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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

THE FOREIGN CORRUPT PRACTICES ACT & UNIQUE RISKS FOR GOVERNMENT CONTRACTORS

By Gregory M. Williams, Ralph J. Caccia, Jillian Volkmar, and Emma Sharma

> [R]obust FCPA enforcement has become part of the fabric of [the Department of Justice]: Our global anti-corruption mission has seeped into the Criminal Division's core. And there is no turning back. The FCPA is now a reality that companies know they must live with and adjust to; and this nation is better off for it.[1]

The U.S. Foreign Corrupt Practices Act (FCPA)[2] is a federal criminal and securities law that prohibits bribery of foreign (i.e., non-U.S.) government officials and establishes specified accounting requirements for public companies whose securities are listed on exchanges in the United States. With now over a decade of vigorous enforcement activity, the FCPA is firmly established as the paramount compliance challenge for companies operating internationally.[3] Fines and penalties imposed under the FCPA regularly total tens, or even hundreds, of millions of dollars. Individuals are receiving prison sentences. On the other hand, if not correctly handled, the costs associated with FCPA compliance and investigation can be significant in their own right. Against this background, it is imperative that companies establish cost-effective, risk-based compliance policies and procedures—drawing on internal and external resources as appropriate—to deter, detect, investigate, and, when necessary, remediate potential FCPA violations.

Government contractors' exposure under the FCPA is particularly acute. The business models

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of such companies frequently feature extensive commercial dealings with foreign governments and state-owned entities (SOEs) and/or the need to obtain foreign government licenses and other approvals. Moreover, beyond the already significant fines and penalties under the Act, contractors potentially face serious ancillary and related consequences for an FCPA violation.

This Briefing Paper examines the universe of potential FCPA considerations from the perspective of a government contractor. It first outlines the substantive requirements of the Act and important enforcement trends, i.e., the "FCPA Basics." Second, the Paper describes the potential for suspension or debarment in connection with an FCPA violation.[4] Third, the Paper discusses whether the mandatory disclosure rule of the Federal Acquisition Regulation (FAR)[5] might be read to encompass FCPA violations. Fourth, the Paper addresses the possibility that an FCPA violation or related conduct could lead to a separate violation of the False Claims Act (FCA)[6] based on the "implied certification" theory of liability. Fifth, the Paper discusses the elements of an effective corporate compliance program and a risk-based approach to addressing potential FCPA exposure. Finally, the Paper concludes with a "Guidelines" section, a series of considerations and practical suggestions for government contractors confronting potential FCPA exposure.

The FCPA Basics

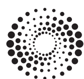
The FCPA consists of two primary components: (1) the anti-bribery provisions in § 30A of the Securities Exchange Act of 1934[7] and in Title 15, U.S. Code,[8] and (2) the books and records and internal accounting control provisions (collectively, "accounting provisions") in § 13(b)(2)(A)[9] and § 13(b)(2)(B)[10] of the Exchange Act, respectively.

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) share overlapping authority to enforce the FCPA. The DOJ is responsible for criminal enforcement of the FCPA.[11] The DOJ also has civil enforcement authority for the FCPA's anti-bribery provisions for (1) "domestic concerns," i.e., U.S. citizens, nationals, and residents, U.S. businesses, and officers, directors, employees, agents, or stockholders acting on a domestic concern's behalf, and (2) certain foreign persons and businesses acting in furtherance of an FCPA violation "while in the territory of the United States."[12] The Fraud Section of the DOJ's Criminal Division, particularly its FCPA Unit, has primary responsibility for FCPA matters.[13]

The SEC is responsible for civil enforcement over "issuers" (publicly listed companies) and officers, directors, employees, agents, or stockholders acting on an issuer's behalf.[14] In 2010, the SEC's Enforcement Division created a specialized FCPA Unit.[15]

■ Anti-Bribery Provisions

In general, the FCPA's anti-bribery provisions prohibit (1) offering, paying, promising to pay, or authorizing the payment of, (2) money or anything of value, (3) to a foreign official, or any other person while knowing that such person will provide all or part of the thing of value to a foreign official, (4) with corrupt intent, (5) for the purpose of either (a) influencing an official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act or decision, (b) inducing a person to do or omit an act in violation of his or her official duty, (c) inducing a foreign official to use his or her influence with a foreign government to affect or influence any government decision or action, or (d) securing an improper advantage, (6) to assist in obtaining or retaining business.[16]

Because companies regularly settle FCPA matters rather than risk the reputational and additional financial harm that might result from unsuccessfully challenging such charges, courts have had few opportunities to render opinions regarding the scope and contours of the Act's requirements. As a result, the government's enforcement positions are announced and, in effect, codified, in connection with the settled FCPA actions, for example, in a DOJ criminal information or an SEC cease-and-desist order. In this environment, the DOJ and the SEC unsurprisingly give broad interpretations to each of the key provisions of the FCPA.

(1) *Anything of Value*. For example, as enforced, the concept "anything of value" covers essentially any form of benefit. The FCPA, therefore, extends to more than simple cash payments in a suitcase and can be violated by the provision of such varied benefits as travel for a foreign official unrelated to a business purpose, excessive gifts or entertainment expenses, scholarships, charitable contributions to organizations affiliated with a foreign official, political donations, or hiring a foreign official's family member.[17] With respect to the latter practice, the DOJ and the SEC are currently investigating—in what some have dubbed the "Princeling Probe"—whether JP Morgan's Hong Kong office hired family members of executives at state-owned companies in China for the purpose of winning business and other contracts.[18] The investigation has spread to Deutsche Bank's practices in China as well.[19]

(2) *Foreign Official*. The term "foreign official" encompasses representatives of a government agency at any level, employees of state-owned enterprises, representatives of political parties, candidates for political office, representatives of international organizations, and, under certain circumstances, members of a royal family.[20] An official at an entity that is controlled by a government, but not majority-owned, may under certain circumstances also constitute a foreign official.[21] Indeed, on several occasions, the United States has even based enforcement actions on payments to private individuals and government entities (as opposed to a government official), either under the accounting provisions or related statutes such as the false statement statute.[22]

(3) *Obtain or Retain Business*. A payment (or provision of anything of value) to "obtain or retain business" is—as the DOJ and the SEC state explicitly in their joint November 2012 publication, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*—"broadly interpreted."[23] Commonly referred to as the "business purpose test," the obtain or retain business requirement captures an extensive range of conduct beyond the classical payment to win a contract award, including a payment to receive or expedite regulatory approval, obtain an advantage in a pending court case, or receive preferential customs treatment.[24] A prominent example of the potentially broad reading of the business purpose test is the FCPA investigation into possibly improper payments made by Wal-Mart Stores Inc. in Mexico and other countries. That investigation involves payments not to win government contracts, but rather related to obtaining zoning approvals, reducing environmental impact fees, and winning the allegiance of neighborhood leaders in connection with the opening of new stores.[25]

The recent Archer-Daniels-Midland Co. (ADM) settlement is a particularly stark illustration of the U.S. government's approach. The ADM matter arose from the company's payments to Ukrainian officials to expedite value-added tax (VAT) refunds.[26] The Ukrainian government, due to a lack of funds, had withheld the tax refunds to which ADM's (indirectly owned) subsidiaries were concededly entitled. The SEC alleged that the payments allowed the ADM subsidiary to receive the refunds "earlier than they would otherwise would have" and that "[g]etting these VAT refunds earlier—before Ukraine endured a brief period of hyperinflation—gave [the subsidiary] a business advantage resulting in a benefit to ADM of roughly $33 million."[27] To be clear, receiving the tax refunds was not the "business advantage" at issue, as the refunds were owed to the ADM subsidiaries. Rather, the earlier than

otherwise payment of the owed funds served purportedly to satisfy the "obtain or retain business" element. Yet, the government did not assert that the Ukrainian government was entitled to delay the refunds, and the benefit appears to have stemmed almost entirely from the fact that the Ukraine experienced a bout of hyperinflation, obviously not a development over which ADM or its subsidiaries had any control.

(4) *Facilitating Payments.* The anti-bribery provisions contain what the *Resource Guide* refers to as "a narrow exception" for "facilitating or expediting payments" made in furtherance of routine governmental action,[28] such as obtaining a permit, license, or other official document, processing governmental papers such as visas and work orders, or providing police protection, mail services, or scheduling inspections.[29]

In practice, the DOJ and the SEC have adopted such a stringent view of what qualifies as a facilitating payment as virtually to read the exception out of the law. Traditionally, it was thought that the key to determining what constitutes "routine government action" was whether the action in question was discretionary. If the act was not discretionary, then it should be deemed routine. Interestingly, the *Resource Guide* echoes this approach.[30] As the ADM settlement illustrates, however, the government's actual calculus for determining whether a payment qualifies as a facilitating payment appears more complex. There, because the VAT refunds were owed to ADM, there was a strong argument that the government officials in question did not enjoy the discretion to refuse to issue the refunds and thus payments to expedite such refunds should constitute facilitation payments. Although there is no direct discussion of the issue, it appears that the government took into account other factors beyond whether the payment of the tax refund was discretionary, such as the amount of money involved, the frequency of payments, the significance of the governmental action in question, and whether the payments were made in a transparent fashion. That the ADM subsidiaries made a series of payments totaling approximately $22 million, through third parties and recorded as insurance premiums, to help obtain $100 million in VAT refunds outweighed the fact that Ukrainian government owed the monies.[31]

The government's constricted view of the facilitating payment exception extends to scenarios involving payments of small amounts of money. For example, the 2010 Panalpina World Transport (Holding) Ltd. FCPA settlement rested, in part, on payments for customs approvals specifically labeled as being of "de minimis amounts."[32] Similarly, the 2007 Dow Chemical Co. settlement involved payments "well under $100" to obtain or expedite registration of the company's products.[33] However, as a practical matter, it is unlikely the government would initiate an enforcement action based on such small amounts unless they were included in a series of payments or as part of an enforcement action involving other conduct that allegedly violated the FCPA.

(5) *Indirect Payments.* Companies operating abroad commonly retain third-party agents who possess the necessary local language skills, knowledge and contacts to help promote the company's business. Frequently, such third parties are paid on a success or commission basis. Although often understandable from a business perspective, such arrangements pose the risk that the third party will make a corrupt payment to a foreign official, for example, splitting its commission with an official in return for favorable treatment for the company for whom the agent works. The anti-bribery provisions expressly prohibit corrupt payments to a foreign official through a third party.[34]

(6) *Constructive Knowledge.* The FCPA's prohibition on corrupt payments through third parties is, in large measure, unsurprising. Many statutes forbid certain types of conduct, whether achieved directly or indirectly. However, when coupled with the government's aggressive interpretation of the Act's knowledge standard, the indirect payment proscription can pose a significant challenge to companies operating internationally. Indeed, the vast majority of FCPA enforcement actions involve payments made by third parties.

Specifically, the FCPA's knowledge standard is broader than actual knowledge; it encompasses the concepts of "conscious disregard" and "willful blindness." Thus, "a person's state of mind is

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'knowing' with respect to conduct, a circumstance, or result" if (a) he or she has actual knowledge of the conduct, circumstance or result, or (b) "a firm belief that such circumstance exists or that such result is substantially certain to occur."[35] In addition, knowledge of a circumstance can be found when there is a "high probability" of the existence of such circumstance.[36] According to the Act's legislative history,[37]

> [T]he so called "head-in-the-sand" problem—variously described in the pertinent authorities as "conscious disregard," "willful blindness" or "deliberate ignorance"—should be covered so that management officials could not take refuge from the Act's prohibitions by their unwarranted obliviousness to any action (or inaction), language or other "signalling device" that should reasonably alert them of the "high probability" of an FCPA violation.

The government thus takes the position that a company that disregards "red flags" of possible corruption has been "willfully blind" to corruption risks and thus should be charged with constructive knowledge of the improper conduct of its third-party agents and other business partners. Moreover, the DOJ and the SEC interpret the concept of red flags so broadly as to include merely doing business in a region known for bribery, at least in the absence of an effective anti-corruption program, including appropriate due diligence on third parties. For example, in an enforcement action stemming from the United Nations Oil-for-Food Programme in Iraq, the SEC noted that "[a]lthough Volvo knew of endemic corruption problems in the Middle East, it appeared to take on faith, without adequate confirming steps, that its managers and employees were exercising their duties to manage and comply with compliance and control issues."[38]

(7) *Ignorance is Not a Defense.* The failure to conduct adequate due diligence on third parties is a frequent basis for determining that a company or individual consciously avoided, and thus has constructive knowledge of, improper payments by those third parties. Ignorance is not a defense. For example, Frederic Bourke—co-founder of the luxury handbags line Dooney & Bourke—made an $8 million investment in the failed privatization of the Azeri state-owned oil company. The business venture was unsuccessful and Bourke lost his entire investment. Bourke, however, was charged for participating in a consortium of investors organized by Viktor Kozeny, an international businessman known as the "Pirate of Prague," who allegedly paid bribes to Azeri officials.[39] Although Bourke consistently denied knowledge of the scheme, he was convicted and received a prison sentence. The prosecuting attorney in Frederic Bourke's trial emphasized in closing that "He [Bourke] didn't ask any of his lawyers to do due diligence."[40] In upholding his conviction, the U.S. Court of Appeals for the Second Circuit concluded: "It was entirely proper for the government to argue that Bourke refrained from asking his attorneys to undertake the same due diligence done by [other potential investors] because Bourke was consciously avoiding learning about the bribes."[41]

The recent $384 million enforcement action against Alcoa, Inc. and its subsidiary similarly rested in large measure on the failure to conduct adequate due diligence. There, the Alcoa subsidiary sales team used an agent, who ultimately was found to have paid bribes to Aluminum Bahrain B.S.C. (Alba), a majority-government owned aluminum smelter, because the agent was "well versed in the normal ways of Middle East business" and "will keep the various stakeholders in the Alba [a government-controlled entity] smelter happy."[42] The government emphasized that "[d]espite the red flags inherent in this arrangement, [the Alcoa subsidiary's] in-house counsel approved the arrangement without conducting any due diligence or otherwise determining whether there was a legitimate business purpose for the use of a third party intermediary."[43]

(8) *Parent Company Liability.* The Alcoa settlement additionally underscores a separate important, new trend in FCPA enforcement. Relying ostensibly on agency principles, the U.S. government has recently held parent companies liable for improper payments made by their subsidiaries even though the parent company neither had knowledge of, nor participated in, the improper payments.

The SEC's cease-and-desist order in the Alcoa enforcement action is explicit: "This Order contains no findings that an officer, director or employee of Alcoa knowingly engaged in the

bribe scheme."[44] The order then describes the factors on which the SEC based its determination that Alcoa's subsidiaries were the agents of the parent corporation. First, Alcoa appointed the majority of seats on a Strategic Council that provided "direction and counsel" to the subsidiaries.[45] Second, Alcoa and a subsidiary transferred personnel between the two companies.[46] Third, Alcoa set the business and financial goals for the subsidiaries and coordinated their legal, audit, and compliance functions.[47] Fourth, the subsidiaries' employees managing the Alba alumina business reported functionally to Alcoa officials.[48] Fifth, Alba was a significant Alcoa customer.[49] Sixth, members of Alcoa senior management met with Alba officials and the third-party agent to discuss matters related to the Alba relationship.[50] Seventh, Alcoa officials were aware that the agent was the subsidiaries' agent and the terms of related contracts were reviewed and approved by senior Alcoa managers.[51]

Each of these allegations, with the possible limited exception of those concerning the agent, relates to Alcoa's control over the subsidiaries as a general matter, rather than Alcoa's participation in, or control, of the specific allegedly improper conduct (as traditional agency principles would require). The assertions related to the agent, moreover, describe what would appear to be unexceptional activities. If the types of factors set forth in the Alcoa order are sufficient to establish parent liability, there will be few circumstances that fail to satisfy the purported "agency" inquiry.

In sum, the FCPA anti-bribery provisions, as interpreted and enforced, capture a wide variety of conduct, and companies may face liability based on the purportedly corrupt actions of its far-flung subsidiaries, third-party agents, and other business partners, even in the absence of participation or even knowledge of those actions.

■ Accounting Provisions

The accounting provisions of the FCPA, which apply to issuers, require corporations, including their non-U.S. subsidiaries, to (a) devise and maintain an adequate system of internal controls for accounting for assets, enabling the preparation of financial statements, and providing "reasonable assurances" that management authorizes transactions and controls access to assets, [52] and (b) make and keep books and records that, "in reasonable detail," accurately and fairly reflect the transactions and disposition of the assets of the corporation.[53] The requirements of the accounting provisions are generic and extend to scenarios that do not involve corrupt payments to foreign officials. In the foreign bribery context, the accounting provisions essentially require public companies to devise controls that are intended to prevent improper payments and, should they occur, prohibit companies from characterizing such payments as legitimate business transactions.

Nominally, the terms "reasonable detail" and "reasonable assurances" indicate a level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.[54] However, in practice, with only rare exceptions, if the SEC determines that an improper payment has occurred, it automatically determines with the benefit of hindsight that a violation of the accounting provisions has taken place. It does so even when the company in question has what would appear to have instituted reasonable controls and one or a few rogue employees violate and circumvent company policies to pay bribes.[55] As with parent company anti-bribery responsibility, the government appears to be moving to a strict liability regime for accounting provisions violations.

■ FCPA Jurisdiction

The U.S. government's view of the reach of the FCPA is expansive. On several occasions, the government has relied on remote, sporadic connections between the alleged improper payment and the United States to establish U.S. jurisdiction.

There are three bases for jurisdiction under the FCPA:

(1) *Domestic Concerns.* The FCPA's anti-bribery provisions apply to U.S. companies and individuals, irrespective of whether they act completely outside of the United States.[56]

(2) *Issuers.* The accounting provisions apply to "issuers"—companies that have securities listed

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on a U.S. exchange—and their officers, directors, employees, agents, and stockholders.[57] Non-U.S. companies that list American Depositary Receipts (ADRs) on a U.S. exchange also constitute issuers.[58] Jurisdiction over issuers under the anti-bribery provisions of the FCPA requires the "use of the mails or any means or instrumentality of interstate commerce in furtherance" of a bribe.[59]

(3) *"Territorial" Jurisdiction.* The FCPA's anti-bribery provisions further apply to a non-U.S. person or entity that engages in an act in furtherance of a corrupt payment "while in the United States."[60] Despite the statutory language, the U.S. government does not interpret the FCPA to require an individual to be physically present in the United States. Rather, it takes the position that the necessary territorial nexus is present whenever U.S. mails or wires are used, even if the conduct at issue otherwise falls wholly outside the United States. For example, an email sent from a person outside the United States to another person outside the United States, but which passed through a U.S. server, has sufficed.[61] Similarly, a wire transfer in U.S. dollars between two non-U.S. banks that cleared through a U.S. correspondent bank has served as grounds for FCPA "territorial" jurisdiction.[62]

Further, the DOJ and the SEC take the position that all non-U.S. entities and individuals involved in an alleged bribery scheme can be subject to FCPA liability if *any* actor in the scheme engages in conduct that satisfies the territorial nexus requirement. The *Resource Guide* states: "[A] foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, *as may any co-conspirators, even if they did not themselves attend the meeting*."[63] Further, the two agencies assert that foreign entities or individuals may be subject to FCPA liability if they aid and abet, conspire with, or act as an agent of an issuer or domestic concern regardless of whether the foreign actor took action within the United States.[64]

■ Fines & Penalties

The FCPA imposes criminal fines and civil penalties. Willful violations of the anti-bribery provisions carry maximum criminal fines of $2 million for organizations and $250,000 for individuals, per violation.[65] Alternatively, a fine of up to twice the pecuniary gain from the offense may apply.[66] Individuals also face up to five years' imprisonment for a willful violation of the anti-bribery violations.[67] Civil penalties for an anti-bribery violation are up to $16,000 for organizations or individuals, per violation.[68] An individual's employer or principal may not pay these fines on the individual's behalf.[69]

For each violation of the accounting provisions, corporations and other organizations are subject to a maximum criminal fine of $25 million and individuals are subject to a maximum criminal fine of $5 million.[70] Under the Alternative Fines Act,[71] a court may instead impose a criminal fine of up to twice the pecuniary gain of the corrupt payments to the defendant. Individuals face imprisonment up to 20 years for willful violations of the accounting provisions.[72] The civil penalties for a violation of the accounting provisions can total either disgorgement of any ill-gotten gains or specified penalties ranging up to $775,000 for organizations and $10,000 for individuals.[73]

As noted above, the fines and penalties for FCPA violations can be staggering. In November 2008, Scott Friestad, then-Deputy Director of Enforcement for the SEC, announced that "[t]he dollar amounts in [FCPA] cases that will be coming within the next short while will dwarf the disgorgement and penalty amounts that have been obtained in prior cases."[74] The words were prophetic. The next month, Siemens AG entered into the largest anti-bribery settlement to date, paying $800 million in combined penalties to the DOJ and the SEC.[75] Together with various penalties imposed in Germany, Siemens' penalties totaled more than $1.6 billion.[76] Several nine figure settlements have followed, including Kellogg Brown & Root LLC /Halliburton Company ($579 million),[77] BAE Systems plc (BAES) ($400 million),[78] Total S.A. ($398 million),[79] and, earlier in 2014, Alcoa ($384 million).[80] Settlements in the tens of millions of dollars are even more common, such as the recent over $54 million in penalties for ADM[81] and $88 million fine for Marubeni Corporation.[82]

The costs of an FCPA violation, moreover, are not confined to the fines, penalties, and disgorgement imposed in a settlement. Investigative costs can skyrocket as well. The tale of Wal-Mart and its ongoing expenses has captured headlines. In

March 2014, Wal-Mart announced that it spent $439 million in the previous two years to investigate the possible payment of foreign bribes.[83] Earlier in the year, Wal-Mart projected that the FCPA probe and compliance costs would total between $200 million and $240 million for fiscal 2015.[84] Similarly, the investigative costs for Avon Products Inc. reportedly reached $340 million.[85] Avon has agreed to pay significantly less than that figure, though the still hefty sum of $135 million, to settle its FCPA charges.[86] Thus, the company's investigative costs totaled more than twice its actual liability for the alleged violations.

In 2010, the DOJ announced that the "prosecution of individuals is a cornerstone of our [FCPA] enforcement strategy."[87] Although there is some debate as to whether the number of individual prosecutions has been sufficient, there can be no doubt that the pace of such prosecutions has increased dramatically. For example, 89 individuals have been charged with FCPA violations since 2008; that number is more than twice that of the previous 10 years.[88] Defendants, moreover, are serving substantial prison time for FCPA violations—in one instance, 87 months.[89]

Perhaps in response to pressure over the perceived lack of individual prosecutions in the wake of the 2008–2009 financial crisis, Marshall L. Miller, the Principal Deputy Assistant Attorney General for the Criminal Division, emphasized in a recent speech that the DOJ's corporate cooperation analysis will hinge to a greater degree than before on a company's assistance in identifying specific employees who are responsible for corrupt payments. "If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation. Make those efforts the last thing you talk about before you walk out. And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely."[90]

There can be no doubt that the costs of an FCPA violation are steep.

■ Enforcement Methods

Traditionally, most FCPA enforcement actions were initiated when a company voluntarily self-reported a potential violation. The company's counsel and forensic accountants played a significant role in investigating the matter and then reported to and negotiated with the DOJ and the SEC to seek a resolution. Although self-reporting remains an important source of information, the government has been increasingly employing more traditional law enforcement methods in prosecuting FCPA violations as well. As Principal Deputy Assistant Attorney General Miller stated:[91]

> And in today's Criminal Division, we are vigorously employing proactive investigative tools that may not have been used frequently enough in white collar cases in past years: tools like wiretaps, body wires, physical surveillance, and border searches, to name just a few.
>
> In one recent fraud investigation, Frederic Cilins, a French citizen, was captured on tape directing a witness to "destroy everything, everything, everything," and saying that "we need to urgently, urgently, urgently destroy all of this." Unbeknownst to Mr. Cilins, his trusted cohort was actually a witness working for the FBI, and his obstructive instructions were captured on tape. Faced with that damning evidence, Cilins recently pleaded guilty to [obstructing an FCPA investigation].
>
> Similarly, in another recent Foreign Corrupt Practices Act (FCPA) investigation, a group of executives at BizJet International, a US-based subsidiary of the Lufthansa corporation, engaged in a scheme to funnel bribes to Mexican and Panamanian officials. When one of the conspiring executives began cooperating with the investigation, he wore a body wire and recorded the scheme's participants as they plotted. The result: four executives and BizJet have now been charged with FCPA crimes; three of them—including the chief executive officer (CEO) and president—have pled guilty; and Bizjet entered into an eight-figure deferred prosecution agreement, admitted the full scope of its criminal conduct, replaced its leadership team, and overhauled its compliance programs.

Another potentially important source of FCPA investigations are the whistleblower provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.[92] Codified as § 21F of the Securities Exchange Act of 1934, the whistleblower provision provides for the SEC to reward individuals who provide "original information" leading to the successful prosecution of securities law violations.[93] Specifically, the whistleblower is entitled to at least 10% and up to 30% of the monetary sanctions imposed if the recovery

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exceeds $1 million.[94] It remains too early to assess the effect of the whistleblower program, as it typically takes a number of years for an FCPA enforcement action to be resolved. The SEC, however, has released statistics regarding the number of whistleblower tips it is receiving relating to possible FCPA violations. In Fiscal Year (FY) 2013, 149 tips related to the FCPA.[95] In FY 2012, the SEC received 115 such tips.[96]

Suspension & Debarment From U.S. Federal Government Contracting

In addition to the steep criminal fines and civil penalties discussed above, a government contractor that violates the FCPA may face substantial collateral consequences, perhaps most prominently, suspension or debarment from contracting with the U.S. federal government.[97] Suspended or debarred contractors are publicly blacklisted and precluded from receiving future contracts and obtaining subcontract work.[98] Suspension and debarment have become more common. The Government Accountability Office recently reported that suspension and debarment activity has increased with the number of actions more than doubling from 1,836 in FY 2009 to 4,812 in FY 2013.[99] For companies doing business with the U.S. federal government, these penalties could be a death knell.

The FAR establishes the policies and procedures governing suspension and debarment actions related to federal contracts.[100] The Nonprocurement Common Rule (NCR) establishes the policies and procedures governing suspension and debarment for discretionary nonprocurement awards (e.g., grants, cooperative agreements, scholarships, or other assistance).[101] The FAR and the NCR enumerate several potential bases for suspension or debarment, including bribery, falsification, destruction of records, false statements, and any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the contractor's present responsibility.[102]

Suspension and debarment are discretionary tools designed to safeguard the government's interest and are not intended to punish a contractor for misconduct.[103] Suspension is a temporary exclusion from contracting, pending the completion of legal proceedings or the government's investigation of the allegations.[104] A suspension may not exceed one year, unless the contractor has been indicted, or the DOJ requests an extension for an additional six-month period to enable the completion of the investigation.[105] Debarment must be for a period commensurate with the seriousness of the underlying causes, but generally, in the absence of a stated exception, should not exceed three years.[106] Debarment and suspension extend to all divisions and organizational elements of the contractor, unless the decision is limited to specific divisions, and may extend to affiliates of the contractor.[107] Persons or entities are generally affiliates of each other if either has the power to control the other, or a third party has power to control both.[108]

The decision to debar or suspend a contractor is made by the Suspending and Debarring Official (SDO) of the relevant government agency, such as the Department of Defense or the Department of Health and Human Services. The SDOs examine a number of factors to determine whether a company or individual should be suspended or debarred including, but not limited to, whether the contractor (1) had effective standards of conduct and internal control systems in place at that time of the misconduct, (2) self-reported the misconduct in a timely manner, (3) cooperated fully with government agencies during the investigation and any court or administrative action, and (4) has implemented or agreed to implement remedial measures.[109]

Notably, SDOs take the position that the misconduct leading to suspension or debarment need not have occurred in connection with a government contract. For example, in a statement on the debarment and suspension system before the U.S. Senate Committee on Homeland Security and Governmental Affairs, David M. Sims, the chair of the U.S. federal government's Interagency Suspension and Debarment Committee, asserted that "the misconduct in question need not have actually occurred under a Federal contract or assistance agreement."[110] Similarly, Rodney A. Grandon, the SDO of the Department of Air Force, asserted that SDOs may suspend a contractor based on adequate evidence of the

commission of specified crimes or other specified misconduct "even where the conduct is unrelated to a government contract (*e.g.*, a matter involving violation of the Foreign Corrupt Practices Act.)"[111] A company that does business with the U.S. federal government could thus potentially face suspension or debarment for an FCPA violation, even if the violation is unrelated to the company's government contracts.

To avoid suspension or debarment, a contractor's actions following the discovery of an FCPA violation can be crucial. The discretionary nature of the process provides an opportunity for a contractor to work with the DOJ and appropriate SDO. Although the DOJ lacks the authority to prevent suspension or debarment, it shapes the resolution of the FCPA matter and contracting agencies may consult with the DOJ in advance of making suspension or debarment decisions.[112] Instead of instituting a legal proceeding which may lead to an indictment that triggers a suspension or debarment proceeding, the DOJ may agree to resolve an FCPA matter either through a negotiated resolution resulting in a plea agreement, deferred prosecution agreement (DPA), or nonprosecution agreement (NPA). In these settlement negotiations, the DOJ may provide information to contracting authorities about the facts and circumstances underlying the criminal conduct and remedial measures undertaken by the company to assist the company to avoid suspension and debarment.[113]

It is worth noting that the discretionary suspension and debarment regime has been called into question with respect to FCPA violations. In 2010–2012, U.S. Representative Peter Welch (D-VT) proposed an initial and revised bill, the Overseas Contractor Reform Act (H.R. 5366 and H.R. 3588), and an amendment to the House version of the National Defense Authorization Act for FY 2012 (H.R. 1540) that would require any person or company that violates the antibribery provisions of the FCPA to be proposed for debarment from all federal contracts and grant awards.[114] Those entities or individuals would then be prohibited from receiving any federal contracts or grants unless and until they persuade government contracting officials that they are currently responsible contractors despite the FCPA violation. The debarment would occur regardless of whether the FCPA violation was in connection with a government contract or grant.

The proposed "mandatory debarment" for FCPA violations was criticized, in part, because there were significant questions regarding how the system would work in practice.[115] The bill required a proposed debarment only after a final "judgment" finding an FCPA violation; however, it was unclear whether the bill would apply to voluntary disclosures of FCPA violations that resulted in an NPA or DPA, as such resolution vehicles typically do not result in a finding or judgment of an FCPA violation.

In addition, the DOJ expressed its opposition to mandatory debarment stating that such a regime "would likely be counterproductive, as it would reduce the number of voluntary disclosures and concomitantly limit corporate remediation and the implementation of enhanced compliance programs."[116] According to the DOJ, a mandatory debarment program could also negatively impact prosecutorial discretion and the flexibility to reach an appropriate resolution given the facts and circumstances of each individual case.[117] Ultimately, Representative Peter Welch's Overseas Contractor Reform Act died and, to date, has not been resurrected.

Mandatory Disclosure Rule

Effective December 12, 2008, the FAR was amended to implement a mandatory disclosure rule for government contractors.[118] The new rule was a "sea change" and "major departure" from the former contractor self-governance approach of voluntary disclosure.[119] The mandatory disclosure rule generally requires contractors to disclose to the relevant Inspector General and Contracting Officer instances when, in connection with a government contract, the contractor has "credible evidence" of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code or a violation of the civil False Claims Act or a "significant overpayment" on a government contract.[120] Failure to disclose any such violation is grounds for suspension or debarment.[121]

Although several years have passed since the promulgation of the mandatory disclosure rule,

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there remains a degree of confusion regarding the rule's application. The rule uses broad and undefined terms and its disclosure requirements relate to complex statutes. For example, the FAR does not define "credible evidence." The credible evidence standard was introduced in the final rule as a means of reducing the number of required disclosures. The original version of the proposed rule required disclosure whenever a contractor "had reasonable grounds to suspect a violation of criminal law."[122] The preamble to the final rule provides no guidance of when evidence should be considered "credible," other than stating that the credible evidence standard is "a higher standard, implying that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose to the Government."[123]

The mandatory disclosure rule limits the types of reportable conduct to "a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code," "a violation of the civil False Claims Act," or a "significant overpayment" on a government contract. The "fraud, conflict of interest, bribery, or gratuity violations" listing, however, is deceptively short because there are myriad violations under Title 18 that relate to these four types of criminal conduct. For instance, there are approximately 80 criminal statutes found in Title 18 that arguably involve fraud.[124] The Title 18 chapter "Bribery, Graft, and Conflicts of Interest" includes over 15 different criminal offenses.[125] A contractor may risk suspension or debarment if the contractor has credible evidence of such fraud or bribery violations and applies, in the eyes of the government, too narrow an analysis of what constitutes a reportable criminal fraud or bribery violation.[126]

It is conceivable that the government could take the position that a contractor must disclose an FCPA violation (found in Title 15 of the U.S. Code) even though there is no explicit requirement under the FAR to do so.[127] An FCPA violation may include or give rise to criminal violations, including secondary criminal violations, found in Title 18. Specifically, conduct that violates FCPA's anti-bribery or accounting provisions may also violate the Travel Act (18 U.S.C.A § 1952), mail and wire fraud statutes (18 U.S.C.A. §§ 1341–1343), fraud and false statements statutes (18 U.S.C.A. § 1001 et seq.), or the conspiracy statute (18 U.S.C.A. § 371).

Several FCPA cases have included alleged violations under those statutes. For example, the Travel Act prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity.[128] "Unlawful activity" includes violations of the FCPA. The DOJ has previously charged both individual and corporate defendants in FCPA cases with violations of the Travel Act.[129] Frederic Bourke was convicted of conspiracy to violate the FCPA and the Travel Act in 2009 where the relevant "unlawful activity" under the Travel Act was an FCPA violation involving a bribery scheme in Azerbaijan.[130]

In addition, many FCPA cases involve violations of mail and wire fraud statutes when communications or money are sent through U.S. mail, telephone, computer, or banking systems. For instance, in 2006, a wholly-owned foreign subsidiary of Schnitzer Steel, a U.S. issuer, pleaded guilty to both FCPA and wire fraud counts when the alleged scheme included overbilling the subsidiary's government and private customers and using part of the overcharged money to pay kickbacks to the customers' employees. The wire fraud charges alleged that the subsidiary had funds wired from its parent's Oregon bank account to off-the-books bank accounts in South Korea that were controlled by the subsidiary. The funds, amounting to almost $2 million, were then paid to managers of state-owned and private steel production companies in China and South Korea as illegal commission payments and kickbacks that were disguised as refunds, commissions, and other seemingly legitimate expenses.[131]

Lastly, licensing, certification, and reporting requirements imposed by the U.S. government can be implicated in the foreign bribery context. For example, the Export-Import Bank of the United States requires U.S. suppliers to make certifications concerning commissions, fees, or other payments paid in connection with the financial assistance and that it has not and will not

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violate the FCPA.[132] A false certification in this area may give rise to criminal liability for false statements under Title 18 and possibly trigger the mandatory disclosure rule.[133]

Implied Certification Theory

An FCPA violation could also potentially lead to a separate violation under the civil False Claims Act (FCA) based on the "implied certification" theory of liability.[134] The FCA subjects a contractor to civil liability if the contractor, among other things, knowingly makes false statements material to a false claim or knowingly makes false statements to get false or fraudulent claims paid or approved.[135] A claim is a demand for money or property made (a) directly to the U.S. federal government or (b) to a contractor, grantee, or other recipient if the money is to be spent on the government's behalf and if the government provides any of the money demanded or if the government will reimburse the contractor or grantee.[136] The FCA does not require specific intent to defraud.[137] Instead, the FCA defines "knowingly" to include acts taken with "actual knowledge of the information" or in "deliberate ignorance" or "reckless disregard of the truth or falsity of the information."[138]

In the U.S. government procurement context, contractors often submit certificates of compliance when seeking payment from the government for services rendered. These certificates may, but more often do not, include references to specific contract terms or regulations. Under the doctrine of implied certification, a mere request for payment implicitly represents material compliance with the contract, as well as relevant statutes and regulations, even if there is no explicit reference in the certification to the specific contract term, statute, or regulation. In other words, under the implied certification theory, a contractor can be held liable under the FCA when an underlying violation of law causes the entire claim to be viewed as tainted.

Courts have held that FCA liability can attach when a contractor submits a claim without disclosing information regarding its noncompliance with material contract terms and with relevant statutes and regulations. The seminal implied certification case is the U.S. Court of Federal Claims' 1994 decision in *Ab-Tech Construction, Inc. v. United States*.[139] There, Ab-Tech contracted with the Small Business Administration for the construction of a facility for the U.S. Army Corps of Engineers pursuant to the Small Business Act, which is designed to assist minority-owned businesses. Although the contract required that Ab-Tech not enter into any management or joint venture agreements without government approval, Ab-Tech entered into a prohibited co-management agreement with one of its principal subcontractors, a non-minority owned enterprise. Ab-Tech subsequently submitted claims for payment to the government and filed a lawsuit seeking an equitable adjustment for allegedly extra work it was required to perform.[140] When the government learned that Ab-Tech had a relationship with a non-minority owned enterprise, it filed a counterclaim under the FCA to recover payments made to Ab-Tech during the noncompliance period. Although the payment vouchers that Ab-Tech submitted to the government did not contain any express misrepresentation, the court held the "payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the [minority-owned business] program."[141] The court further explained that "the Government was duped by Ab–Tech's active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of a false claim."[142]

Following the *Ab-Tech Construction* decision, federal courts of appeals have issued differing opinions regarding the validity and scope of the implied certification theory. The Second, Third, Sixth, Ninth, Tenth, Eleventh, District of Columbia, and Federal Circuits have recognized the implied certification doctrine, but have given it varying breadth.[143] The First Circuit appears to have adopted a broad view of FCA liability, but has declined to recognize a difference between express and implied certifications.[144] The Fourth Circuit has expressed hesitation about the validity of the implied certification doctrine.[145] In the Fifth, Seventh, and Eighth Circuits, the implied certification theory is not yet recognized, but has not been foreclosed, as a basis for liability under the FCA.[146] The Supreme Court has not yet weighed in on the implied certification

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doctrine despite its opportunity to do so in several cases.[147] Today, the implied certification theory is aggressively used by the government and qui tam relators and remains a risk area for government contractors under the FCA and potentially under many U.S. statutes—including the FCPA.

Courts have permitted FCA claims to go forward alleging that contractors implicitly certified compliance with statutes referenced in their contracts. In *United States ex rel. Hutcheson v. Blackstone Medical, Inc.*, the First Circuit held that the implied certification theory reached any undisclosed violation of a contractual, statutory, or regulatory provision material to the government's decision to pay, such as the Anti-Kickback Statute (AKS).[148] The AKS is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the general health care programs (e.g., drugs, supplies, or health care services for Medicare or Medicaid patients).[149] In this case, the relator, Hutcheson, alleged that Blackstone Medical paid kickbacks to hospitals and doctors in exchange for pledges to use the company's products on Medicare and Medicaid patients. Hutcheson argued that Blackstone's kickbacks violated the AKS and caused hospitals and doctors to submit false or fraudulent claims because compliance with the AKS was "a condition of receiving payment from federally-funded healthcare programs, including Medicare, Medicaid, and TRICARE."[150] The court held that Hutcheson's allegations were sufficient to state a claim under the implied certification theory of the FCA.[151]

United States ex rel. Head v. Kane Co. involved FCA counts alleging a contractor scheme to violate the Service Contract Act (SCA).[152] The SCA is a statute that requires federal service contractors to compensate nonexempt personnel at prevailing wage and fringe benefit rates that exceed the federal minimum wage.[153] The U.S. District Court for the District of Columbia held that an allegation that the contractor implicitly and falsely represented that it would comply with SCA's wage requirements was sufficient to state false certification claims against the contractor under the FCA.[154]

In light of these decisions, contractors must be familiar with the terms of their government contracts. To determine potential FCPA implied certification liability, a contractor should confirm whether the FCPA or similar anti-bribery requirements are referenced in its government contracts. If the FCPA is referenced in the contract, it may be found to be a term material to the government's decision to pay a claim.

Even if the FCPA is not referenced directly in the contract, the conduct underlying an FCPA violation may be read to violate other contractual provisions, such as FAR 52.203-7 ("Anti-Kickback Procedures" clause) and FAR 52.203-13 ("Contractor Code of Business Ethics and Conduct" clause). The Anti-Kickback Act (AKA) imposes liability on any person who makes a payment to any other person involved in the federal procurement process for the purpose of obtaining favorable treatment.[155] The AKA defines the term "kickback" as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to" a prime or subcontractor or its employees "to improperly obtain or reward favorable treatment in connection with a prime contract or subcontract relating to a prime contract."[156] It is not uncommon that actors involved in an FCPA violation are simultaneously engaged in other improper payment schemes with vendors or customers, activities that may run afoul the AKA.

Moreover, as discussed above, the mandatory disclosure rule found in FAR 52.203-13 requires contractors to alert the government to instances when, in connection with a government contract, the contractor has credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the U.S. Code, or a violation of the civil False Claims Act or a significant overpayment on a government contract.[157] Thus, the government could potentially argue that a contractor that implicitly certifies compliance with FAR 52.203-13, a common contract provision, and fails to report an FCPA violation is liable under the FCA through the implied certification theory.

Cost Effective, Risk-Based Compliance Programs

Corporate compliance programs are critical to help discover, prevent, investigate, and remedy FCPA

(as well as other compliance) violations. Further, the existence and effectiveness of a corporation's preexisting compliance program is an important factor that SDOs consider when making suspension or debarment decisions and the DOJ and the SEC consider when conducting an FCPA investigation, determining whether to charge a corporation, and negotiating plea or other agreements.[158]

The FAR imposes certain requirements on government contractors with respect to their compliance programs. As a general matter, contractors must "conduct themselves with the highest degree of integrity and honesty."[159] For contracts valued at over $5 million with a period of performance of 120 days or more,[160] contractors must within 30 days after contract award (a) have a written code of business ethics and conduct, (b) provide a copy of the code to each employee engaged in the performance of the contract, (c) exercise due diligence to prevent and detect criminal conduct, and (d) promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.[161]

In addition, large business contractors must establish within 90 days after contract award an ongoing business ethics awareness and compliance program and an internal control system.[162] The business ethics awareness and compliance program must include reasonable steps to communicate periodically the contractor's business ethics awareness and compliance program and internal control system by conducting effective training programs and otherwise disseminating information to principals, employees, agents, and subcontractors.[163] The internal control system must establish standards and procedures to facilitate timely discovery of improper conduct in connection with government contracts and ensure corrective measures are promptly carried out.[164]

At a minimum, the contractor's internal control system should (1) assign responsibility for the business ethics awareness and compliance program at a sufficiently high level and assign adequate resources to ensure effectiveness of the compliance program, (2) provide for periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the contractor's code of business ethics and the special requirements of government contracting, (3) provide an internal reporting mechanism such as a hotline, by which employees may report with anonymity or confidentiality suspected instances of improper conduct and instructions that encourage employees to make such reports, (4) provide for disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct, and (5) provide for full cooperation with any government agencies responsible for audits, investigations, or corrective actions.[165]

Beyond the FAR requirements, the DOJ and the SEC have provided important guidance regarding effective FCPA compliance programs. Building on the U.S. Sentencing Guidelines and other sources, the agencies identify 10 "hallmarks of an effective compliance program" in the *Resource Guide*.[166]

(1) *Appropriate "Tone at the Top."* There must be commitment to compliance from senior management and a clearly articulated policy against corruption. "In short, compliance with the FCPA and ethical rules must start at the top. DOJ and SEC thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization." [167]

(2) *Code of Conduct and Compliance Policies and Procedures.* Effective codes of conduct are "clear, concise, and accessible to all employees and to those conducting business on the company's behalf."[168] They "require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographic risks. Among the risks that a company may need to address include the nature and extent of transactions with foreign governments, including payments to foreign officials; use of third parties; gifts, travel, and entertainment expenses; charitable and political donations; and facilitating and expediting payments."[169]

(3) *Oversight, Autonomy, and Resources.* Companies should assign responsibility for oversight and implementing their compliance programs to one or more specific senior executives. Such executives must have adequate autonomy from management, appropriate authority and seniority to ensure that his or her views are taken seriously

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within the organization and sufficient resources to ensure effective implementation. "Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee)."[170]

(4) *Risk Assessment.* In a topic addressed below in more detail, companies should develop comprehensive and risk-based compliance programs. "Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants, or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective."[171] "As a company's risk for FCPA violations increases, that business should consider increasing its compliance procedures, including due diligence and periodic internal audits."[172]

(5) *Training and Continuing Advice.* Companies should provide periodic training for all directors, officers, relevant employees, and, when appropriate, agents and business partners.[173]

(6) *Incentives and Disciplinary Measures.* Enforcement of a compliance program is fundamental to its effectiveness. The program "should apply from the board room to the supply room—no one should be beyond its reach."[174] A company should have clear disciplinary procedures that are applied consistently and promptly applied. Positive incentives, such as promotions and rewards, can also drive compliant behavior.

(7) *Third-Party Due Diligence and Payments.* "DOJ's and SEC's FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company's compliance program."[175]

(8) *Confidential Reporting and Internal Investigation.* "An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation."[176]

(9) *Continuous Improvement.* Companies should review and improve their compliance programs regularly, especially in light of "lessons learned" from reported violations, changes in operations or customers, and enforcement actions brought against other companies.[177]

(10) *Pre-Acquisition Due Diligence and Post-Acquisition Integration.* The DOJ and the SEC emphasize the importance of effective anti-corruption due diligence in the merger and acquisition context, an activity frequently giving rise to FCPA liability.[178]

The FAR requirements and *Resource Guide*'s hallmarks set forth fundamental principles for effective compliance programs that contractors should absorb and incorporate. However, the guidance sheds little light on some of the most difficult questions regarding FCPA compliance. How does a company implement the above requirements and recommendations? How much is enough?

As detailed above, the liability risks and potential collateral consequences of an FCPA violation can be dire. Yet, the potential investigative and compliance costs, if mishandled, can be crippling. A risk-based approach to FCPA compliance helps balance these competing needs in a cost effective manner.

At the heart of such an approach is conducting an assessment of the potential corruption exposure associated with the company's various operations and business partners and tailoring the company's compliance measures, at least initially, to focus on those activities and third parties that pose the most significant risk. Such a risk analysis examines a variety of factors including:

(a) Geographic region (reputation for corruption);

(b) Sales to foreign government customers or SOEs;

(c) Use of third parties;

(d) Nature of the relationship with the third party (e.g., joint venture, commercial sales agent, supplier);

(e) Any specific allegations or concerns regarding a third party regarding improper conduct, suspect affiliations, or connections with foreign officials;

(f) Any specific corruption concerns or track records of difficulties relating to a particular region, business function or type of commercial activity (i.e., "lessons learned" from past operations);

(g) Need for significant foreign government licenses or approvals;

(h) Newly acquired companies; and

(i) Volume of business involved.

Thus, for example, activities involving significant sales to foreign government or SOEs in countries known to pose a substantial corruption risk, particularly sales through third parties, would call for more robust due diligence and other compliance measures. By contrast, when the activities in question lack one or more of those features, more moderate steps may suffice.

The risk assessment can often be best performed by a combination of internal and external resources working as a team. Internal resources will be more familiar with a company's operations and can often be more cost effective for certain tasks. External experts will likely have greater subject area expertise, as well as a greater degree of perceived independence from company management, which may assist in justifying why certain compliance measures were prioritized over others if ever challenged by regulators. However, outside counsel, if not used properly, can be expensive.

The assessment can often be phased. Once the potentially highest risk operations and regions are identified, the company can review its existing compliance policies and procedures for those operations and regions. If the review concludes that existing policies are effective, the company will be better situated to explain why more robust measures were not implemented for the lower risk areas. For example, if enhanced due diligence concerning the potentially higher risk third parties demonstrates that the corruption exposure is less than originally perceived (due to the nature of the company's operations, the structure of the relationships or otherwise), the company could incorporate those lessons into its third-party due diligence regime, perhaps restricting the enhanced due diligence to those cases in which a specific corruption concern arises.

By contrast, if it appears that existing policies have not fully addressed corruption concerns, additional measures can be implemented for the higher risk operations. The company may determine that a review of medium- and lower-risk operations is appropriate. Thus, continuing the above example, if the initial third-party due diligence revealed greater concerns than anticipated, enhanced due diligence might be apposite for a broader pool of third parties than originally envisioned.

Such a phased, risk-based approach helps a company effectively assess its potential FCPA exposure at a reasonable cost, detect and deter improper conduct, and, if alleged improprieties occur, rationally justify the measures it has undertaken in response to the inevitable assertion of "willful blindness," hopefully avoiding liability and, at a minimum, reducing any fines or penalties that might be levied.

GUIDELINES

These *Guidelines* are intended to provide guidance regarding potential FCPA risks and compliance issues. They are not, however, a substitute for professional representation in any specific situation.

1. Recognize that the government aggressively enforces the FCPA, including to a greater degree than ever through traditional law enforcement measures such as wire taps and informants.

2. Keep in mind that the SEC has implemented a program that can provide whistleblowers substantial awards.

3. Be aware that the FCPA's prohibition on indirect corrupt payments coupled with the U.S. government's aggressive interpretation of the Act's constructive knowledge standard renders the use of third parties a primary risk area.

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4. Be cognizant that parent companies may face FCPA liability based on the conduct of their subsidiaries of which the parent company has no knowledge.

5. Bear in mind that a contractor may face suspension or debarment based on an FCPA violation that is unrelated to the company's government contracts.

6. Remember that potential FCPA violations may give rise to mandatory disclosure obligations.

7. Be aware that conduct underlying an FCPA violation could potentially implicate liability under the False Claims Act under an implied certification theory.

8. Implement appropriately tailored compliance programs, policies, and procedures that allocate resources according to a company's risk profile, based on such factors as industry, geographic region, sales to foreign governments and state-owned entities, and the use of third parties.

★ REFERENCES ★

1/ Lanny A. Breuer, Assistant Att'y Gen., Address at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html.

2/ 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff.

3/ See generally Tillipman, "Gifts, Hospitality & the Government Contractor," Briefing Papers No. 14-7 (June 2014); Irwin & Best, "Integrating Domestic & International Compliance: Considerations & Strategies for Government Contractors," Briefing Papers No. 13-13 (Dec. 2013); Shaw, Wagner & Nichols, "Contractor Responsibility: Toward an Integrated Approach to Legal Risk Management," Briefing Papers No. 13-4 (Mar. 2013); Frey, Heifetz, Irwin, Navarre, Rathbone & Smith, "Compliance Issues Associated With Private Security Contracting in Support of the U.S. Government," Briefing Papers No. 12-12 (Nov. 2012); Tillipman, "The Foreign Corrupt Practices Act & Government Contractors: Compliance Trends & Collateral Consequences," Briefing Papers No. 11-9 (Aug. 2011).

4/ See FAR subpt. 9.4.

5/ See FAR subpt. 3.10, 52.203-13.

6/ 31 U.S.C.A. §§ 3729–3733.

7/ Codified at 15 U.S.C.A. § 78dd-1.

8/ 15 U.S.C.A. §§ 78dd-2, 78dd-3.

9/ Codified at 15 U.S.C.A. § 78m(b)(2)(A).

10/ Codified at 15 U.S.C.A. § 78m(b)(2)(B).

11/ See DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 4 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

12/ 15 U.S.C.A. §§ 78dd-2, 78dd-3; see DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 4 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

13/ See DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 4 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

14/ See DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 4–5 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

15/ See DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 4–5 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

16/ See 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

17/ See, e.g., Order, In the Matter of Stryker Corp., File No. 3-15587 (SEC Oct. 24, 2013), available at http://www.sec.gov/litigation/admin/2013/34-70751.pdf; Complaint, Sec. & Exch. Comm. v. UTStarcom, Inc., Case No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), available at https://www.sec.gov/litigation/complaints/2009/comp21357.pdf. See generally DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 14–15 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

18/ Silver-Greenberg & Protess, "Chinese Official Made Job Plea to JPMorgan Chase Chief," DealBook (Feb. 9, 2014, 10:06 PM), http://dealbook.nytimes.com/2014/02/09/chinese-official-made-job-plea-to-jpmorgan-chase-chief/.

19/ Schuetze, "Regulators Investigate Deutsche Bank in China 'Princeling' Probe," Reuters (June 5, 2014, 12:56 PM), http://www.reuters.com/article/2014/06/05/us-deutsche-bank-princelings-idUSKBN0EG2BX20140605.

20/ See 15 U.S.C.A. §§ 78dd-1(a)(1)–(3), ((f)(1), 78dd-2(a)(1)–(3), (h)(2), 78dd-3(a)(1)–(3), (f)(2); DOJ, Foreign Corrupt Practices Act Review, Opinion Procedure Release No. 12-01 (Sept. 18, 2012), available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf; United States v. Esquenazi, 752 F.3d 912 (11th Cir. 2014). See generally DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 19–21 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

21/ Information at ¶ 21, United States v. Alcatel-Lucent France, S.A., Case No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf.

22/ See, e.g., Order, In the Matter of Schnitzer Steel Indus., File No 3-12456 (SEC Oct. 16, 2006), available at https://www.sec.gov/litigation/admin/2006/34-54606.pdf; Information, United States v. York Int'l Corp., Case No. 1:07-cr-253-RJL (D.D.C. Oct. 1, 2007), available at http://www.justice.gov/criminal/fraud/fcpa/cases/york/10-01-07york-info.pdf; see also 18 U.S.C.A. § 1001.

23/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 12 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

24/ See, e.g., Information, United States v. Vetco Gray Controls, Inc., Case No. 4:07-cr-4 (S.D. Tex. Jan. 5, 2007), available at http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls/02-06-07vetcogray-info.pdf; United States v. Kay, 513 F.3d 432 (5th Cir. 2007), cert. denied, 555 U.S. 813 (2008).

25/ Barstow, "Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle," N.Y. Times (Apr. 21, 2012), http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all&_r=0.

26/ Letter from Eugene Miller, Assistant U.S. Att'y & Daniel S. Kahn, Trial Att'y to William J. Bachman & Jon R. Fetterolf, Attachment A, ¶ 10 (Dec. 20, 2013), available at http://www.justice.gov/criminal/fraud/fcpa/cases/archer-daniels-midland/adm-npa.pdf.

27/ Complaint at ¶ 38, SEC v. Archer-Daniels-Midland Co., Case No. 2:12-cv-2279 (D. Cen. Ill. Dec. 20, 2013), available at https://www.sec.gov/litigation/complaints/2013/comp-pr2013-271.pdf.

28/ 15 U.S.C.A. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b); see DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 25 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

29/ 15 U.S.C.A. §§ 78dd-1(f)(3), 78dd-2(h)(4), 78dd-3(f)(4).

30/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 25 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

31/ See Complaint at ¶ 1, SEC v. Archer-Daniels-Midland Co., Case No. 2:12-cv-2279 (D. Cen. Ill. Dec. 20, 2013), available at https://www.sec.gov/litigation/complaints/2013/comp-pr2013-271.pdf.

32/ Deferred Prosecution Agreement at ¶ 23, United States v. Panalpina World Transp. (Holding) Ltd., (S.D. Tex. Nov. 4, 2010), available at http://www.justice.gov/sites/default/files/opa/legacy/2010/11/04/panalpina-world-transport-dpa.pdf.

33/ Order at ¶ 9, In the Matter of Dow Chem. Co., File No. 2-12567 (SEC Feb. 13, 2007), available at https://www.sec.gov/litigation/admin/2007/34-55281.pdf.

34/ 15 U.S.C.A. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

35/ See 15 U.S.C.A. §§ 78dd-1(f)(2)(A), 78dd-2(h)(3)(A), 78dd-3(f)(3)(A).

36/ See 15 U.S.C.A. §§ 78dd-1(f)(2)(B), 78dd-2(h)(3)(B), 78dd-3(f)(3)(B).

37/ H.R. Rep. No. 100-576, at 920 (1988) (Conf. Rep.), reprinted in 1988 U.S.C.C.A.N. 1547, 1953.

38/ Complaint at ¶ 32, SEC v. AB Volvo, Case No., 1:08-cv-473 (D.D.C. Oct. 20, 2008), available at http://www.sec.gov/litigation/complaints/2008/comp20504.pdf.

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39/ Vardi, "Founder Of Dooney & Bourke Gets Jail In Bribery Case," Forbes (Nov. 10, 2009, 4:20 PM), http://www.forbes.com/2009/11/10/bourke-corrupt-foreign-business-bribery.html.

40/ See Br. for Def.-Appellant-Cross-Appellee Frederic Bourke Jr. at 34, United States v. Kozeny, Case No. 09-4704-cr(L), 09-5149-cr(XAP) (2d Cir. Apr. 1, 2010), available at http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/04-01-10bourke-2ndcircuit-redacted.pdf.

41/ United States v. Kozeny, 667 F.3d 122, 135 (2d Cir. 2011).

42/ Order at ¶ 15, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

43/ Order at ¶ 16, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

44/ Order at ¶ F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

45/ Order at ¶¶ 6, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

46/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

47/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

48/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

49/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

50/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

51/ Order at ¶¶ 12, F, In the Matter of Alcoa Inc., File No. 3-15673 (SEC Jan. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71261.pdf.

52/ 15 U.S.C.A. § 78m(b)(2)(B).

53/ 15 U.S.C.A. § 78m(b)(2)(A).

54/ 15 U.S.C.A. § 78m(b)(7).

55/ See, e.g., Complaint, SEC v. Oracle Corp., Case No. 12-cv-4310 (N.D. Cal. Aug. 16, 2012), available at http://www.sec.gov/litigation/complaints/2012/comp-pr2012-158.pdf; Stuckwisch & Alexander, "The FCPA's Internal Controls Provisions: Is Oracle an Oracle for the Future of Enforcement?," 28 Crim. Just. 10 (Fall 2013); Order, In the Matter of Hewlett-Packard Co., File No. 3-15832 (SEC Apr. 9, 2014), available at http://www.sec.gov/litigation/admin/2014/34-71916.pdf.

56/ 15 U.S.C.A. § 78dd-2.

57/ 15 U.S.C.A. § 78dd-1.

58/ See, e.g., Complaint at ¶ 6, SEC v. Smith & Nephew plc, Case No. 1:12-cv-187 (D.D.C. Feb 6, 2012), available at http://www.sec.gov/litigation/complaints/2012/comp22252.pdf.

59/ 15 U.S.C.A. § 78dd-1.

60/ 15 U.S.C.A. § 78dd-3.

61/ See Information ¶¶ 2, 24, 26(c), 47, United States v. Magyar Telekom, Plc., No. 1:11CR00597 (E.D. Va. Dec. 29, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/magyar-telekom/2011-12-29-information-magyar-telekom.pdf.

62/ See Information at ¶¶ 20(e), 22, United States v. JGC Corp., Case No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), available at http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-info.pdf.

63/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 12 (Nov. 14, 2012) (emphasis added), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

64/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 12 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

65/ 15 U.S.C.A. §§ 78ff(c), 78dd-2(g), 78dd-3(e); 18 U.S.C.A. § 3571(b)(3), (e).

66/ 18 U.S.C.A. §§ 3571(d), (e).

67/ 15 U.S.C.A. §§ 78ff(c)(2)(A), 78dd-2(g)(2)(A), 78dd-3(e)(2)(A).

68/ 15 U.S.C.A. §§ 78ff(c), 78dd-2(g), 78dd-3(e); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

69/ 15 U.S.C.A. §§ 78ff(c)(3), 78dd-2(g)(3), 78dd-3(e)(3).

70/ 15 U.S.C.A. § 78ff(a).

71/ 18 U.S.C.A. §§ 3571(d), (e).

72/ 15 U.S.C.A. § 78ff(a).

73/ 15 U.S.C.A. §§ 78u(d)(3), (5); see also 17 C.F.R. § 201.1004 (providing adjustments for inflation).

74/ Marek, "Larger Foreign Corrupt Practices Act Fines Ahead," Daily Bus. Rev. (Nov. 25, 2009), http://www.dailybusinessreview.com/id=1202426258993/Larger-Foreign-Corrupt-Practices-Act-Fines-Ahead?slreturn=20140910161853.

75/ DOJ Press Release No. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree To Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

76/ DOJ Press Release No. 08-1105, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree To Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

77/ DOJ Press Release No. 09-112, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees To Pay $402 Million Criminal Fine (Feb. 11, 2009), http://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million.

78/ DOJ Press Release No. 10-209, BAE Systems PLC Pleads Guilty and Ordered To Pay $400 Million Criminal Fine (Mar. 1, 2010), http://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

79/ DOJ Press Release No. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection With an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international.

80/ DOJ Press Release No. 14-019, Alcoa World Alumina Agrees To Plead Guilty to Foreign Bribery and Pay $223 Million in Fines and Forfeiture (Jan. 9, 2014); http://www.justice.gov/opa/pr/alcoa-world-alumina-agrees-plead-guilty-foreign-bribery-and-pay-223-million-fines-and.

81/ DOJ Press Release No. 13-1356, ADM Subsidiary Pleads Guilty to Conspiracy To Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), http://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act.

82/ DOJ Press Release No. 14-290, Marubeni Corporation Agrees To Plead Guilty to Foreign Bribery Charges and To Pay an $88 Million Fine (Mar. 19, 2014), http://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine.

83/ Voreacos & Dudley, "Wal-Mart Says Bribe Probe Cost $439 Million in Two Years," Bloomberg (Mar. 26, 2014, 1:36 PM), http://www.bloomberg.com/news/2014-03-26/wal-mart-says-bribery-probe-cost-439-million-in-past-two-years.html.

84/ Voreacos & Dudley, "Wal-Mart Says Bribe Probe Cost $439 Million in Two Years," Bloomberg (Mar. 26, 2014 1:36 PM), http://www.bloomberg.com/news/2014-03-26/wal-mart-says-bribery-probe-cost-439-million-in-past-two-years.html.

85/ Lublin, Palazzolo & Ng, "Avon in Advanced Talks To Settle Bribery Probe," Wall St. J. (Feb. 12, 2014, 6:37 PM), http://online.wsj.com/news/articles/SB10001424052702304703804579379362301600636.

86/ Voreacos & Schoenberg, "Avon Will Pay $135 Million To Settle Bribe Investigation," Bloomberg (May 1, 2014, 8:14 AM), http://www.bloomberg.com/news/2014-05-01/avon-will-pay-135-million-to-settle-bribe-investigation.html.

87/ Lanny A. Breuer, Assistant Att'y Gen., Prepared Address to the 22d National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), available at http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

88/ A Focus On DOJ FCPA Individual Prosecutions, FCPA Professor (Jan. 20, 2014), available at http://www.fcpaprofessor.com/a-focus-on-doj-fcpa-individual-prosecutions-2.

89/ DOJ Press Release No. 10-442, Virginia Resident Sentenced to 87 Months in Prison for Bribing Foreign Government

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Officials (Apr. 19, 2010), http://www.justice.gov/opa/pr/virginia-resident-sentenced-87-months-prison-bribing-foreign-government-officials.

90/ Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Remarks at the Global Investigation Review Program (Sept. 17, 2014), available at http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html.

91/ Marshall L. Miller, Principal Deputy Assistant Att'y Gen., Remarks at the Global Investigation Review Program (Sept. 17, 2014), available at http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html.

92/ Pub. L. No. 111-203, tit. IX, § 922(a), 124 Stat. 1376, 1841 (2010).

93/ 15 U.S.C.A. § 78u-6.

94/ 15 U.S.C.A. § 78u-6(b).

95/ SEC, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program 20 (2013), available at http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

96/ SEC, 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program 20 (2013), available at http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

97/ See generally West, Hatch, Brennan & VanDyke, "Suspension & Debarment," Briefing Papers No. 06-9 (Aug. 2006).

98/ FAR 9.405.

99/ Government Accountability Office, Federal Contracts and Grants: Agencies Have Taken Steps To Improve Suspension and Debarment Programs, GAO-14-513 (May 21, 2014).

100/ FAR subpt. 9.4.

101/ 2 C.F.R. pt. 180.

102/ FAR 9.406-2, 9.407-2; 2 C.F.R. §§ 180.700, 180.800.

103/ FAR 9.402.

104/ FAR 9.407-4(a).

105/ FAR 9.407-4(b).

106/ FAR 9.406-4(a).

107/ FAR 9.406-1(b), 9.407-1(c).

108/ FAR 9.403 ("Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.").

109/ FAR 9.406-1(a).

110/ Weeding Out Bad Contractors: Does the Government Have the Right Tools?: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs, 112th Cong. 57 (2011) (Prepared Testimony of David M. Sims, Chair, Interagency Suspension & Debarment Comm.), available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg72557/pdf/CHRG-112shrg72557.pdf.

111/ Grandon, DOD Suspension and Debarment: Protecting the Government and Promoting Contractor Responsibility 6, available at http://www.safgc.hq.af.mil/shared/media/document/AFD-130918-016.pdf.

112/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 70 (Nov. 14, 2012) (citing USAM § 9-28.1300 (2008)), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

113/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 70 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

114/ H.R. 5366, 111th Cong. (Sept. 16, 2010), available at https://www.govtrack.us/congress/bills/111/hr5366/text; H.R. 1540, 112th Cong. (May 23, 2011), available at http://amendments-rules.house.gov/amendments/welch523111451585158.pdf; H.R. 3588, 112th Cong. (Dec. 7, 2011), available at https://www.govtrack.us/congress/bills/112/hr3588/text.

115/ "The 'Overseas Contractor Reform Act'… It's Still Impotent," FCPA Professor (Dec. 8, 2011), available at http://www.fcpaprofessor.com/the-overseas-contractor-reform-act-its-still-impotent; see also Emmick, "United States: Mandatory Debarment For FCPA Violations? A Bad Idea Whose Time Should Never Come," Mondaq (Apr. 9, 2012), http://www.mondaq.com/unitedstates/x/171742/Government+Contracts+Procurement+PPP/Mandatory+Debarment+For+FCPA+Violations+A+Bad+Idea+Whose+Time+Should+Never+Come.

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116/ Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. 25 (Nov. 30, 2010) (Responses of Greg Andres, Deputy Assistant Att'y Gen., DOJ Crim. Div., to questions submitted by Sens. Coons and Klobuchar), available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

117/ Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. 25–26 (Nov. 30, 2010) (Responses of Greg Andres, Deputy Assistant Att'y Gen., DOJ Crim. Div., to questions submitted by Sens. Coons and Klobuchar), available at http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf.

118/ FAR 52.203-13(b)(3)(i); 73 Fed. Reg. 67,064 (Nov. 12, 2008). See generally West, Richard, Brennan, Barsalona, Koos & Meene, "Contractor Business Ethics Compliance Program & Disclosure Requirements," Briefing Papers No. 09-5 (Apr. 2009).

119/ 73 Fed. Reg. at 67,069.

120/ FAR 52.203-13(b)(3)(i). FAR 52.203-13 does not require disclosure of significant overpayments, although other contract clauses do. See FAR 52.232-25(d) (Prompt Payment Act); FAR 9.407-2(a)(8).

121/ FAR 9.406-2(b)(1)(vi), 9.407-2(a)(8).

122/ 72 Fed. Reg. 64,019 (Nov. 14, 2007).

123/ See 73 Fed. Reg. at 67,073.

124/ Am. Bar Ass'n, Guide to the Mandatory Disclosure Rule 41–43 (2010).

125/ 18 U.S.C.A. ch. 11.

126/ FAR 9.406-2(b)(1)(vi), 9.407-2(a)(8).

127/ Am. Bar Ass'n, Guide to the Mandatory Disclosure Rule 44–45 (2010) (recognizing the Procurement Integrity Act, the FCPA, the Arms Export Control Act, the Trade Agreements Act, and the Buy American Act as examples of statutes of "particular relevance to Government contractors" that are not in Title 18 "and therefore outside the express definition of criminal conduct warranting mandatory disclosure").

128/ 18 U.S.C.A. § 1952.

129/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 48 (Nov. 14, 2012) (citing Superseding Indictment, United States v. Nexus Techs., No. 08-cr-522 (E.D. Pa. Oct. 28, 2009), ECF No. 106; Indictment, United States v. King, No. 01-cr-190 (W.D. Mo. June 27, 2001), available at http://www.justice.gov/criminal/fraud/fcpa/cases/kingr-etal/05-03-02king-robert-indict.pdf; Superseding Indictment, United States v. Mead, No. 98-cr-240 (D.N.J. Oct. 1998), available at http://www.justice.gov/criminal/fraud/fcpa/cases/mead-etal/09-11-98mead-supersed-indict.pdf; Criminal Information, United States v. Saybolt N. Am. Inc., No. 98-cr-10266WGY (D. Mass. Aug. 18, 1998)), available at http://www.justice.gov/criminal/fraud/fcpa/cases/saybolt/08-10-98saybolt-info.pdf), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

130/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 48 (Nov. 14, 2012) (citing Second Superseding Indictment, United States v. Kozeny, No. 05-cr-518 (S.D.N.Y. May 26, 2009), ECF No. 203, available at http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/05-26-09bourke2nd-supersed-indict.pdf; Judgment, United States v. Bourke, No. 05-cr-518 (S.D.N.Y. Nov. 12, 2009), ECF No. 253, available at http://www.justice.gov/criminal/fraud/fcpa/cases/kozenyv/11-12-09bourke-judgment.pdf), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

131/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 48 (Nov. 14, 2012) (citing Criminal Information, United States v. SSI Int'l Far East, Ltd., No. 06-cr- 398, ECF No. 1 (D. Or. Oct. 10, 2006), available at http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-10-06ssi-information.pdf; Plea Agreement, United States v. SSI Int'l Far East, Ltd., 06-cr- 398 (D. Or. Oct. 10, 2006), available at http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-10-06ssi-fareast-plea.pdf), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

132/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 49 (Nov. 14, 2012) (citing Ex-Im Bank, Form of Exporter's Certificate, EBD-M-56 (Jan. 2007), available at http://www.exim.gov/tools/applicationsandforms/upload/ebd-m-56-cofinance.pdf), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

133/ 18 U.S.C.A. § 1001.

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134/ See generally Shaw, Wagner & Nichols, "Contractor Responsibility: Toward an Integrated Approach to Legal Risk Management," Briefing Papers No. 13-4 (Mar. 2013); Mitchell, Abbott & Orozco, "Implied Certification Liability Under the False Claims Act," Briefing Papers No. 11-4 (Mar. 2011).

135/ 31 U.S.C.A. § 3729(a)(1)(A), (B).

136/ 31 U.S.C.A. § 3729(b)(2)(A).

137/ 31 U.S.C.A. § 3729(b)(1)(B).

138/ 31 U.S.C.A. § 3729(b)(1)(A).

139/ See Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994), 36 GC ¶ 384, aff'd without written opinion, 57 F.3d 1084 (Fed. Cir. 1995).

140/ Ab-Tech Constr., Inc., 31 Fed. Cl. at 431–33.

141/ Ab-Tech Constr., Inc., 31 Fed. Cl. at 434.

142/ Ab-Tech Constr., Inc.,31 Fed. Cl. at 434.

143/ See, e.g., Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001), 44 GC ¶ 2 (holding that submitting a claim for payment impliedly certifies compliance with material contract provisions, regulations, and statutes on which government has expressly conditioned payment); United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1268 (D.C. Cir. 2010), 53 GC ¶ 25 (holding that submission of a claim for payment creates implied certification of compliance with all contractual provisions, statutes, and regulations material to government's decision to pay, regardless of whether government has expressly conditioned payment on compliance with any of the provisions); see also Thomas, Nord & Smith, "What Are You Implying?," Cont. Mgmt., Nov. 2011, at 35–36; Martin, Jr., "Reining in Lincoln's Law: A Call To Limit the Implied Certification Theory of Liability Under the False Claims Act," 101 Cal. L. Rev. 227, 241–249 (2013).

144/ See United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 388 (1st Cir. 2011), cert. denied, 132 S. Ct. 815 (2011) (imposing liability when contractor knowingly submits a claim and fails to disclose its violation of any contractual, statutory, or regulatory provision material to government's decision to pay, regardless of whether provision is an express condition of payment).

145/ See Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 n.8 (4th Cir. 1999), 41 GC ¶ 317 (calling implied certification "questionable" in dicta but refusing to accept or reject theory); see also United States ex rel. Godfrey v. KBR, Inc., 360 F. App'x 407, 412 (4th Cir. 2010) (upholding dismissal of relator's claim under implied certification theory predicated on breach of a contract provision because "there [were] no allegations that any contract required certification of compliance with contract terms").

146/ See United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 268 (5th Cir. 2010), 52 GC ¶ 398 ("This Court has not yet recognized the implied-certification theory."); see also United States ex rel. Yannacopoulos v. General Dynamics, 652 F.3d 818, 824 n.4 (7th Cir. 2011) (finding that defendant's violation of statute would not support a claim under False Claims Act if defendant had not certified compliance); United States ex rel. Kennedy v. Aventis Pharms., Inc., 610 F. Supp. 2d 938, 946 (N.D. Ill. 2009) ("Some courts (though, as best as this Court can determine, not the Seventh Circuit), have concluded that a relators [sic] can make out a claim under [31U.S.C.A. § 3729(a)(2) on what is referred to as a theory of implied false certification."); United States ex rel. Lee v. Fairview Health Sys., No. Civ. 02-270 RHK/SRN, 2004 WL 1638252, at *3 (D. Minn. July 22, 2004) (noting that the theory has not been recognized by the Eighth Circuit Court of Appeals).

147/ Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011), 53 GC ¶ 183 (failing to discuss the scope of implied certification and instead deciding case on narrow jurisdictional grounds); Blackstone Med. Inc. v. United States ex rel. Hutcheson, 132 S. Ct. 815 (2011) (denying petition for writ of certiorari).

148/ United States ex rel. Hutcheson, 647 F.3d at 388.

149/ 42 U.S.C.A. § 1320a-7b.

150/ United States ex rel. Hutcheson, 647 F.3d at 380.

151/ United States ex rel. Hutcheson, 647 F.3d at 393–94; see also McNutt ex. rel. United States v. Haleyville Med. Supplies, Inc., 423 F.3d 1256, 1260 (11th Cir. 2005), 47 GC ¶ 416 (holding that government alleged a valid claim where it alleged that defendants violated the AKS, compliance with AKS was necessary for reimbursement under Medicare program, and defendants submitted claims for reimbursement knowing that they were ineligible for the payments demanded in those claims).

152/ United States ex rel. Head v. Kane Co., 798 F. Supp. 2d 186 (D.D.C. 2011).

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153/ 41 U.S.C.A. §§ 6701–6707.

154/ United States ex rel. Head, 798 F. Supp. 2d at 199.

155/ 41 U.S.C.A. §§ 8701–8707.

156/ 41 U.S.C.A. § 8701(2); see also FAR 52.203-7.

157/ FAR 52.203-13(b)(3)(i), 9.407-2(a)(8).

158/ FAR 9.406-1(a)(1); DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 52–53 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

159/ FAR 3.1002(a).

160/ FAR 3.1004, 52.203-13, 52.203-14. The "Contractor Code of Business Ethics and Conduct" clause (FAR 52.203-13) only applies to contracts that are expected to exceed five million dollars and that have a performance period of 120 days or more. Commercial item contracts and small businesses are exempt from the internal control requirements of the clause, but not the disclosure requirements. The "Display of Hotline Poster(s)" clause (FAR 52.203-14) is required when the agency has a fraud hotline poster or if the contract is funded with disaster assistance funds, and exceeds five million dollars in value or such lesser thresholds as established by the agency. This "Display of Hotline Poster(s)" clause does not apply to commercial item contracts or contracts performed entirely outside the United States.

161/ FAR 52.203-13(b).

162/ FAR 52.203-13(c).

163/ FAR 52.203-13(c)(1).

164/ FAR 52.203-13(c)(2).

165/ FAR 52.203-13(c)(2).

166/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 57–62 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

167/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 57 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

168/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 57 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

169/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 58 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

170/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 58 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

171/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 58 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

172/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 59 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

173/ See DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 59 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

174/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 59 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

175/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 60 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

176/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 61 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

177/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 61–62 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

178/ DOJ Criminal Div. & SEC Enforcement Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act 62 (Nov. 14, 2012), available at http:// www.justice.gov/criminal/fraud/fcpa/guide.pdf.

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