THE INTERNATIONAL ANTI-BRIBERY ACT OF 1998 AMENDS THE FOREIGN CORRUPT PRACTICES ACT AND IMPLEMENTS THE OECD CONVENTION COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS

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On November 10, 1998, President Clinton signed into law the "International Anti-Bribery and Fair Competition Act of 1998," Public Law No: 105-366 (the "Anti-Bribery Act"). The Anti-Bribery Act amends the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff, 78m, (the "FCPA" or the "Act"), and the Securities Exchange Act of 1934, 15 U.S.C. § 78 et seq., (The "Securities Exchange Act") and implements the Convention on Combating Bribery of Foreign Public Officials of the Organization for Economic Cooperation and Development, 37 I.L.M. 1, (the "OECD Convention" or the "Convention").

The United States was one of thirty-three countries to sign the OECD Convention on December 17, 1997.[1] By early 1999 many of the Convention signatories will have passed implementing legislation and should be prepared to bring the Convention into effect. Once in force, the Convention will require all ratifying states to enforce legislation modeled on the United States' Foreign Corrupt Practices Act. This new legislation will criminalize the bribery of foreign public officials, require business accounting transparency and promote cooperation in the international investigation and enforcement of anti-bribery laws.

Until recently, the United States was the only country to penalize its domestic businesses and their employees for bribing foreign public officials. However, a growing international intolerance for corrupt business practices, sparked in part by bribery scandals that have destabilized economies all over the world,[2] has inspired a series of international anti-corruption

1. The following countries have now committed to implement the provisions of the OECD Convention: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

2. Recent corruption scandals include: the downfall of Indonesian President Suharto following protests inspired in part by billions of dollars amassed by his family from state-connected enterprises; the defeat of Prime Minister P.V. Narasimha Rao of India and Benazir Bhutto of Pakistan in the wake of corruption charges; the jailing of Roh Tae Woo and Chun Doo Hwan, two former Presidents of South Korea, for bribes received from Korean companies; the resignation of numerous top-level government and business leaders in Japan following corruption scandals; the impeachment of Presidents Fernando Collor de Mello of Brazil and Carlos Andres Perez of Venezuela, and the

initiatives.[3] This heightened scrutiny of corrupt business practices is likely to accompany an era of vigorous enforcement and investigation of the newly expanded anti-bribery and accounting laws.

EXECUTIVE SUMMARY

Once implemented, the OECD Convention will create an international system of anti-corruption law. Implementing legislation in the United States already has extended the jurisdictional scope of the FCPA in important ways. As amended, the FCPA now has the following expanded impact:

- it prohibits payments made to secure "any improper advantage;"
- the Act reaches foreign companies and foreign nationals who commit an act in furtherance of a foreign bribe while in the United States;
- it defines foreign official to include the officials of public international organizations;
- it provides for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States and without the use of the U.S. mails or another instrumentality of interstate commerce; and
- the Act imposes criminal penalties on foreign nationals who violate the Act while employed by or acting as agents of U.S. companies.

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resignation of President Abdala Bucaram of Ecuador, in the wake of bribery charges; the near impeachment of Colombian President Ernesto Samper of Colombia based on evidence that he accepted money from the Cali drug cartel; the shakeup of the Italian government from bribery investigations initiated by Milanese magistrates; the defeat of Prime Minister Felipe Gonzalez of Spain, due, in part, to bribery scandals involving members of his cabinet; the resignation of NATO Secretary-General Willy Claes as the result of bribery charges; and the resignation of a member of the Chinese Politburo during a corruption scandal.

3. Other recent anti-corruption initiatives include: the Inter-American Convention Against Corruption, March 26, 1996, 35 I.L.M. 724, signed by twenty-six countries and since ratified by ten; The Rules of Conduct on Extortion and Bribery in International Business Transactions, 35 I.L.M. 1306, recently revised by the International Chamber of Commerce to address bribery in both the public and the private sectors; the Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, May 26, 1997, 37 I.L.M. 12, adopted by the European Union; and the Statement on Standards of Transactions Between Business and Governments approved in November 1997 by the Pacific Basin Economic Council, *Pacific Basin Economic Council* (visited 11/20/98) <http://www.pbec.org/policy/1997/transpar.htm>.

DISCUSSION

I. UNITED STATES ANTI-BRIBERY AND ACCOUNTING TRANSPARENCY LAWS

In 1977, Congress amended the Securities Exchange Act and enacted The Foreign Corrupt Practices Act after a Securities & Exchange Commission ("SEC") investigation and Watergate hearings testimony revealed the extent to which bribery had become an accepted international business practice for some American companies. This new legislation made it a crime to bribe a foreign official to obtain or retain business and established accounting regulations to increase transparency in corporate transactions.

Although enacted together to address similar concerns, the anti-bribery provisions and the accounting regulations are in fact two entirely distinct sets of laws. The anti-bribery provisions prohibit businesses from corruptly paying foreign officials to obtain something of value. The accounting provisions, by contrast, require companies covered by the Act to maintain accurate books and records and to establish a system of internal accounting controls. Anti-bribery prosecutions, which until now have been relatively infrequent, always incorporate an international element. Accounting provision enforcement actions are more common and may target purely domestic conduct. Generally, the government has not enforced the accounting provisions unless a defendant has also violated some other law or regulation, but has enforced the anti-bribery provisions absent evidence of any additional offense.

A. COMPLYING WITH THE ANTI-BRIBERY PROVISIONS

The anti-bribery provisions, as amended, prohibit certain entities, individuals and their agents from:

(1) using the mails or other means or instrumentality of interstate commerce[4]

(2) corruptly

(3) in furtherance of

(4) an offer, payment or promise to pay or the authorization of the payment of

(5) money or anything of value

4. The Anti-Bribery Act removes the interstate commerce element in certain cases. As amended, the government may enforce a case under the FCPA against a United States person for violations committed outside the United States without proving a link to interstate commerce. This new provision is discussed in section II.A, *infra*.

(6) to any foreign official, foreign political party, foreign political party official, or candidate for foreign political office ("foreign official bribee"), or

(7) to any person who the entity, individual or agent knows will directly or indirectly offer, give or promise all or a portion of such money or thing of value, to any foreign official bribee

(8) for purposes of

(a) influencing any act or decision of the foreign official bribee

(b) inducing the foreign official bribee to do or omit any act in violation of his, her or its lawful duty

(c) securing any improper advantage, or

(d) inducing the foreign official bribee to use his, her or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality

(9) to assist in obtaining, retaining, or directing business to any person.

15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2).

1. DEFINITIONS

There are few published opinions interpreting the anti-bribery provisions. However, court rulings, statutory construction, legislative history and enforcement practice have shed some light on the following statutory terms:

Act in furtherance A bribe need not be successful to fall within the statute. A defendant may be prosecuted for an attempted bribe.

Anything of Value To fall under the anti-bribery provisions, a bribe need not be a monetary payment. For example, in one FCPA anti-bribery action, a defendant pleaded guilty to charges that it transported voters to participate in an election in exchange for a government business opportunity.[5]

Corruptly The Eighth Circuit has ruled that, for purposes of the anti-bribery provisions, "an act is corruptly done if done voluntarily, and intentionally, [a]nd with a bad purpose of accomplishing either an

5. *United States v. Kenny Int'l Corp.*, Cr. No. 79-372 (D.D.C. 1979).

unlawful end or result, or a lawful end or result by some unlawful method or means."[6]

Foreign Official The FCPA defines "foreign official" to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government department, agency, or instrumentality, or for or on behalf of any such public international organization."[7] 15 U.S.C. §§ 78dd-1(f)(1); 78dd-2(h)(2). The government interprets this term broadly to include ministerial, honorary or ceremonial government positions.[8] It does not include private business persons.

Government instrumentality Every business or company wholly owned by a foreign government is an instrumentality of that government for FCPA purposes. The definition probably also extends to any business in which the government has a controlling interest. Therefore, payments to the employees of any business owned by a foreign government will raise FCPA issues.

Knowledge The statute provides that "a person's mind is 'knowing'" if the "person is aware" of the prohibited conduct, or aware that such conduct "is substantially certain to occur;" or if the person "has a firm belief" that such conduct "is substantially certain to occur." 15 U.S.C. §§ 78dd-1(f)(2)(A); 78dd-2(h)(3)(A). In practice, evidence of constructive knowledge will often suffice to establish scienter. Thus, the knowledge element may be satisfied if a defendant consciously disregards or is wilfully blind to circumstances suggesting a violation.

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6. *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991).

7. The Anti-Bribery Act added "public international organization" which it defines as any organization so designated by Executive Order. 15 U.S.C. §§ 78dd-1(f)(1); 78dd-2(h)(2).

8. *See e.g., United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334 (D. Conn. 1990) (individual who served as the executive chairman of a state owned travel agency and who acted on behalf of the government tourist board as a government advisor with respect to tourism is a "foreign official" for FCPA purposes.); *SEC v. Ashland Oil*, 2 FCPA Reporter 696.95, 696.96 (July 8, 1996) (the Complaint in this action that was never tried but terminated in a consent decree, describes a "special adviser to the Sultan on Omani intelligence and security matters" as a "foreign official" for FCPA purposes).

2. EXCEPTION AND DEFENSES

The FCPA anti-bribery provisions, as amended, contain one statutory exception for "routine governmental actions" (also known as the "grease payment" exception) and two affirmative defenses for lawful payments and for reasonable, bona fide expenditures.

i. ROUTINE GOVERNMENTAL ACTIONS

The FCPA, as amended, exempts from prosecution payments to obtain certain "routine governmental actions" ordinarily and commonly performed by foreign officials in the course of their clerical or ministerial duties. For example, an entity or individual may pay a government official to process visas or work papers, or to issue a work permit. 15 U.S.C. §§ 78dd-1(f)(3)(A); 78dd-2(h)(4)(A). However, the statute explicitly exempts from the definition of a routine governmental action: "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." 15 U.S.C. §§ 78dd-1(f)(3)(B); 78dd-2(h)(4)(B).

ii. LAWFUL PAYMENTS AND REASONABLE BONA FIDE EXPENDITURES

The FCPA, as amended, provides for an affirmative defense to prosecution under the anti-bribery provisions if a defendant can demonstrate that disputed payments were "lawful under the written laws and regulations" of the foreign official's country. However, no country's laws permit bribery. A defense is also available for "a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of" a foreign official. 15 U.S.C. §§ 78dd-1(c); 78dd-2(c).

B. COMPLYING WITH THE ACCOUNTING PROVISIONS

The accounting provisions of the FCPA, as amended, require that issuers with a class of securities registered pursuant to section 12 of the Securities Exchange Act and/or required to file reports under section 15(d) of the Securities Exchange Act, 15 U.S.C. § 78m(b)(2):

(1) 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; and

(2) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that —

   i) transactions are executed in accordance with management's general or specific authorization;

   ii) transactions are recorded to allow for the preparation of financial statements in accordance with generally accepted accounting principles or any other criteria applicable to such statements;

iii) access to assets is permitted only in accordance with management's general or specific authorization; and

iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

15 U.S.C. §§ 78m(b)(2)(A); 78m(b)(2)(B).

These rules were originally intended to eliminate "slush funds" ie., monies collected by a company and reflected on its books by false entries intended to disguise their origin and ultimate purpose, which was to make funds available to pay bribes to foreign officials or other illicit payments, such as illegal campaign contributions.

The SEC has explained that the accounting provisions do not "mandate any particular kind of internal controls system. The test is whether a system, taken as a whole, reasonably meets the statute's specified objectives."[9]

1. REASONABLENESS

Critics have complained that the "reasonableness" standard of the FCPA accounting provisions is too vague. Congress attempted to address this problem in 1988 by amending the accounting provisions to provide that: "the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." 15 U.S.C. § 78m(b)(7).

In practice, whether an issuer's accounting systems are reasonable will depend on the issuer's individual circumstances. Relevant circumstances include: the size of an issuer's business, the diversity of its operations, the degree of centralization of financial and operating management, and whether top management is in contact with day to day operations.[10] The SEC has stated that a cost benefit analysis may be among the factors appropriately considered in determining whether an accounting system is reasonable.[11] However, unlike most securities regulations, the concept of materiality is not central to the accounting provisions.[12] Thus, an issuer cannot satisfy its accounting obligations through systems that merely ensure accounts and records contain no false information that would be materially misleading to an investor.

9. Speech by SEC Chairman Williams on the FCPA Accounting Provisions (Jan. 13, 1981). This speech, SEC Release No. 17500, was a formal statement of SEC policy. It appears at 46 Federal Register 11544.

10. *See SEC v. World-Wide Coin Investments, Ltd.*, 567 F. Supp. 724, 751 (N.D. Ga. 1983).

11. SEC Release No. 17500.

12. Materiality is relevant to SEC Rule 13b2-2, as discussed *infra*.

2. NATIONAL SECURITY EXEMPTION

The accounting provisions contain one narrow "national security exemption," which permits a company to disguise a transaction in its books and records "with respect to matters concerning the national security of the United States." An issuer is only eligible for this exemption if it acts at the direction of "the head of any Federal department or agency," "in cooperation with such head of a department or agency" and "upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives." 15 U.S.C. § 78m(b)(3)(A).

II. Who May Be Liable Under The Foreign Corrupt Practices Act

Although certain individuals and entities may be liable under both the anti-bribery and the accounting provisions of the FCPA, as amended, the jurisdiction of the two provisions is not identical.

A. LIABILITY UNDER THE ANTI-BRIBERY PROVISIONS

Prior to the recent amendments, the anti-bribery provisions of the FCPA only applied to "issuers," "domestic concerns," and the officers, directors, employees, agents or stockholders of issuers or domestic concerns. 15 U.S.C. §§ 78dd-1(a); 78dd-2(a). As amended, the anti-bribery provisions of the FCPA now extend to any individual or entity violating the anti-bribery provisions within the United States. 15 U.S.C. § 78dd-3(a). The amendments also extend the Act to reach certain violations by United States persons committed outside the U.S. that were not previously covered. 15 U.S.C. §§ 78dd-1(g); 78dd-2(i).

1. ISSUER AND DOMESTIC CONCERN DEFINED UNDER THE ANTI-BRIBERY PROVISIONS

As originally drafted, the anti-bribery provisions of the FCPA were divided into two nearly identical parts, the first addressing issuers under which either the SEC or the Department of Justice ("DOJ") had jurisdiction, the second addressing domestic concerns under which only the DOJ had jurisdiction. An issuer falls under the jurisdiction of the anti-bribery provisions if it has a class of securities registered pursuant to section 12 of the Securities Exchange Act or if it is required to file reports under section 15(d) of the Securities Exchange Act. The government may also enforce the anti-bribery provisions against "any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer." 15 U.S.C. § 78dd-1(a).

The anti-bribery provisions also apply to "domestic concerns" and to their officers, directors, employees and agents. 15 U.S.C. § 78dd-2(a). The definition of domestic concern is very broad and extends to almost any person or entity with ties to the United States. In the words of the statute a "domestic concern" is "(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States." 15 U.S.C. § 78dd-2(h)(1).

2. EXPANDED JURISDICTION UNDER THE ANTI-BRIBERY ACT

The Anti-Bribery Act extends FCPA jurisdiction in two important ways. First, it extends the scope of the Act to cover virtually any person, any entity, or any officer, director, employee, agent or stockholder of any entity that violates the anti-bribery provisions within the United States. 15 U.S.C. § 78dd-3(a). This means that liability under the Act is no longer limited to issuers, domestic concerns and associated entities and individuals. Under this amendment, the government may now prosecute foreign entities for anti-bribery violations committed in the United States through the use of the mails or another instrumentality of interstate commerce.

Second, the Anti-Bribery Act does away with the interstate commerce requirement for violations committed outside the United States by certain classes of issuers, domestic concerns and their officers, directors, employees, agents and stockholders.[13] Previously, to prove a violation of the FCPA, the government had to link the conduct to the use of the mails or another instrumentality of interstate commerce. Under the FCPA, as amended, the government may prosecute an anti-bribery violation committed outside the United States, absent a link to interstate commerce, if the defendant is:

(1) an issuer "organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof," 15 U.S.C. § 78dd-1(g)(1);

(2) a director, employee, agent, or stockholder of an issuer, if that director, employee, agent or stockholder is a "United States person," 15 U.S.C. § 78dd-1(g)(1);

(3) a domestic concern that is a "United States person," 15 U.S.C. § 78dd-2(i)(1); or

(4) an officer, director, employee, agent or stockholder of a domestic concern, if that officer, director, employee, agent or stockholder is a "United States person," 15 U.S.C. § 78dd-2(i)(1).

The FCPA, as amended, defines "United States person" as "a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State,

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13. The statute defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof." It also explains that interstate commerce includes "the interstate use of — (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality." 15 U.S.C. § 78dd-2(h)(5).

territory, possession, or commonwealth of the United States, or any political subdivision thereof." 15 U.S.C. §§ 78dd-1(g)(2); 78dd-2(i)(2).

3. AN ISSUER OR A DOMESTIC CONCERN MAY BE HELD LIABLE FOR THE ANTI-BRIBERY VIOLATIONS OF THIRD PARTIES, INCLUDING FOREIGN SUBSIDIARIES AND JOINT-VENTURE PARTNERS

Under the FCPA, originally and as amended, issuers, domestic concerns and their officers, directors, employees, agents or stockholders may be liable for the anti-bribery violations of third parties. The anti-bribery provisions prohibit payment to "any person, while knowing that all or a portion" of that payment will be used to bribe a foreign official. 15 U.S.C. §§ 78dd-1(a)(3); 78dd-2(a)(3). The Act also provides:

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance or a result if --- (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

15 U.S.C. §§ 78dd-1(f)(2); 78dd-2(h)(3).

These provisions prevent individuals and entities that fall under the FCPA from paying third parties to bribe foreign officials. As a consequence, issuers, domestic concerns and associated individuals may be liable for bribes paid by their agents, foreign subsidiaries, consultants or joint venture partners, if they are aware of the bribes, if they firmly believe the bribes will occur, or if they are wilfully blind to the bribes.[14]

B. LIABILITY UNDER THE ACCOUNTING PROVISIONS

Issuers, their officers and directors and persons who falsify accounting records may be prosecuted for FCPA accounting provision violations. 15 U.S.C. §§ 78m; 78ff. These provisions of the FCPA, as amended, do not apply to domestic concerns that are not issuers.

14. In this respect, the anti-bribery provisions differ markedly from the accounting provisions. Under the accounting provisions, parent liability for a subsidiary's violations will depend on the extent of the ownership and control the parent company exercises over the subsidiary. Under the anti-bribery provisions, by contrast, even if a parent company does not control a subsidiary, it will be liable for any of the subsidiary's violations of which it was aware.

1. ISSUERS

The accounting provisions apply to the same class of issuers that may be liable under the anti-bribery provisions. Thus any issuer with a class of securities registered pursuant to section 12 of the Securities Exchange Act or required to file reports under section 15(d) of the Securities Exchange Act must comply with the FCPA accounting provisions. 15 U.S.C. § 78m(b)(2). The government interprets its authority to prosecute issuers under the accounting provisions broadly. Liability can extend to non-U.S. corporations. Additionally, issuers may be liable for the actions of certain entities they control.

i. FOREIGN ENTITIES WITH STOCK REGISTERED IN THE U.S. MAY BE LIABLE FOR FCPA ACCOUNTING PROVISION VIOLATIONS

Recent enforcement activity demonstrates that foreign entities with U.S. registered securities may be prosecuted for violating the accounting provisions of the FCPA. In 1996, the SEC Enforcement Division brought a civil injunctive action for accounting provision violations against an Italian company, Montedison, S.p.A.[15] Montedison was not incorporated in the United States, but had registered American Depository Receipts ("ADRs")[16] under section 12(b) of the Securities Exchange Act. Although the FCPA has traditionally been enforced against U.S. companies, Montedison may signal a shift in FCPA enforcement policy. Thus, any company with a class of securities registered in the United States, even limited to ADRs, potentially could be the target of an accounting provision action.

ii. ACCOUNTING PROVISION ISSUERS WILL BE HELD LIABLE WHEN ENTITIES THEY CONTROL VIOLATE THE ACCOUNTING PROVISIONS

Any issuer subject to the Act that controls more than 50% of the voting power of another entity will be held liable if the controlled entity violates the accounting provisions. Thus, it is the issuer's responsibility to ensure that controlled subsidiaries or joint venture partners have accounting compliance procedures in place. Under certain circumstances, an issuer may also be liable if an entity it does not fully control violates the accounting provisions. In a case of incomplete control, liability will depend on the extent of the issuer's actual ownership and control. However, in all cases, an issuer is required to "proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances," to influence the entity to comply with the FCPA accounting provisions. 15 U.S.C. § 78m(b)(6).

15. *SEC v. Montedison, S.p.A.*, Litigation Release No. 15164 (November 21, 1996).

16. ADRs are receipts for the shares of a foreign-based corporation held in the vault of a U.S. bank. The holder of an ADR may collect all dividends and capital gains from the underlying stock. By purchasing ADRs, U.S. entities and individuals can invest in foreign based companies without buying shares in the overseas markets.

2. PERSONS WHO FALSIFY ACCOUNTING RECORDS

In addition to the issuers themselves, certain individuals may also be liable for violating the FCPA accounting provisions. For example, SEC Rule 13b2-1 provides: "No person shall directly or indirectly falsify or cause to b[e] falsified, any book, record or account subject to Section 13(b)(2)(A) of the Securities Exchange Act." The government typically employs this rule to prosecute employees of an issuer who have falsified the issuer's accounting records.[17]

3. OFFICERS AND DIRECTORS WHO MATERIALLY MISLEAD AUDITORS

An issuer's officers and directors may also be held personally liable for violating the accounting provisions. SEC Rule 13b2-2 prohibits an issuer's officers and directors, but not its employees, from materially misleading an accountant auditing the issuer. Unlike the other accounting provisions, this rule is limited to materially misleading statements; however, it applies in the context of any issuer audit, whether it is conducted by internal or by independent accountants.

III. Consequences of Prosecution under the FCPA

A. ANTI-BRIBERY PROVISION PENALTIES

Anti-bribery provision violations may result in civil or criminal penalties. The SEC has civil enforcement authority over violations of the anti-bribery provisions by domestic or foreign issuers with securities registered under the Securities Exchange Act. The DOJ has both civil and criminal enforcement authority for violations of the anti-bribery provisions by domestic concerns, issuers, and other individuals and entities engaged in criminal activity. See also 18 U.S.C. §§ 2; 371.

The FCPA, as amended, provides for criminal fines of up to two million dollars for entities violating the Act within the United States, or for issuers or domestic concerns. 15 U.S.C. §§ 78ff(c)(1)(A); 78dd-2(g)(1)(A); 78dd-3(e)(1)(A). However, under the United States Sentencing Guidelines, which control, the fines may significantly exceed this amount. Corporate penalties under the Sentencing Guidelines may be as high as $290 million. U.S. Sentencing Guidelines Manual, Chapter 8; § 2B4.1(c)(1) et al.[18] Civil violations entities commit within the United States, or civil violations committed by issuers or domestic concerns, may result in fines of up to $10,000 or a civil injunction. 15 U.S.C. §§ 78ff(c)(1)(B); 78u(d); 78dd-2(d)(1); 78dd-2(g)(1)(B); 78dd-3(e)(1)(B).

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17. *See e.g., In the Matter of Elizabeth T. Riggan*, Exchange Act Release No. 32842 (September 3, 1993).

18. *See United States v. Lockheed Corp., et al.*, 1:94-CR-226-01 (N.D. Ga. 1994) (the superseding plea agreement in this anti-bribery action stated that the defendant Lockheed would be eligible for a maximum penalty of $24,800,000 under 18 U.S.C. § 3571(d)).

An individual who wilfully violates the anti-bribery provisions may be sentenced under the FCPA to a maximum fine of $100,000 and up to five years in prison. 15 U.S.C. §§ 78dd-2(g)(2)(A); 78dd-3(e)(2)(A); 78ff(c)(2)(A).[19] However, like corporate defendants, individuals may receive greater fines under the Sentencing Guidelines. U.S. Sentencing Guidelines § 2F1.1, et al. Civil anti-bribery violations by an individual can lead to a maximum fine of $10,000 or a civil injunction. 15 U.S.C. §§ 78ff(c)(2); 78dd-1(d); 78dd-2(g)(2)(C); 78dd-3(e)(2)(B); 78u(d).

B. ACCOUNTING PROVISION PENALTIES

Violations of the accounting provisions may also lead to civil or criminal sanctions. To hold a defendant criminally liable, the DOJ must demonstrate that the defendant acted wilfully. Under the Securities Exchange Act criminal penalty provisions, an individual may be fined up to a million dollars and sentenced to up to ten years in prison and corporate defendants may be fined up to 2.5 million dollars. 15 U.S.C. § 78ff(a). However, actual criminal fines may be higher under the Sentencing Guidelines. U.S. Sentencing Guidelines Manual, Chapter 8; 2F1.1 et al. Absent a showing of wilfulness, the SEC may seek civil penalties under the general penalty provisions of the Securities Exchange Act or a civil injunction. 15 U.S.C. § 78u.

C. OTHER CONSEQUENCES

In addition to criminal and civil sanctions, a number of other negative consequences may stem from conviction, or even indictment under the FCPA. Along with adverse publicity, indictment alone or indictment and conviction may lead to a suspension of the right to do business with government agencies; ineligibility to receive export licenses; and/or suspension or disbarment from participation in Overseas Private Investment Corporation or Commodities and Futures Trading Commission programs. Anti-bribery and accounting violations may also trigger shareholder derivative suits and RICO actions.[20]

IV. Avoiding FCPA Violations

A. COMPLIANCE SYSTEMS

To avoid liability under both the anti-bribery and the accounting provisions of the FCPA, a corporation must institute an effective legal compliance system. How best to structure

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19. The Anti-Bribery Act altered these provisions to impose criminal penalties on individuals regardless of their nationality.

20. By the terms of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, FCPA violations are not predicate acts. However, conduct violating the FCPA may be pled as a Travel Act violation, 18 U.S.C. § 1952, which does constitute a RICO predicate act. *See e.g., Young & Rubicam*, 741 F. Supp. at 338-39. In addition, conduct violating the FCPA may also violate federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, to become a predicate act under RICO. 18 U.S.C. § 1961.

an effective compliance system will depend on a company's individual circumstances. However, commentary to the Corporate Sentencing Guidelines offers some direction by listing the following seven elements that should be a part of any effective compliance program:

- An organization must establish compliance standards and procedures ". . . reasonably capable of reducing the prospect of criminal conduct." U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(1) (1998).

- A specific high-level person must be assigned to oversee compliance with such standards and procedures. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(2) (1998).

- The organization must use due care not to delegate responsibility to a person whom it knew or should have known had a propensity to engage in criminal activity. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(3) (1998).

- The organization must take steps to communicate effectively the standards to all employees and agents, for example, by training programs and/or publications which explain in a practical manner what is required. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(4) (1998).

- The organization must take reasonable steps to achieve compliance, for example, by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(5) (1998).

- The standards must be consistently enforced with appropriate discipline, including, if appropriate, the discipline of employees who have failed to detect an offense. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(6) (1998).

- When an offense is detected, the organization must respond appropriately and take action to prevent future occurrences, including any necessary modifications to the compliance program. U.S. Sentencing Guidelines Manual § 8A1.2 Application Note 3(k)(7) (1998).

Although these standards appear in the Corporate Sentencing Guidelines, they are frequently used by federal prosecutors in deciding whether to indict a corporation.

B. THE DEPARTMENT OF JUSTICE OPINION PROCEDURE

In addition to relying on an effective compliance system, an issuer, domestic concern and associated individuals may attempt to minimize liability under the anti-bribery provisions by testing the legality of a proposed transaction through the FCPA Opinion Procedure. This little used procedure allows "issuers and domestic concerns [to] obtain an opinion of the Attorney General [to determine] whether prospective conduct [will] conform with the Department of Justice's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act."[21] The Attorney General is required by statute to respond to such requests within thirty days, but this deadline may be extended. 15 U.S.C. §§ 78dd-1(e)(1); 78dd-2(f)(1). The DOJ has issued twenty-four review and opinion releases under this provision since 1980. These opinions are published in the Foreign Corrupt Practices Act Reporter. 3 Foreign Corrupt Prac. Act Rep. (Business Laws, Inc.) 711 (1998). A favorable opinion does not insulate a company from prosecution under the FCPA. However, a rebuttable presumption of compliance with the anti-bribery provisions will attach to any transaction approved through the Opinion Procedure.[22]

V. THE OECD CONVENTION

The OECD Convention will become effective in 1999 when any two countries complete their approval process.[23] Even in the unlikely event that the Convention never comes into force, the implementing legislation enacted through the Anti-Bribery Act will remain the law of the United States. When the Convention comes into effect, it will require all ratifying countries to pass laws similar to the FCPA to (1) establish strong penalties for entities and individuals who bribe foreign officials, (2) implement accounting and auditing regulations to prevent off-the-books accounts and (3) provide for mutual legal assistance between countries to strengthen the international enforcement of anti-bribery laws. The passage of implementing legislation in each ratifying country is expected to have a significant impact on international business practices, since many of the world's largest multinational companies are organized under the laws of the OECD Convention signatory countries. As business accounting becomes more transparent and as nations increasingly cooperate to enforce international anti-corruption laws, scrutiny of business transactions is likely to increase substantially, and the compliance obligations of businesses engaged in international transactions will necessarily increase as well.

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21. 28 C.F.R. Part 80, Order No. 1620-92.

22. Id.

23. The OECD Convention provides that "any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of [the] Convention . . . . The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit." OECD Convention, Article 15(2).

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