to confiscate criminal proceeds of many offences that includes criminal forfeiture, civil in rem forfeiture, and administrative forfeiture proceedings. In 2000, the proceeds of money laundering predicate offences, including the FCPA, became directly forfeitable, where previously a separate money laundering

transaction needed to be shown. In addition, in 2001, foreign bribery offences became money laundering predicates and thus the proceeds of such offences became directly forfeitable. In accordance with U.S. constitutional principles, confiscation of proceeds ordinarily is only available in respect of offences committed after the relevant changes to the forfeiture legislation came into effect. However, in limited circumstances, United States courts have applied forfeiture retroactively prior to the date of enactment of the statute where the individual had no legitimate right to the property. At the time of the on-site visit the examiners were not advised of any restraint proceedings which had as yet been taken in a foreign bribery case with a view to the eventual confiscation of assets. The examiners were assured that the reason for this was the lack of available assets in such cases and not unwillingness to use the restraint provisions. Since then, the United States has obtained a forfeiture judgement of nearly US$ 16 million in restrained assets of Victor Alberto Venero, an associate of Vladimiro Montesinos.

126. Most money laundering prosecutions have been brought so far under U.S. Code § 1956. The offences thereunder are based on a wide-ranging list of predicate offences. The predicate offences can be proved in money laundering proceedings by independent evidence and it is understood that a conviction for the predicate offence is not required. However, in the absence of clear statistics that break down the types of money laundering prosecutions brought in the USA, it appears anecdotally that a large majority of money laundering cases are brought as part of the same proceedings as prosecutions for the underlying criminality. It was thus unclear to the examining team how many “stand-alone” money laundering prosecutions take place against professional launderers, acting on behalf of others.

D RECOMMENDATIONS

127. In conclusion, based on the findings of the Working Group with respect to the United States' application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to the United States. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

a) Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

128. With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:

1. Enhance existing efforts to reach small and medium sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources. (Revised Recommendation, Article 1)

2. Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession. (Revised Recommendation, Article 1)

129. With respect to other preventive measures, the Working Group recommends that the United States**,** based on the expertise built up during years of applying and interpreting the FCPA:

3. Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions. (Revised Recommendation, Article 1)

4. Consider developing specific guidance in relation to the facilitation payments exception (Convention, Commentary 9; Phase 1 Evaluation, paragraph 1.3).

5. With respect to the defence of reasonable and bona fide expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided. (Phase 1 Evaluation, paragraph 1.3).

130. The Working Group further recommends that the United States:

6. Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally. (Revised Recommendation, Article V. C (i))

7. Consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. (Convention, Article 8; Revised Recommendation, Article V)

131. With respect to detection, the Working Group recommends that the United States:

8. Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery. (Convention, Article 8; Revised Recommendation, Article V)

9. Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery. (Revised Recommendation, Article 1; Annex to the Revised Recommendation, paragraph 6)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

132. The Working Group recommends that the United States:

10. Make a clear public statement, in the light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)

11. Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).

12. Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA. (Convention, Article 7)

13. Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period. (Convention, Article 6)

14. Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business". (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4)

b) Follow-up by the Working Group

133. The Working Group will follow up the issues below, as the case-law continues to develop**,** to examine**:**

15. Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to (i) cases where a benefit is directed to a third party by a foreign official; and (ii) the scope of the definition of a "foreign public official", in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2)

16. Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4)

134. The Working Group will furthermore monitor developments in the following area:

17. Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1).

ANNEX:[10]

CASES RELATING TO BRIBERY OF FOREIGN PUBLIC OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (1977-2002)

10 . The information contained in this annex is based on the "Digest of Cases and Review Releases relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1997" as of 31 January 2002 (Danforth Newcomb, Partner, Shearman & Sterling, New York, 2002), as provided to the Secretariat by the United States. The information has been up-dated by the Secretariat in consultation with the United States to cover the period January-July 2002.

SECTION 1: FOREIGN BRIBERY CRIMINAL PROSECUTIONS UNDER THE FCPA

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
1	1979	U.S. v. Kenny Int'l Corp.	$50,000	NZ$337,000 (R)	-	Permanent injunction against further FCPA violations	-	Chairman	-	-	-	-	Permanent injunction against further FCPA violations; cooperation agreement with foreign government (Cook Is.)	
2	1982	U.S. v. Crawford Enterprise, Inc.	$3,450,000	-	-	-	Conspiracy, aiding, abetting	President + owner CEI	$309,000	-	-	-	-	Conspiracy, aiding, abetting
								Exec. Vice President	$150,000	-	-	-	-	ditto
								Intermediary	$75,000	-	-	-	-	ditto
								Subdirector purchaser	$5,000	-	-	-	-	ditto
								Subdirector purchaser	$5,000	-	-	-	-	ditto
								Intermediary	fugitive	-	-	-	-	ditto
								Intermediary	fugitive	-	-	-	-	ditto
								Vice President of sub-contractor of Seller	acquitted of conspiracy	-	-	-	-	ditto

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
3	1982 1983	U.S. v. C.E. Miller Corp.; U.S. v. Marquis King	$20,000	-	-	-	Aiding and abetting	President, chairman, major stockholder CEMCO (contractor)	-	-	-	3	500hrs community service	-
								Officer, Director CEMCO	-	-	-	1.17	Cooperation agreement, $5,000 prosecution costs	CFTRA (charges apply to this)
4	1982	U.S. v. Ruston Gas Turbines Inc.	$750,000	-	-	-	-	President	$5,000	-	-	-	-	-
								Vice-President	$5,000	-	-	-	-	-
5	1982 1985 1987	U.S. v. Int'l Harvester Co. (S.D. Tex. 1982); U.S. v. McLean; McLean v. Int'l Harvester Co.	$10,000	-	-	$40,000 prosecution costs	Conspiracy to violate FCPA (charges apply to this)	Vice-President of division of seller	-	-	-	-	-	conspiracy, aiding and abetting (charges apply to this), prosecution barred because employer (seller) was not convicted
								Regional Manager of division of seller	-	-	1 (sus-pended, modified to probation)	1	-	Conspiracy, aiding and abetting (charges apply to this)

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
6	1982	U.S. v. Appl. Process Products Overseas Inc.; U.S. v. Gary Bateman	$5,000	-	-	Cooperation agreement; permanent injunction against further violation of FCPA	see individuals	CoB, President, sole stockholder	-	-	-	3	Cooperation agreement, permanent injunction against further violations of FCPA, $229,512 civil penalty, $300,000 civil tax payments, $5,000 prosecution costs	CFTRA in connection with bribery scheme (charges apply to this)
7	1983	U.S. v. Sam P. Wallace Co.; U.S. v. Alfonson A. Rodriguez	$30,000	-	-	-	CFTRA (fines: $500,000); SEC action	President	$10,000	-	-	3	-	-
8	1985 1990	U.S. v. Harry G. Carpenter and W.S. Kirkpatrick Inc.; U.S. v. Carpenter; Environmental Tectonics Corp Intl. v. W.S. Kirkpatrick & Co. Inc.	$75,000	-	-	-	-	Former Chairman of Board, Chief Exec. Officer	$10,000	-	suspended	3	community service work	-
9	1985	U.S. v. Silicon Contractors Inc.	$150,000	-	-	Permanent injunction against further FCPA violations	-	3 officers	N/A	N/A	N/A	N/A	Permanent injunction against further FCPA violations	-

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
10	1989 1991	U.S. v. Napco Intl Inc. and Venturian Corp.; U.S. v. Liebo	$785,000 (aggregated fine for 3 charges of which 1 count on bribery of foreign official)	-	-	$140,000 settlement of civil liability, $75,000 settlement of civil tax liability	Multi-object conspiracy to defraud the US; preparation of false tax return	Vice President IN RELATED CASE	-	-	1.5 suspended	3 (of which 60 days home confine-ment)	600 hrs community service work	false statements
11	1989	U.S. v. Goodyear Int'l Corp	$250,000	-	-	-	-	none						
12	1989	U.S. v. Joaquin Pou, Alfred G. Duran and Jose Guarsch	no corp. charged					President, sole shareholder	N/A	N/A	N/A	N/A	N/A	Conspiracy to violate FCPA
								Intermediary	flight					ditto
								Intermediary	acquitted					ditto
13	1990 1994	U.S. v. Young & Rubicam Inc.; Abrahams v. Young & Rubicam Inc.	$500,000	-	-	-	Conspiracy (charges apply to this); RICO violations, perjury, 33 alleged racketeering acts	dismissed						

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
14	1990 1991	U.S. v. Morton; U.S. v. Blondek et al.; U.S. v. Eagle Bus.; U.S. v. Castle et al.	-	-	-	civil action: permanent injunction against further violation of FCPA	see individuals	Canadian agent of seller	-	-	-	3	-	Conspiracy to violate FCPA (charges apply to this)
								2 Canadian officials: dismissed (FCPA does not apply to foreign officials)						
								2 company officers: acquitted at trial						
15	1990	U.S. v. F.G. Mason Eng'g Inc. and Francis G. Mason	$75,000 (jointly with individual)	$160,000 (R)	-	Co-operation agreement	Conspiracy to violate FCPA (charges apply to this)	President, sole stockholder	$75,000 (jointly with corp.)	-	-	5	Co-operation agreement	Conspiracy to violate FCPA (charges apply to this)
16	1990	U.S. v. Harris Corp.	acquitted				Conspiracy, false books and records, aiding and abetting	Vice President	acquitted					Conspiracy, false books and records, aiding and abetting
								Director Human relations	acquitted					ditto
17	1994	U.S. v. Steindler et al.	GE: $69,000 (criminal and civil fines)	-	-	-	Filing of false claims (fines apply to this)	Int'l sales manager of GE	-	$1,741,453 (F)	7	-	-	Conspiracy, wire fraud, ML (charges apply to this)
			National Airmotive Corp.: $1.25mio. (criminal fines), $1.75 (civil fines)				Related charges (fines apply to this)	Foreign official	fugitive					Conspiracy to divert US funds; mail fraud; wire fraud; ML
								Intermediary	fugitive					ditto

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
18	1993 1994	U.S. v. Vitusa Corp.; U.S. v. Herzberg	$20,000	-	-	Cooperation agreement	-	President, Chief Exec. Officer, sole stockholder	$5,000	-	-	2	-	-
19	1994	U.S. v. Lockheed Corp.; U.S. v. Love; U.S. v. Nassar	$21.8mio. (alternative fine provision)	-	-	Cooperation agreement, $3 mio. civil settlement	Conspiracy to violate FCPA (charges apply to this), conspiracy to defraud US gov. foreign military funds programs	Reg. Vice president Lockheed Int'l	-	-	1.5	-	-	-
								Sales director Lockheed Aeronauti-cal IN RELATED CASE	$20,000	-	-	-	-	perjury
20	1998	U.S. v. Saybolt North America Inc.; U.S. Saybolt Inc.; U.S. v. David H. Mead; U.S. v. Frerik Pluimers	$1.5mio.	-	5 each	$800 spec. assessment, compliance programs and co-operation agreement with DoJ etc.	Data falsification ($3.4 mio., 5 years prob., $800 spec. assessment), conspiracy to falsify Clean Air Act reports and test results, conspiracy to violate FCPA, wire fraud	President, Chief Exec. Officer, Exec. Vice President	$20,000		0.33	3	4 month home detention	conspiracy to violate FCPA, use of facility in foreign commerce in aid of racketeering, aiding and abetting
								Chairman of Board of Directors	Fugitive, extradition request denied, decision on appeal					ditto
21	1998	U.S. v. Herbert Tannebaum	no corp. charged					President	$15,000	-	1	-	-	Conspiracy to violate FCPA (charges apply to this)

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
22	1998	U.S. v. Control Systems Specialist Inc.; U.S. v. Darrold Richard Crites	$1,500		1			President	$50 (Plea agree-ment)	complete restitution	unspecified, modified into probation	3	$100 for bribery of US pub. off., 150 hrs community service work, cooperation agreement DoJ	conspiracy to violate FCPA, bribery of US pub. off.
23	1999	U.S. v. Int'l Material Solutions Corp. and Donald K. Qualey	$1,000	-	1	-	Conspiracy to violate FCPA	President	$5,000	-	-	3	4 months home confinement, 150 hrs community service work	Conspiracy to violate FCPA
24	2001	U.S. v. Cantor	no corp. charged					Former Exec. Vice President, GM, later President and Director	Pending	pending	pending	Pending	pending	pending
25	2001	U.S. v. Daniel Ray Rothrock	no corp. charged					Vice President	-	-	-	1	$100 spec. assessment	-

			Charges against legal persons					Charges against natural persons						
#	Date	Case	Fines	Restitution or Forfeiture	Probation (years)	Other sanctions	Other crimes charged	Position	Fines	Restitu-tion or Forfeiture	Imprison-ment (years)	Probation (years)	Other sanctions	Other crimes charged
26	2001	U.S. v. R. K. Halford; U.S. v. A.F. Reitz; U.S. v. R.R. King; U.S. v. P.B. Hernandez	No corp. charged					Stockholder, Chief Financial Officer	pending	pending	pending	pending	pending	Conspiracy to violate FCPA (charges apply to this), Tax evasion
								Vice President, secretary, employee, stockholder	pending	pending	pending	pending	pending	conspiracy to violate the FCPA (charges apply to this), mail fraud, use of fictitious name and address, false and fraudulent statements to invest. agent, fraudulent and false statements on fed. tax return
								Stockholder, Officer	Senten-cing on conspiracy and FCPA violation expected in Sept.02	Senten-cing on conspiracy and FCPA violation expected in Sept.02	Sentencing on conspiracy and FCPA violation expected in Sept.02	Senten-cing on conspiracy and FCPA violation expected in Sept.02	Sentencing on conspiracy and FCPA violation expected in Sept.02	Travel Act (Interstate Travel in Aid of Racketeering) (dismissed), conspiracy to defraud the US
								Employee	fugitive					ditto
27	2001	U.S. v. David Kay	No corp. charges					Vice President	Charges dismissed on legal grounds [appeal pending]					
								CEO	ditto					
28	2002	U.S. v. Sengupta						Former World Bank employee	pending	Full restitution of $127,000	pending		pending	

SECTION 2: FOREIGN BRIBERY CIVIL ACTIONS INSTITUTED BY THE DEPARTMENT OF JUSTICE UNDER THE FCPA

			Charges against legal persons			Charges against natural persons		
#	Date	Case	Fines	Other sanctions	Other crimes charged	Position	Sanctions	Other crimes charged
1	1979	U.S. v. Carver et al.	no corp. charged			Officer, shareholder	Permanent injunctions prohibiting future violations of FCPA	-
						Officer, shareholder	ditto	-
2	1990	U.S. v. Dornier GmbH	-	Permanent injunction against future FCPA violations	-	none		
3	1993	U.S. v. American Totalisator Co.	-	Permanent injunction against future FCPA violations	-	none		
4	1999	U.S. v. Metcalf & Eddy	$400,000	$50,000 investigation costs; implement specified compliance program; implement financial and accounting controls; promptly investigate and report alleged FCPA violations in the future; include in future joint venture agreement representation and undertaking by each partner as to FCPA matters; 5 years annual audits and compliance certificates as to FCPA matters; periodic reviews at least every 5 years of its FCPA policies and programs; cooperate with a further investigation, permanently enjoined from FCPA violations				

SECTION 3: SEC ACTIONS RELATING TO FOREIGN BRIBERY

			Charges against legal persons			Charges against natural persons		
#	Date	Case	Fines	Other sanctions	Other crimes charged	Position	Fines	Sanctions
1	1978	SEC. v. Page Airways Inc.	-	Permanent injunction prohibiting future violations of FCPA	-	6 officers and/or directors	charges dismissed	
2	1978	SEC. v. Katy Indus. Inc.	-	Consent judgements: Permanent injunction prohibiting future violations of FCPA; amendment of filings, establishment of Special Review Committee of outside directors to report to the BoD	-	2 directors	-	Consent judgements: Permanent injunction prohibiting future violations of FCPA
3	1979	SEC. v. Int'l Systems & Controls Corp.	-	Permanent injunction against future violations of FCPA; Amendment of filings, appointment of Audit Committee and Special Agent	-	2 officers	-	Permanent injunction against future violations of the FCPA
4	1980	SEC. v. Tesoro Petroleum Corp.	-	Permanent injunction against future violations of FCPA; appointment of new director; keeping of accurate books and records.	-	none		
5	1981	SEC. v. Sam P. Wallace Co.	-	Permanent injunction against future violations of FCPA; establishment of independent committee of the BoD to conduct an internal investigation and report to SEC.	-	none		
6	1986 1987 1988	SEC. v. Ashland Oil Inc.; Howes v. Atkins; Williams v. Hall	-	Permanent injunction prohibiting the corporation from using corporate funds for unlawful pol. contributions or other similar unlawful purposes	-	Chairman and Chief Exec. Officer	-	Permanent injunction prohibiting the corporation from using corporate funds for unlawful pol. contributions or other similar unlawful purposes
7	1996	SEC. v. Montedison, S.P.A.	N/A	N/A	Financial Fraud, Violation of corp. reporting, books and records, internal control sections of SEC Act 1934	none		

			Charges against legal persons			Charges against natural persons		
#	Date	Case	Fines	Other sanctions	Other crimes charged	Position	Fines	Sanctions
8	1997	SEC. v. Triton Energy Corp.	$300,000 penalty	Injunction against future violations	-	Former senior officer	$50,000 penalty	Injunction against future violations
						Former senior officer	N/A	N/A
						4 former Executives	-	cease and desist order enjoining them from causing further violations
9	2000	SEC. v. IBM Corporation	$300,000 civil fine	Cease and desist order as to the book and records provision		none		
10	2001	SEC v. Weissman, Cantor, Gorman and Gentile; SEC v. Weissman, Cantor, Gorman and Gentile; SEC v. American Bank Note Holographics Inc.	$75,000 civil penalty	Order requiring the corp. to cease and desist from committing or causing any violation, and any future violation, of the FCPA and other accounting controls in the SEC proceedings; permanently restrain from violating the antifraud, periodic reporting, record keeping and internal control provisions of the federal securities laws.		"certain officials not directly involved"	-	civil actions, permanent restraint orders prohibiting violations of antifraud, periodic reporting, record keeping, internal controls and lying to auditors provisions of the federal securities laws and injunctions suspending them from appearing or practicing before the Commission as accountants.
						2 Exec. Officers	$20,000 civil penalty each)	permanently restrained and enjoined from violating and aiding and abetting violations of the antifraud, periodic reporting, and lying to auditors provisions of the federal securities laws
11	2001	SEC v. KPMG-SSH; SEC v. Eric L. Mattson and James W. Harris	-	Permanently enjoined from violating and aiding and abetting the violation of the anti-bribery provisions of the FCPA and the internal controls and books and records provisions of the Exchange Act; Cease and desist order as to the internal controls and books and records provisions of the Exchange Act.		none		
12	2001	SEC v. Chiquita Brands Int'l, Inc.	$100,000 civil penalty	Cease and desist order for violating the FCPA books and records and internal accounting controls provisions		none		

13	2002	SEC v. BellSouth Corporation	none	Cease and desist order for violating the FCPA books and records and internal accounting controls provisions		none		