The FCPA and analogous foreign anti-bribery laws—overview, recent developments, and acquisition due diligence

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Key points

- Securities regulators and law enforcement authorities are increasingly active in the application of anti-bribery laws in the global environment. This renewed emphasis on rooting out transnational corruption has substantial implications for participants in the global capital markets engaged in cross-border mergers and acquisitions.
- More than ever, there is a risk that transactions improperly structured or subjected to inadequate due diligence may result in unexpected criminal or civil liabilities of unprecedented scope and severity.
- This article is intended as a brief primer on the essentials of the Foreign Corrupt Practices Act a summary of the most current global developments in global anti-bribery enforcement, and basic guidance on the due diligence efforts that prudent participants in a cross-border transaction should consider.

1. Primer on the Foreign Corrupt Practices Act

What is the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act, known in common parlance as the FCPA, is a US law passed in 1977 in response to widespread international corruption involving US-based corporations and foreign government officials. The Act was adopted after more than 400 US companies, including 117 members of the Fortune 500, admitted to more than $300 million in questionable payments to foreign officials as part of an amnesty programme administered by the United States Securities and Exchange Commission (‘SEC’). The SEC’s findings sparked concerns within the United States Congress that not only were such payments to foreign officials immoral and ‘bad business’, but were potentially harmful to US foreign policy interests:

The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.

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2 Ibid, at 5.
The FCPA consists of two sets of complementary provisions: the anti-bribery provisions and the accounting provisions. The anti-bribery provisions proscribe the bribery of foreign government representatives and the accounting provisions require companies regulated by the SEC to keep and maintain accurate books-and-records as well as a system of internal controls that reasonably assures that corporate assets are used for authorized corporate purposes. Both sets of provisions have criminal and civil applications, with criminal proceedings the exclusive province of the United States Department of Justice (‘DOJ’) and civil proceedings primarily enforced by the SEC.

The anti-bribery provisions

The anti-bribery provisions prohibit (i) the payment of (or promise to pay) (ii) money or anything of value (iii) to a foreign official, foreign political party or representative thereof (hereinafter collectively ‘foreign official’) (iv) with the corrupt intent to influence the foreign official in the exercise of his or her official duties (v) to assist the payor in obtaining or retaining business. Several of these terms require elaboration:

- **Payment:** In addition to direct payments to foreign officials, the FCPA also forbids payments to any person (eg a third-party agent) while knowing that all or part of the payment will ultimately be given to a foreign official. The term ‘knowing’ encompasses conscious disregard and deliberate ignorance. In other words, willful blindness—the so-called ‘ostrich’ or ‘head-in-the-sand’ defence—is no defence. This presents significant compliance issues for companies doing business in countries where the use of a local agent, over whom the company has limited control, is a practical if not legal necessity. Of the 35 FCPA cases filed since 1 January 2006, 23 are alleged to have involved payments through third-party agents.

- **Anything of value:** Although the majority of FCPA prosecutions have involved the payment of (or promise to pay) cash or cash equivalents (eg a percentage of profits from a contract), the DOJ and SEC have on occasion asserted that other forms of consideration are also forbidden. Examples of non-cash items of value forming the basis for FCPA prosecutions include donations to charitable organizations with which the foreign official was affiliated, shares of stock in the payor’s business, payment of the foreign officials’ travel and medical expenses, and even the international transportation of expatriate voters to the polls so that they could cast votes for the foreign official’s party.

- **Foreign official:** The FCPA prohibits corrupt payments to any representative of a foreign government, irrespective of the official’s rank. Moreover, foreign officials include employees of a foreign government’s ‘instrumentalities’, including state-owned businesses that participate in commercial activities. The People’s Republic of China, for example, has been a frequent situs of FCPA actions involving payments to state-owned entities.

3 15 USC §§ 78dd-1(a), (g); 78dd-2(a), (i); 78dd-3(a).
5 For purposes of all statistics cited herein, the authors have counted charges against each defendant separately, even if arising from the same investigation, but have not double counted actions brought by both the DOJ and SEC against the same defendant. Most FCPA matters are resolved by negotiated settlement with these two agencies. Accordingly, most factual descriptions of cases discussed herein are taken from the government’s allegations.
7 United States v Kozeny, 05-cv-00518 (SDNY 2005).
9 United States v Kozeny, 05-cv-00518 (SDNY 2005).
• **Obtaining or retaining business:** On its face, this phrase could reasonably be read to limit the FCPA’s scope to a prohibition on payments that influence the foreign official to award the payor new contracts or renew existing contracts. In fact, the first two US district court judges to squarely address this issue so held; dismissing, respectively, a criminal indictment and a civil complaint charging the defendants with making or authorizing payments to foreign officials to persuade these officials to reduce their employers’ customs duties and tax obligations. But in overturning the first of these decisions and reinstating the indictment, the United States Court of Appeals for the Fifth Circuit held that ‘Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage’. The Fifth Circuit reasoned that payments that beget such benefits assist the payor in obtaining or retaining business by reducing the beneficiary’s cost of doing business, thus providing a competitive advantage vis-à-vis its competitors and incentivizing its continued presence in the relevant market.

The FCPA also includes an exception and two affirmative defences to the anti-bribery provisions. The exception provides that the anti-bribery provisions shall not apply to ‘facilitating or expediting’ payments made to foreign officials to ‘expedite or to secure the performance of a routine government action’. But this exception applies only to actions that are ‘ordinarily and commonly performed’ by the official. The statute provides the following examples of qualifying routine actions: obtaining permits or licenses to do business in the country; processing government papers (eg visas and work orders); providing police protection, mail services or scheduling inspections; providing utility (eg phone, power, water) and cargo handling services and ‘actions of a similar nature’. Routine governmental action will never include, however, actions relating to the decision to award new or continue existing business.

The anti-bribery provisions’ two affirmative defences are that: (i) the payment was ‘lawful under the written laws and regulations’ of the foreign official’s country; and (ii) the payment was to reimburse a foreign official for ‘reasonable and bona fide expenditure[s], such as travel and lodging expenses’, incurred in relation to the promotion or demonstration of the payor’s products or services or the execution or performance of a contract between the payor and the foreign official’s employer.

Although this exception and these affirmative defences are certainly valid, one must approach them with caution. Their boundaries are not clearly delineated and the consequences of overstepping them are great. For instance, while it is acceptable to pay for a foreign official’s travel for contract-related purposes (eg to train the official on how

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12 *United States v Kay*, 200 F. Supp. 2d 681 (SD Tex. 2002); *SEC v Mattson*, 01-cv-03106 (SD Tex. 2002).
13 *United States v Kay*, 359 F.3d 738, 755 (5th Cir. 2004). For unknown reasons, the SEC dismissed its appeal in the *Mattson* case after the *Kay* decision.
14 359 F.3d at 759.
15 15 USC §§ 78dd-1(b); 78dd-2(b); 78dd-3(b). In exempting these so-called ‘grease payments’, Congress noted that although ‘payments made to assure or to speed the proper performance of a foreign official’s duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments’. HR Rep. No. 95–640, at 8 (1977); see also S. Rep. No. 95–114, at 10 (1977).
16 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).
17 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).
18 15 USC §§ 78dd-1(f)(3); 78dd-2(h)(4); 78dd-3(f)(4).
19 15 USC §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
to use a product), practices such as upgrading the official’s flight accommodations, inviting his family members, detouring him to tourist destinations unrelated to the contract and providing him with ‘pocket money’ during the trip have all formed the basis of FCPA prosecutions.20

The accounting provisions

The FCPA’s accounting provisions are two-fold. The ‘books-and-records’ provision requires that ‘issuers’ (as that term will be defined subsequently) ‘make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer’.21 The ‘internal controls’ provision requires that issuers ‘devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that’: (i) transactions are executed in accordance with management’s directions; (ii) transactions are recorded in a manner that facilitates preparation of financial statements in accordance with generally accepted accounting principles and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management’s directions; and (iv) recorded assets are periodically compared to assets on hand with reconciliation of discrepancies.22 The accounting provisions apply broadly to all records kept and internal controls maintained by US securities registrants, not just those relating to international transactions. Thus, the full extent of their reach is beyond the scope of this article.

Congress included the accounting provisions as a complement to the FCPA’s anti-bribery provisions. The requirement that issuers keep and maintain accurate books-and-records addresses Congress’s concern that, prior to the FCPA, issuers were using unrestricted ‘off-the-books slush funds’ to facilitate illicit payments to foreign officials.23 The internal controls provision requires that issuers have organizational structures with controls designed to prevent improper payments.24 It was Congress’s belief that the accounting provisions, together with the anti-bribery provisions, would ‘go a long way’ towards enhancing public confidence in the securities markets that corporate recordkeeping is honest.25

To whom does the Foreign Corrupt Practices Act apply

The FCPA’s accounting provisions apply to ‘issuers’, defined as any company that has securities registered with the SEC pursuant to Section 12, or that is required to file periodic reports with the SEC pursuant to Section 15, of the Securities Exchange Act of 1934.26 Notably, this provision applies to foreign companies that sponsor American

21 15 USC § 78m(b)(2)(A).
22 15 USC § 78m(b)(2)(B).
26 15 USC § 78m(b)(2).
Depository Receipts (‘ADRs’). It also includes any wholly or majority-owned subsidiary (foreign or domestic) of an issuer. With respect to subsidiaries in which issuers have an ownership interest of 50% or less, issuers are only required to make ‘good faith’ efforts to exercise their influence to cause these minority-owned entities to maintain a system of internal accounting controls.

The anti-bribery provisions generally apply more broadly. In addition to issuers, these provisions also apply to ‘domestic concerns’—which include US citizens, nationals and residents, as well as business entities that have their principal place of business in the United States or which are organized under the laws of a state or territory of the United States—and foreign citizens and businesses who act or cause an act in furtherance of a corrupt payment within the territory of the United States. The anti-bribery provisions also apply to any officer, director, employee, agent or stockholder of an issuer or domestic concern acting on behalf of the issuer or domestic concern. In perhaps the most famous of the FCPA’s agency cases, name partner Sonny Harsono of KPMG’s Indonesian member firm, KPMG Siddharta Siddharta & Harsono, authorized—at the behest of an issuer client—an allegedly improper payment to an Indonesian tax official in exchange for reducing the client’s tax bill.

Although the anti-bribery provisions generally do not apply directly to foreign subsidiaries of issuers or domestic concerns (even wholly or majority-owned ones), such entities can nonetheless find themselves subject to these provisions if they act within the United States or act as an agent on behalf of the parent issuer. Their actions may even form the basis of liability for the parent issuer if the parent knew of or consciously disregarded a risk (eg ignoring a red flag) of the subsidiary’s illicit payments.

What are the consequences of violating the Foreign Corrupt Practices Act

As noted previously, violations of the FCPA have both criminal and civil ramifications. Criminal penalties for violating the anti-bribery provisions carry the potential for up to five years imprisonment and/or $100,000 in fines for individuals and up to $2 million in fines for companies. But the DOJ routinely seeks and obtains criminal fines substantially in excess of these statutory maximums by invoking the Alternative Fines

27 ADRs are receipts issued by US depository banks representing an interest in a foreign security held abroad by an agent of the depository. They effectively allow US investors to own foreign stock without having to engage in cross-border transactions.
28 15 USC § 78m(b)(6).
29 15 USC § 78dd-1(a), (g).
30 15 USC § 78dd-2(a), (i).
31 15 USC § 78dd-3(a). Acts within the United States subjecting foreign persons to liability under this provision have been as seemingly inconsequential as an e-mail transmitting a budget from which funds for improper payments were to be made. See United States v Syncor Taiwan, Inc, 02-cr-01244 (CD Cal. 2002). See also discussion supra at 8.
32 15 USC §§ 78dd-1(a), (g); 78dd-2(a), (i).
33 United States & SEC v KPMG Siddharta Siddharta & Harsono & Sonny Harsono, 01-cv-03105 (SD Tex. 2001).
34 See eg SEC v Tyco Int’l Ltd, 06-cv-02942 (SDNY 2006) (holding Tyco responsible for bribes allegedly paid by its foreign subsidiary where Tyco failed to implement adequate controls ‘despite its knowledge and awareness... that corruption and illicit payments were common practices in the foreign country where the unlawful payments were made’).
35 Of course, individual liability under the FCPA must be premised on direct and knowing participation. A board member, for example, would not be liable under the FCPA by mere virtue of his or her supervisory status alone.
36 See 15 USC §§ 78dd-2(g); 78dd-3(e).
Act, which authorizes fines of up to twice the greater of the defendant’s gain or the victim’s loss from a criminal offence.\footnote{37 18 USC § 3571(d).}

Because of the Sarbanes Oxley Act of 2002,\footnote{38 Pub L No. 107–204, 116 Stat. 745 (2002).} the statutory penalties for criminal violations of the accounting provisions are much harsher than those for the anti-bribery provisions. Individuals face prison terms of up to 20 years along with fines of up to $5 million, and companies face criminal fines of up to $25 million.

The civil enforcement responsibilities for the FCPA are shared between the DOJ and SEC, with the SEC empowered to seek civil penalties and injunctive relief against issuers (and their agents) and the DOJ against domestic concerns and foreign persons.\footnote{39 15 USC §§ 78u(d)(1) and 78ff(c) (issuers); 78dd-2(d), (g) (domestic concerns); 78dd-3(d), (e) (foreign persons).} In practice, the DOJ has brought relatively few civil actions, leaving the bulk of the statute’s civil enforcement to the SEC. One reason for this—in addition to the fact that the DOJ has criminal enforcement alternatives where the SEC does not—may be that the maximum that the DOJ may seek as a civil penalty is $10,000 per violation, while the SEC may seek up to the greater of $100,000 for a natural person or $500,000 for an issuer and the ‘gross amount of the pecuniary gain’ from the offence.\footnote{40 Cf. 15 USC § 77t(d)(2) (SEC) with 15 USC §§ 78dd-2(g) and 78dd-3(e) (DOJ).} Moreover, as an adjunct to its civil enforcement powers, the SEC has recently begun seeking disgorgement of ill-gotten profits in FCPA prosecutions.\footnote{41 The first instance in which the SEC required disgorgement as a settlement condition was its 2004 enforcement action against ABB, Ltd See SEC v ABB, Ltd, 04-cv-01141 (DDC 2004). Now, this remedy is a common feature of SEC FCPA settlements, with the SEC seeking it in nearly half of its post-ABB actions.}

2. Recent FCPA enforcement

After averaging approximately three prosecutions per year between the DOJ and SEC from 1978 through 2000, FCPA enforcement has accelerated since 2001. In the past 19 months alone,\footnote{42 1 January 2006 through 26 July 2007.} there have been a combined 35 FCPA cases filed by the DOJ and SEC. Some of the most significant of these recent cases are profiled subsequently.

**Omega Advisors**

On 6 July 2007, US hedge fund Omega Advisors, Inc. entered into a non-prosecution agreement\footnote{43 Non-prosecution agreements, together with deferred prosecution agreements, are a tool that the DOJ has increasingly employed in recent years to resolve corporate fraud investigations short of the company entering a guilty plea. For more on this subject, see F. Joseph Warin & Peter Jaffe, ‘The Deferred-Prosecution Jigsaw Puzzle: A Modest Proposal for Reform’, Andrews Litig. Rep. on White-Collar Crime 19 (2005).} with the DOJ to resolve the government’s investigation into Omega’s investment in a privatization programme in the Republic of Azerbaijan. According to the agreement, Omega invested more than $100 million in an effort to privatize the State Oil Company of the Azerbaijan Republic (‘SOCAR’) while knowing that its investment partner—Victor Kozeny of Oily Rock Ltd and Minaret Group Ltd—had entered into arrangements with officials of SOCAR and the Azerbaijan State Property Commission, which oversaw the privatization programme, giving those officials a financial interest in
SOCAR’s privatization. The items of value allegedly provided to the Azeri officials included millions of dollars in cash, the promise of a two-thirds share in any profits realized by Oily Rock from the SOCAR privatization, $300 million in shares of Oily Rock, $600,000 worth of jewelry and other luxury items and the payment of medical treatments in the United States. Omega, which lost all of its investment when the SOCAR privatization effort failed, agreed to forfeit $500,000 to the DOJ as part of the non-prosecution agreement.

The Omega resolution is the most recent in a string of FCPA cases arising out of the failed attempt to privatize SOCAR. In 2004, former Omega partner Clayton Lewis pleaded guilty to a two-count criminal information charging him with violations of the anti-bribery provisions and conspiracy to commit the same. In 2005, Victor Kozeny, President and Chairman of the Board of Oily Rock and Minaret, was indicted on anti-bribery charges and is presently awaiting extradition from the Bahamas. Kozeny’s two co-defendants, Frederic Bourke of Blueport International, Ltd and David Pinkerton of AIG’s Global Investment Corporation, recently persuaded the court to dismiss the FCPA charges against them on statute-of-limitations grounds. And finally, Hans Bodmer, a Swiss lawyer who advised Omega in the SOCAR privatization efforts, pleaded guilty in 2004 to money laundering charges stemming from his role in the Azeri scheme—including setting up Swiss bank accounts to receive $151 million in investment funds from the United States and then chartering jets to fly the $151 million in cash into Azerbaijan.

The SOCAR cases raise a number of issues of specific interest to capital market participants, particularly the substantive and jurisdictional FCPA theories advanced by the DOJ. The government’s substantive theory of FCPA liability for Lewis—and by extension through the principle of respondeat superior, Omega Advisors—is that Lewis invested in the SOCAR privatization effort while knowing that Kozeny had entered into arrangements giving Azeri officials an interest in the privatization and ‘with the understanding that [he] was taking advantage of the arrangements that Kozeny had already set up’. Under this theory, anyone who invests in a venture while ‘knowing’...
that the venture will receive an improper advantage by virtue of unlawful payments tendered to foreign officials will be liable under the FCPA.

The jurisdictional theory advanced in Kozeny’s indictment is that Kozeny—a Czech national and Irish citizen who headed the operations of two companies (Oily Rock and Minaret) incorporated in the British Virgin Islands and based in Azerbaijan—is subject to the FCPA because the majority of the investors in Oily Rock and Minaret were US citizens. Because US citizens are ‘domestic concerns’ under 15 USC section 78dd-2(h)(1)(A) and because Kozeny was allegedly the agent of these investors, the DOJ asserts that he is an ‘agent’ of a ‘domestic concern’ subject to the FCPA’s anti-bribery provisions pursuant to 15 USC section 78dd-2(a). This theory, while not yet tested before a judicial body, should grab the attention of anyone who solicits money from US citizens to invest in industries outside of the United States.

**Si Chan Wooh**

On 29 June 2007, Schnitzer Steel executive Si Chan Wooh pleaded guilty to a criminal conspiracy to violate the FCPA’s anti-bribery and books-and-records provisions and entered into a civil settlement arising from the same conduct. The DOJ and SEC filings allege that over a five-year period Wooh made and authorized more than $200,000 in corrupt payments to officials of government owned steel producers in China, and $1.7 million in bribes to managers of privately owned steel producers in China and South Korea, to induce these officials to purchase scrap metal from Schnitzer. Although the terms of Wooh’s plea agreement are not yet public—he is currently scheduled to be sentenced on 17 September 2007—Wooh’s SEC settlement requires him to disgorge approximately $15,000 in bonus commissions (plus pre-judgment interest of approximately $1,000) he received in connection with the tainted contracts and to pay a $25,000 civil penalty.

Wooh’s guilty plea followed a criminal and administrative resolution by his employer in October 2006 arising from the same course of conduct. Schnitzer Steel entered into a deferred prosecution agreement with the DOJ and consented to an administrative cease-and-desist order from the SEC on anti-bribery and books-and-records charges. Its Korean subsidiary, SSI International Far East, Ltd, pleaded guilty to criminal violations of the same provisions. Schnitzer Steel paid $7.7 million to the SEC and SSI International paid $7.5 million to the DOJ in connection with these resolutions.

The Wooh case is significant for at least three reasons. First, it is exemplary of a trend in FCPA enforcement of targeting individual corporate officers, even after the successful prosecution of their employers. Nineteen of the 35 defendants in FCPA actions filed since 1 January 2006 have been individuals, including a sitting United States Congressman.

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52 United States v Wooh, 07-cr-00244 (D Or. 2007); SEC v Wooh, 07-cv-00957 (D Or. 2007).
53 United States v Schnitzer Steel Indus., Inc. (D Or. 2006) (deferred prosecution agreement); In the Matter of Schnitzer Steel Indus., Inc., Admin. Proc. File No. 3-12456 (16 October 2006).
54 United States v SSI Int’l Far East, Ltd, 06-cr-00398 (D Or. 2006).
Sanctions in these actions have been severe—with jail terms as high as three years$^{56}$ and financial assessments as high as $114,675. But even these stiff sanctions fall well short of the highest penalties doled out in the history of individual FCPA prosecutions: seven years imprisonment and $1,741,453 in criminal fines in the 1994 prosecution of Herbert Steindler.$^{58}$

Second, the Wooh case is significant because it demonstrates that even payments to private, non-government officials can violate the FCPA if they are not accurately accounted for in the company’s books-and-records. According to the SEC’s complaint, Wooh caused his employer to violate the books-and-records provision with respect to the bribes paid to private industry members ‘by failing to properly account for and disclose the bribes in [Schnitzer’s] internal records and public filings’.

Third, the Wooh case—albeit a negotiated settlement and thus without formal precedential effect—presents an expansive interpretation of the books-and-records provision. Included in the criminal information is a chart that details the descriptions of the company’s accounting entries for the payments to the foreign officials. Some of these payments were logged as ‘Gratuity to Customer Representative’ and ‘Gratuity Commission to Customer’. It is difficult to posit how Schnitzer Steel could have more precisely recorded these transactions, suggesting that the DOJ views the books-and-records provision as requiring not only an objectively accurate description, but also a normative tag (eg ‘bribe’) when recording an improper payment.

**Baker Hughes**

In the largest FCPA settlement to date, on 26 April 2007 the DOJ and SEC announced criminal and civil actions—worth a combined $44 million—against Houston-based oilfield services contractor Baker Hughes, Inc. and its wholly owned subsidiary Baker Hughes Services International, Inc. (‘BHSI’). Baker Hughes and BHSI acknowledged in their respective resolutions with the DOJ that BHSI paid approximately $4.1 million to an Isle of Man-based consulting firm knowing that portions of these payments were intended to bribe an official of Kazakhoil, then Kazakhstan’s state oil company, to influence this official in awarding business to BHSI. Baker Hughes’s settlement with the SEC covered a broader range of conduct, involving contracts in Angola, Indonesia, Nigeria, Uzbekistan and Russia in addition to Kazakhstan, and implicated additional Baker Hughes subsidiaries.

In its settlement with Baker Hughes, the DOJ agreed to defer prosecution for a three-count criminal information charging the company with violating the FCPA’s anti-bribery provisions, conspiring to violate the same, and willfully falsifying its books and records.$^{59}$

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56 United States v Salam, 06-cr-00157 (DDC 2006).
57 SEC v Samson, 06-cv-01217 (DDC 2006) ($50,000 civil penalty plus $64,675 in disgorgement and pre-judgment interest).
58 United States v Steindler, 94-cr-00029 (SD Oh. 1994). Although this was an FCPA prosecution, the sentence was imposed for violations of the money laundering statute (18 USC § 1956). The highest jail term ever imposed for an FCPA count of conviction is five years. See United States v Murphy, 02-cr-02908 (SD Tex. 2002). The highest monetary assessment for an FCPA count of conviction is $400,000 in restitution. United States v Pitchford, 02-cr-00365 (DDC 2002).
59 United States v Baker Hughes, Inc., 07-cr-00130 (SD Tex. 2007).
Baker Hughes’s settlement with the SEC included charges that it violated the FCPA’s anti-bribery, books-and-records and internal controls provisions, and that it violated a cease-and-desist order entered in connection with a 2001 FCPA settlement with the SEC.\textsuperscript{60} BHSI pleaded guilty to a three-count criminal information charging it with violating the FCPA’s anti-bribery provisions, conspiring to violate the same, and aiding and abetting in the falsification of parent company Baker Hughes’s books-and-records.\textsuperscript{51}

In connection with the SEC settlement, Baker Hughes agreed to: (i) disgorge nearly $20 million in profits from the relevant transactions; (ii) pay more than $3 million in prejudgment interest; (iii) pay a $10 million civil penalty for violating the 2001 cease-and-desist order; (iv) cease and desist from future violations of the FCPA; and (v) retain an independent compliance consultant to review Baker Hughes’s compliance programme and monitor the implementation of new internal controls related to the FCPA. BHSI agreed to pay an $11 million criminal fine in connection with its guilty plea. There was no monetary assessment associated with Baker Hughes’s deferred prosecution agreement, but Baker Hughes agreed to abide by various terms of probation, including the independent compliance consultant, during the deferred prosecution agreement’s two-year term. If Baker Hughes violates these terms, it will be subject to prosecution for the presently deferred three-count criminal information.

Separate from the respective corporate resolutions, the SEC charged Roy Fearnley, Baker Hughes’s former Business Development Manager for Kazakhstan, with aiding and abetting Baker Hughes’s FCPA violations. Fearnley, a British national residing in Kazakhstan, has yet to enter an appearance.

In addition to setting the record as the highest FCPA monetary resolution to date, the Baker Hughes case is also significant for several other reasons. First, and foremost, the SEC’s assessment of a $10 million civil penalty for Baker Hughes’s violation of its 2001 cease-and-desist order is the first of its kind in the FCPA context. Noting that Baker Hughes committed the instant FCPA violations while subject to the cease-and-desist order, SEC Director of Enforcement Linda Thomsen said, ‘The $10 million penalty demonstrates that companies must adhere to Commission Orders and that recidivists will be punished.’\textsuperscript{62} Because SEC orders are of indefinite duration, imposition of such an order or consent to a judicial injunction may expose a company to additional jeopardy for a significant period of time. Indeed, many US corporations remain subject to FCPA injunctions issued several decades ago.

A second noteworthy point about Baker Hughes’s resolution is the wide-ranging scope of the SEC settlement. With the exception of a few very early cases,\textsuperscript{63} up until approximately 2002 FCPA resolutions typically focused on a limited set of events taking

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\textsuperscript{51} SEC v Baker Hughes, Inc., 07-cv-01408 (SD Tex. 2007).

\textsuperscript{52} United States v Baker Hughes Servs. Int’l, Inc., 07-cr-00129 (SD Tex. 2007).


place in one country. Now it is commonplace for companies—especially those that operate in ‘high risk’ industries and/or nation states\(^{64}\)—that identify serious FCPA concerns in one nation to expand their internal inquiry to examine their operations in other parts of the world.

The Baker Hughes resolution also illustrates the desire of US authorities that defendants engage an independent compliance consultant to assure future FCPA compliance. At Baker Hughes’s expense, an outside consultant chosen by Baker Hughes but approved by the DOJ and SEC will undertake a comprehensive review of the company’s internal controls. The consultant will issue a report with recommendations that Baker Hughes must adopt unless it can convince the consultant that they are unduly burdensome and that a less burdensome alternative would satisfy the consultant’s concerns equally as well. The consultant will then periodically review the implementation of the recommendations over the next three years. If at any time during this period the consultant discovers additional violations of the FCPA, the consultant will be obligated to report them to the DOJ and SEC.

Appointment of an independent compliance consultant is a significant corporate event. Without discounting the utility of a new and focused perspective on FCPA compliance that should (hopefully) prevent future FCPA violations, compliance consultants are expensive, may continue to distract employees and officers—who by that point have already undergone a substantial internal and/or federal investigation—from their business mission, and have an obligation to report any new violations to the US government. Some companies have managed to avoid the imposition of compliance consultants by voluntarily revamping their compliance systems and/or retaining their own consultants prior to reaching a resolution with government authorities.\(^{65}\) This may well be a worthwhile alternative for companies that discover FCPA problems.

**Dow Chemical**

On 13 February 2007, the SEC filed settled civil and administrative actions charging The Dow Chemical Company with having violated the FCPA’s books-and-records and internal controls provisions.\(^{66}\) According to the civil complaint, DE-Nocil Crop Protection, Ltd, a ‘fifth-tier foreign subsidiary’ of Dow Chemical’s based in Mumbai, India, provided approximately $200,000 in ‘improper payments and gifts’ to federal and state agriculture officials in India to facilitate the licencing approval and distribution of its pesticides. Dow Chemical consented to the entry of an administrative cease-and-desist order and agreed to pay a $325,000 civil penalty.

The primary significance of this settlement lies in the aggressive assertion of jurisdiction by the SEC over a matter with little connection to the United States.

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The complaint identifies DE-Nocil as a ‘fifth-tier foreign subsidiary’ of Dow Chemical. Moreover, the administrative cease-and-desist order explicitly states that DE-Nocil’s payments to Indian officials were made ‘without knowledge or approval of any Dow employee’, thus removing an agency theory of liability for Dow Chemical. The SEC’s assertion of jurisdiction must therefore have been premised on the theory that DE-Nocil’s books-and-records were ultimately ‘folded-up’ five levels into Dow Chemical’s ledgers—by which point they would have been aggregated and re-aggregated several times over—and that Dow Chemical, an employer of 43,000, was responsible for the failure of low-level sales employees to follow corporate policies some 8,000 miles removed from Midland, Michigan where said policies were formulated.

The Dow Chemical settlement is also noteworthy for the insignificant amount of the payments to the foreign officials. According to the SEC’s complaint, most of the improperly recorded payments to the Indian officials were ‘well under $100’. Virtually impossible to identify during an audit, double digit payments forming the basis for FCPA liability demonstrates the importance of impressing FCPA compliance upon line-level personnel responsible for authorizing and booking charges in high-risk countries.

**El Paso**

On 7 February 2007, the DOJ and SEC announced that they had reached settlements with El Paso Corporation arising out of El Paso’s involvement in the United Nations Oil-for-Food Programme (‘OFFP’ or the ‘Programme’). According to the SEC’s complaint, El Paso violated the books-and-records and internal controls provisions by purchasing oil from third parties that had themselves made approximately $5.5 million in ‘illegal surcharge payments’ in connection with their own purchase of the oil directly from the then Iraqi government. El Paso knew or should have known, the complaint states, that these third parties had paid the ‘kickbacks’ and were passing the surcharges through to El Paso. El Paso then improperly recorded the whole of the purchase price from these third parties as ‘cost of goods sold’.

In settling the SEC’s complaint, El Paso agreed to pay a $2,250,000 civil penalty and to disgorge $5.48 million in ‘profits’, the latter to be satisfied as part of El Paso’s agreement with the DOJ. El Paso’s resolution with the DOJ took the form of a non-prosecution agreement whereby El Paso agreed to forfeit the $5.48 million ‘in illegal surcharges paid . . . by third parties from whom El Paso purchased Iraqi oil’ to the United States for transfer to the Development Fund of Iraq as ‘restitution for the benefit of the people of Iraq’.

The El Paso settlement is significant because it is the first of what may well be many FCPA cases arising from the OFFP. On 27 October 2005, the Independent Inquiry Committee (‘IIC’), an independent international body appointed by then UN Secretary General Kofi Annan, published its final report detailing the results of its 16-month investigation.

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investigation into alleged corruption surrounding the OFFP. The IIC accused 2,253 companies worldwide of having provided more than $1.8 billion in illicit payments to the Iraqi government.

Nearly two dozen companies have publicly disclosed that they are under investigation by the DOJ and/or SEC for OFFP conduct. Although El Paso is the first to settle FCPA-related charges arising from the OFFP scandal, several others are reportedly nearing a settled resolution. It is interesting to note, however, that what may be the largest FCPA investigation to date may not even involve the FCPA’s bread-and-butter: anti-bribery charges. That is because the OFFP investigation presents the unusual circumstance where the allegedly unlawful payments were demanded by and made to a foreign government, not a foreign official.

**Vetco International**

On 6 February 2007, the DOJ announced that three subsidiaries of Vetco International Ltd had agreed to plead guilty—a fourth entered into a deferred prosecution agreement—to violations of the anti-bribery provisions and conspiracy to commit the same. According to the plea agreements, from 2002 to 2005 the Vetco subsidiaries authorized a freight forwarding company to make at least 378 separate payments totaling $2.1 million to Nigerian customs officials in order to induce these officials to afford them preferential treatment in the customs process. The $26 million combined criminal fine associated with the guilty pleas is the largest in the history of FCPA. The Vetco subsidiaries were also required to retain an independent consultant to assist them in creating and maintaining a robust compliance programme.

The Vetco case illustrates the potential complications that businesses face when acquiring companies with unresolved FCPA liability. In 2003, the predecessor to one of the Vetco subsidiaries, ABB Vetco Gray UK, uncovered evidence of FCPA violations in Nigeria while negotiating its acquisition by a consortium of investors. ABB Vetco Gray UK management and the acquiring investment group thereafter conducted a comprehensive FCPA compliance review. According to a DOJ report, ABB Vetco Gray and its prospective acquirers reviewed more than four million pages of documents, conducted over 165 interviews of current and former employees, and visited more than 21 countries to analyze hundreds of thousands of transactions stored locally as part of their internal investigation.


70 See Claudio Gatti and Jad Mouawad, *Chevron Seen Settling Case on Iraq Oil*, *N.Y. Times* (8 May 2007) (reporting that Chevron is nearing a $25 – $30 million settlement whereby it will admit that it ‘should have known that kickbacks were being paid . . . on oil it bought from Iraq’); Johnson Controls, Inc., ‘SEC Form 10-Q Filing’ (8 May 2007) (reporting that the company ‘has begun discussions with the relevant authorities to explore how these matters may be resolved’); Ingersoll-Rand Co. Ltd, ‘SEC Form 10-Q Filing’ (10 May 2007) (reporting a 27 March 2007 meeting with DOJ and SEC officials whereat the company ‘began discussions concerning the resolution of this matter with both the SEC and DOJ’).

71 An alternative ground that the anti-bribery provisions were not violated by the payments to the Iraqi government is that the payments were lawful under Iraqi law—a complete defence under the FCPA. See 15 USC § 78dd-1(c)(1); see also below n 101.

72 *United States v Vetco Gray Controls, Inc.*, *Vetco Gray UK Ltd, and Vetco Gray Controls Ltd, 07-cr-00004* (SD Tex. 2007).

Ultimately, in 2001, ABB Vetco Gray UK settled with the DOJ and SEC on criminal and civil anti-bribery, books-and-records and internal controls charges relating to the company’s operations in Nigeria. The acquiring companies then obtained a written opinion from the DOJ that they would not be prosecuted for the pre-acquisition conduct of ABB. But when the DOJ discovered in connection with the 2007 FCPA case against Vetco Gray UK that the payments in Nigeria had in fact continued through at least mid-2005—a full year after the acquisition—it levied the highest criminal fine in FCPA history. For more on the subject of FCPA liability arising from M&A activity, see Section 5 subsequently.

Statoil

On 13 October 2006, the DOJ and SEC announced that Statoil ASA, a Norwegian oil company whose ADRs are traded on the New York Stock Exchange, had agreed to pay a total of $21 million to settle criminal and administrative charges of violating the anti-bribery and accounting provisions. Statoil admitted that it made two bribe payments totalling $5.2 million through a third-party consultant to an Iranian official in order to obtain non-public information—such as competitors’ bid documents—relating to a lucrative procurement from the Iranian government.

Pursuant to a deferred prosecution agreement with the DOJ, Statoil agreed to a $10.5 million criminal penalty and the appointment of an independent compliance consultant who will review and report on Statoil’s FCPA compliance. In the parallel SEC administrative proceeding, Statoil consented to the entry of an administrative order requiring the company to cease and desist from committing future FCPA violations, and to disgorge $10.5 million.

The Statoil matter marked the first time that the DOJ has taken criminal enforcement action against a foreign issuer for violating the FCPA. Assistant Attorney General Alice Fisher, head of the DOJ’s Criminal Division, noted that this case was intended to send ‘a clear message’ to foreign companies trading on the American exchanges that they too must comply with US anti-bribery laws, adding, ‘[t]his prosecution demonstrates the Justice Department’s commitment vigorously to enforce the FCPA against all international businesses whose conduct falls within its scope’.

74 United States v ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd, 04-cr-00279 (SD Tex. 2004); SEC v. ABB Ltd, 04-cv-01141 (DDC 2004).
75 See n 73 above. Issuers and domestic concerns may seek written opinions from the DOJ as to whether the DOJ would bring an enforcement action for described prospective conduct involving the requestor. See 28 CFR part 80.
76 United States v Statoil, ASA, 06-cr-00960 (SDNY 2006).
77 In the Matter of Statoil, ASA, Admin. Proc. File No. 3-12453 (13 October 2006).
3. International foreign bribery enforcement

International conventions against foreign bribery

For many years, the FCPA was the only law directed at punishing the extraterritorial bribery of foreign officials. But even the FCPA was incapable of reaching every instance of multinational graft, subjecting only those companies with some nexus to the United States to its restrictions. Congress, as part of the 1988 amendments to the FCPA, expressed its concern that US companies were being disadvantaged in this regard vis-à-vis their international competitors, some of which were not only unrestricted in their domestic laws from international bribery, but were able to deduct the cost of such bribes from their annual tax assessments. Accordingly, Congress directed the Executive Branch to commence negotiations with the Organization of Economic Cooperation and Development (‘OECD’) regarding the development of an international treaty covering acts then prohibited under the FCPA.80

After nearly a decade of US lobbying for an international counterpart to the FCPA, on 21 November 1997 34 countries signed the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.81 Modelled in large part on the FCPA, the OECD Convention requires, inter alia, that signatories undertake to establish that it is a criminal offence under domestic law to:

promise or give any undue pecuniary or other advantage . . . to a foreign official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.82

The Convention also requires signatories to adopt legislation similar to the FCPA’s accounting provisions83 and provides for extradition among Member States as well as for other forms of international legal assistance.84 Currently there are 38 signatories to the Convention, including all 30 members of the OECD and eight non-OECD Member States.85

In addition to the OECD Convention, a number of significant regional treaties concerning international bribery have taken effect across the globe in recent years, including: the Inter-American Convention Against Corruption;86 the European Union’s Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of the Member States of the European Union;87 the Council on Europe’s Criminal Law Convention on Corruption88 and Civil Law Convention on Corruption;89 and the African Union Convention on Preventing and
Combating Corruption. The most recent development on the international treaty front is the United Nations Convention Against Corruption. Although it is too early to assess the impact of this treaty on international foreign bribery enforcement—it was ratified but 18 months ago on 14 December 2005—its symbolic importance alone is undeniably important.

International prosecutions for foreign bribery

With legislation passed pursuant to the various international conventions discussed before (primarily the OECD), the vast majority of the world’s major economies have implemented laws against foreign corruption. But these legislative efforts notwithstanding, prosecutions outside of the United States have been relatively slow to develop. An OECD working group chartered to assess the actual enforcement of anti-bribery laws by OECD signatories has reported concerns about whether the application of sanctions to date has been ‘effective, proportionate and dissuasive’, and concluded that there appears to be a ‘lack of a firm, proactive approach to investigating and prosecuting foreign bribery’. That said, European authorities have become much more active of late. Several recent, high profile investigations are discussed subsequently:

Oil-for-Food programme investigations (multi-national)

With a budget of $36 million, a staff of nearly 100 attorneys, accountants and law-enforcement agents, and offices in Baghdad, New York and Paris, the IIC’s OFFP investigation, referenced at pages 12–13 above, is likely the largest international corruption investigation ever. The IIC’s mandate was to investigate: (i) mismanagement and maladministration of the OFFP by UN personnel and agents; (ii) illicit or corrupt activities involving the OFFP by UN officials, personnel or agents; and (iii) illicit or corrupt activities involving the OFFP by UN contractors, purchasers of oil and providers of humanitarian aid. The OFFP was the UN’s attempt to maintain the integrity of economic sanctions against the regime of Saddam Hussein—initially imposed as a result of the 1990 Iraqi invasion of Kuwait and thereafter maintained because of Hussein’s refusal to comply with post-Gulf War conditions for disarmament and weapons inspections—while at the same time ameliorating the devastating effect said sanctions were having on the Iraqi people. Although initially devised as a
'temporary measure', the OFFP lasted seven years—from 1996 through the fall of Hussein’s regime in 2003—and administered $64.2 billion in petroleum sales and $37 billion in humanitarian aid.\(^97\)

The IIC found corruption within the UN administration reached as high as Benon Sevan, Under-Secretary-General of the UN and Executive Director of the Office of the Iraqi Programme, the UN agency charged with administering the OFFP.\(^98\) As significant as the IIC’s findings of internal UN corruption and general maladministration were, the true core of the IIC’s findings involved the Iraqi government’s imposition of surcharges on the Programme’s oil and humanitarian contractors. Beginning in 2000, the Iraqi government conditioned the right to purchase its oil on the purchaser paying a ‘surcharge’—generally between 10 and 30 cents per barrel—to the Iraqi government.\(^99\) On the humanitarian side of the Programme, Iraq began requiring contractors to ‘kickback’ 10% of the value of their contracts to the Iraqi government.\(^100\) In all, the IIC estimated that the Iraqi government collected nearly $1.8 billion from OFFP contractors through these schemes.

For companies without ties to the United States, where the DOJ and SEC immediately initiated their own investigations as described above, the IIC reports were initially little more than an international embarrassment. Although the IIC’s findings generated substantial negative press for OFFP contractors, the reports had no legal effect and most nations took little to no initiative to pursue their own investigations.\(^101\) On 9 December 2006, more than a year after the IIC released the last of its investigative reports, former IIC Commissioner Mark Pieth publicly rebuked the international community for its failure to prosecute OFFP-related corruption cases.\(^102\) Now, more than 18 months removed from the IIC’s work, the international response to the OFFP corruption allegations finally appears to be making some headway.


\(^{98}\) Independent Inquiry Comm., ‘Third Interim Report’, Ch. 1 (8 August 2005), available at: <http://www.iic-offp.org/documents/IICSR.pdf> accessed 25 July 2007. Sevan has since been indicted in Manhattan federal district court on charges relating to his alleged receipt of approximately $160,000 from an OFFP oil trader in exchange for brokering deals with the Iraqi government to ensure that the trader received valuable rights to purchase oil from the Iraqi government. United States v Sevan, 05-cr-00059 (SDNY 2007).

\(^{99}\) Ibid, at 8.


\(^{101}\) A notable exception to the early international acquiescence is Australia, whose Australian Wheat Board (‘AWB’) was perhaps the most prominently featured of all companies in the IIC’s reports—accused of making nearly $222 million in illicit payments in connection with $2.3 billion in OFFP contracts. Australia immediately convened its own investigatory body, commonly known as the Cole Commission after Chairman and retired Australian judge Terrence P. Cole, to investigate AWB’s involvement in the OFFP. Ultimately, the Cole Commission concluded that there was ‘no reasonable basis’ for a prosecution under Australia’s OECD Convention-implementing legislation because the payments had been levied on behalf of the Iraqi government, rendering them ‘akin to a tariff imposed by the Iraqi government on all goods imported under the Oil-for-Food Programme’. Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme, App. 26, Vol. V, at 347–48, available at: <http://www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report> accessed 25 July 2007. As such, the payments were lawful under Iraqi law—a complete defence under Australia’s OECD Convention-implementing law much as it would be under the FCPA. See 15 USC § 78dd–1(c)(1).

\(^{102}\) Adam Jones and Hugh Williamson, ‘Volcker author attacks lack of oil-for-food lawsuits’, Financial Times (9 December 2006).
• **Italy:** On 18 April 2007, Italian police conducted coordinated raids of the Milan offices of five Italian companies with OFFP contracts. 103

• **France:** On 11 April 2007, a French magistrate announced that he had completed his preliminary investigation of Total SA’s OFFP involvement. Preliminary charges have been filed in that matter against 15 people, including Total CEO Christophe de Margerie, former French Interior Minister Charles Pasqua, former French UN Ambassador Jean-Bernard Merimee and former Secretary General of the French Foreign Ministry, Serge Boidevaix. 104

• **United Kingdom:** In February 2007, UK Attorney General Lord Goldsmith announced the formation of a 50-person team within the Serious Fraud Office to investigate British companies identified in the IIC reports, including pharmaceutical giants GlaxoSmithKline, AstraZeneca and Eli Lilly, and international oil trader Mabey & Johnson. 105

• **Germany:** On 29 December 2006, German prosecutors announced a November raid on the Munich offices of industrial gas company Linde as part of an OFFP investigation. 106 Then, in January 2007, German authorities reported the existence of a preliminary investigation of the OFFP involvement of industrial conglomerate Siemens AG. 107

• **New Zealand:** In December 2006, New Zealand’s Serious Fraud Office announced that it had visited the IIC’s offices to review evidence compiled by the IIC relating to the three New Zealand companies linked to surcharge payments: Fonterra, Ecroyd Beekeeping Supplies and JB Sales. Progress in the investigation is uncertain, however, as in March 2007 the press reported that the SFO had not contacted any of the companies regarding its investigation. 108

### Siemens (Germany)

On 15 November 2006, German authorities conducted coordinated raids of as many as 30 offices and homes of Siemens AG employees searching for evidence of violations of Germany’s Act on Combating Bribery of Foreign Public Officials. What has emerged is a wide-ranging and multi-faceted inquiry reportedly focusing on the operations of Siemens’s telecommunications unit in Cameroon, Egypt, Greece, Indonesia, Kuwait, Saudi Arabia and Vietnam and that allegedly involves as much as €420 million in suspicious payments dating back seven years. 109

In an unrelated case involving Siemens, German prosecutors just recently convicted a former finance chief and a consultant from the power generation unit of foreign bribery in a case involving contracts with the Italian utility company Enel SpA. 110 These and other corruption investigations, including the OFFP inquiry referenced above, are presently pending.

### BAE Systems (UK and US)

Perhaps the most controversial ongoing foreign corruption investigation involves BAE Systems. The United Kingdom’s Serious Fraud Office is reported to have spent more than


107 *Siemens Investigated Over Iraq Oil-for-Food Scheme, New Zealand Herald* (16 January 2007).

108 *Slow Progress on Oil-for-Food Probe, New Zealand Herald* (22 March 2007).


two years (and £2 million) investigating allegations that Britain’s largest defence contractor funnelled more than £1 billion to Saudi-controlled bank accounts in Washington, DC for the benefit of members of the Saudi royal family. The payments were allegedly made in connection with the 20-year, £43 billion al Yamamah contract under which BAE provided Saudi Arabia with more than 100 warplanes.

But on 14 December 2006, Attorney General Lord Goldsmith directed the SFO to close its investigation, citing the potential for ‘serious damage to UK/Saudi security, intelligence and diplomatic cooperation’. Lord Goldsmith stated that, in this instance, ‘the wider public interest’ outweighed ‘the need to maintain the rule of law’. He maintained, however, that the SFO would continue to investigate BAE contracts in Romania, Chile, the Czech Republic, South Africa and Tanzania. Acknowledging responsibility for this move, then Prime Minister Tony Blair explained that failure to terminate the inquiry would have led to ‘the complete wreckage of a vital strategic relationship and the loss of thousands of British jobs...’

But that would not be the end of the al Yamamah matter for BAE. On 26 June 2007, BAE confirmed media reports that the DOJ has opened its own investigation into the Saudi payments. And on 15 July 2007, SFO Director Robert Wardle confirmed reports that the DOJ had filed a formal request for assistance under its Mutual Legal Assistance Treaty with the United Kingdom. According to one anonymous US government source, the DOJ will be looking not only at the al Yamamah deal, but also more broadly at BAE’s operations in Romania, South Africa, Tanzania, Chile, the Czech Republic, Qatar, Argentina and the British Virgin Islands.

4. Special focus—acquisition due diligence

Given the increasing level of cross-border M&A activity, the FCPA and other international corruption statutes pose important issues for prospective acquirers by virtue of the liabilities they may assume as a matter of corporate law and of institutional culture. There are at least two risks attendant to every acquisition that are significant for FCPA purposes: (i) that the acquirer will assume criminal and/or civil liability for the unlawful pre-acquisition conduct of the target and (ii) that the acquirer will be unable to reform any wayward business practices of the target in time to prevent unlawful payments post-acquisition.
The principle of successor liability

Under traditional principles, a ‘successor’ is a ‘corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation’. Whether an acquiring company vests with the liabilities of a target depends, in the first instance, on the structure of the corporate transaction. Under US law, if the acquisition is a merger or consolidation—meaning that the target loses its corporate form and is absorbed entirely into the acquiring company—the acquiring company assumes the liabilities of the target. But if the acquisition is structured as an asset sale or stock purchase, absent an express agreement to do so the acquiring company generally does not assume the liabilities of the target as long as it continues in its separate existence.

The prospect of imposing successor liability on an acquiror itself ‘innocent’ of the conduct at issue bears broad policy ramifications, including the potential to chill market efficient M&A activity. Fortunately, the DOJ and SEC have exercised restraint in this regard, with only two SEC civil/administrative actions against an acquiror for pre-acquisition conduct of a target between them in the history of FCPA enforcement. Even in these two instances, the 2004 acquisition of InVision Technologies by the General Electric Company and the 2007 acquisition of Delta & Pine by Monsanto, the conduct at issue was discovered prior to the closing date of the acquisition, presumably meaning that GE and Monsanto at least had the option of walking away from the acquisitions (and their attendant FCPA liability).

But just because US enforcement authorities have thus far exercised their discretion not to bring successor liability prosecutions does not mean that the prospect alone does not have significant M&A implications. One recent acquisition was reportedly abandoned because the putative target was unable to resolve its FCPA issues prior to the expected closing date with the would-be acquirer. At least two more acquisitions in recent years—although ultimately consummated—were delayed until settlements were reached with the targets resolving their respective FCPA liabilities. Shortly after the

119 See Anspec Co., Inc. v Johnson Controls, Inc., 922 F.2d 1240, 1246 (6th Cir. 1991); Smith Land & Improvement Corp. v Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988); William M. Fletcher, ‘Cyclopedia of the Law of Private Corporations’, § 7121, at 213–14 (perm. edn 1999). Although the concept of merger is foreign to English company law, the legal proposition of an acquirer inheriting the liabilities of its target is substantially the same under the closest English equivalent, a scheme of arrangement pursuant to the Companies Act 1985. See Tolley’s ‘Company Law Issue’ 68 (LexisNexis, UK 2003) s10/12 at S1009 (a) and Palmer’s ‘Company Law Manual’ (Sweet & Maxwell, London 2000) at 8003–6.
120 See eg Holand v Williams Mountain Coal Co., 256 F.3d 819, 824 (DC Cir. 2001) (asset purchase under US law); Esmark, Inc. v NLRB, 887 F.2d 739, 751 (7th Cir. 1989) (stock sale under US law); Tolley’s ‘Company Law Issue’ 68 (April 2003) A35/1 at A.3501 (UK law); Tolley’s ‘Company Acquisitions Handbook’ (6th edn LexisNexis, UK 2003) p 214, para 8.3 (UK law); Palmer’s ‘Company Law Manual’ (December 2000) at 8003–6 (UK law).
123 SEC v Syncor Int’l Corp., 02-cv-02421 (DDC 2002) and United States v Syncor Taiwan, Inc. 02-cr-01244 (CD Cal. 2002); SEC v ABB Ltd, 04-cv-01141 (DDC 2004) and United States v ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd, 04-cr-00279 (SD Tex. 2004).
announcement of each of these settlements, the DOJ issued formal opinions delineating circumstances in which the DOJ will not assert successor liability against an acquirer for the prior FCPA violations of an acquired foreign subsidiary.\footnote{US Department of Justice, ‘FCPA Review Op. Proc. Rel. 2003-01’, 15 January 2003; ‘FCPA Review Op. Proc. Rel. 2004-02’ (12 July 2004).} Among the factors enumerated were the commitment to investigate the violations once they were known, full disclosure and cooperation with the government, discipline imposed on personnel involved in the activity, imposition of an adequate compliance programme and implementation of strengthened internal controls.

**Due diligence checklist**

The principal vaccine for the successor liability malady is stringent pre-acquisition due diligence. In each of the cases cited immediately above, the improper payments were discovered during due diligence, thus enabling the acquiror to re-evaluate the transaction and, in most instances, insist that the would-be target resolve its FCPA liabilities pre-acquisition as part of or incident to the acquisition. The DOJ’s lead criminal prosecutor has publicly stated her belief that ‘[t]ransactional due diligence in the FCPA context is good for business’.\footnote{Fisher, ‘Prepared Remarks at the ABA National Institute on the FCPA’, n 78 above.} And the SEC, in a recent FCPA settlement, deliberately alleged that the improper payments at issue were made possible by the acquiror’s decision to complete the acquisition of the subsidiary who would ultimately make the payments post-acquisition notwithstanding the acquiror’s discovery during due diligence that ‘illicit payments to government officials…were portrayed as necessary’ in the subsidiary’s business.\footnote{SEC v Tyco Int’l Ltd, 06-cv-02942 (SDNY 2006).} Adequate M&A due diligence ‘best practices’ increasingly include specific inquiries designed to ferret out potential FCPA violations so they can be considered as part of the overall transaction terms and necessary remediation and reporting steps taken.

Of course, no one due diligence ‘checklist’ can be crafted to apply to all situations, as each potential acquisition is driven by individual facts and circumstances, including the acquirer’s appetite for risk or offsetting terms. Yet, acquirers and their advisers, investment bankers, accountants and attorneys may well consider some of the following steps:\footnote{Of course, many of these steps could also inform the implementation of an effective FCPA compliance programme outside of the M&A context. Although the specifics and details of this subject are beyond the scope of this article, there is a plethora of guidance available from other sources. See eg Timothy Coleman and Peter H. Bresnan, ‘What Does Law Enforcement Regard as an Effective Compliance Program?’ *Practicing Law Institute*, (March–June 2005) 1478 PLI/Corp 543.}

✓ Evaluate the target’s compliance programme, particularly with respect to the FCPA and other international corruption laws:

- Is there a code of conduct provision or other form of recognition of anti-bribery protocols?
- Is there an adequate ‘whistleblower’ or similar mechanism for company personnel to report suspected bribery?
- Is there a basic understanding of these principles both ‘at the top’ in the ranks of upper management and ‘in the field’ where interactions with government officials are taking place?


Evaluate the target’s sales/marketing programme:

- Do sales personnel have access to cash and/or are they given excessive marketing budgets?
- What is the target’s policy with respect to gift giving on national holidays?
- Are records of entertainment expenditures ever mischaracterized or destroyed out of ‘cultural sensitivity’ for the government official?

Evaluate the risk associated with the target’s line of business:

- The oil services industry, for example, has a history of demands for corrupt payments.
- Another area of frequent concern is the customs process encountered by any business that needs to import equipment and pay an assessment thereon.
- Does the business entail a high level of interaction with foreign government officials?

Evaluate the risk associated with the countries in which the target operates:

- Transparency International’s *Corruption Perceptions Index* is perhaps the best-known and most comprehensive source for comparing indicators of corruption across nation states.
- Other useful sources include Freedom House’s *Nations in Transit*, the World Bank’s *Ease of Doing Business* and the World Economic Forum’s *Global Competitiveness Report*.

Evaluate the target’s business control model:

- How decentralized is the operational supervision of field offices (ie do local operations have a great deal of autonomy)?
- Knowing the true control centre will enable the acquiring company to better focus its due diligence review.

Evaluate the target’s use of third-party agents:

- Have the agents been implicated in any corruption investigations?
  - A useful source in this regard may be the local embassy of the acquiring company’s home state.
  - What expertise or abilities do these agents bring to the table justifying their utilization?
- Do the agents have any connection to the government of the country in which they are operating on the target’s behalf?
- Has the agent agreed to abide by the target’s compliance policy in the past and is the agent willing to abide by the acquiring company’s compliance policy in the future?
- Is the agent willing to give the acquiring company audit rights on future contracts?

Conduct enhanced due diligence of any ‘red flags’ that arise during the review process, including:

- Allegations of improper payments and/or other corrupt business practices by the target and/or its agents;
- Large and/or frequent cash expenditures;

128 See n 64 above.
132 In constructing this list, the authors have liberally borrowed from the work of Messrs. Sturc and Chesley’s colleagues at Gibson Dunn. See F. Joseph Warin and Jason A. Monahan, ‘Foreign Corrupt Practices Act Due Diligence and Voluntary Disclosure’, The Journal of Payment of Systems Law (September 2005).
• Large and/or frequent political contributions;
• Agent commissions that appear unusually large in comparison to the scope of their work;
• Inaccurate or incomplete books and records and/or poor controls over disbursements;
• Unexplained or poorly documented expense reports relating to the entertainment of government officials;
• References to a ‘special arrangement’ (or other similar language) with a government official; and
• Refusal by any employee or agent to agree in writing to comply with the FCPA and other international corruption laws in the future and/or to certify past compliance with such laws.

5. Conclusion
The past five years has seen unprecedented interest by US and global regulators and law enforcement authorities in combating international corruption and there is little reason to expect that this level of emphasis will soon abate. Indeed, through the efforts of global organizations like the OECD, even more scrutiny is expected on the issue of actual enforcement of anti-bribery laws. Participants in cross-border mergers and acquisitions thus will have to assess the terms of the transaction with an understanding of the extent and thoroughness of the due diligence focusing on anti-bribery issues under both domestic and foreign law as well as any attendant remediation efforts necessary to redress issues that such diligence reveals. Principals to such transactions are encouraged more than ever to work closely with their professional advisors to ferret out and assess the risks of anti-bribery issues.