[As of July 22, 2004]

Anti-Bribery and Books & Records Provisions of

The Foreign Corrupt Practices Act

Current through Pub. L. 105-366 (November 10, 1998)

UNITED STATES CODE

TITLE 15. COMMERCE AND TRADE

CHAPTER 2B--SECURITIES EXCHANGES

§ 78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) Form of report; books, records, and internal accounting; directives

* * *

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall--

(A) 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

(B) 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 as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

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

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

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues such a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, 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.

* * *

§ 78dd-1 [Section 30A of the Securities & Exchange Act of 1934].

Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney

General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(1) A) The term "foreign official" means 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 or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means--

(i) an organization that is designated by Executive Order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (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.

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative Jurisdiction

(1) It shall also be unlawful for any 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 and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of this subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means 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, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (i) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue--

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, by made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1) (A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of

this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means--

(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.

(2) (A) The term “foreign official” means 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 or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii)any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (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.

(4) (A) The term "routine governmental action"means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce"means 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, and such term includes the intrastate use of--

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative Jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, a "United States person"means 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, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

§ 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern, as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) of this section that--

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to--

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties

(1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than

$2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions

For purposes of this section:

(1) The term “person,” when referring to an offender, means any natural person other than a. national of the United States (as defined in 8 U.S.C. § 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof

(2) (A) The term “foreign official” means 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 or department, agency, or instrumentality, or for or on behalf of any such public international organization.

For purposes of subparagraph (A), the term "public international organization" means --

(i) an organization that has been designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act (22 U.S.C. § 288); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (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.

(4) (A) The term "routine governmental action"means only an action which is ordinarily and commonly performed by a foreign official in--

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means 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, and such term includes the intrastate use of —

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

§ 78ff. Penalties

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2) (A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title [15 U.S.C. § 78dd-1] shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

FOREIGN CORRUPT PRACTICES ACT

An Overview

The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. ("FCPA"), was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. With the enactment of certain amendments in 1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, an act in furtherance of such a corrupt payment to take place within the territory of the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.

For more background information regarding the anti-bribery provisions of the FCPA, please refer to the "Lay Person's Guide", found here. For particular FCPA compliance questions relating to specific conduct, you should seek the advice of counsel as well as consider using the Department of Justice's FCPA Opinion Procedure, found here.

CONTACT US REGARDING THE FCPA

By Mail

Correspondence relating to the Foreign Corrupt Practices Act (FCPA) may be sent to:

U.S. Department of Justice
Criminal Division
Fraud Section
ATTN: FCPA Coordinator
Bond Building, 4th Floor
10th and Constitution Ave. NW

Washington, DC 20530-0001

By Fax

Facsimile - 202-514-7021

By E-Mail

Report a FCPA Violation via email to FCPA.Fraud@usdoj.gov

FOREIGN CORRUPT PRACTICES ACT

ANTIBRIBERY PROVISIONS

United States Department of Justice
Fraud Section, Criminal Division
10th & Constitution Ave. NW (Bond 4th fl.)
Washington, D.C. 20530
Phone: (202) 514-7023
Fax: (202) 514-7021
Internet: http://www.justice.gov/criminal/fraud/fcpa
Email: FCPA.fraud@usdoj.gov

United States Department of Commerce
Office of the Chief Counsel for International Commerce
14th Street and Constitution Avenue, NW
Room 5882
Washington, D.C. 20230
Phone: (202) 482-0937
Fax: (202) 482-4076
Internet: http://www.ita.doc.gov/legal

INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 ("FCPA"), 15 U.S.C. §§ 78dd-1, et seq., to potential exporters and small businesses that are unable to obtain specialized counsel on issues related to the FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure (described below at p. 10) and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. In addition, other statutes such as the mail and wire fraud statutes, 18 U.S.C. § 1341, 1343, and the Travel Act, 18 U.S.C. § 1952, which provides for federal prosecution of violations of state commercial bribery statutes, may also apply to such conduct.

The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA. Moreover, material in this brochure is not intended to set forth the present enforcement intentions of the Department of Justice or the SEC with respect to particular fact situations.

BACKGROUND

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. See Convention and Commentaries on the DOJ web site.

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the anti-bribery provisions.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the anti-bribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the anti-bribery provisions with respect to issuers.

ANTIBRIBERY PROVISIONS

BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

A. Who -- The FCPA potentially applies to any individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the anti-bribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an "issuer," a "domestic concern," or a foreign national or business.

An "issuer" is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or 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.

Issuers and domestic concerns may be held liable under the FCPA under either territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken outside the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as "issuers," and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves "domestic concerns," who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

B. Corrupt intent -- The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The offer or promise of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision.

C. Payment -- The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

D. Recipient -- The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A "foreign official" means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a "foreign official," such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a "foreign official."

The FCPA applies to payments to any public official, regardless of rank or position. The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the anti-bribery provision for "facilitating payments for routine governmental action" (see below).

E. Business Purpose Test -- The FCPA prohibits payments made in order to assist the firm in obtaining or retaining business for or with, or directing business to, any person. The Department of Justice interprets "obtaining or retaining business" broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality.

THIRD PARTY PAYMENTS

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. The term "knowing" includes conscious disregard and deliberate ignorance. The elements of an offense are essentially the same as described above, except that in this case the "recipient" is the intermediary who is making the payment to the requisite "foreign official."

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called "red flags," i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for "facilitating payments" for "routine governmental action" and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a "routine governmental action." The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions "similar" to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department's Foreign Corrupt Practices Opinion Procedure, described below on p. 10.

"Routine governmental action" does not include any decision by a foreign official to award new business or to continue business with a particular party.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's anti-bribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are "affirmative defenses," the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

CRIMINAL

The following criminal penalties may be imposed for violations of the FCPA's anti-bribery provisions: corporations and other business entities are subject to a fine of up to $2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to $100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher -- the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may not be paid by their employer or principal.

CIVIL

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to $10,000 against any firm as well as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the anti-bribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $5,000 to $100,000 for a natural person and $50,000 to $500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the anti-bribery provisions.

OTHER GOVERNMENTAL ACTION

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. Indictment alone can lead to suspension of the right to do business with the government. The President has directed that no executive agency shall allow any party to participate in any procurement or non-procurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or non-procurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the anti-bribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery led to the defendant winning a foreign contract.

GUIDANCE FROM THE GOVERNMENT

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the anti-bribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not begin to run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Charles Duross, Deputy Chief, Fraud Section, at (202) 353-7691; or Nathaniel Edmonds, Assistant Chief, Fraud Section, at (202) 307-0629; or William Stuckwisch, Assistant Chief, Fraud Section, at (202) 353-2393.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Kathryn Nickerson, Senior Counsel, Office of the Chief Counsel for International Commerce, Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, or Rebecca Reese, Senior Attorney, Office of the Chief Counsel for International Commerce, at Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, or (202) 482-0937.

FOREIGN CORRUPT PRACTICES ACT OPINION PROCEDURE

28 C.F.R. part 80 (current as of July 1, 1999)

Sec. 80.1 Purpose.

These procedures enable issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective--not hypothetical--conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. 78dd-1 and 78dd-2. An opinion issued pursuant to these procedures is a Foreign Corrupt Practices Act opinion (hereinafter FCPA Opinion).

Sec. 80.2 Submission requirements.

A request for an FCPA Opinion must be submitted in writing. An original and five copies of the request should be addressed to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Opinion Group. The mailing address is 10th & Constitution Avenue, NW, Bond Building, Washington, DC 20530.

Sec. 80.3 Transaction.

The entire transaction which is the subject of the request must be an actual--not a hypothetical--transaction but need not involve only prospective conduct. However, a request will not be considered unless that portion of the transaction for which an opinion is sought involves only prospective conduct. An executed contract is not a prerequisite and, in most--if not all--instances, an opinion request should be made prior to the requestor's commitment to proceed with a transaction.

Sec. 80.4 Issuer or domestic concern.

The request must be submitted by an issuer or domestic concern within the meaning of 15 U.S.C. 78dd-1 and 78dd-2, respectively, that is also a party to the transaction which is the subject of the request.

Sec. 80.5 Affected parties.

An FCPA Opinion shall have no application to any party which does not join in the request for the opinion.

Sec. 80.6 General requirements.

Each request shall be specific and must be accompanied by all relevant and material information bearing on the conduct for which an FCPA Opinion is requested and on the circumstances of the prospective conduct, including background information, complete copies of all operative documents, and detailed statements of all collateral or oral understandings, if any. The requesting issuer or domestic concern is under an affirmative obligation to make full and true disclosure with respect to the conduct for which an opinion is requested. Each request on behalf of a requesting issuer or corporate domestic concern must be signed by an appropriate senior officer with operational responsibility for the conduct that is the subject of the request and who has been designated by the requestor's chief executive officer to sign the opinion request. In appropriate cases, the Department of Justice may require the chief executive officer of each requesting issuer or corporate domestic concern to sign the request. All requests of other domestic concerns must also be signed. The person signing the request must certify that it contains a true, correct and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.

Sec. 80.7 Additional information.

If an issuer's or domestic concern's submission does not contain all of the information required by Sec. 80.6, the Department of Justice may request whatever additional information or documents it deems necessary to review the matter. The Department must do so within 30 days of receipt of the opinion request, or, in the case of an incomplete response to a previous request for additional information, within 30 days of receipt of such response. Each issuer or domestic concern requesting an FCPA Opinion must promptly provide the information requested. A request will not be deemed complete until the Department of Justice receives such additional information. Such additional information, if furnished orally, shall be promptly confirmed in writing, signed by the same person or officer who signed the initial request and certified by this person or officer to be a true, correct and complete disclosure of the requested information. In connection with any request for an FCPA Opinion, the Department of Justice may conduct whatever independent investigation it believes appropriate.

Sec. 80.8 Attorney General opinion.

The Attorney General or his designee shall, within 30 days after receiving a request that complies with the foregoing procedure, respond to the request by issuing an opinion that states whether the prospective conduct, would, for purposes of the Department of Justice's present enforcement policy, violate 15 U.S.C. 78dd-1 and 78dd-2. The Department of Justice may also take such other positions or action as it considers appropriate. Should the Department request additional information, the Department's response shall be made within 30 days after receipt of such additional information.

Sec. 80.9 No oral opinion.

No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting issuer or domestic concern may rely only upon a written FCPA Opinion letter signed by the Attorney General or his designee.

Sec. 80.10 Rebuttable presumption.

In any action brought under the applicable provisions of 15 U.S.C. 78dd-1 and 78dd-2, there shall be a rebuttable presumption that a requestor's conduct, which is specified in a request, and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department's present enforcement policy, is in compliance with those provisions of the FCPA. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption, a court, in accordance with the statute, shall weigh all relevant factors, including but not limited to whether information submitted to the Attorney General was accurate and complete and whether the activity was within the scope of the conduct specified in any request received by the Attorney General.

Sec. 80.11 Effect of FCPA Opinion.

Except as specified in Sec. 80.10, an FCPA Opinion will not bind or obligate any agency other than the Department of Justice. It will not affect the requesting issuer's or domestic concern's obligations to any other agency, or under any statutory or regulatory provision other than those specifically cited in the particular FCPA Opinion.

Sec. 80.12 Accounting requirements.

Neither the submission of a request for an FCPA Opinion, its pendency, nor the issuance of an FCPA Opinion, shall in any way alter the responsibility of an issuer to comply with the accounting requirements of 15 U.S.C. 78m(b)(2) and (3).

Sec. 80.13 Scope of FCPA Opinion.

An FCPA Opinion will state only the Attorney General's opinion as to whether the prospective conduct would violate the Department's present enforcement policy under 15 U.S.C. 78dd-1 and 78dd-2. If the conduct for which an FCPA Opinion is requested is subject to approval by any other agency, such FCPA Opinion shall in no way be taken to indicate the Department of Justice's views on the legal or factual issues that may be raised before that agency, or in an appeal from the agency's decision.

Sec. 80.14 Disclosure.

(a) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer or domestic concern under the foregoing procedure shall be exempt from disclosure under 5 U.S.C. 552 and shall not, except with the consent of the issuer or domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer or domestic concern withdraws such request before receiving a response.

(b) Nothing contained in paragraph (a) of this section shall limit the Department of Justice's right to issue, at its discretion, a release describing the identity of the requesting issuer or domestic concern, the identity of the foreign country in which the proposed conduct is to take place, the general nature and circumstances of the proposed conduct, and the action taken by the Department of Justice in response to the FCPA Opinion request. Such release shall not disclose either the identity of any foreign sales agents or other types of identifying information. The Department of Justice shall index such releases and place them in a file available to the public upon request.

(c) A requestor may request that the release not disclose proprietary information.

Sec. 80.15 Withdrawal.

A request submitted under the foregoing procedure may be withdrawn prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect. The Department of Justice reserves the right to retain any FCPA Opinion request, documents and information submitted to it under this procedure or otherwise and to use them for any governmental purposes, subject to the restrictions on disclosures in Sec. 80.14.

Sec. 80.16 Additional requests.

Additional requests for FCPA Opinions may be filed with the Attorney General under the foregoing procedure regarding other prospective conduct that is beyond the scope of conduct specified in previous requests.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	**Cr. No. ______________.**
Plaintiff,	:	
	:	**(Foreign Corrupt Practices Act – Internal Controls and Books and Records Provisions, 15 U.S.C. §§ 78m(b)(2), 78(b)(5), and 78ff(a)**
v.	:	
	:	
SIEMENS AKTIENGESELLSCHAFT,	:	
Defendant	:	

INFORMATION

The United States Attorney, and the Department of Justice, Criminal Division, Fraud Section charge, at all times relevant to this Information, or at the dates and times indicated:

INTRODUCTORY ALLEGATIONS

THE FOREIGN CORRUPT PRACTICES ACT

1. The Foreign Corrupt Practices Act of 1977 (hereinafter, the "FCPA"), as amended, 15 U.S.C. §§ 78dd-1 *et seq.*, prohibited certain classes of persons and entities from making payments to foreign government officials to obtain or retain business, as well as required certain entities to maintain accurate books and records and adequate internal controls.

2. In relevant part, the FCPA's anti-bribery provisions prohibited any issuer of publicly traded securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*l*, or required to file periodic reports with the United States Securities and Exchange Commission under Section 13 of the Securities Exchange Act, 15 U.S.C. § 78(o)d (hereinafter, "issuer") from making use of the mails or any means or instrumentality of interstate

commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value would be offered, given, or promised, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person or securing any improper advantage. 15 U.S.C. § 78dd-1(a)(3).

3. Pertinent to the charges herein, the FCPA's accounting provisions required, among other things that issuers make and keep books, records, and accounts that accurately and fairly reflect transactions and disposition of the company's assets and prohibited the knowing falsification of such books, records, or accounts. 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5), and 78ff(a). The FCPA's accounting provisions also required that issuers maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions were executed in accordance with management's general or specific authorization; (ii) transactions were recorded as necessary to (I) permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) maintain accountability for assets; (iii) access to assets was permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets was compared with the existing assets at reasonable intervals, and appropriate action was taken with respect to any differences. 15 U.S.C. § 78m(b)(2)(B). The FCPA also prohibited the knowing circumvention or failure to implement such a system of internal accounting controls. 15 U.S.C. §§ 78m(b)(5) and 78ff(a).

SIEMENS AND OTHER RELEVANT ENTITIES AND INDIVIDUALS

Corporate Governance and Structure

4. Defendant SIEMENS AKTIENGESELLSCHAFT ("SIEMENS") was a corporation organized under the laws of Germany with its principal offices in Berlin and Munich, Germany, and, through its operating groups, subsidiaries, officers, directors, employees, and agents, was engaged in a variety of business activities for, among others, national, state, and municipal governments. This included, among other things, developing, constructing, selling, and servicing telecommunications equipment and systems; power generation, transmission, and distribution equipment and systems; transportation equipment and systems; medical equipment and systems; and industrial and traffic equipment and systems.

5. As of March 12, 2001, SIEMENS was listed on the New York Stock Exchange ("NYSE") and was an "issuer" as that term is used in the FCPA. 15 U.S.C. § 78dd-1(a). By virtue of its status as an issuer, SIEMENS was required to comply with the provisions of the FCPA.

6. SIEMENS was organized in a matrix-like structure with both operating groups and regional companies, organized by location. The functions of operating groups and regional companies often overlapped, though each operated independently with minimal, if any, centralized reporting mechanisms beyond financial reporting. Over 1,800 legal entities operated as part of the SIEMENS group of companies.

7. SIEMENS' Supervisory Board (the "Supervisory Board"), based in Munich, Germany, was the highest-level board within SIEMENS and was composed of twenty members, ten of whom were elected by the shareholders and ten of whom were elected by the employees. The Supervisory Board had the authority to appoint and remove members of the Managing

Board, known in German as the "Vorstand," but was not permitted to make management decisions or give directions to management.

8. SIEMENS' Vorstand, based in Munich, Germany, was the Managing Board for SIEMENS and was composed of eleven members. Pursuant to the Bylaws of the Managing Board, as they existed at the time, a Corporate Executive Committee (the "SIEMENS ZV") was created, with a maximum number of nine members. The SIEMENS ZV was authorized to make all management decisions unless specifically reserved by the Managing Board. Most SIEMENS ZV members "coached," or had oversight responsibility for, both a geographic region and an operating group.

9. SIEMENS' Audit Committee (the "Audit Committee"), based in Munich, Germany, was composed of a subset of the Supervisory Board and was responsible for the supervision of accounting and risk management, compliance, ensuring the independence of SIEMENS' external auditor, engaging the external auditor for the audit of SIEMENS' financial statements, determining the focus of the audit, and agreeing on the audit fees.

10. As part of the legal function, SIEMENS' lawyers, based in Erlangen and Munich, Germany, advised on corporate and compliance matters and supported the SIEMENS operating groups and regional companies in legal matters, including drafting and reviewing contracts, participating in customer negotiations, and reviewing and analyzing third party legal claims against SIEMENS. Those lawyers relevant to this matter reported to the General Counsel.

11. SIEMENS' compliance function was established in 2001 and in 2004 a Corporate Compliance Office (the "Corporate Compliance Office") based in Erlangen and Munich, Germany was established. It was composed of several lawyers responsible for compliance

initiatives within SIEMENS, but who were also responsible, at least until 2006, for defending SIEMENS against outside allegations and for handling compliance investigations.

12. SIEMENS' Regional Compliance Officers (the "Regional Compliance Officers") and Group Compliance Officers (the "Group Compliance Officers") were employees who were responsible for compliance at the regional companies and the operating groups, respectively. Many of the Regional Compliance Officers and Group Compliance Officers had other full-time responsibilities besides compliance, and they received minimal training or direction regarding their compliance responsibilities.

Select Operating Groups

13. SIEMENS' former Communications operating group ("COM"), headquartered in Munich, Germany, was responsible for the design, manufacture, sale, and service of mobile and fixed telecommunications systems. COM operated worldwide, and a substantial portion of its business was with foreign government entities. Prior to October 1, 2004, the communications business was operated by two separate groups, Siemens Information and Communication Mobile Group ("ICM") and Information and Communication Network Group ("ICN").

14. ICM was responsible for the design, manufacture, sale, and service of mobile telecommunications systems.

15. ICN was responsible for the design, manufacture, sale, and service of fixed network telecommunications systems.

16. SIEMENS' Industrial Solutions and Services operating group ("I&S"), headquartered in Erlangen, Germany, was responsible for the development, design, construction, sale, operation, and maintenance of infrastructure and automation equipment and systems. I&S

operated worldwide, and a substantial portion of its business was with foreign government entities.

17. SIEMENS' Power Generation operating group ("PG"), headquartered in Erlangen, Germany and with subsidiary offices in Orlando, Florida, was responsible for the development, design, construction, operation, and maintenance of large-scale power plants. PG operated worldwide, and a substantial portion of its business was with foreign government entities.

18. SIEMENS' Power Transmission and Distribution operating group ("PTD"), headquartered in Erlangen, Germany and with subsidiary offices in Wendell, North Carolina, was responsible for the design, manufacture, sale, and service of power transmission and distribution equipment, software and network control equipment. PTD operated worldwide, and a substantial portion of its business was with foreign government entities.

19. SIEMENS' Transportation Systems operating group ("TS"), headquartered in Erlangen, Germany and with subsidiary offices in Sacramento, California, was responsible for the development, design, construction, sale, operation, and maintenance of trains, train tracks, and railway systems. TS operated worldwide, and a substantial portion of its business was with foreign government entities.

20. SIEMENS' Medical Solutions operating group ("MED"), headquartered in Erlangen, Germany, was responsible for the development, sale, and service of medical products, medical equipment, and health care information systems, as well as the provision of management consulting and support services. MED operated worldwide, and a substantial portion of its business was with foreign government entities.

Select Senior Officers and Directors

21. "Officer A," a German citizen, was President and Chief Executive Officer of SIEMENS from 1992 to 2005, a senior member of the SIEMENS ZV from 1992 to 2005, and Chairman of the Supervisory Board from 2005 to 2007.

22. "Officer B," a German citizen, was General Counsel from 1992 to 2004 and the Chief Compliance Officer from 2004 until the end of 2006.

23. "Officer C," a German citizen, was Chief Financial Officer of SIEMENS from 1998 to 2006.

24. "Officer D," a German citizen, was a member of the SIEMENS ZV and a senior executive with management and oversight responsibility for PTD and the Americas from 2000 until 2007.

25. "Officer E," a German citizen, was a member of the SIEMENS ZV from 1994 until 2007.

26. "Officer F," a German citizen, was a member of the SIEMENS ZV from 2003 to 2007.

27. "Officer G," a German citizen, was President and Chief Executive Officer of SIEMENS from 2005 to 2007.

United Nations Oil for Food Program: Select Entities and Individuals

28. Siemens S.A.S. of France ("Siemens France"), SIEMENS' regional company in France, entered into contracts for power station renovation, servicing, and spare parts, with the Iraqi government in connection with the United Nations Oil for Food Program. All of Siemens France's contracts under the United Nations Oil for Food Program (the "OFFP") were entered into in partnership with PG or PTD.

29. Siemens Sanayi ve Ticaret A.S. of Turkey ("Siemens Turkey"), SIEMENS' regional company in Turkey, sold power and electrical equipment to the Iraqi government in connection with the OFFP.

30. Osram Middle East FZE ("Osram Middle East") was the United Arab Emirates-based subsidiary of Osram GmbH, which was a wholly-owned subsidiary of SIEMENS. Osram Middle East sold light bulbs and lighting equipment to the Iraqi government in connection with the OFFP.

31. Gas Turbine Technologies S.p.A. ("GTT"), an Italian subsidiary of SIEMENS, contracted to sell gas turbines to the Iraqi government in connection with the OFFP.

32. "OFFP Agent A," a Paraguayan company registered in Jordan, acted as an agent for Siemens France and Siemens Turkey in connection with sales to the Iraqi government made through the OFFP.

33. "OFFP Agent B," an Iraqi citizen, acted as an agent for Osram Middle East in connection with sales to the Iraqi government made through the OFFP.

34. "OFFP Agent C" and "OFFP Agent D," Iraqi citizens, acted as agents for GTT in connection with sales to the Iraqi government made through the OFFP.

SIEMENS' HISTORICAL FAILURE TO MAINTAIN SUFFICIENT INTERNAL ANTI-CORRUPTION CONTROLS

Pre-1999

35. By the late nineteenth century, SIEMENS and its subsidiaries had become known as an international company, with over half of their employees outside of Germany. After World War II, with most of its facilities destroyed, its material assets and trademark patents confiscated, and its business prospects in the developed world weakened, SIEMENS began to focus on

developing markets. By the mid-1950s, SIEMENS was handling major infrastructure projects in South America, the Middle East, and Africa. By the mid-1990s, SIEMENS became the first foreign corporation to have a holding company in China.

36. Until in or about February 1999, SIEMENS operated in a largely unregulated environment with respect to international business practices, in which (a) German law did not prohibit overseas bribery and permitted tax deductions for bribe payments to foreign officials; (b) SIEMENS was not yet listed on the NYSE; and (c) SIEMENS operated in many countries where corruption was endemic.

37. Until in or about February 1999, SIEMENS' project cost calculation sheets sometimes reflected "nützliche aufwendungen" ("NAs"), a common tax term literally translated as "useful expenditures" but partly understood by many SIEMENS employees to mean "bribes."

38. Until in or about February 1999, certain systems existed within SIEMENS that allowed for corrupt payments as necessary to win business. For example, there were multiple "cash desks" housed within SIEMENS offices where employees could withdraw large sums of cash, up to and including one million Euros at a time. In addition, in the 1990s, very large sums of money – more than one billion Euros – were withdrawn for questionable business purposes from off-books accounts in Austria, Switzerland, Liechtenstein, and elsewhere. SIEMENS also relied heavily on purported "business consultants," in many cases for the sole purpose of passing along corrupt payments from SIEMENS to foreign government officials responsible for awarding business.

1999 - 2004

39. Over the period from in or about February 1999 to in or about July 2004, certain SIEMENS ZV members became aware of changes in the regulatory environment. While foreign

anti-corruption circulars and policies were promulgated, that "paper program" was largely ineffective at changing SIEMENS' historical, pervasive corrupt business practices.

40. On or about February 15, 1999, the German law implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Convention"), which generally required signatory countries to implement antibribery laws similar to the FCPA, came into force. On the same day, Officer A made a presentation at a high-level SIEMENS executive meeting expressing "concern at the number of criminal and other investigations into members of the company," further noting the new German law prohibiting foreign bribery and that "[a]s the Board could possibly be held responsible for various offenses, it was important to take protective measures."

41. In or about March 1999, the SIEMENS ZV issued a Z Circular, a company-wide policy, reminding employees of the general need to observe laws and regulations.

42. On or about April 25, 2000, Officer B issued a report to the SIEMENS ZV recommending the creation of a company-wide list of agents and consultants and a committee to review these relationships.

43. On or about April 25, 2000, during the SIEMENS ZV meeting, a debate ensued regarding whether to promulgate company-wide uniform guidelines for consultants, but meeting minutes indicate that the SIEMENS ZV rejected the concept of instituting such guidelines due to "different business practices" in each division.

44. In or about June 2000, SIEMENS' lawyers sent memoranda to Officer C and a Supervisory Board member warning of the potential criminal and civil implications of maintaining off-books accounts for cash payments in light of SIEMENS' upcoming listing on the NYSE. Specifically, the memoranda identified "three bank accounts in Switzerland which are

run as trust accounts for SIEMENS AG and for which confiscation was ordered by the Swiss courts."

45. On or about July 5, 2000, SIEMENS issued a Z Circular requiring operating groups and regional companies to ensure that the following anti-corruption clause would be included in all contracts with agents, consultants, brokers, or other third parties: "The agent shall strictly comply with all laws and regulations regarding the performance of the activities applicable to the agent. Without limitation, the Agent agrees to comply with the requirements of the anticorruption laws applicable to the Parties."

46. In or about September 2000, Officer B forwarded to Officer C a letter regarding a foreign public prosecutor's investigation into bribes to a former Nigerian dictator allegedly paid from SIEMENS' off-books accounts. Officer B's handwritten note on the letter said "for info – particulars verbally."

47. On or about September 12, 2000, in connection with an investigation, Austrian authorities froze assets in at least one Austrian bank account used by SIEMENS. On or about February 7, 2001, in connection with the Nigeria investigation, an Austrian judge granted a Swiss prosecutor's request for judicial assistance concerning that account and another off-books Austrian bank account used by SIEMENS for improper payments.

48. On or about March 12, 2001, SIEMENS became listed on the NYSE. At the time of listing, SIEMENS and its subsidiaries had over 400,000 employees and operated in 190 countries.

49. On or about July 18, 2001, SIEMENS issued Business Conduct Guidelines that included the following anti-corruption provision: "No employee may directly or indirectly offer or grant unjustified advantages to others in connection with business dealings, neither in

monetary form nor as some other advantage." The guidelines also provided that gifts to business partners should "avoid the appearance of bad faith or impropriety," that no gifts should be made to "public officials or other civil servants," and that employees entering into contracts with consultants or agents must see to it that those parties also offered no "unjustified advantages."

50. In or about July 2001, SIEMENS established a new position for a Corporate Officer for Compliance and expanded the existing antitrust compliance system to cover anti-corruption issues. The Corporate Officer for Compliance worked on compliance issues part-time due to other job duties and, until 2004, had a staff of only two lawyers.

51. On or about October 18, 2001 – nearly seven months after SIEMENS became an issuer – the Swiss off-books accounts were still active, despite knowledge by certain individuals at the highest levels of SIEMENS of the legal concerns surrounding these accounts raised in or about June 2000.

52. On or about October 18, 2001, Officer A testified about the Swiss off-books accounts before a German parliamentary committee investigating donations to a political party. Officer A confirmed the existence of the accounts and testified that they were not used for cash payments to German political parties, but rather for business consultant commissions in foreign countries.

53. On or about June 13, 2002, SIEMENS issued principles and recommendations, but not mandatory policies, regarding business-related internal controls and agreements with business consultants, including that such agreements should be in writing, transparent, and as detailed as possible. These non-binding recommendations were largely ineffective. They contained no discussion of how to conduct due diligence on consultants or agents, and although SIEMENS employees often reduced consulting agreements to writing, they frequently did so

only after SIEMENS won a contract and needed documentary support for a payment. Many written consulting agreements were form agreements containing no substance particular to the engagement, and most called for success fee payments.

54. In or about July 2003, *The Financial Times* reported that the Milan, Italy public prosecutor's office was investigating payments by SIEMENS to managers of the Italian energy company, Enel. The Milan investigation focused on €6 million in bribes that PG managers had arranged to be paid to managers of Enel so that PG could win two power plant projects. The payments to the Enel managers were routed through slush funds in Liechtenstein and through an account at Emirates Bank.

55. In or about July 2003, the Darmstadt, Germany public prosecutor's office also publicly announced an investigation into the Enel matter.

56. In or about August 2003, SIEMENS engaged a U.S. law firm for advice on how to respond to the Enel cases.

57. On or about September 9, 2003, the U.S. law firm submitted to SIEMENS a memorandum, received by several SIEMENS ZV members including Officer A, Officer C, Officer D, and Officer E, concluding that there was an "ample basis for either the [Securities and Exchange Commission] or [Department of Justice] to start at least an informal investigation of a company's role in such a matter." In addition, the U.S. law firm informed SIEMENS that U.S. enforcement officials would expect an internal investigation to be carried out on behalf of senior management and SIEMENS ZV. Finally, the U.S. law firm suggested that SIEMENS immediately review and assure proper functioning of its FCPA compliance program, report on those findings to the SIEMENS ZV, and discipline the employees involved in wrongdoing.

58. On or about September 30, 2003, SIEMENS engaged a local law firm in Erlangen, Germany to investigate some of the facts underlying the Enel allegations.

59. In or about October 2003, SIEMENS' outside auditors discovered that €4,120,000 in cash had been brought to Nigeria by COM personnel and flagged the issue for additional review. A SIEMENS compliance lawyer conducted a one-day investigation and wrote a report warning of numerous possible violations of German law, including antibribery laws, in connection with cash payments to purported business consultants. Officer C received the report, which identified as playing prominently in the scheme several COM employees later arrested by the Munich public prosecutor's office in 2006. Further, the compliance lawyer's report indicated that based on interviews with employees, the issue investigated was not an isolated incident. Officer C asked the CFO of COM to take care of the problem, but no follow-up was conducted on whether any action was taken. The report itself was not circulated to the Vorstand as a whole or to the Audit Committee, and the employees involved were not disciplined.

60. In or about November 2003, to comply with the Sarbanes-Oxley Act of 2002, SIEMENS issued a Code of Ethics for Financial Matters, which, among other things, required Chief Financial Officers and business heads to act responsibly and with integrity.

61. In or about November 2003, at a meeting of SIEMENS financial officers, Officer C reported on "unpleasant topics regarding Business Conduct which emerged in the past weeks of the Financial Statement," and reminded the financial officers of their duties to adhere to the Business Conduct Guidelines.

62. In or about November 2003, a compliance lawyer, at Officer B's request, wrote a memorandum describing the standards for an effective compliance organization under both

German and United States law, and highlighting deficiencies in SIEMENS' compliance organization.

63. In or about November 2003, Officer B forwarded to Officer C the memorandum outlining deficiencies in SIEMENS' compliance organization, with a request to circulate the memorandum to other members of the SIEMENS ZV. The subject of compliance was taken off the agenda for the SIEMENS ZV meeting that immediately followed the drafting of the memorandum, and was also not discussed at the subsequent SIEMENS ZV meeting in or about December 2003.

64. From in or about February 1999 to in or about July 2004, notwithstanding the promulgation of some written policies, SIEMENS senior management provided little corresponding guidance on how to conduct business lawfully in countries where SIEMENS had been paying bribes historically. The SIEMENS ZV provided few strong messages regarding anti-corruption. Senior management made no clear statement that SIEMENS would rather lose business than obtain it illegally, and employees were still under tremendous pressure to meet their sales goals.

2004 - 2006

65. From in or about mid-2004 to in or about 2006, the SIEMENS ZV grew increasingly alarmed at developments in the Enel corruption cases and adopted more robust – but still imperfect – compliance measures in response. Certain SIEMENS ZV members began to recognize the serious legal risks in both the United States and Europe that SIEMENS faced for bribery.

66. On or about April 24, 2004, the Milan, Italy investigating judge issued a written opinion stating that the evidence in the Enel case indicated that SIEMENS, as a company, saw

bribery "at least as a possible business strategy." The judge further opined that the existence of the Liechtenstein and Emirates Bank accounts had been "disguised deliberately" and that such conduct "creates the danger that cases of corruption will recur." Finally, the judge noted that SIEMENS was not cooperating with the investigation, as evidenced by its concealment of the accounts.

67. On or about May 4, 2004, several members of the SIEMENS ZV, including Officer A, Officer C, Officer D, Officer E, and Officer F received a memorandum outlining the Milan, Italy investigating judge's ruling.

68. On or about June 1, 2004, the Erlangen law firm SIEMENS engaged to investigate the Enel matter issued the first report of its findings to Officer B, who shared the report with Officer A, Officer C, and Officer D. The report discussed the Milan prosecutor's allegations that various SIEMENS employees had paid bribes to Enel officials through purported business consultants. In the report, the Erlangen law firm indicated that several key SIEMENS employees had refused to submit to interviews. None of these key SIEMENS employees was ever disciplined as a result of the failure to submit to interviews by SIEMENS' Erlangen lawyer regarding the Enel corruption allegations.

69. In or about July 2004, Officer C delivered a speech to the SIEMENS ZV and high-level business managers entitled "Tone from the Top," which was the first time a member of SIEMENS ZV strongly and directly sent a message to a large group of employees that corruption would not be tolerated and was contrary to SIEMENS' principles of integrity. In this speech, Officer C proposed that in order to impose more control over consulting agreements and "off set the[ir] danger," such agreements should be reviewed and signed by the chairmen of the divisional boards. Officer C also suggested implementing more stringent disciplinary penalties

for employees who violate internal controls and fail to cooperate with investigations. He explained that in U.S. companies, "whenever employees refuse to cooperate with the authorities, they are immediately dismissed irrespective of their position on the corporate ladder."

70. On or about August 4, 2004, SIEMENS promulgated its first Company-wide, comprehensive policy on the use of bank accounts and external payment orders. The policy, among other things, restricted the use of bank accounts controlled by SIEMENS employees or third parties, a mechanism that had previously been heavily used by certain operating groups, particularly COM, to make improper payments on behalf of SIEMENS.

71. On or about September 7, 2004, Officer C sent an email to SIEMENS ZV members Officer A and Officer E stating that divisional chairmen did not consider his July 2004 compliance speech as mandatory and requesting a Z Circular regarding agreements with business consultants.

72. On or about November 4, 2004, the Erlangen law firm SIEMENS engaged to investigate the Enel case issued its second report, and the full SIEMENS ZV received a briefing about the contents of the report. The report highlighted questionable payments from SIEMENS to a Dubai-based business consultant and to certain off-books accounts in Liechtenstein.

73. On or about November 5, 2004, the SIEMENS ZV received a written report identifying by name the Dubai-based purported business consultant as the conduit for the payments through Emirates Bank in the Enel matter. Nevertheless, no action was taken to investigate the broader implications of this report.

74. On or about January 26, 2005, at an Audit Committee meeting in which the Enel case was discussed, a member of the Audit Committee asked Officer C "whether pointers could be drawn from this regarding gaps in the internal control system." In response, Officer C said

"the existing rules were comprehensive and clearly written down," despite the fact that he and other senior executives were aware by that time of significant control weaknesses.

75. On or about April 25, 2005, at an Audit Committee meeting in which the off-books accounts in Liechtenstein were mentioned, a member of the Audit committee asked Officer C whether "an inference might be drawn from existing knowledge that cash deposits might exist outside Siemens AG." Despite his knowledge that such cash deposits did exist, Officer C replied that "no indication existed of any [such] accounts which may be attributable to the company and in the case that any such indication existed, the company would look into this."

76. On or about May 4, 2005, the Erlangen law firm engaged by SIEMENS to investigate the Enel case issued the final report of its findings to several SIEMENS ZV members.

77. On or about May 31, 2005, the full SIEMENS ZV learned at a meeting that the final report of the Enel investigation submitted by the Erlangen lawyer had discovered 126 payments totaling €190 million to Liechtenstein accounts from 1997 to 1999 for which recipients could not be identified. At the same meeting, SIEMENS ZV received a report that Liechtenstein authorities were investigating a former ICN employee accused of siphoning money from SIEMENS through sham consulting agreements. The report identified five off-books accounts in Liechtenstein that were seized. Despite striking similarities between the facts of the two reports, SIEMENS ZV members took no action to investigate the payments or accounts further. Similarly, SIEMENS ZV made no attempt to determine whether the former ICN employee had in fact embezzled company money. At the same SIEMENS ZV meeting, Officer B included the following statements in his presentation:

> The most important thing in each Compliance programme is the absolute commitment of management: Adherence to the laws is for us the most important commandment. Offences are not

> tolerated and are punished consistently and without exception. *In the Enel case, the investigating Frankfurt chief prosecutor said to a counsel for the defence of the former Siemens employees that he considered the Siemens Compliance programme to exist only on paper.*

(Emphasis added.)

78. On or about July 27, 2005, Officer B made a presentation to the Audit Committee, during which he told the Audit Committee that "an investigation by an external [accountant] of unclarified payments to a bank in Liechtenstein had become necessary. This has revealed that the recipient of 126 payments totaling EUR 190 million in 1997 to 1999 could not be identified." Officer B said the information had been given to the auditors and that [two] Z Circulars . . . had added new rules on external payments and bank accounts, which would make it possible in the future to identify payment recipients. During the same meeting, Officer B included in his presentation statements regarding the compliance and adherence to the laws that were identical to those he had made at the May 31, 2005 SIEMENS ZV meeting, but he removed the final sentence regarding the Frankfurt prosecutor's statement that SIEMENS' compliance program existed only on paper.

79. On or about July 26, 2005, the Corporate Compliance Office, at Officer G's request, completed a written benchmarking analysis comparing SIEMENS' compliance program and infrastructure with that of General Electric Company ("GE"). The analysis, which was distributed to Officer E and Officer G, showed serious deficiencies in SIEMENS' resourcing and infrastructure when compared to GE's. In particular, the analysis noted, "[t]he Compliance Office team is extremely small (six lawyers) in relation to the number of employees, and understaffed in comparison with GE," which had 300 "ombudsmen." The memorandum further pointed out that GE's program "seem[ed] more efficient than SIEMENS' at diffusing

Compliance principles throughout the entire company." SIEMENS took no action to augment compliance resources in response to the benchmarking memorandum apart from Officer G ordering an audit of the compliance organization, which remained in draft form until as late as November 2006.

80. In or about July 2005, SIEMENS redistributed the Business Conduct Guidelines, with a new foreword by Officer G.

81. On or about June 29, 2005 – nine months after Officer C's email request for consulting agreement guidelines – SIEMENS enacted a Z Circular containing mandatory guidelines regarding agreements with business consultants. The guidelines prohibited success fees and required relevant compliance officers to sign off on consulting agreements and attached a due diligence questionnaire.

82. On or about November 23, 2005, in his report to the SIEMENS ZV, Officer B commented on the lack of effectiveness of the Regional Compliance Officers. Officer B noted that when SIEMENS attempted to collect business consulting agreements from the regions after the June 29, 2005 Z Circular, most Regional Compliance Officers had reported that "either such agreements [did] not exist, or that the possible infringements of the laws of the Business Conduct Guidelines [were] not visible." Officer B went on to comment that "[t]aking into account the known business environments in, for example, the Asiatic territories, the correctness of this statement [had] to be questioned. It also [shed] some doubt as to the quality of the [Regional Compliance Officers]." Notwithstanding Officer B's explicit doubts that existing consulting agreements had been produced by regions as requested, there was no follow-up to seek the missing documents.

83. On or about December 7, 2005, during his presentation to the Audit Committee, Officer B made no mention of the questions he had raised at the November 23, 2005 SIEMENS ZV meeting regarding the Regional Compliance Officers' quality and their truthfulness in reporting on the status of business consulting agreements.

84. In or about March 2006, in the course of a compliance investigation, a SIEMENS Greece COM manager admitted to the Corporate Compliance Office and Internal Audit that he had received substantial funds to make "bonus payments" to managers at the Greek national telephone company, OTE. Neither the SIEMENS ZV nor the Corporate Compliance Office undertook a comprehensive investigation aimed at discovering the full extent of corruption in Greece or in the COM business more broadly.

85. In or about April 2006, in response to a special audit request by Intercom's board of directors, SIEMENS' outside auditors reported at least 250 suspicious payments made through Intercom to companies in foreign jurisdictions on behalf of COM ICM and SIEMENS' Italian subsidiary. The audit report was provided to the board of directors of Intercom, as well as to certain members of the SIEMENS ZV and the Corporate Compliance Office. Neither the SIEMENS ZV nor the Corporate Compliance Office made any attempt to investigate these facts, or explore whether they were related to other similar instances of wrongdoing.

86. From in or about 2004 to in or about 2006, in addition to learning of the corruption issues involving SIEMENS in Nigeria, Italy, Greece, Liechtenstein, and elsewhere, SIEMENS' senior management became aware of government investigations into corruption by SIEMENS in Israel, Hungary, Azerbaijan, Taiwan, and China. Nevertheless, SIEMENS ZV members and other senior management failed to adequately investigate or follow up on any of these issues. SIEMENS ZV also failed to take effective disciplinary measures with respect to

any of the employees implicated in the various investigations. For example, the three PG managers implicated in the Enel cases each received a severance package standard for early retirees, despite the fact that certain SIEMENS ZV members knew that at least two of the PG managers had already admitted to paying bribes at the time of their retirement.

87. From in or about 2004 to in or about 2006, the Corporate Compliance Office continued to lack resources, and there was an inherent conflict in its mandate, which included both defending the company against prosecutorial investigations and preventing and punishing compliance breaches. In addition, there were extremely limited internal audit resources to support compliance efforts. All of these factors undermined the improved policies because violations were difficult to detect and remedy, and resources were insufficient to train business people in anti-corruption compliance.

88. From in or about 2004 to in or about 2006, there was a consistent failure on the part of certain members of management to alert the Audit Committee to the significance of the compliance failures discovered within SIEMENS. Reports to the Audit Committee by the Chief Compliance Officer were principally status reports on prosecutorial investigations and often conveyed incomplete information. In some instances, management provided inaccurate information in response to Audit Committee inquiries. At no time did management convey to the Audit Committee a sense of alarm or growing crisis.

SIEMENS' SYSTEMATIC EFFORTS TO CIRCUMVENT INTERNAL CONTROLS AND FALSIFY BOOKS AND RECORDS

89. From in or about the mid-1990s to in or about 2007, SIEMENS engaged in systematic efforts to falsify its corporate books and records and circumvent existing internal controls. These systematic efforts included, but were not limited to: (a) using off-books

accounts for corrupt payments even after compliance risks associated with such accounts were raised at the highest levels of management; (b) entering into purported business consulting agreements with no basis, sometimes after SIEMENS had won the relevant project; (c) engaging former SIEMENS employees as purported business consultants to act as conduits for corrupt payments to government officials; (d) justifying payments to purported business consultants based on false invoices; (e) mischaracterizing corrupt payments in the corporate books and records as consulting fees and other seemingly legitimate expenses; (f) limiting the quantity and scope of audits of payments to purported business consultants; (g) accumulating profit reserves as liabilities in internal balance sheet accounts and then using them to make corrupt payments through business consultants as needed; (h) using removable Post-It notes to affix signatures on approval forms authorizing payments to conceal the identity of the signors and obscure the audit trail; (i) allowing third party payments to be made based on a single signature in contravention of SIEMENS' "four eyes principle," which required authorization of payments by two SIEMENS managers; (j) drafting and backdating sham business consulting agreements to justify third party payments; and (k) changing the name of purported business consulting agreements to "agency agreements" or similar titles to avoid detection and conceal noncompliance with the 2005 business consulting agreement guidelines.

90. In addition, from on or about March 12, 2001 to in or about 2007, SIEMENS made payments totaling approximately $1,360,000,000 through various mechanisms. Of this amount, approximately $554,500,000 was paid for unknown purposes, including approximately $341,000,000 constituting direct payments to business consultants. The remaining $805,500,000 of this amount was intended in whole or in part as corrupt payments to foreign officials through the following payment mechanisms, among others:

a. Direct payments to business consultants: COM, MED, PG, PTD, TS, I&S, and various SIEMENS regional companies made payments directly to purported business consultants, knowing that at least some or all of those funds would be passed along to foreign government officials. From on or about March 12, 2001 to on or about November 15, 2006, COM, MED, PG, PTD, TS, I&S, and various SIEMENS regional companies made approximately $183,400,000 in direct payments to business consultants. Thereafter, those groups and companies made another $6,300,000 in direct payments to purported business consultants.

b. Cash desks: SIEMENS maintained three cash desks within SIEMENS' offices where COM employees withdrew large sums of cash for corrupt payments. COM employees typically brought empty suitcases to fill with the cash received from the cash desks. The same managers who submitted the requests for the cash were able to authorize the cash pick-ups. From on or about March 12, 2001 to on or about September 2004, COM employees withdrew approximately $66,600,000 predominantly from cash desks operated by Siemens Real Estate. Thereafter, an additional $500,000 was paid out in cash until November 2005, when the last cash desk was closed.

c. Barschecks: Until approximately March 2002, COM's Accounting department wrote special checks called "Barschecks" to two former COM managers, who deposited these cash equivalents in Austrian off-books accounts. The two former COM managers then transferred corrupt payments intended in whole or in part for foreign government officials from the off-books accounts to purported business consultants. COM stopped using the Barschecks system from in or about September 2000 to in or about March 2002, the period in which the Austrian off-books accounts were seized by the Austrian public prosecutor's office.

On or about March 21, 2002, COM issued approximately $1,500,000 in Barschecks to the two former COM managers.

d. Bearer checks: Beginning in or about September 2000 and continuing until approximately September 2003, COM authorized its bank in Germany to issue bearer checks to two former COM managers, who then deposited these cash equivalents into off-books accounts. The two former COM managers then transferred corrupt payments from the off-books accounts to purported business consultants. The bearer checks system was established in large part to replace the barschecks system. From on or about March 12, 2001 to on or about September 2002, COM authorized approximately $80,500,000 in bearer checks to the two former COM managers. Thereafter, COM authorized an additional $1,900,000 in bearer checks to the two former COM managers.

e. Payment intermediaries: COM, MED, PG, PTD, and TS entered into agreements with intermediary entities for the sole purpose of transferring money from SIEMENS to purported business consultants, who then used some or all of the money to pay bribes to government officials. The payment intermediaries sent sham invoices to SIEMENS to trigger payments for certain projects, then kept a percentage of the payments for themselves and passed along the rest to purported business consultants. COM, MED, PG, PTD, and TS utilized this mechanism to further conceal the end recipients of the funds in SIEMENS' books and records. From on or about March 12, 2001 to on or about November 15, 2006, COM, MED, PG, PTD, and TS paid approximately $185,400,000 to payment intermediaries. Thereafter, COM, MED, PG, PTD, and TS paid an additional $2,700,000 to payment intermediaries. Although SIEMENS used thousands of business consultants, it used less than a dozen intermediaries. Intermediaries, unlike business consultants, did not interface directly with the end recipients of the payments.

f. Slush funds: Until approximately September 2004, COM, PG, PTD, and a SIEMENS regional company in South America created "slush funds" controlled by non-SIEMENS "trustees" and SIEMENS managers at off-shore banks. COM, PG, PTD, and the regional company in South America used the slush funds to generate cash for corrupt payments. Slush funds differed from payment intermediaries in that funds were often pooled gradually rather than through project-specific invoices. From on or about March 12, 2001 to on or about September 2004, COM, PG, PTD, and the regional company in South America paid approximately $192,600,000 to third parties through the slush funds. Thereafter, COM, PG, PTD, and the regional company in South America paid approximately $1,900,000 to third parties through the slush funds.

g. Confidential payment system: PG utilized a confidential payment system that was outside the normal accounts payable process and that facilitated corrupt payments without invoices. There was no evidence of the payments in the accounts payable detail, thereby obscuring the audit trail, providing flexibility regarding which project to charge for the payments, and eliminating any record in the project accounting of the exact purposes of the payments. From on or about March 12, 2001 to on or about November 15, 2006, PG paid approximately $36,500,000 to purported business consultants and agents using the confidential payment system.

h. Internal Commission Accounts: Until approximately July 2005, MED and various regional companies created pools of funds for corrupt payments in balance sheet accounts called internal commission accounts. MED and the regional companies reserved percentages of the customer prices from certain projects and allocated them to the internal commission accounts as liabilities. The funds were then used for various purposes, including by purported business consultants for corrupt payments. From on or about March 12, 2001 to in or about 2007, MED and the various regional companies paid approximately $12,600,000 to purported business consultants through the internal commission accounts.

i. Other Mechanisms: From on or about March 12, 2001 to in or about 2007, SIEMENS entities paid approximately $33,100,000 through other mechanisms including sham supplier agreements, sham resale transactions, receivables manipulation, and others. Part or all of that amount was intended as corrupt payments to foreign officials.

91. The payments described in paragraphs 90(a) though 90(i) are summarized in the chart below:

Payment Mechanism	**SIEMENS Entities that Employed Mechanism**	**Amount of Corrupt Payments Paid Through Mechanism After March 12, 2001**
Direct Payments to Business Consultants	COM, MED, PG, PTD, TS, I&S, various regional companies	$189,700,000
Cash Desks	COM	$67,100,000
Barschecks	COM	$1,500,000
Bearer Checks	COM	$82,400,000
Payment Intermediaries	COM, MED, PG, PTD, TS	$188,100,000
Slush Funds	COM, PG, PTD, various regional companies	$194,500,000
Confidential Payment System	PG	$36,500,000
Internal Commission Accounts	MED, various regional companies	$12,600,000
Corrupt Payments through other methods	Various SIEMENS entities	$33,100,000
Total corrupt payments paid through all of the above mechanisms	COM, MED, PG, PTD, I&S, TS, and various regional companies	$805,500,000

THE UNITED NATIONS OIL FOR FOOD PROGRAM

92. On or about August 6, 1990, days after Iraq's invasion of Kuwait, the United Nations ("U.N.") adopted Security Council Resolution 661, which prohibited U.N. member-states from transacting business with Iraq, except for the purchase and sale of humanitarian supplies. Resolution 661 prohibited virtually all direct financial transactions with the government of Iraq.

93. On or about April 15, 1995, the U.N. adopted Security Council Resolution 986, which served as a limited exception to the Iraq sanctions regime in that it allowed Iraq to sell its oil. However, Resolution 986 required that the proceeds from oil sales be used by the Iraqi government to purchase humanitarian supplies, including but not limited to food, for the Iraqi people. Hence, this program became known as the Oil for Food Program ("OFFP"). Payments made to the Iraqi government that were not approved by the U.N. and that were outside the strict contours of the OFFP were prohibited.

94. The rules of the OFFP required that the proceeds from all sales of Iraqi oil be deposited into a U.N.-controlled escrow account at the New York, New York, branch of Banque Nationale de Paris ("BNP-Paribas"). That escrow account funded the purchase of humanitarian goods by the Iraqi government.

95. Under the rules of the OFFP, a supplier of humanitarian goods contracted with a ministry or other department of the Iraqi government to sell goods to the government. Once that contract was finalized, the contract was submitted to a U.N. Committee ("the 661 Committee") which reviewed the contracts to ensure that their terms complied with all OFFP and Iraqi sanction regulations. The 661 Committee accepted the contracts, rejected them, or asked the supplier to provide additional information upon which the committee could make a decision.

96. If a contract was approved by the 661 Committee, a letter of credit was issued by BNP-Paribas to the supplier's bank stating that the supplier would be paid by the OFFP for the relevant goods once certain conditions were met, including delivery of the goods to Iraq and inspection of the goods by a U.N. contractor based in Geneva, Switzerland, that provided inspection services in Iraq on behalf of the U.N. Once those conditions were deemed by the U.N. to have been met, the U.N. would direct BNP-Paribas to release payment to the supplier.

97. On or about December 10, 1996, the first Iraqi oil exports under the OFFP began. The OFFP continued from in or about December 1996 until the United States' invasion of Iraq on or about March 19, 2003. From in or about December 1996 through March 2003, the United States government prohibited United States companies, including their foreign branches, and individuals from engaging in transactions with the government of Iraq, unless such transactions were authorized by the U.N. pursuant to the OFFP.

98. Beginning in approximately August 2000, the Iraqi government demanded that suppliers of humanitarian goods pay a kickback, usually valued at 10% of the contract price, to the Iraqi government in order to be awarded a contract by the government. These kickbacks violated OFFP regulations and U.N. sanctions, which prohibited payments to the Iraqi government that were not expressly approved by the U.N. and that were not contemplated by the guidelines of the OFFP.

99. Often, these kickbacks were termed "after sales service fees" ("ASSFs"), but did not represent any actual service being performed by the supplier. These ASSFs were usually included in the contract price submitted by the supplier to the U.N. without disclosing to the U.N. that the contract contained an extra 10% which would be returned to the Iraqi government.

Including the 10% in the contract price allowed the supplier to avoid paying the 10% out of its profits; instead, the suppliers caused the U.N. to fund the kickbacks to the Iraqi government.

100. Some suppliers labeled the ASSFs as such, thereby leading the U.N. to believe that actual after-sales services were being provided by the supplier. Other suppliers disguised the ASSFs by inserting fictitious line items into the contracts for goods or services that were not being provided. Still other suppliers simply offered or accepted contract prices inflated by 10% to account for the payments they would make, or cause to be made, to the Iraqi government.

SIEMENS' OFFP Kickback Payments

101. From in or about 2000 to in or about 2002, Siemens France, Siemens Turkey, Osram Middle East, and GTT, each wholly owned by SIEMENS or one of its subsidiaries, were awarded 42 contracts with a combined value of more than $80,000,000 with the Ministries of Electricity and Oil of the Government of the Republic of Iraq under the OFFP. To obtain these contracts, at the demand of these ministries, the relevant Siemens entities caused to be paid as much as $1,736,076 in kickbacks to the Iraqi government, and they collectively earned a gross profit of over $38,000,000.

102. In order to generate the funds to pay the kickbacks to the Iraqi government and to conceal those payments, the Siemens entities inflated the price of some contracts by up to 10% before submitting them to the 661 Committee and the U.N. for approval.

103. In most cases, after the U.N. approved the Siemens France, Siemens Turkey, and Osram Middle East contracts, BNP-Paribas issued letters of credit, via international wire communications, to banks used by Siemens France, Siemens Turkey, and Osram Middle East. These letters of credit authorized Siemens France, Siemens Turkey, and Osram Middle East to be paid the contracted amounts, which included the kickbacks to be paid to the Iraqi government.

In connection with one of the Siemens Turkey contracts and all of the GTT contracts, which were not performed until after the war began in 2003, the U.N. requested that Siemens Turkey and GTT reduce the contract amounts by 10% to eliminate the ASSFs promised to the Iraqi government. Siemens Turkey and GTT ultimately complied with the U.N.'s requests with respect to those contracts, though they had already caused kickbacks to be paid to the Iraqi government.

Siemens France Contracts

104. From in or about January 2000 to in or about April 2001, Siemens France, in partnership with PG and PTD, entered into at least twelve contracts with the Iraqi Ministry of Electricity ("Ministry of Electricity") to provide power station renovation, servicing, and spare parts. At the demand of the Ministry, Siemens France caused a kickback to be paid to the Iraqi government on each contract. In connection with the Siemens France OFFP contracts, PG engaged OFFP Agent A as the agent on each of these contracts.

105. Between in or about November 2000 and in or about January 2001, several PG operational managers had a meeting to discuss how to fund and pay the 10% kickback required by the Iraqi government on the OFFP contracts.

106. In or about March 2001, a PG employee wrote a memorandum regarding how to secure the 10% "after sales service ch." The memorandum reported a statement by an employee of OFFP Agent A that Siemens Turkey paid this amount partially in cash "so that no names appear on paper."

107. In or about March and April 2001, a now-deceased PG employee met with two representatives of the Ministry of Electricity and wrote memoranda summarizing the meetings. The memoranda indicated that the Ministry of Electricity representatives informed him that the

Iraqi government would from then on require a guarantee of 10% of the contract value to be paid to the relevant Iraqi government customer before the Central Bank of Iraq would authorize a letter of credit to be issued for the contract. One of the Ministry of Electricity representatives referred to the 10% guarantee as an "after sales service" payment. The PG employee's memoranda expressed his concern as to the permissibility of the payments under the OFFP rules and indicated he would relay the information to his supervisors for their review.

108. In or about 2001, in connection with at least one OFFP contract, PG signed a supplemental agreement with OFFP Agent A providing for a payment of 10% of the contract value for "after sales services" to cover the kickback payment.

109. On each contract, on behalf of Siemens France, OFFP Agent A deposited the 10% kickback into a Jordanian bank account held by two Iraqi officials, whereupon such officials transferred the funds into a Jordanian bank account held by the Ministry of Electricity. OFFP Agent A, using the name of an acquaintance who did not work for OFFP Agent A to conceal its identity, made the deposits in cash into the account of the Ministry of Electricity. When the funds were transferred to the Ministry of Electricity's account, OFFP Agent A received documentary confirmation from the Jordanian bank that the "after sales services fees" had been paid.

110. Siemens France caused a total of at least $321,745 in kickbacks to be paid to the Iraqi government in connection with Siemens France OFFP contracts.

111. After OFFP Agent A made the kickback payments, PG reimbursed OFFP Agent A for the kickbacks based on sham invoices for commissions prepared by OFFP Agent A.

112. In or about 2000 and 2001, in order to conceal on its corporate books and records the kickback payments made to the Iraqi government, Siemens France and PG improperly

characterized payments to OFFP Agent A, part of which were paid as kickbacks to the Iraqi government, as commissions to OFFP Agent A.

113. At the end of SIEMENS' fiscal years 2001 and 2002, the books and records of Siemens entities involved in the Siemens France contracts, including those containing false characterizations of the kickbacks paid to the Iraqi government, were incorporated into the books and records of SIEMENS for purposes of preparing SIEMENS' year-end financial statements.

Siemens Turkey Contracts

114. From in or about September 2000 to in or about June 2002, Siemens Turkey entered into at least twenty contracts to provide power and electrical equipment to the Ministry of Electricity. On each contract, Siemens Turkey caused a kickback to be paid to the Iraqi government. Prior to the OFFP, Siemens Turkey had not conducted business in Iraq. Because PG had a relationship with OFFP Agent A for work in Iraq, Siemens Turkey engaged OFFP Agent A as an agent for its OFFP contracts as well.

115. For each of its contracts, Siemens Turkey caused OFFP Agent A to deposit the 10% kickback into a Jordanian bank account held by two Iraqi officials, whereupon such officials transferred the funds into a Jordanian bank account held by the Ministry of Electricity. OFFP Agent A, using the name of an acquaintance who did not work for OFFP Agent A to conceal its identity, made the deposits in cash into the account of the Ministry of Electricity. When the funds were transferred to the Ministry of Electricity's account, OFFP Agent A received documentary confirmation from the Jordanian bank that the "after sales services fees" had been paid.

116. Siemens Turkey caused a total of at least $1,243,119 in kickbacks to be paid to the Iraqi government in connection with its OFFP contracts.

117. After OFFP Agent A made the kickback payments, Siemens Turkey reimbursed OFFP Agent A for the kickbacks based on sham invoices for commissions prepared by OFFP Agent A.

118. From in or about 2000 to in or about 2002, in order to conceal on its corporate books and records the kickback payments made to the Iraqi government, Siemens Turkey improperly characterized payments to OFFP Agent A, part of which were paid as kickbacks to the Iraqi government, as commissions to OFFP Agent A.

119. At the end of SIEMENS' fiscal years 2000 through 2002, the books and records of Siemens Turkey, including those containing false characterizations of the kickbacks paid to the Iraqi government, were incorporated into the books and records of SIEMENS for purposes of preparing SIEMENS' year-end financial statements.

Osram Middle East Contracts

120. From in or about February 2000 to in or about June 2002, Osram Middle East entered into at least six contracts to sell lightbulbs and lighting equipment to the Ministry of Oil. On each of the contracts, at the demand of the Ministry, Osram Middle East caused a kickback to be paid to the Iraqi government. Osram Middle East used OFFP Agent B as its agent and made commission payments to OFFP Agent B of approximately 10% on each of the contracts. The commission paid to OFFP Agent B included an amount based on a percentage of the contract that Osram Middle East employees understood to be a kickback payment required by the Iraqi government.

121. In connection with at least three of the contracts, Osram Middle East delivered side letters to the Ministry of Oil in which it promised to provide the Ministry of Oil with a "letter of credit" or "irrevocable bank guarantee" for a specified sum equivalent to approximately

10% of the contract value. On the same contracts, an amount covering the specified sum was incorporated into the contract price.

122. For each contract, Osram Middle East caused OFFP Agent B to wire transfer the 10% kickback payment from his own account into a Jordanian bank account held by the Ministry of Oil.

123. Osram Middle East caused a total of at least $89,250 in kickbacks to be paid to the Iraqi government in connection with its OFFP contracts.

124. By paying OFFP Agent B his "commission" on the OFFP contracts, Osram Middle East reimbursed OFFP Agent B for the kickbacks it had paid to the Iraqi government.

125. From in or about 2000 to in or about 2002, in order to conceal on its corporate books and records the kickback payments to the Iraqi government, Osram Middle East improperly characterized payments to OFFP Agent B, part of which were paid as kickbacks to the Iraqi government, as commissions to OFFP Agent B.

126. At the end of SIEMENS' fiscal years 2000 through 2002, the books and records of Osram Middle East, including those containing false characterizations of the kickbacks paid to the Iraqi government, were part of SIEMENS' books and records.

GTT Contracts

127. In or about June 2001, GTT entered into at least four contracts to sell gas turbines and equipment to the Ministry of Electricity. GTT engaged OFFP Agent C and OFFP Agent D to act as its agents on the OFFP contracts. On each of the four contracts, at the demand of the Ministry, GTT caused a kickback to be paid to the Iraqi government.

128. OFFP Agent C informed GTT that they were making payments to the Iraqi government to secure letters of credit for the contracts. In connection with at least three of the

contracts, GTT documents budget for a 20% commission to either OFFP Agent C or OFFP Agent D. GTT employees understood that half of that commission, or 10%, was intended to be paid as a kickback to the Iraqi government.

129. On all four contracts, the U.N. requested that GTT amend the contracts to decrease their value by 10%, representing the removal of the "after sales service" component. Nevertheless, GTT caused some kickback payments to be made on these contracts.

130. GTT caused a total of at least $81,962 in kickbacks to be paid to the Iraqi government in connection with its OFFP contracts.

131. By paying OFFP Agent C and OFFP Agent D their "commission" on the OFFP contracts, GTT reimbursed OFFP Agent C and OFFP Agent D for the kickbacks they had paid to the Iraqi government.

132. In or about 2001, in order to conceal on its corporate books and records the kickback payments to the Iraqi government, GTT improperly characterized payments to OFFP Agent C and OFFP Agent D, part of which were paid as kickbacks to the Iraqi government, as commissions to OFFP Agent C and OFFP Agent D.

133. In or about fiscal year 2001, the books and records of GTT, including those containing false characterizations of the kickbacks paid to the Iraqi government, were incorporated into the books and records of SIEMENS for purposes of preparing SIEMENS' year-end financial statements.

COUNT ONE
(FCPA – Internal Controls)

134. Paragraphs 1 through 1 through 27 and 35 through 91 of this Information are re-alleged and incorporated by reference as if set out in full.

135. From on or about March 12, 2001 to in or about at least November 2006, SIEMENS knowingly circumvented and knowingly failed to implement a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions were executed in accordance with management's general and specific authorization; (ii) transactions were recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles and any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets was permitted only in accordance with management's general and specific authorization; and (iv) the recorded accountability for assets was compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any differences, *to wit*: SIEMENS: (a) knowingly failed to implement sufficient antibribery compliance policies and procedures; (b) knowingly failed to implement sufficient controls over third party bank accounts and the use of cash; (c) knowingly failed to appropriately investigate and respond to allegations of corrupt payments; (d) knowingly failed to discipline employees involved in making corrupt payments; (e) knowingly failed to establish a sufficiently empowered and competent Corporate Compliance Office; (f) knowingly failed to report to the Audit Committee substantiated allegations of corrupt payments around the world; (g) limited the quantity and scope of audits of payments to purported business consultants; (h) created and utilized certain mechanisms for making and concealing approximately $1,361,500,000 in payments to third parties; (i) engaged former SIEMENS employees as purported business consultants to act as conduits for corrupt payments; (j) continued to use off-books accounts for corrupt payments even after compliance risks associated with such accounts were raised at the highest levels of management; (k) used removable Post-It notes to affix signatures to approval forms authorizing payments to conceal the identity of the signors and

obscure the audit trail; (l) allowed third party payments to be made based on a single signature in contravention of SIEMENS' "four eyes principle," which required authorization of payments by two SIEMENS managers; (m) changed the name of purported business consulting agreements to "agency agreements" or similar titles to avoid detection and conceal noncompliance with the 2005 business consulting agreement guidelines; (n) knowingly failed to exercise due diligence to prevent and detect criminal conduct; (o) knowingly included within substantial authority personnel individuals whom SIEMENS knew had engaged in illegal activities and other conduct inconsistent with an effective compliance and ethics program; (p) knowingly failed to take reasonable steps to ensure SIEMENS' compliance and ethics program was followed, including monitoring and internal audits to detect criminal conduct; (q) knowingly failed to evaluate regularly the effectiveness of SIEMENS' compliance and ethics program; (r) knowingly failed to have and publicize a system whereby employees and agents could report or seek guidance regarding potential or actual criminal conduct without fear of retaliation; (s) knowingly failed to provide appropriate incentives to perform in accordance with the compliance and ethics program; and (t) knowingly entered into purported business consulting agreements with no basis, and without performing any due diligence, sometimes after SIEMENS had won the relevant project.

All in violation of Title 15, United States Code, Sections 78m(b)(2)(B), 78m(b)(5), and 78ff(a).

COUNT TWO
(FCPA – Books and Records)

136. Paragraphs 1 through 133 of this Information are re-alleged and incorporated by reference as if set out in full.

137. From on or about March 12, 2001 to in or about at least November 2006, SIEMENS knowingly falsified and caused to be falsified books, records, and accounts required to, in reasonable detail, accurately and fairly reflect the transactions and dispositions of SIEMENS, *to wit:* SIEMENS (a) used off-books accounts as a way to conceal corrupt payments; (b) entered into purported business consulting agreements with no basis, sometimes after SIEMENS had won the relevant project; (c) justified payments to purported business consultants based on false invoices; (d) mischaracterized bribes in the corporate books and records as consulting fees and other seemingly legitimate expenses; (e) accumulated profit reserves as liabilities in internal balance sheet accounts and then used them to make corrupt payments through business consultants as needed; (f) used removable Post-It notes to affix signatures to approval forms authorizing payments to conceal the identity of the signors and obscure the audit trail; and (g) drafted and backdated sham business consulting agreements to justify third party payments; and (h) falsely described kickbacks paid to the Iraqi government in connection with the Oil for Food Program in its corporate books and records as commission payments to agents when SIEMENS and Siemens France, Siemens Turkey, Osram Middle East and GTT were aware that a substantial portion of these payments was being passed on to the Iraqi government in exchange for being awarded contracts with the Iraqi government.

All in violation of Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(5), and 78ff(a).

STEVEN A. TYRRELL
Chief
Fraud Section, Criminal Division

By: ______________________
FOR Mark F. Mendelsohn
Deputy Chief
Fraud Section, Criminal Division
(202) 514-1721

By: ______________________
Lori A. Weinstein
Trial Attorney – Foreign Corrupt Practices Act
Fraud Section, Criminal Division
(202) 514-0839

United States Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

JEFFREY A. TAYLOR
United States Attorney

By: ______________________
John D. Griffith
Assistant United States Attorney
Fraud and Public Corruption Section
(202) 353-2453

United States Attorney's Office
555 Fourth Street, NW
Washington, D.C. 20530

CATEGORY A
PLEA TO INFORMATION

CO-14
Rev. 12/01

JUDGE: Leon

CRIMINAL CASE NUMBER: ____________

FILED: December 12, 2008

VIOLATION
& COUNTS: Foreign Corrupt Practices Act- Internal Controls and Books and Records Provisions, 15 U.S.C. §§ 78m(b)(2), 78(b)(5), and 78ff(a)

DEFENDANT: **SIEMENS AKTIENGESELLSCHAFT**

ADDRESS: ____________

DATE OF BIRTH: N/A

PDID NUMBER: ____________

JAIL: ____________
or
BOND: ____________

ARREST DATE (if none, so state): ____________

MAGISTRATE NUMBER (if none, so state): ____________

AUSA: John Griffith 202-353-2453, DOJ Trial Attorneys Mark F. Mendelsohn 202-514-0839 and Lori Weinstein 202-514-0839
(Name and telephone number)

ATTORNEY FOR DEFENDANT: Scott W. Muller
(Address and Telephone Number) Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017 202-450-4359

PLEASE INDICATE WHETHER OR NOT DEFENDANT HAS A PENDING CASE & NAME OF JUDGE TO WHOM ASSIGNED:

[ ] No Pending case.

[ ] Pending case is Criminal No.: ____________

Name of Judge: ____________

CLERK'S OFFICE
UNITED STATES DISTRICT COURT

CO-931
New 3/78

NOTICE OF DESIGNATION OF PENDING* RELATED CRIMINAL CASE PURSUANT TO RULE 3-4, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Number: 08- (RJL)
(To be supplied by the Clerk)

NOTICE TO PROSECUTOR:

Pursuant to LCrR 57.12(a)(1) of this Court's Rules, you should prepare this form and submit it to the Clerk's Office along with the indictments in any related cases. One copy is needed for the Clerk's records, once for the Judge to whom the case is assigned, and one additional copy for each defendant. Therefore, in a one defendant case you should submit 3 copies, for a two defendant case you should submit 4 copies, etc. The Clerk will mail copies of this form to all defense counsel along with the arraignment notice.

NOTICE TO DEFENDANT:

Rule LCrR 57.12(b)(1) of this Court's Rules requires that any objection by the defendant to the related case designation shall be served on the U. S. Attorney and filed with the Clerk within 10 days after arraignment.

NOTICE TO ALL COUNSEL:

Rule LCrR 57.12(b)(3) requires, in part, that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The prosecutor will please complete the following:

1. Name of defendant: **SIEMENS AKTIENGESELLSCHAFT**

2. Number of related case:**07-00253 (RJL), 07-00294 (RJL), 08-00068(RJL), 08-00069 (RJL), 08-00035 (RJL) and cases not assigned criminal numbers: Siemens S.A. (Argentina), Siemens Bangladesh Ltd., and Siemens S.A. (Venezuela)**

3. Name of Judge assigned to related case: **RICHARD J. LEON**
4. Name of United States Court in which the related case is pending (if other than this Court:)

5. ~~Relationship of new case to related case:~~

[Check appropriate box(es)]

[X] (a) New case is an **INFORMATION.**

[ ] (b) More than one indictment is filed or pending against defendant.

[X] (c) Prosecution against different defendant(s) arises from:

[ ] a common wiretap

[ ] a common search warrant

[X] activities which are a part of the same alleged criminal event or transaction

(*) A case is considered pending until a defendant has been sentenced. [Rule 3-4(a)(1)]

** Please note: these cases are related pursuant to local rule LcvR 40.5 (a)(2) as "a defendant is charged in a criminal case while a civil forfeiture proceeding is pending concerning that defendant."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. SECURITIES AND EXCHANGE COMMISSION, **100 F. Street, NE** **Washington, D.C. 20549**	)	
Plaintiff,		Case: 1:08-cv-02167 Assigned To : Leon, Richard J. Assign. Date : 12/12/2008 Description: General Civil
v.		
SIEMENS AKTIENGESELLSCHAFT **Wittelsbacherplatz 2** **D-80333 Munich** **Federal Republic of Germany**	)	
Defendant.	)	

COMPLAINT

Plaintiff, U.S. Securities and Exchange Commission (the "Commission"), alleges:

SUMMARY

1. Between March 12, 2001 and September 30, 2007 (the "Relevant Period"), Siemens Aktiengesellschaft ("Siemens" or the "Company") violated the Foreign Corrupt Practices Act [15 U.S.C. § 78dd-1] (the "FCPA") by engaging in a widespread and systematic practice of paying bribes to foreign government officials to obtain business. Siemens created elaborate payment schemes to conceal the nature of its corrupt payments, and the Company's inadequate internal controls allowed the illicit conduct to flourish. The misconduct involved employees at all levels of the Company, including former senior management, and reveals a corporate culture that had long been at odds with the FCPA.

2. During this period, Siemens made thousands of separate payments to third parties in ways that obscured the purpose for, and the ultimate recipients of, the money. At least 4,283 of those payments, totaling approximately $1.4 billion, were used to bribe government officials in return for business to Siemens around the world. Among the transactions on which Siemens paid bribes were those to design and build metro transit lines in Venezuela; metro trains and signaling devices in China; power plants in Israel; high voltage transmission lines in China; mobile telephone networks in Bangladesh; telecommunications projects in Nigeria; national identity cards in Argentina; medical devices in Vietnam, China, and Russia; traffic control systems in Russia; refineries in Mexico; and mobile communications networks in Vietnam. Siemens also paid kickbacks to Iraqi ministries in connection with sales of power stations and equipment to Iraq under the United Nations Oil for Food Program. Siemens earned over $1.1 billion in profits on these fourteen categories of transactions that comprised 332 individual projects or individual sales.

3. In November 2006, Siemens' current management began to implement reforms to the Company's internal controls. These reforms substantially reduced, but did not entirely eliminate, corrupt payments. All but $27.5 million of the corrupt payments occurred prior to November 15, 2006.

4. Siemens violated Section 30A of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. § 78dd-1] by making illicit payments to foreign government officials in order to obtain or retain business. Siemens violated Section 13(b)(2)(B) of the Exchange Act by failing to have an adequate internal control system in place to detect and prevent the illicit payments. Siemens violated Section 13(b)(2)(A) of

the Exchange Act by improperly recording each of those payments in its accounting books and records.

JURISDICTION

5. This Court has jurisdiction over this action under Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa]. Siemens, directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the transactions, acts, practices, and courses of business alleged in this Complaint.

6. Venue is appropriate in this Court under Section 27 of the Exchange Act [15 U.S.C. § 78aa] or 28 U.S.C. § 1391(d).

DEFENDANT

7. **Siemens** is a German corporation with its executive offices in Munich, Federal Republic of Germany. Siemens is one of the world's largest manufacturers of industrial and consumer products. Siemens builds locomotives, traffic control systems and electrical power plants. The Company also manufactures building control systems, medical equipment and electrical components, and formerly manufactured communications networks. Siemens employs approximately 428,200 people and operates in approximately 190 countries worldwide. Siemens reported net revenue of $116.5 billion and net income of $8.9 billion for its fiscal year ended September 30, 2008.

8. In accordance with German law, Siemens has a Supervisory Board and a Managing Board. The Supervisory Board is generally comparable to the board of directors of a corporation in the United States in that it oversees management but with

less oversight power under German law. The Managing Board -- or "Vorstand" – generally performs the duties and responsibilities of senior management of a corporation in the United States and includes the Company's Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO").

9. Prior to a recent reorganization, Siemens operated through a complex array of business groups and regional companies. The business groups are divisions within Siemens and are not separate legal entities. The regional companies are wholly- or partly-owned subsidiaries of Siemens. The thirteen principal business groups during the Relevant Period were: Communications ("COM"), Siemens Business Services ("SBS"), Automation and Drives ("A&D"), Industrial Solutions and Services ("I&S"), Siemens Building Technologies ("SBT"), Power Generation ("PG"), Power Transmission and Distribution ("PTD"), Transportation Systems ("TS"), Siemens VDO Automotive ("SV"), Medical Solutions ("MED"), Osram Middle East, Siemens Financial Services ("SFS"), and Siemens Real Estate ("SRE"). In 2008, Siemens reorganized the groups into three Sectors – Energy, Healthcare and Industry.

10. Since March 12, 2001, Siemens' American Depository Shares have been registered with the Commission pursuant to Section 12(b) of the Exchange Act. [15 U.S.C. § 78l(b)]. Siemens' American Depository Shares trade on the New York Stock Exchange ("NYSE") under the symbol "SI."

FACTS

A. Background

11. Siemens traces its origins to 1847 and for over 160 years has been one of the most successful conglomerate companies in Germany. After World War II, Siemens

had difficulty competing for business in many Western countries and responded by seeking business opportunities in certain less developed countries where corrupt business practices were common.

12. During the pre-1999 period, *the first period*, bribery at Siemens was largely unregulated. German law did not prohibit foreign bribery and allowed tax deductions for bribes paid in foreign countries. Siemens was not yet listed on the NYSE and therefore was not subject to U.S. regulation. Undeterred by foreign laws that prohibited bribery, Siemens put several payment mechanisms in place, including the use of cash and off-books accounts, to make payments as necessary to win business.

13. The term Nützliche Aufwendungen ("NA") or "useful expenditures" was a commonly used tax law term and was commonly listed on Siemens' cost calculation sheets to denote payments to third parties, including illicit payments to foreign officials. Though as a rule Siemens required two signatures on all major documents in accordance with an internal control known as the "four-eyes" principle, many exceptions to the rule were made to ensure quick access to cash to make illicit payments.

14. Over time, Siemens developed a network of payment mechanisms designed to funnel money through third parties in a way that obscured the purpose and ultimate recipient of the funds. On at least one project, bribes to high ranking government officials were arranged personally by a member of the Vorstand. The success of Siemens' bribery system was maintained by lax internal controls over corruption related activities and an acceptance of such activities by members of senior management and the compliance, internal audit, legal and finance departments.

1. **NYSE Listing**

15. From 1999 to 2003, *the second period*, the Vorstand was ineffective in implementing controls to address constraints imposed by Germany's 1999 adoption of the Organization for Economic Cooperation and Development ("OECD") anti-bribery convention that outlawed foreign bribery. On February 15, 1999, the very day that Germany ratified the OECD Convention, the then-CEO of Siemens "expressed his concern at the number of criminal and other investigations into members of the Company," further noting that "[a]s the Board could possibly be held responsible for various offenses, it was important to take protective measures." However, bribery continued for years afterward.

16. The Vorstand was also ineffective in meeting the U.S. regulatory and anti-bribery requirements that Siemens was subject to following its March 12, 2001, listing on the NYSE.

17. The changes in the legal landscape caused by Germany's ratification of the OECD Convention and Siemens' listing on the NYSE should have put an end to bribery at Siemens. Unfortunately, they did not. Instead, a steady flow of improper payments continued to emanate from the Company, in large part because of certain actions and inactions taken by the Vorstand.

18. For instance in mid-2000, as Siemens prepared for its NYSE listing, its legal department forwarded a memorandum to the Supervisory Board Chairman and CFO identifying certain off-books accounts. The memorandum made it clear that Siemens' accounts had to be maintained "in harmony with the principles of orderly accounting.

Otherwise sanctions are likely under criminal law." The Vorstand failed to act, and the off-books accounts continued to exist even after Siemens' NYSE listing.

19. In addition, the Vorstand failed to adopt meaningful compliance measures, failed to adequately staff Siemens' compliance function and, at times, failed to adopt reasonable recommendations designed to enhance compliance procedures at the Company. As illustrated herein, many of the improper payments made by Siemens involved the use of business consultants and business consulting agreements to funnel illicit payments to third parties, including government officials. In April 2000, the Vorstand rejected a proposal by the Company's General Counsel to create a Company-wide list of business consultants and a committee to review these relationships. Although Siemens issued various principles and recommendations regarding business consultants, Siemens had no mandatory and comprehensive Company-wide rules in place governing the use of business consultants until June of 2005.

2. **Red Flags (Communications Group – Nigeria)**

20. From 2003 to 2006, the *third period*, members of the Vorstand failed to respond appropriately to indications that bribery was widespread at Siemens. Red flags that the Vorstand members missed or ignored included substantial cash payments in Nigeria by senior level employees within the COM business group. In the fall of 2003, Siemens' outside auditor KPMG identified €4.12 million in cash that was brought to Nigeria by COM employees and flagged the payments for review. A compliance attorney at the Company conducted a one-day investigation of the payments and wrote a report indicating that COM employees admitted that it was not an isolated event and warned of numerous possible violations of law. Though the compliance report was

reviewed in November 2003 by Siemens' then-CFO, no disciplinary action was taken, no further investigative work was conducted, and the report was not provided to or discussed with the Vorstand as a whole or the Company's audit committee. COM employees identified in the report, including a former COM manager, continued to pay bribes through a series of slush funds until at least November 2006, when they were arrested following a raid of Siemens' offices (the "Dawn Raid") by criminal authorities in Munich, Germany. Had senior management responded differently, bribes paid by the COM group could have been reduced or eliminated.

3. **<u>Red Flags (Power Generation Group - Italy)</u>**

21. During the *third period*, the Vorstand also failed to respond appropriately to multi-million dollar bribes paid in Italy by managers of the Siemens PG business group. In July 2003, the news media reported that prosecutors in Milan were investigating bribes paid to employees of ENEL, an energy company partly-owned by the Italian government, in connection with two power plant projects. Siemens PG managers made approximately €6 million in corrupt payments to two ENEL officials. The corrupt payments were routed through slush funds in Liechtenstein using a Dubai-based business consultant.

22. In April 2004, a judge in Milan issued a written opinion concluding that the evidence indicated that Siemens viewed bribery "at least as a possible business strategy." In or around May 2004, a legal memorandum concerning the ruling was sent to members of the Vorstand, including the then-CEO and then-CFO of the Company. Another memorandum, sent to members of the Vorstand, including the then-CEO and the then-CFO in April 2004, detailed severance packages that had been given to the PG

managers and attached a September 2003 memorandum prepared by an American law firm. The legal memorandum suggested that Siemens should immediately review and assure proper functioning of its FCPA compliance program, that the allegations and steps taken to address them should be reported to the board, and that the employees involved should be disciplined.

23. Subsequently, Siemens, along with two of its PG managers, entered into a plea bargain with criminal authorities in Italy pursuant to which Siemens paid a €0.5 million fine, gave up €6.2 million in profits and was barred from selling gas turbines in Italy for one year. Despite their criminal conduct, the two PG managers involved in the ENEL matter received early retirement with full retirement benefits. The PG CFO received a €1.8 million severance package from Siemens when he left the Company as a result of the ENEL matter. In a related criminal proceeding in Germany, the longtime CFO of PG confessed to authorizing the bribes. Siemens' corporate response to bribery assured certain employees that they could expect to be taken care of if and when caught paying bribes on behalf of the Company.

24. There were additional significant red flags of corruption including admissions of bribery or so called "bonus payments" to government officials in March 2006 by a manager at Siemens Greece of over €37 million, as well as an April 2006 KPMG audit identification of over 250 suspicious payments made through an intermediary on behalf of Information and Communication Mobile, a corporate predecessor of COM, and Siemens S.p.A in Italy.

4. Tone at the Top

25. The Vorstand's response to the situations in Nigeria and Italy demonstrated a tone at the top of Siemens that was inconsistent with an effective FCPA compliance program and created a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company.

26. Siemens implemented certain improvements to its compliance program in response to the situation in Italy. These included an anti-bribery speech delivered by the then-CFO to high-level business managers in summer 2004 and the establishment of a Corporate Compliance Office in October 2004. In addition, the Company issued policies over bank accounts, including requirements relating to the initiation and use of Company accounts and authorizations regarding cash. However, it was not until one year later, in June 2005, that the Company issued mandatory rules governing the use of business consultants, e.g. prohibiting success fees and requiring compliance officers to sign off on business consulting agreements. While these measures appear to have been partially effective, improper payments continued at least until the Dawn Raid in November 2006.

27. Despite the Vorstand's knowledge of bribery at two of its largest groups - COM and PG - the Corporate Compliance Office continued to have a conflicted mandate and lacked resources. There was an inherent conflict in the Corporate Compliance Office mandate, which included both defending the Company, and preventing compliance breaches. The Corporate Compliance Office was significantly understaffed, with a part-time Chief Compliance Officer, and up to six full-time lawyers until 2007. Despite knowledge of numerous instances of corruption in multiple areas of the business, the Company did not implement mandatory FCPA compliance training until 2007.

B. <u>Illicit Payment Mechanisms Used to Pay Bribes</u>

28. During the Relevant Period, Siemens made thousands of payments to third parties in ways that obscured the purpose for, and ultimate recipient of, the money. The principal payment mechanisms used to facilitate illicit payments were business consultants, payment intermediaries, slush funds, cash, and intercompany accounts.

29. Through its use of business consultants and payment intermediaries, Siemens funneled more than $982.7 million to third parties, including government officials. All but $27.5 million of the payments were made prior to November 15, 2006. Business consultants were typically hired pursuant to business consultant agreements, contracts that on their face obligated Siemens to pay for legitimate consulting services. In reality, many business consultant agreements were shams in that the business consultants performed no services beyond funneling bribes. PG had specific instructions on how to use a "confidential payment system" to conceal payments to business consultants. Payment intermediaries were additional entities and individuals through which Siemens funneled bribes. In many cases, Siemens would pay the intermediary an amount and simultaneously direct that the money be transferred to a third-party bank account, less a small portion as the intermediary's fee.

30. Siemens also funneled more than $211 million through slush funds for use as bribes. All but $2.3 million of the payments were made prior to September 30, 2004. Slush funds were bank accounts held in the name of current or former senior Siemens employees, third parties, or affiliated entities. The most notable slush funds were maintained by a former COM manager recently convicted in Germany for his role in the

payment of bribes to foreign officials, which included several slush funds held in the name of U.S. shell companies.

31. Siemens also used cash and cash equivalents to funnel more than $160.4 million to third parties. All but $9.2 million of the payments were made prior to September 30, 2004. Siemens COM employees used cash desks maintained by the Siemens Real Estate Group to obtain large amounts of cash to pay bribes. Often, employees would obtain hundreds of thousands of dollars and, at times, even $1 million in various currencies from the cash desks in Germany. The cash was transported, sometimes in suitcases, across international borders into various countries. At times, the cash was then stored in safes maintained by Siemens employees to ensure ready access to cash to pay bribes.

32. Lastly, Siemens used various types of internal accounts to funnel more than $16.2 million to third parties. Approximately 99% of the payments were made prior to September 30, 2005. An intercompany account is a type of Siemens' internal account that is used to make payments on transactions between two Siemens entities, i.e., for entity to entity business. Siemens used the intercompany accounts to make third party payments and in a number of instances, Siemens maintained the accounts in the names of unconsolidated entities around the globe, including Ecuador and Nicaragua, in order to avoid detection. Some of the intercompany accounts maintained at unconsolidated entities were known to, and possibly created by, a former member of the Vorstand, who had oversight responsibility for Latin America.

33. As early as 2004, a Siemens Corporate Finance Financial Audit employee raised concerns about the use of intercompany accounts. He was phased out of his job

and assigned to work on "special projects" from his home until leaving the Company in 2005. Siemens thereafter began closing some of the accounts and eventually closed all of them.

34. Another type of internal account that employees abused was Siemens MED internal commission accounts. These balance-sheet accounts were intended to be used to record commissions MED earned on transactions with other Siemens entities. These accounts were used to make third party payments. Many of the intercompany account payments and the MED internal commission account payments were done manually to bypass Siemens' automated payment system. The manual payments, executed through SFS, did not require the submission of documentation in support of a payment.

35. Siemens used a host of other schemes to make more than $25.3 million in payments to third parties. In particular, Siemens used sham supplier agreements, receivables and other write-offs to generate payments.

C. Breakdown of Third Party Payments

36. During the Relevant Period, Siemens made 4,283 separate payments totaling approximately $1.4 billion to bribe government officials in foreign countries throughout the world. An additional approximately 1,185 separate payments to third parties totaling approximately $391million were not properly controlled and were used, at least in part, for illicit purposes, including commercial bribery and embezzlement. The following chart breaks down the $1.4 billion in illicit payments to foreign government officials by business group.

Business Group	Bribes to Foreign Officials	
	Number of Payments	$Millions
Communications (COM)	2,505	$813.9
Industrial Solutions (I&S)	89	$22.5
Medical Solution (MED)	705	$92.6
Power Generation (PG)	353	$208.7
Power Transmission PTD)	356	$148.2
Transportation Systems (TS)	154	$70.0
Other	121	$44.8
Total	**4,283**	**$1,400.7**

D. <u>Bribery of Government Officials</u>

37. The following paragraphs provide examples of bribery schemes involving projects and individual sales carried out by Siemens using U.S. means during the Relevant Period with profits of over $1.1 billion.

1. <u>Metro Transit Lines in Venezuela</u>

38. Between 2001 and 2007, Siemens TS and Siemens S.A., a regional company in Venezuela, paid an estimated $16.7 million in bribes to Venezuelan government officials in connection with the construction of metro transit systems in the cities of Valencia and Maracaibo, Venezuela. The two projects, Metro Valencia and Metro Maracaibo, generated approximately $642 million in revenue to Siemens. The Metro Valencia project was awarded to a TS entity in the United States and later transferred to Siemens, and the Metro Maracaibo project was awarded to Siemens and

part of the work was assigned to the U.S. TS entity. Each of the contracts was financed in part by the U.S. Export-Import Bank in Washington, D.C. The corrupt payments were made using four separate, overlapping payment schemes.

39. Under the first scheme, Siemens maintained a numbered, off-books bank account in Panama and either maintained a similar account in Miami or had contacts to a banker in Miami who had access to such accounts. These accounts were controlled by two CEOs and two CFOs of Siemens' regional subsidiary in Venezuela. One of the regional CFOs estimated that between 2001 and 2003 he paid \$5 to \$6 million per year out of the accounts, a portion of which went to government officials in support of the Venezuelan projects. The regional CFO periodically destroyed the account statements.

40. Under the second scheme, Siemens paid over \$6.8 million to four U.S.-based entities controlled by a longtime Siemens business consultant. Siemens called upon the consultant, known as a political "fixer" in Venezuela and who had been an advisor to former Venezuelan presidents, to ensure political support for the Maracaibo and Valencia projects and for Siemens' role in them. Siemens made payments into the U.S. bank accounts of the four controlled entities pursuant to sham consulting agreements in return for no legitimate work. Bank records reveal payments to Venezuelan government officials and politically-connected individuals, including a high-ranking member of the central government, two prominent Venezuelan attorneys acting on behalf of government officials, a former Venezuelan defense minister and diplomat, and a relative of a local politician, all of whom had influence over these and other Siemens contracts in Venezuela. Siemens transferred an additional \$4.9 million to one of the

controlled entities between 2006 and 2007 by artificially inflating the terms of a contract with a U.S. engineering firm.

41. Under the third scheme, Siemens used a Cyprus-based business consultant as an intermediary to fund up to $2.5 million in bribe payments on the Valencia project. Sham agreements were entered into with the business consultant that purported to be for other Siemens projects, but were actually designed to transfer money to Valencia. This payment scheme was authorized by a former CFO of the Turnkey Division within the TS group at Siemens.

42. Under the fourth scheme, Siemens in 2002 and 2003 entered into a sham agreement with a Dubai-based business consultant to supply Metro Maracaibo with approximately $2.6 million in workshop equipment. The equipment was actually supplied by another supplier, and the business consultant did not supply any goods under the contract. After the business consultant came under suspicion as a result of its involvement in the investigation of possible bribes paid to ENEL managers in Italy, the CFO of Siemens' Turnkey Division's successor was ordered to terminate the contract. Instead, the new CFO arranged the assignment of the contract to another Dubai-based business consultant that continued the sham workshop equipment arrangement.

2. <u>Metro Trains and Signaling Devices in China</u>

43. Between 2002 and 2007, Siemens TS paid approximately $22 million to business consultants who used some portion of those funds to bribe foreign officials in connection with seven projects for the construction of metro trains and signaling devices on behalf of government customers in China. The total value of the projects was over $1 billion. After experiencing difficulty breaking into the modern Chinese market, Siemens

began using a Hong-Kong based business consultant and related entities to pay bribes to influence the award of contracts to Siemens. Siemens typically hired the business consultant based on an oral agreement to pay a success fee equal to a percentage of the project value and would enter into a written business consulting agreement after the government contract was awarded to Siemens. In connection with one Shanghai project, four wholly-owned subsidiaries of the Hong Kong business consultant submitted invoices totaling $11.7 million to Siemens and requested payment routed through a U.S. correspondent bank and then to various Swiss accounts. The illicit arrangement was entered into by a Sales & Marketing manager, who later became a Vice President of Siemens TS in China with the knowledge and approval of his supervisors. There were few, if any, legitimate services provided by the business consultant; backdated agreements and phony work product were used to support at least some of the payments. E-mails relating to a variety of projects indicate that the business consultant was funneling money to government officials and "friends" with inside information and influence over government contracting decisions.

3. Power Plants in Israel

44. Between 2002 and 2005, Siemens PG paid approximately $20 million in bribes to a former Director of the state-owned Israel Electric Company ("IEC"). The bribes were paid in connection with four contracts to build and service power plants in Israel. The total value of the contracts was approximately $786 million. Siemens routed the corrupt payments through a business consultant owned and managed by the brother in-law of the CEO of Siemens Israel Limited, a regional subsidiary. The business consultant was ostensibly paid to "identify and define sales opportunities, provide market

intelligence," and support contract negotiations. In reality, the business consultant was a Hong Kong-based clothing company with no expertise in the power generation industry. The business consultant never provided the services called for under its business consultant agreement.

45. Some of the money paid to the business consultant was traced to the former IEC Director, who was in a position to influence the award of the contracts won by Siemens. A portion of the funds passed through U.S. bank accounts.

4. **<u>High - Voltage Transmission Lines in China</u>**

46. Between 2002 and 2003, Siemens PTD paid approximately $25 million in bribes to government customers in connection with two projects for the installation of high voltage transmission lines in South China. The total value of the projects was approximately $838 million. The payments were funneled through multiple intermediaries, including a Dubai-based business consulting firm controlled by a former Siemens PTD employee and then paid to several entities associated with a Chinese business consultant who held a U.S passport and maintained a U.S. residence. Payments to the Dubai-based business consultant were supported by phony distribution contracts. Senior management of PTD in Germany approved the payments with the understanding that they would be shared with "partners" in China, including government officials. In 2002, Siemens used U.S. banks to funnel $1.2 million in bribes to another business consultant whose principal shareholders held U.S. passports. That business consultant also entered into a sham business consultant agreement with Siemens under which no legitimate services were provided.

5. **Mobile Telephone Services in Bangladesh**

47. Between 2004 and 2006, Siemens COM paid approximately $5.3 million in bribes to government officials in Bangladesh in connection with a contract with the Bangladesh Telegraph & Telephone Board ("BTTB") to install mobile telephone services. The total value of the contract was approximately $40.9 million. The payments were made to three business consultants pursuant to sham agreements calling for services associated with the mobile telephone project. The ultimate recipients of the payments included the son of the then-Prime Minister in Bangladesh, the Minister of the Ministry of Posts & Telecommunications in Bangladesh, and the BTTB Director of Procurement. In addition, Siemens Limited Bangladesh, a regional company, hired relatives of two other BTTB and Ministry of Post and Telecom officials. Most of the money paid to the business consultants was routed through correspondent accounts in the United States, with at least one payment originating from a U.S. account. Since approximately September 2004, a Siemens business consultant who served as a principal payment intermediary on the Bangladesh bribe payments has been resident in the United States. At least $1.7 million of the bribe payments made through this intermediary were paid into a Hong Kong bank account while the intermediary was residing in the United States.

48. The involvement of senior officials at Siemens' regional company in Bangladesh, including a former CEO and the director of the regional company's COM division, in the bribery scheme is revealed both in statements by the officials and in internal email messages, several of which include the tagline, "kindly delete this mail once the purpose is done."

6. Four Telecommunications Projects in Nigeria

49. Siemens COM made approximately $12.7 million in suspicious payments in connection with Nigerian projects, with at least $4.5 million paid as bribes in connection with four telecommunications projects with government customers in Nigeria, including Nigeria Telecommunications Limited and the Ministry of Communications. The total value of the four contracts was approximately $130 million. The practice of paying bribes by Siemens COM in Nigeria was long-standing and systematic. According to a high ranking official within Siemens Limited Nigeria, a regional company, corrupt payments in 2000 and 2001 commonly reached 15 to 30% of the contracts' value. Bribe payments were typically documented using fictitious business consultant agreements under which no actual services were performed. The CEO of Siemens Limited Nigeria forwarded requests for "commission" payments to Siemens headquarters in Germany. The illicit payments were then made through a number of means, frequently including large cash withdrawals from cash desks that were then hand-carried in suitcases to Nigeria.

50. In the four telecommunications projects, approximately $2.8 million of the bribe payments was routed through a bank account in Potomac, Maryland, in the name of the wife of a former Nigerian Vice President. The Vice President's wife, a dual U.S.-Nigerian citizen living in the United States, served as the representative of a business consultant that entered into fictitious business consultant agreements to perform "supply, installation, and commissioning" services but did no actual work for Siemens. The purpose of these payments was to bribe government officials. Other corrupt payments included the purchase of approximately $172,000 in watches for Nigerian officials

designated in internal Siemens records as "P." and "V.P.," likely referring to the President and Vice-President of Nigeria.

7. **Identity Card Project in Argentina**

51. Between 1998 and 2004, Siemens paid over $40 million in bribes to senior officials of the government of Argentina in an effort to secure a $1 billion project to produce national identity cards. Siemens officials between 1998 and 1999, including the then-CEO of Siemens regional company in Argentina, Siemens S.A., caused $19 million to be paid to business consultants for bribes. At least $2.6 million was transferred from the business consultants' accounts directly to the President of Argentina, the Minister of the Interior, and the Head of Immigration Control to obtain the contract. During this period, Siemens officials promised to pay an additional $30 million or more to the President and his Cabinet ministers. In late 1999, the Argentine President ended his term when his party was voted out of office, and the new administration threatened to terminate the contract on the ground that it had been procured by fraud. In an effort to head off that possibility, Siemens paid $6 million in additional bribes to officials in the new Argentine administration. Despite these payments, the contract was nonetheless canceled in May 2001.

52. Over the following four years, Siemens officials received a series of payment demands and threats against its employees in Argentina if it did not fulfill its past commitment to pay additional bribes. Between 2002 and 2004, Siemens paid over $23 million to settle these demands. The Siemens officials involved in authorizing the payments included a member of the Vorstand, who in 2003 personally flew to the United States to meet with Siemens' principal intermediary to negotiate the payment terms, as

well as the CEO and CFO of Siemens' regional company in Argentina. Approximately $9.5 million of these payments were routed through the books of an unrelated PTD transmission project in China in an effort to conceal the payments from Siemens' internal auditors. Other payments were made through U.S. bank accounts based on fictitious invoices for non-existent past services in connection with the identity card project and other projects in the region, including payments to a former government Minister and member of the Argentine Congress.

8. <u>Medical Devices in Vietnam</u>

53. Siemens MED paid $183,000 in early 2005 and $200,000 in early 2006 in connection with the sale of approximately $6 million of medical devices on two projects involving the Vietnamese Ministry of Health. After learning that bribe payments were required in Vietnam, Siemens MED sought the name of the business consultant entrusted by Siemens TS to conduct business in that market, including making its bribe payments. Siemens MED then entered into an agreement with an affiliate of the group of Hong-Kong based business consultants used by Siemens TS to act as Siemens MED's payment intermediary. The payments were routed through a U.S. correspondent bank and then to Singapore bank accounts of the Hong Kong business consultant. The amounts were then withdrawn in cash and transported to Vietnam. Project calculation sheets connected to the sales describe the payments to the intermediary as relating to "room preparation." A number of Siemens senior managers, including the then-CFO of Siemens' business in Vietnam, admitted that the purpose of the payments was to bribe government officials.

54. With regard to the $183,000 payment that was made in early 2005, the former CFO of Siemens Limited Vietnam ("SLV") described how he and the then CEO

of Siemens SLV picked up an envelope with $183,000 cash at a hotel in Singapore "from a Hong Kong business man" and flew to the Hanoi airport where the money was left with the then-head of Siemens MED in Vietnam, who had primary responsibility for contract negotiations with officials at the Vietnamese Ministry of Health.

9. Medical Devices in China

55. Between 2003 and 2007, Siemens MED paid approximately $14.4 million in bribes to the same intermediary described above in connection with $295 million in sales of medical equipment to five Chinese-owned hospitals, as well as to fund lavish trips for Chinese doctors. The former controller of Siemens oversaw the business relationship between Siemens and the affiliate of the Hong-Kong-based intermediary that it used to pay the bribes. A majority of the sales on which the intermediary received a payment involved a bribe to a government official. The same intermediary was used by Siemens TS to pay bribes in China and by Siemens MED to pay bribes in Vietnam.

56. For example, Siemens paid $64,800 in May 2006 in connection with the sale of a $1.5 million MRI system to the Songyuan City Central Hospital in China. The payment was sent to a U.S. bank account, and later routed to a Singapore bank account in the name of the intermediary. A project calculation sheet signed by the then-CFO of Siemens MED China described the payment as relating to "expenses (commission)"; however, no services were provided by the intermediary aside from acting as a vehicle for the transfer of bribe payments. In or around March 2008, Songyuan Hospital's deputy director and head of the radiology department was convicted in China of corruption charges, including a charge for accepting a $60,000 bribe from a

Siemens salesperson in connection with the sale of the MRI system and sentenced to fourteen years in prison.

57. Siemens also used the Hong Kong intermediary to pay $9 million in travel costs for "study trips" taken by doctors who worked at government-owned hospitals in China. The study trips, which included lavish trips to Las Vegas, Miami, and other vacation spots in the United States, were connected to at least 231 separate sales to hospitals awarded to Siemens with revenue of approximately $235 million. The former CFO of Siemens MED in China used the intermediary to pay for study trips because of concerns about the lavishness and "non-scientific content" of the trips, which were taken by doctors who were in a position to award business to Siemens.

58. Bribes were also paid to secure sales of medical equipment to hospitals in China on behalf of two Siemens U.S.-based subsidiaries, Oncology Care Solutions ("OCS") in California and Molecular Imaging ("MI") in Illinois. For OCS, Siemens developed a scheme to minimize the risk of anti-bribery prosecution in the United States for these transactions by routing the approval of business consulting agreements and the payment of business consultants through Siemens' headquarters in Germany rather than in the United States. Between 1998 and 2004, this scheme was used to approve improper payments of approximately $650,000 to Chinese business consultants in connection with the U.S.-related sales. A senior manager at Siemens MED in Germany and officials of the U.S.-based subsidiaries, including the CFOs of OCS and MI were aware of the business consultant payments and facilitated the scheme by verifying the amounts to be paid and that the payments were due and owing. At one point after approving twenty-six such payments, the senior manager at Siemens MED refused to continue the payment

scheme, citing concern for the welfare of his family if he were sent to prison. The CFO of MED attempted to pressure the senior manager to keep the payment scheme going, but without success.

59. In 2005, these officials also verified that "clean up" payments totaling over $500,000 were owed to Siemens' Hong Kong-based intermediary in connection with sales by OCS and MI in China. The outstanding payments were for bribes owed to third parties on behalf of Siemens. After receiving confirmation from OCS and MI that the payments were outstanding, the former controller of Siemens Med authorized three "clean up" payments in 2005 for $377,400, $140,000 and $44,000.

10. <u>Traffic Control System in Russia</u>

60. From 2004 to 2006, Siemens I&S and OOO Siemens, a regional company in Russia, paid approximately $741,419 in bribes to government officials in connection with a World Bank-funded project for the design and installation of a $27 million traffic control system in Moscow called the Moscow Third Ring Project. First, Siemens paid money to its business consultant who simultaneously worked as a technical consultant for the Moscow Project Implementation Unit (the "MPIU"), a quasi-governmental unit that ran the Moscow Third Ring project. The MPIU hired the technical consultant at Siemens' suggestion. From 2004 to 2006, Siemens paid approximately $313,000 to three entities associated with the technical consultant, with at least $141,419 of the payment in exchange for favorable treatment in the tendering process. The technical consultant used his position at the MPIU to create tender specifications favorable to Siemens, to provide tender documents to Siemens before their official publication, to evaluate project bids in

a way that ensured Siemens would win the contract, and to assist during the implementation phase of the project.

61. Second, Siemens colluded with a competitor who agreed to inflate its project bid to ensure Siemens won the project. In return, Siemens hired the competitor at an inflated rate of approximately $800,000. Siemens also hired two of the competitor's former consortium members to become subcontractors to Siemens on the project ("Subcontractor A and Subcontractor B"). Siemens paid Subcontractor A approximately $1.3 million for a sham traffic study and approximately $1.4 million to Subcontractor B for other alleged services. In fact, both subcontractors were used to funnel at least $600,000 of the $741,419 described in paragraph 60 to senior officials of the MPIU.

11. <u>Refinery Modernization Project in Mexico</u>

62. In late 2004, Siemens PG and Siemens S.A. de CV, a regional entity, made three separate illicit payments totaling approximately $2.6 million to a politically-connected business consultant to assist in settling cost overrun claims in connection with three refinery modernization projects in Mexico. Some portion of these payments were routed through the business consultant to a senior official of the Mexican state-owned petroleum company, Petroleos Mexicanos ("Pemex"). The official was in a position to influence the settlement. The payments were made with the knowledge and approval of the then-CEO of Siemens' regional company in Mexico. The payments were supported by invoices reflecting consulting services that were not provided or only vaguely described. A portion of Siemens' work on the contracts was performed by a regional subsidiary in Atlanta, and some of the contract financing was provided by the U.S. Export-Import Bank in Washington, DC.

12. Medical Devices in Russia

63. Between 2000 and 2007, Siemens MED made improper payments of over $55 million to a Dubai-based business consultant in connection with sales of medical equipment in Russia. The business consultant was used as a payment intermediary for bribes to government-owned customers in Russia. The former CFO of Siemens MED knew of and approved the payments. Senior Siemens officials estimated that up to 80% of Siemens' MED business in Russia involved illicit payments. On one such transaction in 2006, Siemens made payments of approximately $287,914, some of which was used for bribes, in connection with the $2.5 million sale of a computer tomograph system to a public hospital in Ekaterinburg. On this contract, the bribes were routed through the Dubai-based business consultant, as well as a second business consultant that was registered in Des Moines, Iowa.

13. GSM Mobile Network Services in Vietnam

64. In 2002, Siemens COM paid approximately $140,000 in bribes in connection with a tender worth approximately $35 million for the supply of equipment and services related to a Global Systems mobile network for Vietel, a government owned telecommunications provider founded by the Vietnamese Ministry of Defense. Two separate payments totaling $140,000 were made to the Singapore account of a Siemens business consultant. The payments were then routed through a U.S. correspondent account and likely paid to officials at the Vietnamese Ministry of Defense. The payments were part of a much larger bribery scheme concocted by high-level managers at Siemens regional company in Vietnam, SLV, to pay bribes to government officials at Vietel and the Vietnamese Ministry of Defense in order to acquire Phase I of the Vietel GSM tender.

In a June 2002, facsimile that discussed the bribery scheme, the former head of COM sales for the regional company described Siemens' explicit agreement to pay 8% of the value of the Vietel project to officials at the Ministry of Defense and 14% of the project value to officials at Vietel. In August and September 2002, Siemens signed agreements with two business consultants who were retained for the sole purpose of funneling the bribes to government officials connected to Vietel. Ultimately, Siemens was unsuccessful in its pursuit of the Vietel project and lost the tender before paying additional bribes.

E. <u>The Oil for Food Program</u>

65. The Oil for Food Program was intended to provide humanitarian relief for the Iraqi population, which faced severe hardship under the international trade sanctions that followed Iraq's 1990 invasion of Kuwait. The Program permitted the Iraqi government to sell its crude oil and use the proceeds to purchase food, medicine, and critical infrastructure supplies. The proceeds of the oil sales were transferred directly from the buyers to an escrow account (the "U.N. Escrow Account") maintained in New York by the United Nations 661 Committee. Funds in the U.N. Escrow Account were available for the purchase of humanitarian supplies, subject to U.N. approval and supervision. The intent of this structure was to prevent the proceeds of Iraq's crude oil sales from undermining the sanctions regime by supplying cash to Saddam Hussein.

66. Corruption was rampant within the Program. By mid-2000, Iraqi ministries on the instruction of top government officials instituted a policy requiring suppliers of humanitarian goods to pay a ten percent kickback on each contract. This kickback requirement was euphemistically referred to as an "after-sales service" fee

("ASSF"); however, no services were provided. Suppliers competing to obtain contracts under the Program were encouraged to include a ten percent markup in their bids or purchase orders. The inflated contract prices were incorporated into the Oil for Food contracts as a way to permit the suppliers to recover from the U.N. Escrow Account the kickback payments they had paid secretly to Iraq. Following the 2004 release of a report by the U.S. General Accounting Office exposing some of the abuses, the U.N. commissioned an independent inquiry committee, headed by former Federal Reserve Chairman Paul Volcker (the "Volcker Committee"), to investigate the Program's performance. That committee's October 27, 2005, final report estimated that the Iraqi government had diverted $1.7 billion in illicit income from the Program.

1. **<u>Siemens' Involvement in the Oil for Food Program</u>**

67. Siemens participated in the Program through two of its regional companies, Siemens S.A.S. ("Siemens France") and Siemens Sanayi ve Ticaret A.S. ("Siemens Turkey") and two subsidiaries, Osram Middle East FZE ("Osram ME") and Gas Turbine Technologies SpA ("GTT"). In total, 42 Oil for Food contracts were entered into, and secret kickback payments of approximately $1.7 million were made to Iraqi controlled accounts in order to avoid detection by the U.N. Total revenues on the contracts were over $124 million with profits of approximately $38,226,537. The payments were characterized as after sales service fees; however, no services were actually rendered. The ASSFs were effectively bribes paid to the Iraqi regime, which Siemens improperly disguised on its books and records by mischaracterizing the bribes as legitimate commissions.

2. Siemens France

68. From approximately September 2000 to July 2001, Siemens France entered into twelve contracts covering power station renovation, servicing and spare parts with the Iraqi Ministry of Electricity and paid illicit ASSFs of approximately $321,745. The contracts were artificially inflated by 10% and then submitted to the U.N. for payment. The U.N. was not informed that the contracts had been inflated or that Siemens France intended to pay illicit kickbacks to Iraq.

69. For instance, in July 2000 Siemens submitted a bid for the refurbishment of cranes at the Daura Power Station in Iraq. The purchase order was subsequently signed in November 2000, and included a 10% increase in the contract value. Shortly thereafter, in January 2001, Siemens signed a Supplement to its business consultant agreement with its local agent in Iraq providing for a 10% commission to the agent for "after sales services and activities." The document was unusual because it provided a higher agent compensation than was usually provided on such contracts; it was "inconsistent with Siemens' practice" which required specification and pricing of any true after sales services; and because there was only one Siemens signatory on the contract. In various letters and memoranda, one former Siemens salesman documented discussions that he had with Iraqi officials regarding the requirement of ASSFs. In a memorandum written by another Siemens employee discussing how to make the ASSF payments, the employee stated that Siemens' agent in Iraq told him that another Siemens subsidiary, Siemens Turkey, had chosen to pay ASSFs in cash "so that no names appear on paper."

70. Siemens France used a local agent in Iraq to deposit the ASSF payments in cash into a Jordanian bank account held by two Iraqi officials, which were later transferred to an account controlled by the Iraqi Ministry of Electricity. The local agent confirmed the bank deposits were made on behalf of Siemens and bank records reflect the payments. When making the ASSF payments, the local agent used the name of an acquaintance who did not work for Siemens so as to conceal his true identity.

3. **Siemens Turkey**

71. From approximately September 2000 to June 2002, Siemens Turkey entered into twenty contracts relating to the building and rehabilitation of power stations, and paid after sales service fees totaling approximately $1,243,119. Many aspects of Siemens Turkey's involvement in the Oil for Food Program were similar to those of Siemens France. Both companies used the same local agent in Iraq and both dealt principally with the Ministry of Electricity in their payment of illicit ASSFs. As described above, a Siemens employee stated that the agent informed him that Siemens Turkey was paying ASSFs in cash "so that no names appear on paper." Siemens' local agent also deposited some ASSFs into a Jordanian bank account controlled by Iraqi officials.

4. **Osram Middle East**

72. From approximately May 2000 to June 2002, Osram Middle East ("Osram"), a Siemens subsidiary, entered into six contracts with state companies within the Ministry of Oil, and paid ASSFs of approximately $89,250 for the sale of lighting equipment. Osram employees admitted that Siemens' local agent relayed the Ministry of Oil's demand for ASSFs sometime in late 2000. On three of the contracts, Osram entered

into secret side agreements agreeing to pay a 10% kickback to the Iraqi ministry. The local agent signed each of the side letters on Osram's behalf. The contracts between Osram and the Ministry of Oil typically contained a 10% markup for ASSFs. The inflated contracts were submitted to the U.N. for approval, but the U.N. was not informed that the contracts were inflated and the side letters were not disclosed. The agent admitted that he made the ASSF payments to Jordanian bank accounts held for the benefit of the Iraqi Ministry of Oil on Osram's behalf.

5. **GTT**

73. Beginning in 2001, GTT entered into four contracts with the Ministry of Electricity in which ASSFs of $81,962 were paid. For each contract, the value of the contract was increased by approximately 10% between the submission of the initial bid and the signing of the purchase order. GTT employees admit to the ASSF kickback scheme, and documents reflect that GTT's agent in Iraq informed GTT that ASSF payments were a condition to obtaining contracts. Though all of the contracts were signed before 2003, none were performed before the start of the Iraqi war. After the war began, the U.N asked GTT to amend each contract to decrease its value by the 10% ASSF.

F. Siemens Employed U.S. Means to Engage in Bribery

74. In total, Siemens made bribe payments directly or indirectly to foreign government officials in connection with at least 290 projects or individual sales involving business in Venezuela, China, Israel, Bangladesh, Nigeria, Argentina, Vietnam, Russia, and Mexico that employed the mails and other means and instrumentalities of U.S. interstate commerce. The corrupt payments were made to government officials or their

designees for the purpose of obtaining or retaining business in connection to the above projects. The use of interstate commerce in connection with bribery included involving U.S.-based Siemens subsidiaries and their employees in the bribery schemes; financing of three underlying projects by the World Bank and the U.S. Export-Import Bank; making illegal payments through U.S. banks; using U.S.-based companies as intermediaries, business consultants, and holders of slush funds; conducting meetings in the United States in furtherance of a bribery scheme; and transmitting mail, electronic mail, and facsimile messages into and out of the United States.

G. Siemens Failed to Maintain Its Books and Records

75. During the Relevant Period, Siemens made thousands of payments to third parties in ways that obscured the purpose for, and the ultimate recipients of, the payments. In particular, Siemens paid approximately $1.4 billion in bribes to foreign government officials. Doing so involved the falsification of Siemens' books and records by employees throughout the Company. Specifically, Siemens failed to keep accurate books and records by: 1) establishing and funding secret, off-books accounts; 2) establishing and using a system of payment intermediaries to obscure the source and destination of funds; 3) making payments pursuant to business consultant agreements that inaccurately described the services provided; 4) generating false invoices and other false documents to justify payments; 5) disbursing millions in cash from cash desks with inaccurate documentation authorizing or supporting the withdrawals; 6) using post-it notes for the purpose of concealing the identity of persons authorizing illicit payments; 7) recording illicit ASSF payments as legitimate commissions in Oil for Food

transactions; 8) falsifying U.N. documents in connection with the Oil for Food Program; and 9) recording bribes as payment for legitimate services.

H. Siemens Failed to Maintain Adequate Internal Controls

76. Siemens failed to implement adequate internal controls to comply with the Company's NYSE listing, including the detection and prevention of violations of the FCPA. First, Siemens engaged in the knowing falsification of books and records. Siemens established numerous off-books accounts and secret slush funds for the purpose of obscuring the purpose for, and ultimate recipient of, illicit payments. Elaborate payment mechanisms were used to conceal the fact that bribe payments were made around the globe to obtain business, including the PG confidential payment system and extensive use of business consultants and intermediaries to funnel bribes. False invoices and payment documentation was created to make payments to business consultants under false business consultant agreements that identified services that were never intended to be rendered. Illicit payments were falsely recorded as expenses for management fees, consulting fees, supply contracts, room preparation fees, and commissions. Documents related to its participation in the Oil for Food Program were also inaccurate. Siemens inflated U.N. contracts, signed side agreements with Iraqi ministries that were not disclosed to the U.N., and recorded the ASSF payments as legitimate commissions despite U.N., U.S., and international sanctions against such payments.

77. Second, Siemens employees routinely circumvented the internal controls the Company had in place. Slush funds were opened in the names of former and current employees and maintained off-books. At any given point, Siemens had no central record of the true number of bank accounts opened on its behalf, from which, millions in illicit

payments were made. Despite a "four-eyes" policy that required two signatures on Company documents to authorize transactions, a significant number of business consultant agreements were entered into and a significant number of payments were authorized in violation of the policy. In many instances, signatures authorizing the withdrawal of hundreds of thousands of dollars from cash desks were placed on post-it notes and later removed in order to eradicate any permanent record of the approvals. In numerous instances, officials signing documents failed to conduct any review of the documents. For example, an official who authorized payments on behalf of Siemens' Russian regional subsidiary authorized payments despite his inability to read the language in which the supporting documentation of the payments were prepared. Siemens officials frequently misused internal accounts by transferring money from one Siemens entity to another without any legitimate business purpose or proper documentation of the disposition of the funds. Siemens officials modified the format of agreements to avoid internal controls on the use of business consultants by backdating agreements, misidentifying counterparties as "agents" rather than "business consultants," and obscuring the amounts paid to business consultants by splitting the payments among separate agreements.

78. Finally, Siemens failed to establish adequate internal controls despite its knowledge that corruption was rampant. Siemens did not issue mandatory and comprehensive Company-wide controls regarding the use of business consultants until June 2005, well after senior officials were aware of widespread bribery in the Company's two largest divisions, COM and PG. Despite those controls, due diligence on business consultants remained largely inadequate, and payments continued to be made without

adequate proof of services rendered. Siemens failed to establish controls over numerous off-books accounts held on its behalf around the world. The Company maintained no central list of corporate accounts held at unconsolidated entities or in the names of individual Siemens officials. Siemens failed to establish controls over cash disbursements, allowed manual payments without documentation, and failed to ensure the proper use of intercompany accounts. Siemens failed to establish an effective central compliance function. The compliance office lacked independence and was severely understaffed. Siemens tone at the top was inadequate for a law abiding entity, and employees engaged in bribery and other misconduct on behalf of the Company were not adequately disciplined. Siemens also failed to conduct appropriate anti-bribery and corruption training.

CLAIMS FOR RELIEF

FIRST CLAIM

[Violations of Section 30A of the Exchange Act]

Paragraphs 1 through 78 are realleged and incorporated by reference.

79. As described above, Siemens, through its officers, agents, and subsidiaries, corruptly offered, promised to pay, or authorized payments to one or more persons, while knowing that all or a portion of those payments would be offered, given, or promised, directly or indirectly, to foreign officials for the purpose of influencing their acts or decisions in their official capacity, inducing them to do or omit to do actions in violation of their official duties, securing an improper advantage, or inducing such foreign officials to use their influence with foreign governments or instrumentalities thereof to assist Siemens in obtaining or retaining business.

80. By reason of the foregoing, Siemens violated, and unless enjoined will continue to violate, Section 30A of the Exchange Act. [15 U.S.C. § 78dd-1]

SECOND CLAIM

[Violations of Section 13(b)(2)(A) of the Exchange Act]

Paragraphs 1 through 80 are realleged and incorporated by reference.

81. As described above, Siemens, through its officers, agents and subsidiaries, failed to keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected its transactions and dispositions of its assets.

82. By reason of the foregoing, Siemens violated, and unless enjoined will continue to violate, Section 13(b)(2)(A) of the Exchange Act. [15 U.S.C. § 78m(b)(2)(A)]

THIRD CLAIM

[Violations of Section 13(b)(2)(B) of the Exchange Act]

Paragraphs 1 through 82 are realleged and incorporated by reference.

83. As described above, Siemens failed to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (i) transactions were executed in accordance with management's general or specific authorization; and (ii) transactions were recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for its assets.

84. By reason of the foregoing, Siemens violated, and unless enjoined will continue to violate, Section 13(b)(2)(B) of the Exchange Act. [15 U.S.C. § 78m(b)(2)(B)]

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that this Court enter a final judgment:

A. Permanently restraining and enjoining Siemens from violating Sections 30A, 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act [15 U.S.C. §§ 78dd-1, 78m(b)(2)(A), and 78m(b)(2)(B)];

B. Ordering Siemens to disgorge ill-gotten gains wrongfully obtained as a result of its illegal conduct; and

C. Granting such further relief as the Court may deem just and appropriate.

Dated: Dec 12, 2008

Respectfully submitted,

Cheryl J. Scarboro

Cheryl J. Scarboro (D.C. Bar No. 422175)
Reid A. Muoio
Tracy L. Price
Denise Hansberry
Robert I. Dodge

Attorneys for Plaintiff,
U.S. Securities and Exchange Commission
100 F Street, NE
Mail Stop 6030 SPII
Washington, DC 20549-6030
(202) 551-4403 (Scarboro)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	
v.	:	**CRIMINAL NO.:**
SIEMENS AKTIENGESELLSCHAFT, SIEMENS S.A. (ARGENTINA), SIEMENS BANGLADESH LTD., and SIEMENS S.A. (VENEZUELA),	:	
Defendants	:	

DEPARTMENT'S SENTENCING MEMORANDUM

The United States of America, by and through its counsel, the United States Department of Justice, Criminal Division, Fraud Section, and the United States Attorney for the District of Columbia (collectively, the "Department"), hereby submits in the above-captioned matters the Department's Sentencing Memorandum. For the reasons outlined below, the Department respectfully submits that the Court should accept the guilty pleas of Siemens Aktiengesellschaft ("Siemens"), Siemens S.A. (Argentina) ("Siemens Argentina"), Siemens Bangladesh Limited ("Siemens Bangladesh"), and Siemens S.A. (Venezuela) ("Siemens Venezuela"), and sentence them in accordance with the parties' agreement.

I. Background

Siemens is a German engineering company with over 400,000 employees and operations in 191 countries. Siemens, through its operating groups, subsidiaries, officers, directors, employees, and agents, is engaged in, among other things, developing, constructing, selling, and servicing telecommunications equipment and systems; power generation, transmission, and distribution equipment and systems; transportation equipment and systems; medical equipment and systems; and industrial and traffic equipment and systems, for, among others, national, state, and municipal governments. On March 12, 2001, Siemens became listed on the New York Stock Exchange, subjecting itself as an "issuer" tot he United States' securities laws, including the Foreign Corrupt Practices Act ("FCPA").

In November 2006, the Munich Public Prosecutor's Office conducted raids on multiple Siemens offices and the homes of Siemens employees in and around Munich, Germany, as part of an investigation of possible bribery of foreign public officials and falsification of corporate books and records. Shortly after these raids, Siemens disclosed to the Department and to the Securities and Exchange Commission ("SEC"), which under the FCPA has civil enforcement authority over issuers, potential violations of the FCPA in multiple countries and initiated a sweeping global internal investigation. Siemens engaged Davis Polk & Wardwell to represent the Company, and engaged Debevoise & Plimpton LLP ("Debevoise") to conduct an independent investigation for the Audit Committee. Debevoise, in turn, hired Deloitte & Touche GmbH ("Deloitte"), translators, computer experts, litigation support firms, and other third parties to assist in the investigation.

The scope of Siemens' internal investigation was unprecedented and included virtually all aspects of its worldwide operations, including headquarters components, subsidiaries, and regional operating companies. Compliance, legal, internal audit, and corporate finance departments were a significant focus of the investigation and were discovered to be areas of the company that played a significant role in the violations. Finally, the role and awareness of Siemens' Managing Board and Supervisory Board in serious compliance failures were the subject of particular scrutiny of the Audit Committee and the Department. Debevoise and Deloitte, at the direction of Siemens, provided frequent and extensive reports to the Department and the SEC in face-to-face presentations and conference calls that assisted the Department's investigation enormously.

As described below, Siemens has provided extraordinary cooperation in connection with the investigation of its past corporate conduct, and has undertaken uncommonly sweeping remedial action in response to the discovery of its prior misconduct. In addition, Siemens has provided substantial and timely assistance in the investigation of other persons and entities.

2. Summary of Facts

The Debevoise internal investigation uncovered evidence of corruption by Siemens spanning several decades in many operating groups and regions. Equally if not more important, the internal investigation revealed knowing failures to implement, and circumvention of, internal controls up to the most senior echelons of management. Wilmer Cutler Pickering Hale & Dorr LLP, which was engaged to conduct a related investigation into Siemens' United Nations Oil for Food Program contracts, discovered evidence confirming the Volcker Commission's findings that several Siemens AG subsidiaries made significant kickback payments to the Iraqi government in connection with the Oil for Food Program. The Debevoise internal investigation and the Department's investigation also revealed evidence of corrupt and improperly recorded payments with a strong nexus to the U.S. by two Siemens subsidiaries, Siemens Venezuela and Siemens Bangladesh, as well as evidence of improperly recorded payments with respect to an additional subsidiary, Siemens Argentina.

a. Siemens' Knowing Falsification of Books and Records and Knowing Failures in and Circumvention of Internal Controls

From in or about the mid-1990s to in or about 2007, Siemens engaged in systematic efforts to knowingly falsify its corporate books and records and to knowingly fail to implement and to circumvent existing internal controls. These systematic efforts included, but were not limited to: (a) using off-books accounts for corrupt payments even after compliance risks associated with such accounts were raised at the highest levels of management; (b) entering into purported business consulting agreements with no legitimate business purpose, sometimes after Siemens had won the relevant project; (c) engaging former Siemens employees as purported business consultants to act as conduits for corrupt payments to government officials; (d) justifying payments to purported business consultants based on false invoices; (e) mischaracterizing corrupt payments in the corporate books and records as consulting fees and other seemingly legitimate expenses; (f) limiting the quantity and scope of audits of payments to purported business consultants; (g) accumulating profit reserves as liabilities in internal balance sheet accounts and then using them to make corrupt payments through business consultants as needed; (h) using removable Post-It notes to affix signatures on approval forms authorizing payments to conceal the identity of the signors and obscure the audit trail; (I) allowing third party payments to be made based on a single signature in contravention of Siemens' "four eyes principle," which required authorization of payments by two Siemens managers; (j) drafting and backdating sham business consulting agreements to justify third party payments; and (k) changing the name of purported business consulting agreements to "agency agreements" or similar titles to avoid detection.

1) Siemens' Use of Payment Mechanisms

From on or about March 12, 2001 to in or about 2007, Siemens made payments totaling approximately $1,360,000,000 through various mechanisms. Of this amount, $805,500,000 was intended in whole or in part as corrupt payments to foreign officials through various payment mechanisms, as explained in more detail in the Siemens criminal information.

2) Siemens' United Nations Oil for Food Program Contracts

In addition, from in or about 2000 to in or about 2002, four Siemens AG subsidiaries - Siemens S.A.S. of France ("Siemens France"), Siemens Sanayi ve Ticaret A.S. of Turkey ("Siemens Turkey"), Osram Middle East FZE ("Osram Middle East"), and Gas Turbine Technologies S.p.A. ("GTT") - each wholly owned by Siemens or one of its subsidiaries, were awarded 42 contracts with a combined value of more than $80,000,000 with the Ministries of Electricity and Oil of the Government of the Republic of Iraq under the United Nations Oil for Food Program. To obtain these contracts, Siemens France, Siemens Turkey, Osram Middle East, and GTT paid a total of at least $1,736,076 in kickbacks to the Iraqi government, and they collectively earned over $38,000,000 in profits on those 42 contracts.

In order to generate the funds to pay the kickbacks to the Iraqi government and to conceal those payments, Siemens France, Siemens Turkey, Osram Middle East, and GTT inflated the price of the contracts by approximately 10% before submitting them to the United Nations for approval. In order to conceal on their corporate books and records the kickback payments made to the Iraqi government, Siemens France, Siemens Turkey, Osram Middle East, and GTT improperly characterized payments to purported business consultants, part of which were paid as kickbacks to the Iraqi government, as "commissions" to the business consultants. For the relevant years, the books and records of Siemens France, Siemens Turkey, Osram Middle East, and GTT, including those containing false characterizations of the kickbacks paid to the Iraqi government, were part of the books and records of Siemens.

b. Siemens Argentina's Improperly Recorded Payments

Siemens Argentina was a wholly owned subsidiary of Siemens AG. Beginning around September 1998 and continuing until 2007, Siemens Argentina made and caused to be made significant payments to various Argentine officials, both directly and indirectly, in an effort to retain current business or secure future business.

In or about 1994, the Argentine government issued a tender for bids to replace the then existing manually-created national identity booklets with state of the art national identity cards (the "national identity card project"). The total estimated value of the national identity card project was $1 billion. In February 1998, Siemens Argentina and its affiliates were awarded the national identity card project contract by the Argentine Ministry of the Interior. In approximately September 1998, Siemens Argentina began making and causing to be made multiple payments to a group of purported business consultants (the "Argentine Consulting Group") in connection with the national identity card project, despite the fact that the Argentine Consulting Group provided no legitimate services on the project. Siemens Argentina employees understood these payments to be, at least in part, bribes for the high-level Argentine government officials responsible for awarding Siemens Argentina and its affiliates the identity card project.

From in or about 1997 to in or about January 2007, Siemens Argentina paid or caused to be paid at least $15,725,000 directly to entities controlled by members of the Argentine government, at least $35,150,000 directly to the Argentine Consulting Group, and at least

$54,908,000 to other entities. Some of the corrupt payments were approved by Siemens Argentina personnel or agents from within the United States or paid into United States bank accounts. From the date Siemens became an issuer on March 12, 2001 through in or about January 2007, Siemens Argentina made approximately $31,263,000 in corrupt payments through the Argentine Consulting Group and other entities, and improperly characterized those corrupt payments in its books and records as legitimate payments for "consulting fees" or "legal fees." Siemens Argentina's books and records, including those containing the false characterizations of the corrupt payments, were part of the books and records of Siemens.

c. Siemens Bangladesh's Corrupt and Improperly Recorded Payments

From 2000 to 2002, the Bangladesh Telegraph Telephone Board (the "BTTB"), a government-owned telecommunications regulatory entity in Bangladesh, conducted a series of three open tenders for a mobile telephone project (the "BTTB Project") that was ultimately awarded to Siemens. In 2000, the BTTB conducted the first tender for the BTTB Project contract. Siemens was excluded from the first tender for technical non-compliance, but the tender was subsequently cancelled. The second tender in 2001 was cancelled and reissued because of a change in government. Siemens was initially disqualified from the third tender, but in partnership with Siemens Bangladesh and Siemens Mobile Communications S.p.A. (then a Siemens subsidiary located in Milan, Italy), ultimately was awarded part of that tender in June 2004. Siemens' and its subsidiaries' portion of the contract value was $40,887,000.

From May 2001 to August 2006, Siemens Bangladesh, which was responsible for the local operations on the project, engaged or caused to be engaged purported business consultants to pay bribes to various Bangladeshi officials in exchange for favorable treatment during the bidding process. Siemens Bangladesh caused to be paid at least $5,319,839.83 to the purported business consultants. Siemens Bangladesh caused at least one payment to be made to each of these purported consultants from a United States bank account, and the remaining payments to be made through payment intermediaries.

Siemens Bangladesh knew that the purported business consultants were passing along some or all of the money they received from Siemens Bangladesh to senior Bangladeshi government officials in exchange for favorable treatment of Siemens AG in the BTTB Project bid process. In September 2004, Siemens Bangladesh learned that one of the purported business consultants had moved to the United States, after which Siemens Bangladesh continued to cause him to be paid purported consulting fees to an account in Hong Kong. In 2003, Siemens Bangladesh also made payments of at least $16,000 directly to Bangladeshi government officials, or relatives of Bangladeshi officials, with responsibility for awarding the BTTB Project. Siemens Bangladesh caused these payments to be improperly recorded on Siemens' books and records as "consulting fees" and other seemingly legitimate payments.

d. Siemens Venezuela's Corrupt and Improperly Recorded Payments

Beginning around November 2001 and continuing until around May 2007, Siemens Venezuela made and caused to be made significant payments to various Venezuelan officials, indirectly through purported business consultants, in exchange for favorable business treatment. The payments were related to two major transportation infrastructure projects.

1) Metro Valencia Project

In or about 1996, Siemens was awarded a contract to design and build a rail mass transit system in the City of Valencia, Venezuela (the "Metro Valencia project"). Due to the size, cost, and complexity of the project, work was performed in several phases, each of which was governed by a contract between a Siemens entity and the city of Valencia. The total estimated value of all the contracts was $240,000,000. Siemens Venezuela was responsible for overseeing certain administrative aspects of the contracts, including the hiring and payment of business consultants.

2) Metro Maracaibo Project

In 2000, the city of Maracaibo, Venezuela, and the State of Zulia, Venezuela, solicited bids for a contract to design and build a rail mass transit system in the city of Maracaibo (the "Metro Maracaibo project"). Siemens Venezuela and its affiliates submitted a bid. Prior to opening the bids, a dispute arose between the Mayor of Maracaibo, who favored the project, and the Governor of the State of Zulia, who opposed the project. In or about 2000, Siemens Venezuela hired a purported business consultant in connection with the dispute. Following that, the project was unanimously approved at a Metro Maracaibo board meeting, which the representatives from the Governor's Office failed to attend. The total value for the contract and project was over $100,000,000. Siemens Venezuela was responsible for overseeing certain administrative aspects of the contracts, including the hiring and payment of business consultants.

3) Total Corrupt Payments by Siemens Venezuela

From in or about November 2001 through in or about May 2007, Siemens Venezuela paid and caused to be paid at least $18,782,965 to various purported business consultants with the understanding that some or all of those funds would be passed along to Venezuelan government officials for the corrupt purpose of obtaining and retaining government contracts in Venezuela relating to the Metro Valencia and Metro Maracaibo projects. Some of those payments were made using United States bank accounts controlled by the purported business consultants. Siemens Venezuela caused these payments to be improperly recorded on Siemens' books and records as "consulting fees," payments for "studies," and other seemingly legitimate payments.

3. **Dispositions With Siemens, Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela**

a. **Summary of Criminal Charges**

The Department and Siemens agree that the appropriate resolution of this matter consists of guilty pleas pursuant to plea agreements with Siemens, Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela. The Siemens information charges (a) a violation of the FCPA's internal controls provisions under 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(5), and 78ff(a) (Count One); and (b) a violation of the FCPA's books and records provisions under 15 U.S.C. §§ 78m(b)(2)(B), 78m(b)(5), and 78ff(a) (Count Two). The Siemens Argentina information charges a single count of conspiracy to commit an offense against the United States, in violation of 18 U.S.C. § 371, with a single object - to violate the books and records provisions of the FCPA. The proposed informations against Siemens Bangladesh and Siemens Venezuela each charge a single count of conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371, with two objects - to violate the FCPA's antibribery provisions and to violate the FCPA's books and records provisions.

b. **Summary of Plea Agreements**

The proposed plea agreements contain the following core terms: (a) agreement to plead guilty to the charges in the informations in the District of Columbia, the factual allegations of which Siemens, Siemens Venezuela, Siemens Bangladesh, and Siemens Argentina agree not to contest; (b) a total criminal penalty of $450,000,000, apportioned as follows: a $448,500,000 fine for Siemens; and a $500,000 fine (the statutory maximum for conspiracy) for each of Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela; (c) a continuing obligation to provide full, complete, and truthful cooperation to the Department and any other law enforcement agency, domestic or foreign, with which the Department directs Siemens to cooperate, in particular the Munich Public Prosecutor's Office; (d) implementation of rigorous compliance enhancements, including periodic testing of same, with a recognition that Siemens has already implemented substantial compliance changes over the course of the investigation; and (e) retention of an independent monitor, who will, over a four-year term, conduct a review of the compliance code, Siemens' internal controls and related issues, and will prepare periodic reports on his reviews.

In accordance with the Department's Principles of Federal Prosecution of Business Organizations, the Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Siemens' cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts. In considering the overall disposition, the Department also considered related cases of other governmental authorities.

4. Sentencing Guidelines Calculation and Criminal Penalties

a. Siemens Sentencing Guidelines Calculation

As set forth in paragraph 4 of the plea agreement, the parties agree that the following Sentencing Guidelines provisions, using the 2007 Sentencing Guidelines Manual, apply based on the facts of this case, for purposes of determining an advisory guideline range:

§ 2B1.1(a)(2)	Base Offense Level	6
§ 2B1.1(b)(1)(P)	Loss of $400 million or more	30
§ 2B1.1(b)(2)(c)	Over 250 victims	6
§ 2B1.1(b)(9)	Significant Conduct Outside U.S./ Sophisticated Means	2
TOTAL OFFENSE LEVEL		44

Calculation of Culpability Score:

§ 8C2.5(a)	Base Score	5
§ 8C2.5(b)(1)	5,000 or More Employees and High-Level Personnel Involvement/ Pervasive Tolerance	5
§ 8C2.5(g)(2)	Full Cooperation and Acceptance of Responsibility	-2
TOTAL CULPABILITY SCORE		8

Calculation of Fine Range:

Base Fine: Greater of the amount from table in U.S.S.G. § 8C2.4(a)(1) & (d) corresponding to offense level of 44 ($72,500,000), or the pecuniary gain/loss from the offense ($843,500,000) (U.S.S.G. § 8C2.4(a)(2)):	$843,500,000
Multipliers, culpability score of 8 (U.S.S.G. § 8C2.6):	1.6-3.2
Fine Range (U.S.S.G. § 8C2.7):	$1.35 billion - $2.70 billion

b. Siemens Loss Figure

For purposes of calculating "loss" under U.S.S.G. § 2B1.1(b)(1)(P), the parties combined the $805,500,000 in corrupt payments, with the pecuniary gain of $38,000,000 on the Oil for Food contracts, to arrive at a total of $843,500,000. The rationale for using this figure was that calculating a traditional loss figure in a case of this magnitude, involving literally thousands of contracts over many years, would be overly burdensome, if not impossible. The commentary to U.S.S.G. § 2B1.1 states that where loss cannot reasonably be determined, gain is an alternative measure of loss. Because the Oil for Food profits are calculable, those $38,000,000 in profits are included as the "loss" figure for purposes of the Oil for Food conduct.

For the remaining conduct, however, a determination of either true loss or gain is not reasonably calculable. The controls failures and books and records falsifications in this case spanned many thousands of projects over a long time period, and to calculate loss or gain on a project-by-project basis would take an unreasonable amount of time and resources. The commentary to U.S.S.G. § 2B1.1 relating to "Government Benefits" is instructive here. It provides that in cases involving government benefits, "loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be." U.S.S.G. § 2B1.1, comment. (n. 3(F)(ii)). Although the commentary is intended to apply to cases involving government grants, loans, and entitlement programs, a case like this one can be viewed through the same prism. In this case, the amount "obtained by unintended recipients or diverted to unintended uses" is arguably the amount of money directly involved in the corrupt payments. Accordingly, the parties used $805,500,000 in calculating the loss figure for the conduct unrelated to the Oil for Food contracts.

c. **Siemens Fine**

Pursuant to Fed. R. Crim. P. 11(c)(1)(c), the Department and Siemens agree that the appropriate criminal fine in the case, after consideration of (a) the appropriate consideration of the Sentencing Guidelines, (b) Siemens' assistance in the investigation of other individuals and organizations pursuant to U.S.S.G. § 8C4.1, (c) its prior and anticipated payments of fines or disgorgement in other related proceedings both in the U.S. and abroad, (d) its substantial compliance and remediation efforts, (e) its extraordinary rehabilitation, and (f) the factors set forth in 18 U.S.C. § 3553(a), is $448,500,000. Although this represents a number below the advisory sentencing guideline range, the Department and Siemens agree and stipulate that the factors mentioned above and those described elsewhere in this Sentencing Memorandum represent mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission." 18 U.S.C. § 3553(b)(1).

d. **Subsidiary Fines**

The statutory maximum sentence that the Court can impose on an organization for a violation of Title 18, United States Code, Section 371, is a fine not exceeding $500,000 (18 U.S.C. §3571(c)(3)) or twice the pecuniary gain derived from the offense or twice the pecuniary loss suffered by a person other than defendant, unless imposition of a fine under this provision would unduly complicate or prolong the sentencing process (18 U.S.C. §3571(d)); five years' probation, 18 U.S.C. § 3561(c)(1); and a mandatory special assessment of $400, 18 U.S.C. § 3013(a)(2)(B).

The parties agree that, in light of (a) the complexity of the overall dispositions with Siemens and its subsidiaries, and (b) the interrelationship and overlap among and between the charges and conduct underlying those dispositions, application of the Alternative Fines Act, 18 U.S.C. § 3571(d), to this case would unduly complicate or prolong the sentencing process. Accordingly, the maximum fine under the Sentencing Guidelines is $500,000 as provided in 18 U.S.C. § 3571(c)(3). Accordingly, the parties agree that $500,000 is the appropriate criminal fine for each of Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela.

5. Siemens' Substantial Assistance, Cooperation, and Remediation Efforts

The Department believes the above-proposed penalties are appropriate based on Siemens' substantial assistance to the Department in the investigation of other persons and entities, its extraordinary efforts to uncover evidence of prior corrupt activities, and in its extensive commitment to restructure and remediate its operations to make it a worldwide leader in transparent and responsible corporate practices going forward, all of which are described in more detail below.

If the plea agreement were being filed pursuant to Fed. R. Crim. P. 11(c)(1)(B) instead of pursuant to Fed. R. Crim. P. 11(c)(1)(c), the Department believes that the facts contained in the Department's Sentencing Memorandum would merit a motion for downward departure with respect to Siemens. U.S.S.G § 8C4.1, the corporate analogue to U.S.S.G § 5K1.1, provides for downward departures from the advisory sentencing guideline range based on the defendant's "substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant who has committed an offense."

If the plea agreement were being filed pursuant to Fed. R. Crim. P. 11(c)(1)(B) and the Department were filing a motion for downward departure with respect to Siemens, it would also argue that under 18 U.S.C. § 3553(b)(1) and the introductory commentary to U.S.S.G § 8C4, departure is warranted if the court finds "that there exists an aggravating or mitigating circumstance of a kind, *or to a degree*, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." (Emphasis added). Because Siemens did not voluntarily disclose the conduct before the Munich Public Prosecutor raided its offices, it only receives a two-point reduction in its culpability score, which is incongruent with the level of cooperation and assistance provided by the company in the Department's investigation.

The Department's and Siemens' proposed criminal penalty of $448,500,000 would be the same in the event of a plea under Fed. R. Crim. P. 11(c)(1)(B) accompanied by a motion for downward departure. Nevertheless, the Department and Siemens AG agreed that filing the plea agreement pursuant to Fed. R. Crim. P. 11(c)(1)(c) was more appropriate in this case.

a. Substantial Assistance in the Investigation of Others

As part of its overall cooperation efforts, Siemens (primarily through Debevoise and Deloitte) has developed and timely provided detailed and significant information regarding third parties, including individuals and entities that were used as conduits to conceal corrupt payments made to foreign government officials. Several of these individuals and entities were located in the United States and utilized United States banks to facilitate the payments.[1] Siemens has assisted in the investigation of these individuals and entities by initially disclosing the existence

[1] As part of the internal investigation, in consultation with the Department and the SEC, Siemens sought to identify any pertinent transactions involving its U.S. operations, including any regional operating companies or divisions, U.S. bank accounts, and business consultants with ties to the U.S.

of the activities, and then providing detailed and useful information obtained from interviews of Siemens employees, corporate records, and bank and other financial records. Frequently, this detailed information has been presented during debriefing sessions that included PowerPoint presentations together with binders of pertinent documents. Because many Siemens documents are in German or other foreign languages, Siemens has routinely provided English language translations of documents produced, thereby saving the Department very significant time and expense.

In certain instances, Siemens has provided forensic analyses of bank records and payments that have greatly assisted in the tracing of multi-layered financial transactions. Many of these transactions involved the movement of funds through several countries. It was only through the extensive, worldwide investigative efforts of the internal investigators that these complex criminal activities were uncovered. As a practical matter, it would have been exceedingly difficult for the Department to identify and obtain the necessary foreign financial records, review them, trace proceeds, and identify and interview potential witnesses, all between late 2006 and the present. Furthermore, the documentation and analysis undertaken by Siemens has been possible only because it took aggressive steps starting immediately after the Munich raids to preserve evidence in both electronic and hard copy form. A summary of the specific substantial assistance efforts, identifying the persons and entities involved, appears in a separate pleading being filed under seal.

In addition to the many timely and useful presentations to the Department and the SEC, Siemens has undertaken significant similar efforts to cooperate with foreign law enforcement authorities who have been conducting investigations of alleged improper payments abroad. In addition to the Munich Public Prosecutor's Office, the Department understands that Siemens has cooperated extensively with law enforcement authorities in numerous countries, including but not limited to, Bangladesh, Greece, and Nigeria. Siemens has also fully cooperated with several international development banks, including the World Bank and the Inter-American Development Bank, in connection with Siemens projects that received funding from those banks. Siemens interacted with the relevant government and inter-governmental entities in a transparent fashion, such that it facilitated communication between and among the Department and the SEC and these bodies. These efforts have set a standard going forward for the type of multi-national cooperation that can greatly enhance worldwide law enforcement efforts involving corruption of foreign officials.

b. Siemens' Exceptional Cooperation

The Department views as exceptional Siemens' wide-ranging cooperation efforts throughout this investigation, which included a sweeping internal investigation, the creation of innovative and effective amnesty and leniency programs, and exemplary efforts with respect to preservation, collection, testing, and analysis of evidence.

1) Extensive Internal Investigation

Within a short time after the Munich Public Prosecutor's Office conducted raids of Siemens' offices in November 2006, Siemens retained Debevoise "to conduct an independent and comprehensive investigation to determine whether anti-corruption regulations have been violated and to conduct an independent and comprehensive assessment of the compliance and control systems at Siemens." Siemens has since then provided its unwavering support and commitment to this investigation. By all indications, Debevoise has been permitted to conduct its investigation in a completely independent fashion, without limitations as to scope or duration. According to Siemens' latest estimates, over 1.5 million hours of billable time by Debevoise and Deloitte professionals have been devoted to the investigation. This includes the extensive and sustained participation of approximately 100 lawyers and 100 support staff from Debevoise and 130 forensic accountants and support staff from Deloitte. The investigative work has taken place in 34 countries and has involved over 1,750 interviews and over 800 informational meetings. Over 100 million documents have been collected and preserved, many of which have been searched or reviewed for evidence relevant to the investigation. Siemens, either directly or through Debevoise, has produced to the Department over 24,000 documents, amounting to over 100,000 pages.

To ensure that Debevoise and Deloitte had the support needed within Siemens to effectively conduct their investigation, Siemens stressed to all employees that they must fully cooperate in the investigation. In addition, Siemens established a Project Office at headquarters staffed by 16 full-time employees that facilitated interviews and document collection. To facilitate visits to regional companies by the investigation team, the Project Office communicated with regional management to explain and prepare them for the interviews and other investigative work.

2) Amnesty and Leniency Programs

In consultation with the Department, Siemens designed and implemented a company-wide amnesty program to facilitate the internal investigation. This amnesty program was implemented on October 31, 2007 and continued until approximately February 29, 2008. The program provided that all but the most senior employees who voluntarily disclosed to Debevoise truthful and complete information about possible violations of relevant anti-corruption laws would be protected from unilateral employment termination and company claims for damages. The policy that implemented the amnesty program made clear that it was in no way binding on any prosecutors or regulators, including the Department and the SEC, but that Siemens would bring an employee's cooperation to the attention of such authorities if he or she were the subject of a government investigation.

For employees too senior to qualify for the amnesty program, as well as those employees who did not come forward during the amnesty program period, Siemens established a similar leniency program on April 4, 2008. The leniency program provided for individualized leniency determinations for cooperating employees. The creation of these two programs was a unique and effective way to further the investigation and it yielded impressive results. Over 100 employees provided information in connection with the programs, including numerous employees who previously provided incomplete or less than truthful information and employees who had not come forward previously.

Shortly after the amnesty program began, the Department and the SEC identified various individuals and projects for more extensive debriefings by Siemens, referred to by the parties as "deep dives." The amnesty and leniency programs were vital to obtaining the types of detailed information needed for the deep dives. These deep dive sessions greatly enhanced the Department's ability to evaluate the overall case, properly target its limited resources, and develop the evidence necessary to bring the charges here.

3) Preservation, Collection, Testing, and Analysis of Evidence

At the outset of the internal investigation, Siemens instituted a worldwide data preservation policy directing that employees secure and preserve, among other things, all documents relating to financial transactions; all corporate books and records; records of any payments to government officials; and records concerning consultants, agents, or other third parties that assisted Siemens in obtaining business. Siemens took extensive steps using technological and human resources to ensure successful preservation of these documents. One of the primary functions of the Project Office has been to ensure that employees have complied with the data preservation policy.

Due to the enormous volume of records and the data protection laws in various countries, document preservation and production have been complex and expensive. Siemens established special offices in Germany and China to collect, review, process, and store documents in connection with the investigation. To date, Siemens has spent over $100 million on document collection, review, processing and storage, including those facilities in Germany and China. Although data protection laws, including those in Germany, have at times limited or delayed Siemens' production of certain documents, Siemens has worked hard to take necessary steps and, where necessary, obtain approvals from foreign authorities, to make the documents available to the Department and the SEC as promptly as possible and in compliance with relevant data privacy laws and other legal restrictions.

Siemens' extensive efforts in preserving and making available documents from foreign countries have been exemplary and serve as a model to other multi-national companies seeking to cooperate with law enforcement authorities.

c. Remediation Efforts

Since the beginning of the internal investigation, Siemens' remediation efforts have been exceptional. Siemens has replaced nearly all of its top leadership, including the Chairman of the Supervisory Board,[2] the Chief Executive Officer, the General Counsel, the Head of Internal Audit, and the Chief Compliance Officer. The Company has terminated members of senior management implicated in the misconduct uncovered by the investigation and has reorganized the Company to be more centralized from both a business and compliance perspective. This includes the creation of a new position on the Managing Board with specific responsibility for legal and compliance matters.

Siemens also overhauled and greatly expanded its compliance organization, which now totals more than 500 full time compliance personnel worldwide. Control and accountability for all compliance matters is vested in a Chief Compliance Officer, who, in turn, reports directly to the General Counsel and the Chief Executive Officer. Siemens has also reorganized its Audit Department, which is headed by a newly appointed Chief Audit Officer who reports directly to Siemens' Audit Committee. To ensure that auditing personnel throughout the company are competent, the Chief Audit Officer required that every member of his 450 person staff reapply for their jobs.

Siemens also has enacted a series of new anti-corruption compliance policies, including a new anti-corruption handbook, sophisticated web-based tools for due diligence and compliance

---

[2] Siemens has a Supervisory Board, consisting of 10 members elected by shareholders and 10 members elected by employees. It also has a Managing Board, responsible for managing the company's business. The Supervisory Board appoints and removes members of the Managing Board and generally oversees the company's management, but is not permitted to make management decisions.

matters, a confidential communications channel for employees to report irregular business practices, and a corporate disciplinary committee to impose appropriate disciplinary measures for substantiated misconduct.

Siemens has organized a working group devoted to fully implementing the new compliance initiatives, which consists of employees from Siemens' Corporate Finance and Corporate Compliance departments, and professionals from PricewaterhouseCoopers ("PwC"). This working group developed a step-by-step guide on the new compliance program and improved financial controls known as the "Anti-Corruption Toolkit." The Anti-Corruption Toolkit and its accompanying guide contain clear steps and timelier required of local management in the various Siemens entities to ensure full implementation of the global anti-corruption program and enhanced controls. Over 150 people, including 75 PwC professionals, provided support in implementing the Anti-Corruption Toolkit at 162 Siemens entities, and dedicated support teams spent six weeks on the ground at 56 of those entities deemed to be "higher risk," assisting management in those locations with all aspects of the implementation. The total external cost to Siemens for the PwC remediation efforts has exceeded $150 million.

In addition to these efforts, during the investigation, Siemens imposed a moratorium on entering into new business consulting agreements or making payments under existing business consulting agreements until a complete collection and review was undertaken of all such agreements. Siemens also initiated, and has nearly completed, a review of all third party agents with whom it has agreements. This has resulted in a significant reduction in the number of business consultants used by Siemens.

Siemens also significantly enhanced its review and approval procedures for business consultants, in light of the past problems. The new state-of-the-art system requires any employee who wishes to engage a business consultant to enter detailed information into an interactive computer system, which assesses the risk of the engagement and directs the request to the appropriate supervisors for review and approval. Siemens has also increased corporate-level control over company funds and has centralized and reduced the number of company bank accounts and outgoing payments to third parties.

The reorganization and remediation efforts of Siemens have been extraordinary and have set a high standard for multi-national companies to follow. These measures, in conjunction with Siemens' agreement to retain a Monitor (with support from a U.S. law firm with FCPA and compliance expertise) for a term of four years, highlight the serious commitment of Siemens to ensure that it operates in a transparent, honest, and responsible manner going forward.

CONCLUSION

For the foregoing reasons, the Department respectfully recommends that the Court sentence Siemens to a fine in the amount of $448,500,000 and a special assessment of $800; and that the Court sentence Siemens Venezuela, Siemens Bangladesh, and Siemens Argentina each to a fine in the amount of $500,000 and a special assessment of $400.

STEVEN A. TYRRELL
Chief
Fraud Section, Criminal Division

By: /s/
Mark F. Mendelsohn
Deputy Chief
Fraud Section, Criminal Division
(202) 514-1721

By: /s/
Lori A. Weinstein
Trial Attorney – Foreign Corrupt Practices Act
Fraud Section, Criminal Division
(202) 514-0839

United States Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

JEFFREY A. TAYLOR
United States Attorney

By: /s/
John D. Griffith
Assistant United States Attorney
District of Columbia
Fraud and Public Corruption Section
(202) 353-2453

United States Attorney's Office
555 Fourth Street, NW
Washington, D.C. 20530

U.S. Department of Justice
Criminal Division
Fraud Section

December 15th, 2008

FILED

DEC 15 2008

Clerk, U.S. District and Bankruptcy Courts

Scott W. Muller, Esq.
Angela T. Burgess, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017

RE: United States v. Siemens Aktiengesellschaft CR-08-367-RJL

Dear Mr. Muller and Ms. Burgess:

1. This letter sets forth the full and complete plea offer to your client, Siemens Aktiengesellschaft (referred to herein as "Siemens AG" or "defendant"). This offer is by the Criminal Division of the U.S. Department of Justice and the United States Attorney's Office for the District of Columbia (collectively referred to as the "Department") and is binding upon both. It does not bind any other state or local prosecuting, administrative, or regulatory authority. This agreement does not apply to any charges other than those specifically mentioned herein. However, the Department will bring this agreement and the cooperation of Siemens AG, its direct or indirect affiliates and subsidiaries to the attention of other prosecuting authorities or other agencies, if requested. Upon receipt and execution by or on behalf of Siemens AG, the executed letter will itself become the plea agreement. The terms of the offer are as follows:

2. **Charges:** Pursuant to Fed. R. Crim. P. 11(c)(1)(C), Siemens AG agrees to waive its right to grand jury indictment and its right to challenge venue in the District Court for the District of Columbia, and to plead guilty to a two-count information charging violations of the

internal controls and books and records provisions of the Foreign Corrupt Practices Act, Title 15, United States Code, Sections 78m(b)(2)(A), 78m(b)(2)(B), 78m(b)(5) and 78ff(a). It is understood that the guilty plea will be based on a factual admission of guilt to the offenses charged and will be entered in accordance with Rule 11 of the Federal Rules of Criminal Procedure. An authorized representative of Siemens AG will admit that Siemens AG is in fact guilty. By virtue of corporate resolution dated 12-9-08, defendant has authorized this plea and has empowered its General Counsel, its Chief Counsel Project Office Compliance Investigation and/or its outside counsel, Davis Polk & Wardwell, to act on its behalf for purposes of this plea. Siemens AG agrees that it has the full legal right, power and authority to enter into and perform all of its obligations under this agreement and it agrees to abide by all terms and obligations of this agreement as described herein. The attached "Statement of the Offense" is a fair and accurate description of the facts the Department believes it can prove through admissible evidence regarding defendant's actions and involvement in the offense. Siemens AG is pleading guilty because it is guilty of the charges contained in the accompanying Information and admits and accepts responsibility for the conduct described in the Statement of the Offense. Prior to the Rule 11 plea hearing, defendant, through counsel, will adopt and sign the Statement of the Offense as a written proffer of evidence by the United States.

3. **Potential penalties, assessments, and restitution**: The statutory maximum sentence that the Court can impose for each violation of Title 15, United States Code, Section 78m(b)(2)(A) and (b)(5), and for each violation of Title 15, United States Code, Section 78m(b)(2)(B) and (b)(5), is a fine not exceeding $25,000,000 (15 U.S.C. § 78ff(a)) or twice the pecuniary gain derived from the offense or twice the pecuniary loss from the offense suffered by a person other than defendant (18 U.S.C. §3571); five years' probation, 18 U.S.C. § 3561(c)(1);

and a mandatory special assessment of $400, 18 U.S.C. § 3013(a)(2)(B). The statutory maximum sentences for multiple counts can be aggregated and may run consecutively. The parties agree that restitution is not required and that probation is not necessary in light of the monitorship provisions and undertakings in this agreement and in the Judgment being entered in the companion case of U.S. Securities and Exchange Commission v. Siemens Aktiengesellschaft, Civil Action No. 08-02-167.

4. **Federal Sentencing Guidelines:** The parties agree that pursuant to *United States v. Booker*, 543 U.S. 220 (2005), the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines. The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in 18 U.S.C. § 3553(a). The parties agree that for purposes of determining an advisory sentencing guideline range, the 2007 Sentencing Guidelines apply as follows:

a. **Calculation of Offense Level:**

§ 2B1.1(a)(2)	Base Offense Level	6
§ 2B1.1(b)(1)(P)	Loss of $400 million or more	30
§ 2B1.1(b)(2)(C)	Over 250 victims	6
§ 2B1.1(b)(9)	Significant Conduct Outside U.S./ Sophisticated Means	2
	TOTAL	**44**

b. **Calculation of Culpability Score:**

§ 8C2.5(a)	Base Score	5
§ 8C2.5(b)	5,000 or More Employees and High-Level Personnel Involvement/ Pervasive Tolerance	5
§ 8C2.5(g)(2)	Full Cooperation and Acceptance of Responsibility[1]	-2
	TOTAL	**8**

c. **Calculation of Fine Range:**

Base Fine: Greater of the amount from table in U.S.S.G. § 8C2.4(a)(1) & (d) corresponding to offense level of 44 ($72,500,000), or the pecuniary loss/gain from the offense ($843,500,000) (U.S.S.G. § 8C2.4(a)(2)):	$843,500,000
Multipliers, culpability score of 8 (U.S.S.G. § 8C2.6)	1.6 – 3.2
Fine Range (U.S.S.G. § 8C2.7):	**$1.35-2.70 Billion**

The parties agree and stipulate that for purposes of U.S.S.G. § 2B1.1(b)(1)(P), the loss amount is $843,500,000, a sum that the parties agree is the total amount of (a) corporate assets known to have been distributed for unauthorized purposes, and (b) the profits from defendant's Oil for Food Program contracts, which were reasonably calculable. The parties agree that the offenses of conviction should be grouped together for purposes of sentencing pursuant to U.S.S.G. § 3D1.2.

[1] The cooperation and compliance and remediation efforts of Siemens AG are described in more detail in the Department's Sentencing Memorandum.

5. **Penalties and Assessments:** Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the Department and defendant agree that the appropriate sentence in the case, after consideration of (a) the appropriate consideration of the Sentencing Guidelines, (b) defendant's assistance in the investigation of other individuals and organizations pursuant to U.S.S.G. § 8C4.1, (c) its payments of fines or disgorgement in other related proceedings both in the U.S. and in Germany, (d) its substantial compliance and remediation efforts, (e) its extraordinary rehabilitation, as outlined in the Department's Sentencing Memorandum and (f) the factors set forth in 18 U.S.C. § 3553(a), is a criminal fine in the amount of $448,500,000 and a special assessment of $800. Although this represents a number below the advisory sentencing guideline range, the parties agree and stipulate that the factors mentioned above and described in the Department's Sentencing Memorandum represent mitigating circumstances "of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission." 18 U.S.C. § 3553(b)(1). This $448,500,000 fine and the $800 special assessment shall be paid to the Clerk of Court, United States District Court for the District of Columbia, within ten (10) days of sentencing. Defendant acknowledges that no tax deduction may be sought in connection with the payment of this $448,500,000 penalty.

6. **Court is Not Bound:** Defendant understands that, if the Court rejects this agreement, the Court must: (a) inform the parties that the Court rejects the agreement, (b) advise defendant's counsel that the Court is not required to follow the agreement and afford defendant the opportunity to withdraw its plea, and (c) advise defendant that if the plea is not withdrawn, the Court may dispose of the case less favorably toward defendant than the agreement contemplated. Defendant further understands that if the Court refuses to accept any provision of this plea agreement, neither party shall be bound by the provisions of the agreement.

7. **Waiver of Rights:** Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 limit the admissibility of statements made in the course of plea proceedings or plea discussions in both civil and criminal proceedings, if the guilty plea is later withdrawn. Defendant expressly warrants that it has discussed these rules with its counsel and understands them. Solely to the extent set forth below, defendant voluntarily waives and gives up the rights enumerated in Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410. Specifically, defendant understands and agrees that any statements that it makes in the course of its guilty plea or in connection with this plea agreement are admissible against it for any purpose in any U.S. federal criminal proceeding if, even though the Department has fulfilled all of its obligations under this agreement and the Court has imposed the agreed-upon sentence, Siemens AG nevertheless withdraws its guilty plea.

The parties further agree, with the permission of the Court, to waive the requirement for a pre-sentence report pursuant to Federal Rule of Criminal Procedure 32(c)(1)(A), based on a finding by the Court that the record contains information sufficient to enable the Court to meaningfully exercise its sentencing power. The parties agree, however, that in the event the Court orders the preparation of a pre-sentence report prior to sentencing, such order will not affect the agreement set forth herein.

The parties further agree to ask the Court's permission to combine the entry of the plea and sentencing into one proceeding. However, the parties agree that in the event the Court orders that the entry of the guilty plea and sentencing hearing occur at separate proceedings, such an order will not affect the agreement set forth herein.

If the Court orders a pre-sentence investigation report or a separate sentencing date, the parties agree to waive the time requirements for disclosure of and objections to the pre-sentence investigation report under Fed. R. Crim. P. 32(e), so as to accommodate a sentencing hearing prior to the date that would otherwise apply. At the time of the plea hearing, the parties will suggest mutually agreeable and convenient dates for the sentencing hearing with adequate time for (a) any objections to the pre-sentence report, and (b) consideration by the Court of the pre-sentence report and the parties sentencing submissions.

8. **Press Releases:** Defendant agrees that if Siemens AG or any of its direct or indirect affiliates or subsidiaries issues a press release in connection with this agreement, defendant shall first consult the Department to determine whether (a) the text of the release is true and accurate with respect to matters between the Department and defendant; and (b) the Department has no objection to the release. Statements at any press conference concerning this matter shall be consistent with this press release.

9. **Sales, Mergers or Transfers:** Except as may otherwise be agreed by the parties hereto in connection with a particular transaction, defendant agrees that in the event it sells, merges or transfers all or substantially all of its business operations, or all or substantially all of one of its seventeen (17) individual operating divisions and cross-sector businesses, as they exist as of the date of this agreement, whether such sale(s) is/are structured as a stock or asset sale, merger, or transfer, Siemens AG shall include in any such contract for sale, merger or transfer, a provision fully binding the purchaser(s) or any successor(s) in interest thereto to the obligations described in this agreement. In considering requests for exemption from or modifications of this requirement, the Department agrees to consider in good faith Siemens AG's compliance history with respect to the business, and all other relevant facts and circumstances including the need for and cost of compliance with this provision.

10. **Continuing Cooperation**: Siemens AG shall: (a) plead guilty as set forth in this agreement; (b) abide by all sentencing stipulations contained in this agreement; (c) appear, through its duly appointed representatives, as ordered for all court appearances and obey any other ongoing court order in this matter; (d) commit no further crimes; (e) be truthful at all times with the Court; (f) pay the applicable fine and special assessment; and (g) continue to cooperate fully with the Department, the Federal Bureau of Investigation, the Internal Revenue Service, Criminal Investigation Division, the U.S. Securities and Exchange Commission and the Munich Public Prosecutor's Office in a manner consistent with the non-waiver agreement between the parties, dated March 16, 2007, and consistent with applicable law and regulation including labor, data protection, and privacy laws. At the request of the Department, Siemens AG shall also cooperate fully with such other foreign law enforcement authorities and agencies, and in such manner, as the parties may agree. Siemens AG shall truthfully disclose all non-privileged information with respect to the activities of Siemens AG and its subsidiaries, its present and former directors, officers, employees, agents, consultants, contractors and subcontractors, concerning all matters relating to corrupt payments in connection with their operations, related books and records and internal controls about which Siemens AG has any knowledge and about which the Department, the Federal Bureau of Investigation, the Internal Revenue Service, Criminal Investigation Division, the U.S. Securities and Exchange Commission, the Munich Public Prosecutor's Office or, at the request of the Department, any mutually agreed upon foreign law enforcement authorities and agencies, shall inquire. This obligation of truthful disclosure includes the obligation, consistent with applicable law or regulation including labor, data protection, and privacy laws, to provide, upon request, any non-privileged document, record, or other tangible evidence in the custody and control of Siemens AG relating to such

corrupt payments, books and records, and internal controls about which the aforementioned authorities and agencies shall inquire of Siemens AG, subject to the direction of the Department where appropriate. In addition, Siemens AG agrees to recommend orally and in writing that all Siemens AG officers, directors, employees, agents and consultants cooperate fully with any investigation or prosecution conducted by any of the aforementioned authorities and agencies relating to corrupt payments, related books and records, and internal controls, including appearing for interviews and testimony in the United States or elsewhere, and shall pay reasonable costs associated with such cooperation. All such requests for information shall be channeled through Siemens AG's existing Project Office Compliance Investigation, unless the parties otherwise agree. Nothing in this agreement shall be construed to require Siemens AG to conduct any further investigation other than as necessary to identify and produce relevant non-privileged documents, records or other tangible evidence within the custody and control of Siemens AG.

11. **Remediation**: Siemens AG agrees, for itself and its subsidiaries, to maintain a compliance and ethics program that includes, at a minimum, the basic components set forth in Attachment 1, which are hereby incorporated herein. Siemens AG's program must be reasonably designed to detect and deter violations of the Foreign Corrupt Practices Act and similar anti-corruption laws, both domestic and foreign, and to ensure that its books, records, and accounts, in reasonable detail, accurately and fairly reflect the transactions and dispositions of its assets, and that it has a system of internal accounting controls sufficient to provide reasonable assurances that: (a) transactions are executed with management's general or specific authorization; (b) transactions are recorded as necessary (i) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria

applicable to such statements, and (ii) to maintain accountability for assets; (c) access to assets is permitted only in accordance with management's general or specific authorization; and (d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

12. **Corporate Monitor**: Subject to the approval of the Court, Siemens AG agrees that as part of its continuing cooperation obligations and to ensure that Siemens AG implements an effective system of corporate governance and compliance with applicable laws and regulations going forward, Dr. Theodor Waigel will serve as an independent monitor (the "Monitor") for a period of up to four (4) years from the date of signing of this agreement. The term of the monitorship and the Monitor's powers, duties and responsibilities will be as set forth in Attachment 2. Siemens AG further agrees to retain F. Joseph Warin of Gibson, Dunn & Crutcher, LLP to provide counsel ("Independent U.S. Counsel") to the Monitor regarding compliance with the U.S. Foreign Corrupt Practices Act, 15 U.S.C. §§78dd-1, et seq., and to assist the Monitor in the performance of his duties and responsibilities as set forth in Attachment 2. Siemens AG agrees to engage the Monitor and retain the Independent U.S. Counsel within sixty (60) days from the date of the acceptance of this agreement by the Court. If either of Dr. Waigel or Mr. Warin resigns or is otherwise unable to fulfill his obligations as set out herein, Siemens AG, or its successor, shall within thirty (30) calendar days recommend a pool of three qualified monitor or Independent U.S. Counsel candidates, as the case may be, from which to choose a potential replacement. Siemens AG and the Department shall use mutual best efforts to agree on a replacement for the Monitor or Independent U.S. Counsel. If the Department, in its sole discretion, is not satisfied with the candidates proposed, the Department reserves the right to seek additional nominations from Siemens AG.

13. **Department Concessions:** In exchange for defendant's guilty plea, the guilty pleas to be taken by Siemens S.A. (Argentina), Siemens S.A. (Venezuela) and Siemens Bangladesh Ltd., and the complete fulfillment of all of defendant's obligations under this agreement, the Department agrees not to use any information related to the conduct described in the accompanying Information and Statement of the Offense, or any other conduct disclosed to the Department prior to the date of this agreement, against defendant or any of its present or former subsidiaries or affiliates in any criminal case except in a prosecution for perjury or obstruction of justice, in a prosecution for making a false statement after the date of this agreement, or in a prosecution or other proceeding relating to any crime of violence. In addition, the Department agrees that it will not bring any criminal charge against defendant, or any of its present or former subsidiaries or affiliates for conduct that (i) arises from or relates in any way to the conduct of defendant or its present and former employees, consultants and agents alleged in the accompanying Information and Statement of the Offense or the Informations and Statements of the Offense accompanying the pleas of Siemens S.A. (Argentina), Siemens S.A. (Venezuela), and Siemens Bangladesh Ltd. or any similar conduct that took place prior to the date of this agreement, or (ii) that arises from or relates in any way to information disclosed by defendant to the Department prior to the date of this agreement. This paragraph does not provide any protection against prosecution for any corrupt payments, false accounting, or circumvention of internal controls, if any, made in the future by defendant, or any of its officers, directors, employees, agents or consultants, whether or not disclosed by defendant pursuant to the terms of this agreement. This agreement will not close or preclude the investigation or prosecution of any natural persons, including any current or former officers, directors, employees, stockholders, consultants or agents of defendant, of its present or future direct or indirect affiliates or of its

present or future subsidiaries who may have been involved in any of the matters set forth in the accompanying Statement of the Offense or in any other matters. Finally, the Department agrees that it will file a Sentencing Memorandum in support of the proposed agreed-upon sentence that will include a description of (a) relevant facts, (b) the nature of the offenses, and (c) Siemens AG's cooperation and compliance and remediation measures including the fact that the Department is aware of no evidence that any present member of the Siemens AG Managing Board or Supervisory Board had knowledge of or involvement in the offenses charged in the Criminal Information. The Department further agrees to cooperate with Siemens AG, in a form and manner to be agreed, in bringing facts relating to the nature of the charges and to Siemens AG's cooperation, remediation and its present reliability and responsibility as a government contractor to the attention of other governmental authorities as requested.

14. **Full Disclosure/Reservation of Rights:** In the event the Court directs the preparation of a pre-sentence report, the Department will fully inform the preparer of the pre-sentence report and the Court of the facts and law related to defendant's case. Except as set forth in this agreement, the parties reserve all other rights to make sentencing recommendations and to respond to motions and arguments by the opposition.

15. **Waiver of Appeal Rights:** Defendant knowingly, intelligently, and voluntarily waives its right to appeal the conviction in this case. Defendant similarly knowingly, intelligently, and voluntarily waives its right to appeal the sentence imposed by the Court, provided such sentence is consistent with the terms of this plea agreement. Defendant waives all defenses based on the statute of limitations and venue with respect to any prosecution that is not time-barred on the date this agreement is signed in the event that: (a) the conviction is later

vacated for any reason; (b) defendant violates this agreement; or (c) the plea is later withdrawn. The Department is free to take any position on appeal or any other post-judgment matter.

16. **Breach of Agreement:** Defendant agrees that if it fails to comply with any of the provisions of this plea agreement, makes false or misleading statements before the Court, commits any further crimes, or attempts to withdraw the plea after sentencing even though the Department has fulfilled all of its obligations under this agreement and the Court has imposed the sentence (and only the sentence) provided in this agreement, the Department will have the right to characterize such conduct as a breach of this plea agreement. In the event of such a breach, (a) the Department will be free from its obligations under the agreement and may take whatever position it believes appropriate as to the sentence (for example, should defendant commit any conduct after the date of this agreement – examples of which include but are not limited to, obstruction of justice and false statements to law enforcement agents, the probation office, or the Court – the Department is free under this agreement to seek an increase in the sentence based on that post-agreement conduct); (b) defendant will not have the right to withdraw the guilty plea; (c) defendant shall be fully subject to criminal prosecution for any other crimes which it has committed or might commit, if any, including perjury and obstruction of justice; and (d) the Department will be free to use against defendant, directly and indirectly, in any criminal or civil proceeding any of the information or materials provided by defendant pursuant to this agreement, as well as the admitted Statement of the Offense.

In the event of such breach, any such prosecutions of defendant not time-barred by the applicable statute of limitations on the date of the signing of this agreement may be commenced against defendant in accordance with this paragraph, notwithstanding the running of the applicable statute of limitations in the interval between now and the commencement of such prosecutions. Defendant knowingly and voluntarily agrees to waive any and all defenses based on the statute of limitations for any prosecutions commenced pursuant to the provisions of this paragraph.

17. **<u>Complete Agreement</u>:** No agreements, promises, understandings, or representations have been made by the parties or their counsel other than those contained in writing herein. Nor will any such agreements, promises, understandings, or representations be made unless committed to writing and signed by defendant, defendant's counsel, an attorney for the U.S. Department of Justice, Criminal Division, Fraud Section, and an Assistant United States Attorney for the District of Columbia. If the foregoing terms and conditions are satisfactory, Siemens AG may indicate its assent by signing the agreement in the space indicated below and returning the original once it has been signed by Siemens AG and its counsel.

STEVEN A. TYRRELL
Chief
Fraud Section, Criminal Division

By: Mark F. Mendelsohn
Mark F. Mendelsohn
Deputy Chief
Fraud Section, Criminal Division
(202) 514-1721

By: Lori A Weinstein
Lori A. Weinstein
Trial Attorney – Foreign Corrupt Practices Act
Fraud Section, Criminal Division
(202) 514-0839

United States Department of Justice
1400 New York Avenue, N.W.
Washington, D.C. 20005

JEFFREY A. TAYLOR
United States Attorney

By: ______________________
John D. Griffith
Assistant United States Attorney
Fraud and Public Corruption Section
(202) 353-2453

United States Attorney's Office
555 Fourth Street, NW
Washington, D.C. 20530

FOR SIEMENS AG: ______________________

Written Testimony

United States House of Representatives

Committee on the Judiciary

Subcommittee on Crime, Terrorism and Homeland Security

"The Foreign Corrupt Practices Act"

June 14, 2011

The Honorable Michael B. Mukasey
Partner, Debevoise & Plimpton LLP, on behalf of the U.S. Chamber Institute for Legal Reform

Good morning Chairman Sensenbrenner, Ranking Member Scott, and members of the Committee. I am Michael B. Mukasey, a partner at the law firm of Debevoise & Plimpton LLP in New York. I served as Attorney General of the United States from November 2007 to January 2009. I also served for more than eighteen years, from January 1988 to September 2006, as a United States District Judge for the Southern District of New York, including as Chief Judge from 2000 to 2006. I am testifying today on behalf of the U.S. Chamber Institute for Legal Reform, which seeks to make the nation's legal system simpler, fairer and more efficient for everyone. The Institute for Legal Reform was founded in 1998 by the U.S. Chamber of Commerce, which represents the interests of three million businesses and organizations of all sizes, sectors and regions.

The Foreign Corrupt Practices Act ("FCPA") is a valuable statute that helps reduce corruption and reinforce public and investor confidence in markets here and abroad. The primary aim of Congress in enacting the FCPA was to prohibit U.S. companies and companies listed on U.S. exchanges from paying or offering bribes to foreign government officials and political parties for the purpose of obtaining or retaining business opportunities. In addition to anti-bribery provisions, Congress included in the FCPA requirements that any corporation with securities listed on a U.S. exchange maintain financial books and records that accurately reflect transactions by the corporation and maintain adequate internal accounting controls. Collectively, these provisions properly target foreign bribery and the improper business practices that enable and facilitate such bribe schemes.

While I served as Attorney General, the Department of Justice ("DOJ" or "Department") took its responsibilities under the Act very seriously. Some of the largest FCPA penalties were imposed during my tenure. I think the Members will agree that I am not "soft" on crime of any kind – including overseas corruption.

However, for all the merits of the FCPA in curbing corrupt business practices, thirty-four years of experience have revealed ways in which the statute itself and its enforcement could be improved. In particular, while the past decade has seen an extraordinary increase in the level of FCPA enforcement and investigation by the Department and the Securities and Exchange Commission ("SEC"), judicial oversight of such enforcement remains minimal. Companies are rarely positioned to litigate an FCPA enforcement action to its conclusion or even risk indictment with consequent debarment in some industries, and the possibility of substantial prison time for individual defendants, has led most to negotiate pleas of guilty. The primary statutory interpretive function therefore is performed almost exclusively by the DOJ Fraud Section and the SEC, which are responsible for bringing FCPA charges. By negotiating resolutions in many cases before an indictment or enforcement action is filed, the agencies effectively control the disposition of the FCPA cases they initiate and impose their own extremely broad interpretation of the FCPA's key provisions. We are left with a circumstance in which, as Professor Mike Koehler, a specialist in the FCPA, has stated, "the FCPA means what the enforcement agencies say it means."[1]

Instead of serving the original intent of the statute, which was to punish companies that participate in foreign bribery, actions taken by the government under more expansive interpretations of the statute may ultimately punish corporations whose connection to improper acts is attenuated or, in some cases, nonexistent. The result is that the FCPA, as it is currently written and enforced, leaves corporations vulnerable to civil and criminal penalties for a wide variety of conduct that is in many cases beyond their control or even their knowledge.

The shortcomings in the FCPA and its enforcement may be remedied by several improvements and amendments that will enable businesses to have a clearer understanding of what is and is not a violation of the FCPA. Today I will outline six

[1] Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 410 (2010).

reforms that are intended to provide more certainty to businesses when trying to comply with the FCPA and to ensure that the statute and its enforcement are consistent with the fundamental principles of our criminal justice system. The six changes are:

(1) Adding a compliance defense;

(2) Clarifying the meaning of "foreign official";

(3) Improving the procedures for guidance and advisory opinions from the DOJ;

(4) Limiting a company's criminal liability for the prior actions of a company it has acquired;

(5) Adding a "willfulness" requirement for corporate criminal liability; and

(6) Limiting a company's liability for acts of a subsidiary not known to the parent.

1. <u>Adding a Compliance Defense</u>

The FCPA does not currently provide a compliance defense -- that is, an affirmative defense that would permit companies to rebut the imposition of criminal liability for FCPA violations if the people responsible for the violations circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations. A company may therefore be held liable for FCPA violations committed by rogue employees, agents or subsidiaries even if the company has a state-of-the-art FCPA compliance program. It is true that the DOJ or SEC may look more favorably on a company with a strong FCPA compliance program when determining whether to charge the company or what settlement terms to offer,[2] and such compliance programs may be

[2] *See* Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.000, UNITED STATES ATTORNEY MANUAL, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm (decision whether to charge). While evidence of a strong compliance program may help a corporation reach a resolution on less onerous terms than it otherwise would have received, the government has complete discretion as to how much credit to give for such a program.

taken into account by a court at the sentencing of a corporation convicted of an FCPA violation.[3] However, such benefits are subject to unlimited prosecutorial discretion, are available only after the liability phase of a prosecution, or both. There is also no guarantee that a strong compliance program will be given the weight it deserves.

By contrast, the comprehensive Bribery Act of 2010 passed by the British Parliament – Section 6 of which addresses bribes of foreign officials and closely tracks the FCPA – provides a specific defense to liability if a corporate entity can show that it has "adequate procedures" in place to detect and deter improper conduct.[4] The Ministry of Justice recently released detailed guidance on what may constitute "adequate procedures,"[5] and the Act is due to become effective on July 1, 2011. Similarly, in 2001, the Italian government passed a statute that proscribes foreign bribery but contains a compliance defense.[6] Articles 6 and 7 of the Italian statute permit a company to avoid liability if it can demonstrate that, before employees of the company engaged in a specific crime (such as bribery), it (1) adopted and implemented a model of organization, management and control designed to prevent that crime, (2) engaged an autonomous body to supervise and approve the model, and (3) the autonomous body adequately exercised its duties.[7]

The addition of a compliance defense would align the FCPA with the enforcement regimes of the U.K. and Italy, helping to ensure consistent application of anti-corruption law across jurisdictions. Furthermore, the principles embodied in the U.K. Bribery Act and the Italian statute closely track the factors currently taken into consideration by courts in the United States, albeit at a very different phase of the criminal process – namely, sentencing.[8] These principles – which Congress and the Sentencing Commission

---

3 *See* U.S.S.G. § 8B2.1.

4 *See* Bribery Act of 2010, ch. 23, § 7(2) (U.K.).

5 *See* Ministry of Justice, The Bribery Act 2010: Guidance (Mar. 30, 2011), available at www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf.

6 Legislative Decree no. 231 of 8 June 2001; *see also* McDermott, Will & Emery, *Italian Law No. 231/2001: Avoiding Liability for Crimes Committed by a Company's Representatives*, (Apr. 27, 2009), *available at* http://www.mwe.com/info/news/wp0409f.pdf.

7 *See id.*

8 *See* U.S.S.G. § 8B2.1.

have already identified as key indicators of a strong and effective compliance program – should be considered instead during the liability phase of an FCPA prosecution, as they are under the British and Italian statutes.

In the earlier days of the FCPA, Congress had shown interest in such an affirmative defense to liability for companies that had adopted and vigorously enforced FCPA compliance programs. In 1986, Representative Howard L. Berman proposed a "due diligence" affirmative defense that would be available to any company that had established and implemented procedures designed to prevent FCPA violations and had exercised due diligence to prevent the violation at issue.[9] The defense was adopted by the House of Representatives but not included in legislation ultimately signed into law.[10]

Such a defense merits renewed consideration. The FCPA was not intended nor should it be applied as a strict liability statute under the anti-bribery provisions of the Act. Companies cannot guarantee that all of their thousands or even hundreds of thousands of employees worldwide will comply with the Act at all times. Responsible companies implement and enforce strong compliance measures designed to avoid and promptly address infractions. This is precisely what Congress intended with the passage of the FCPA, and it is exactly what the capital markets and American shareholders expect our companies to do. There is little more that a responsible company can do.

In fact, policies adopted by the DOJ, the SEC, and the U.S. Sentencing Commission over the past two decades have all been designed to give companies reasons and incentives to implement effective compliance measures. Many companies have responded to these initiatives, often at substantial cost. The absence of a compliance defense tells corporate America, in effect, no compliance effort can be good enough -- even if you did everything we required, we still retain the right to prosecute purely as a matter of our discretion. I question whether that is the appropriate signal to send to the business community and to American shareholders.

A company that has a strong pre-existing FCPA compliance program that is effective in identifying and preventing violations should be permitted to present that program as an affirmative defense where employees or agents have circumvented that

---

9 Trade and International Economic Policy Reform Act of 1986, H.R. 4800, 99th Cong.. The proposed "due diligence" defense is discussed at 132 Cong. Rec. H. 2946.

10 *See* H.R. Conf. Rep. on H.R. 3, 100th Cong., 2d Sess. 916, 922-23 (1988).

compliance program, rather than be compelled to rely solely on the discretion of prosecutors. It is inherently unfair to impose liability for the acts of rogue employees on a company that had in place a robust FCPA compliance program designed to prevent such acts.[11] The adoption of a compliance defense not only will increase compliance with the FCPA by providing businesses with an incentive to develop and enforce strong compliance programs that effectively deter and identify violations, but also will protect businesses from incurring potentially significant liability as a result of conduct by employees who commit crimes despite a business's diligence. Otherwise, the system in place is one with conflicting and even perverse incentives. On the one hand, an effective compliance program can hold out a qualified promise of indeterminate benefit should a violation occur and be disclosed, as it would have to be as part of such a program. On the other hand, if all that can be achieved is that qualified and indeterminate benefit, there is a perverse incentive not to be too aggressive lest wrongdoing be discovered, and a consequent tendency for standards to seek the lowest common denominator, or at best something that is only a slight improvement over it.

2. <u>Clarifying the Meaning of "Foreign Official"</u>

The FCPA prohibits corrupt payments or offers of payment to foreign officials, but does not provide adequate guidance on who is a "foreign official" for purposes of the statute. Under the FCPA, a "foreign official" is defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization,[12] or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[13] The statute does not, however, define

[11] It is quite clear that and accepted reality that no system of internal controls can prevent all forms of willful deceit. The SEC itself recognizes this proposition. *See* SEC Div. of Corp. Fin., Staff Statement on Management's Report on Internal Controls Over Financial Reporting (2005) ("[D]ue to their inherent limitations, internal controls cannot prevent or detect every instance of fraud. Controls are susceptible to manipulation, especially in instances of fraud caused by the collusion of two or more people including senior management.").

[12] A "public international organization" is "(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register." 15 U.S.C. §§ 78dd-1(f)(1)(B), 78dd-2(h)(2)(B), 78dd-3(f)(2)(B).

[13] 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

"instrumentality."[14] It is therefore unclear what types of entities are "instrumentalit[ies]" of a foreign government such that their employees will be considered "foreign officials." As a result, it is often difficult for companies to determine when they are dealing with "foreign officials," particularly in markets in which many companies are at least partially state-owned.

The DOJ's and SEC's enforcement of the FCPA make clear that they interpret the terms "foreign official" and "instrumentality" extremely broadly. From the government's perspective, once an entity is defined as an "instrumentality", all employees of the entity – regardless of rank, title, role or position – are considered "foreign officials."[15] The DOJ's current perspective is illustrated by a recent statement by an Assistant Chief of the DOJ's Fraud Section, who said, "[i]t's not necessarily the wisest move for a company" to challenge the definition of "foreign official," and "[q]uibbling over the percentage ownership or control of a company is not going to be particularly helpful as a defense."[16]

---

[14] By contrast, the Foreign Sovereign Immunities Act includes a clear and time-tested definition of "instrumentality," illustrating that the lack of such a definition in the FCPA can be readily cured:

> "An 'agency or instrumentality of a foreign state' means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in [28 U.S.C. § 1332 (c), (e)], nor created under the laws of any third country."

28 U.S.C. § 1603(b).

[15] Taken to its logical conclusion, the government's position means that – if the United States were a foreign government – employees of General Motors or AIG could be considered "foreign officials" of the United States government, because the government owns portions of each company.

[16] Christopher M. Matthews, "DOJ Official Warns Against Challenging Foreign Official Definition in FCPA Cases" (May 4, 2011), *available at* www.mainjustice.com/justanticorruption.

The DOJ's position recently has met with some success in the courts: two judges recently rejected defense motions arguing that employees of state-owned enterprises are not "foreign officials" under the FCPA. Yet, in doing so, the courts recognized that there are limits on the definition of instrumentality – but neither court clarified what those limits are. On April 20, 2011, Judge A. Howard Matz of the Central District of California, while concluding that the particular enterprise at issue may be an "instrumentality" of a foreign government, found that Congress did not intend either to include or to exclude *all* state-owned enterprises from the ambit of the FCPA.[17] On May 18, 2011, Judge James V. Selna, also of the Central District of California, denied a similar motion, holding that whether a state-owned enterprise qualifies as an "instrumentality" is a question of fact for the jury to decide based on a variety of factors, including the level of investment in the entity by a foreign state, the foreign state's characterization of the entity and its employees, the foreign state's degree of control over the entity, the purpose of the entity's activities, the entity's obligations and privileges under the foreign state's law, the circumstances surrounding the entity's creation and the foreign state's extent of ownership of the entity.[18]

If the definitions of these fundamental statutory terms vary by circumstance and by case, and therefore must be determined by a jury rather than as a matter of law, it becomes impossible for companies to determine in advance what conduct may and may not present a meaningful risk of violating the FCPA. This approach to which foreign companies qualify as "instrumentalities" of foreign governments and who may be a "foreign official" engenders tremendous uncertainty and creates barriers to U.S. businesses seeking to sell their goods and services in foreign markets. Without a clear understanding of the parameters of "instrumentality" and "foreign official," companies have no way of knowing whether the FCPA applies to a particular transaction or business relationship, particularly in countries like China where most if not all companies are at least partially owned or controlled by the state.

The FCPA should therefore be amended to clarify the meaning of "instrumentality" and "foreign official." The statute should indicate the percentage ownership by a foreign government that will qualify a corporation as an "instrumentality," with majority ownership as the most plausible threshold; whether ownership by a foreign official necessarily qualifies a company as an instrumentality and, if so, whether the foreign official must be of a particular rank or the ownership must

---

17 *U.S. v. Noriega, et al.*, No. 02:10-cr-01031-AHM, Criminal Minutes – General (C.D. Cal. Apr. 20, 2011), ECF No. 474, at 2, 14.

18 *U.S. v. Carson, et al.*, No. 08:09-cr-00077-JVS, Criminal Minutes – General (C.D. Cal. May 18, 2011), ECF No. 373, at 5.

reach a certain percentage threshold; and to what extent "control" by a foreign government or official will qualify a company as an "instrumentality."

3. **Improving Guidance from the DOJ**

The FCPA, as amended, permits the DOJ to issue advisory opinions and guidelines regarding compliance with the statute. In practice, though, such opinions and guidance are issued infrequently by the DOJ. For its part, the SEC has not issued advisory opinions on FCPA-related questions and does not have a process for doing so. This near-absence of a meaningful advisory opinion process represents a lost opportunity for the enforcement agencies to provide practical guidance to the business community and thereby enhance FCPA compliance.

The 1988 amendments to the FCPA require the DOJ to issue opinions in response to questions regarding whether prospective conduct would conform with the DOJ's enforcement policies.[19] A rebuttable assumption of compliance with the FCPA applies to conduct that the DOJ identifies as conforming to its FCPA enforcement policies. Unfortunately, this advisory procedure is rarely used. The opinion archive of the DOJ's Fraud Section shows that the DOJ has issued only 33 opinions in more than 18 years, an average of about 1.8 opinions per year.[20]

The 1988 amendments also required the DOJ to determine, following consultation with other agencies and a public notice and comment period, whether the business community's compliance with the FCPA would be enhanced or assisted by "further clarification of the [FCPA's anti-bribery provisions]."[21] In the event the DOJ concluded such clarification was warranted, it was authorized to issue guidelines describing conduct that would conform to the FCPA's anti-bribery provisions.[22] In addition, or as an alternative, it was authorized to offer "general precautionary procedures" that companies

---

19 The 1988 amendments were enacted as Title V of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418.

20 *See* http://www.justice.gov/criminal/fraud/fcpa/opinion/ for a complete list of opinions issued from 1993 to 2010. As of June 8, 2011, no opinions had been issued in 2011.

21 Guideline issuance authority remains codified at 15 U.S.C. § 78dd-1(d) and 15 U.S.C. § 78dd-2(e).

22 *Id*.

could implement voluntarily to conform their conduct to the requirements of the FCPA.[23] In accordance with the 1988 amendments, the DOJ invited interested parties to submit their views concerning the extent to which the business community's compliance with the FCPA would be enhanced by the issuance of guidelines.[24] On July 12, 1990, the DOJ formally declined to issue guidelines. The Federal Register notice announcing the decision stated simply that, "[a]fter consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary."[25] The DOJ does not appear to have reconsidered the issuance of guidelines in the two decades since 1990.

The overwhelming majority of businesses operating in the U.S. or listed on U.S. exchanges seek in good faith to ensure that they do not violate the requirements of the FCPA, and therefore would find meaningful advisory opinions and guidelines from both the DOJ and the SEC to be tremendously useful in reviewing and monitoring their conduct and practices, improving their internal controls and enhancing their compliance programs. An active advisory opinion process and robust guidelines from the enforcement agencies would likely result in a higher level of compliance by companies subject to the FCPA.

4. <u>Limiting Criminal Successor Liability</u>

Currently, a company may be held criminally liable under the FCPA for the actions of a company that it acquires or merges with – even if those actions took place prior to the acquisition or merger and were entirely unknown to the acquiring company.[26] Such criminal successor liability is at odds with the basic principles and goals of criminal law, including punishing only culpable conduct or deterring offending behavior. While a

---

23 *Id*.

24 54 Fed. Reg. 40,918 (Oct. 4, 1989).

25 55 Fed. Reg. 28,694 (July 12, 1990).

26 *See, e.g.*, Department of Justice FCPA Opinion Procedure Release No. 03-01 (Jan. 15, 2003), *available at* http://www.justice.gov/criminal/fraud/fcpa/opinion/2003/0301.pdf (advising that a company that conducted due diligence on a target company and self-reported any violations that took place pre-acquisition may be able to escape criminal and/or civil successor liability, thereby suggesting that successor liability was a viable theory of liability under the FCPA).

company may mitigate its risk by conducting due diligence prior to an acquisition or merger (or, in certain circumstances, immediately following an acquisition or merger),[27] such due diligence does not provide a legal defense, but merely a circumstance that the DOJ may consider when deciding whether to exercise its discretion not to prosecute. Thus, even when an acquiring company has conducted exhaustive due diligence and immediately self-reported the suspected violations of the target company, it is still legally susceptible to criminal prosecution and substantial penalties. Its only recourse is an appeal to the prosecutorial discretion of the DOJ.

Examples of the application of criminal successor liability under the FCPA include the recent Snamprogetti and Alliance One cases. Snamprogetti was a wholly-owned Dutch subsidiary of ENI S.p.A. From approximately 1994 to 2004, Snamprogetti participated in a bribery scheme.[28] In 2006, after the conduct at issue had ended, ENI sold Snamprogetti to Saipem S.p.A. The DOJ ultimately reached a deferred prosecution agreement in connection with these charges, and the parties to that agreement included Snamprogetti, ENI and Saipem.[29] Under the terms of the deferred prosecution agreement, Saipem is jointly and severally liable for the $240 million fine imposed on Snamprogetti, and its inclusion in the deferred prosecution agreement reflects that it is being held criminally liable for Snamprogetti's conduct on a theory of successor liability. Alliance One was formed in 2005 by the merger of Dimon Incorporated ("Dimon") and Standard Commercial Corporation ("SCC"). Employees and agents of two foreign subsidiaries of Dimon and SCC committed FCPA violations prior to the merger.[30] In 2010, the DOJ brought a criminal case against Alliance One on a successor liability

---

[27] *See* Department of Justice FCPA Opinion Procedure Release No. 08-02 (Jun. 13, 2008), *available at* http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html (providing advice on proper post-acquisition due diligence in the rare situation where it was impossible for the acquiring company to perform due diligence on the target prior to acquisition).

[28] *See* Criminal Information, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460 (S.D. Tex. Jul. 7, 2010).

[29] *See* Deferred Prosecution Agreement, *United States v. Snamprogetti Netherlands B.V.*, Crim. No. H-10-460 (S.D. Tex. Jul. 7, 2010).

[30] *See* Press Release, Department of Justice, Alliance One International Inc. and Universal Corporation Resolve Related FCPA Matters Involving Bribes Paid to Foreign Government Officials (Aug. 6, 2010), *available at* http://www.justice.gov/opa/pr/2010/August/10-crm-903.html.

theory, ultimately entering into a non-prosecution agreement.[31] In both cases, the conduct that constituted an FCPA violation took place entirely at a predecessor entity prior to a merger or acquisition, yet the successor entity was subjected to liability for that conduct.

The threat of criminal successor liability even if thorough investigation is undertaken prior to a transaction has had a significant chilling effect on mergers and acquisitions. For example, Lockheed Martin terminated its acquisition of Titan Corporation when it learned about bribes paid by Titan's African subsidiary that were uncovered during pre-closing due diligence; Lockheed Martin was unwilling to assume the risk of successor liability for those bribes under the FCPA.[32]

Under basic principles of criminal law, a company, like a person, should not be held liable for the actions of another company with which it did not act in concert. Yet in the FCPA context, due to the DOJ's position on criminal successor liability, that is just what is happening. The DOJ's position on criminal successor liability contrasts with the application of successor liability in civil litigation, where the doctrine originated. In the civil context, the question of whether such liability can be imposed generally requires a complex analysis of a variety of factors, including whether the successor company expressly agreed to assume the liability and whether a merger or acquisition veiled a fraudulent effort to escape liability. Courts may also look to whether it is actually in the public interest to impose such liability. *See, e.g., United States v. Cigarette Merchandisers Ass'n, Inc.*, 136 F. Supp. 214 (S.D.N.Y. 1955).

Clear parameters for criminal successor liability under the FCPA are needed. A company should not be held criminally liable for pre-acquisition violations by an acquiree. If the successor company inherits employees who continue to commit FCPA violations, such new or continuing conduct may appropriately be imputed to the new

---

31 *See, e.g.,* Complaint, *Securities and Exchange Commission v. Alliance One International, Inc.*, Civil Action No. 01:10-cv-01319 (RMU) (D.D.C. Aug. 6, 2010), *available at* http://www.sec.gov/litigation/complaints/2010/comp21618-alliance-one.pdf (describing the merger in ¶ 1 of the Complaint, and then detailing the actions taken by the Dimon and SCC subsidiaries, which formed the basis for the charges against Alliance One).

32 *See* Margaret M. Ayres and Bethany K. Hipp, *FCPA Considerations in Mergers and Acquisitions*, 1619 PLI/CORP 241, 249 (Sept. 17, 2007); *see also* SEC Litig. Rel. No. 19107, 2005 WL 474238 (Mar. 1, 2005), *available at* http://www.sec.gov/litigation/litreleases/lr19107.htm.

company. However, criminal conduct by employees of one company, pre-acquisition, should not be imputed to a different company (the acquirer). That would amount to an extraordinary expansion of the doctrine of *respondeat superior* (imputation of current employee conduct to an employer). If a company conducts reasonable due diligence regarding an acquisition, the company should as a matter of law (rather than merely as a matter of the government's discretion) not be subject to criminal liability for pre-acquisition conduct by the acquired entity.[33]

5. <u>Adding a "Willfulness" Requirement for Corporate Criminal Liability</u>

Although the FCPA expressly limits an individual's liability for violations of the anti-bribery provisions to situations in which that individual has violated the Act "willfully," it does not contain any similar limitation for corporations.[34] This inconsistency in the statutory language substantially extends the scope of corporate criminal liability: a company can face criminal penalties for a violation of the FCPA even if there is no identifiable person of authority who knew that the conduct was unlawful or even wrong. Given that corporations act through their employees or agents and therefore can be liable only if an individual for whom the corporation is liable has committed the criminal act, it should not be possible to convict a corporation unless the employee is liable. Such individual liability requires willful conduct, and so should corporate liability.

---

[33] What constitutes sufficient due diligence necessarily will vary depending on the risks in a given transaction – e.g., whether the target company does significant business in regions that are known for corruption – and the size and complexity of the transaction. But sufficient due diligence should not require a full internal investigation and the expenditure of extraordinary resources by the company. Instead, guidance from the DOJ could outline standards for such diligence and identify factors that will be considered in determining whether diligence was adequate.

[34] 15 U.S.C. § 78dd-3(a)(2). The anti-bribery provisions do contain a requirement that conduct in furtherance of an improper payment must be "corrupt" in order to constitute an FCPA violation, and this requirement applies to both corporate entities and to individuals. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The FCPA does not define the word "corruptly," but courts interpret it to mean an act that is done "voluntarily and intentionally, and with a bad purpose." *See, e.g., United States v. Kay*, 513 F.3d 461, 463 (5th Cir. 2008). The requirement that an individual's conduct be "willful" in addition to "corrupt" necessitates a showing that not only was the act in question performed with a bad purpose, but with the knowledge that conduct was unlawful. *Id.* at 463-64.

Adding a willfulness requirement for corporate criminal liability also will help address another area of concern in the FCPA: the potential liability of a parent company for acts of a subsidiary that are not known to the parent.[35] Nothing in the legislative history indicates that the FCPA was intended to allow a parent corporation to be charged with criminal violations of the anti-bribery provisions if it had no direct or even indirect knowledge of improper payments by a subsidiary. At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary resulted from conscious avoidance of knowledge, the parent "could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls."[36]

Furthermore, because the DOJ and SEC have construed their FCPA jurisdiction to extend to acts that have only the most attenuated of connections to the United States, the lack of a "willfulness" requirement means that corporations can be held criminally liable for FCPA anti-bribery violations in situations where they not only do not have knowledge of the improper payments, but also do not even know that U.S. law is applicable to the conduct at issue. In such a case, the parent corporation could be charged with violations of the anti-bribery provisions even if it was unaware that the FCPA could reach such conduct.

The "willfulness" requirement therefore should be extended to corporate criminal liability under the FCPA. This amendment would significantly reduce the likelihood that a company will be criminally sanctioned for FCPA violations of which the company had no direct knowledge. The risk of criminal liability for conduct outside the control or knowledge of any person of authority at the company also would be mitigated by the addition of a rebuttable presumption that gifts of truly de minimis value – a trinket bearing the company logo or a modest business lunch – shall be presumed not to violate the FCPA. Similarly, rather than the current strict liability standard for books and records and internal controls violations, under which companies can be charged regardless of how small the payment in question, there should be a materiality standard. This would bring the FCPA in line with other securities laws.

6. <u>Limiting Parent Liability for Subsidiary's Conduct Not Known to the Parent</u>

The SEC has charged parent companies with civil violations of the anti-bribery provisions of the FCPA based on actions of which the parent is entirely ignorant taken by

---

[35] *See infra* Section 6.

[36] *See* S. Rep. No. 95-114, at 11 (1977).

foreign subsidiaries.[37] This approach is contrary to the statutory language of the anti-bribery provisions, which – even if they do not require evidence of "willfulness," as discussed above – do require evidence of knowledge and intent for liability. It is contrary to the position taken by the drafters of the FCPA, who recognized the "inherent jurisdictional, enforcement and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill" and who made clear that an issuer or domestic concern should be liable for the actions of a foreign subsidiary only if the issuer or domestic concern engaged in bribery by acting "through" the subsidiary.[38] It also appears to be at odds with the DOJ's stated position that a parent corporation "may be held liable for the acts of [a] foreign subsidiary[y] [only] where they authorized, directed, or controlled the activity in question."[39]

I am aware of no explanation or rationale for the government's theory that a parent company can be liable for a subsidiary's violations of the anti-bribery provisions where the activity was not "authorized, directed or controlled" by the parent or where the parent did not itself act "through" the subsidiary, but, to the contrary, where the subsidiary's improper acts were undertaken without the parent's knowledge, consent, assistance or approval. Nor has that theory been tested in court. In the absence of any judicial guidance on the contours and the limits, if any, of this potential parent-company liability, it remains a source of significant concern for American companies with foreign subsidiaries. The fact that a parent may exercise "control" of the corporate actions of a foreign subsidiary should not, without more, expose the parent company to liability under the anti-bribery provisions of the FCPA where it did not direct, authorize or even know of the improper payments at issue.

---

37 For example, in 2009, the SEC charged United Industrial Corporation ("UIC"), an American aerospace and defense systems contractor, with violations of the FCPA's anti-bribery provisions based on allegations that a UIC subsidiary made improper payments to a third party, but did not allege that UIC had any direct knowledge of the improper payments. *See In re* United Industrial Corp., Exchange Act Release No. 60005, 2009 WL 1507586 (May 29, 2009), *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf; SEC Litig. Rel. No. 21063, 2009 WL 1507590 (May 29, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr21063.htm.

38 *See* H.R. Conf. Rep. 95-831, at 14 (1977). *See also supra* fn 36 and accompanying text (the drafters intended that actions of a foreign subsidiary unknown to a parent company could constitute FCPA liability only under the books-and-records and internal controls provisions, and not under the anti-bribery provisions).

39 Department of Justice, *Layperson's Guide to FCPA*, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

*   *   *

The reforms I have discussed today, by providing greater clarity and certainty to the business community, will provide incentives for compliance and help ensure that companies operating in the U.S. or listed on its securities exchanges adhere to high legal and ethical standards when doing business abroad. These amendments also will focus the investigative resources of the DOJ and SEC on the corrupt business practices that were the principal concern of Congress when it enacted the FCPA and that both the government and the business community seek to eradicate. The result will be a statute that is both stronger and fairer.

Department of Justice

STATEMENT

OF

GREG ANDRES
ACTING DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

“FOREIGN CORRUPT PRACTICES ACT”

PRESENTED ON

JUNE 14, 2011

Statement of
Greg Andres
Acting Deputy Assistant Attorney General
Criminal Division
Department Of Justice

Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives

"Foreign Corrupt Practices Act"

June 14, 2011

I. INTRODUCTION

Chairman Sensenbrenner, Ranking Member Scott, and distinguished Members of the Subcommittee: Thank you for providing me with the opportunity to speak to you today about the Department of Justice's enforcement of the Foreign Corrupt Practices Act ("FCPA"). I am privileged to appear before you on behalf of the Justice Department.

Corruption undermines the democratic process, distorts markets, and frustrates competition. When government officials, whether at home or abroad, trade contracts for bribes, communities, businesses and governments lose; and when corporations and their executives bribe foreign officials in order to obtain or retain business, they perpetuate a culture of corruption that we are working hard to change. As the FCPA's legislative history makes clear, "Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service." The Department of Justice is committed to fighting foreign bribery through continued enforcement of the FCPA, and to providing guidance to corporations and others on our enforcement efforts.

II. FOREIGN CORRUPTION

Foreign corruption remains a problem of significant magnitude. Its effects are felt far and wide, including in U.S. markets, boardrooms, factories, mines, and farms. The World Bank estimates that more than $1 trillion dollars in bribes are paid each year – roughly three percent of the world economy. Some experts have concluded that bribes amount to a 20 percent tax on foreign investment.

Foreign bribery offends core American principles of fair play and it is plainly bad for business. In short, it stifles competition. Responsible companies, which prosper through innovation and efficiency, quality and customer service, unfairly lose business opportunities when their competitors cheat. Congress recognized as much more than 30 years ago, when it enacted the FCPA in the wake of the Watergate scandal, noting:

> The payment of bribes to influence the acts or decisions of foreign officials, foreign political parties or candidates for foreign political office is unethical. It is counter to the moral expectations and values of the American public. But not only is it unethical, it is bad business as well. It erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.

These principles have equal force today.

Moreover, corruption undermines efficiency and good business practices. Bribes are rarely paid only once. Companies and executives that pay bribes often rely on loose controls and poor accounting, which promote corporate instability and permit other crimes, such as embezzlement and antitrust violations, to flourish – all to the detriment of shareholders and the marketplace. Recently, a federal jury in the Central District of California heard evidence of bribes paid by an American company to Mexican officials, including bribes consisting of a $297,500 Ferrari Spyder, a $1.8 million yacht, and payments of more than $170,000 towards one official's credit card bills. It is difficult to dispute that this conduct does not amount to good business practices.

III. ENFORCEMENT

In recent years, the Department has made great strides prosecuting foreign corruption in all corners of the globe – against both foreign and domestic companies. These cases have often involved systematic, longstanding bribery schemes in which significant sums of money were paid. Department prosecutions have not involved single bribe payments of nominal sums. For example, the Department's prosecution of Daimler AG involved hundreds of improper payments worth tens of millions of dollars to foreign officials in almost two dozen countries. Similarly, the Department's prosecution of Siemens AG, a German corporation, and three of its subsidiaries, involved the payment of over $50 million in bribes in a variety of countries.

A. Prosecution Guidelines

When the Department seeks to enforce the FCPA against corporate entities, it does so pursuant to internal procedures set forth in the Department's United States Attorney's Manual. These rules, also known as the *Principles of Federal Prosecution Of Business Organizations*, represent official Department policy that all federal prosecutors must follow.

The Principles require federal prosecutors to consider the following nine factors when assessing whether to pursue charges against a business entity:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;

3. The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;

5. The existence and effectiveness of the corporation's pre-existing compliance program;

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

7. The collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution;

8. The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

9. The adequacy of remedies such as civil or regulatory enforcement actions.

Pursuant to these Principles, generally the Department does not hold a corporate entity accountable for the acts of a single employee. And while no single factor is necessarily more important than another, the existence and implementation of a company's compliance program remains an important factor, and one which the Department has routinely recognized as significant. For example, on April 8, 2011, the Department announced that it had entered into a deferred prosecution agreement with Johnson & Johnson, its subsidiaries, and its operating companies (collectively, "J&J"). As set forth in that agreement, the Department and J&J resolved the investigation in this manner, in part, because "J&J had a pre-existing compliance and ethics program that was effective and the majority of problematic operations globally resulted from insufficient implementation of the J&J compliance and ethics program in acquired companies."

Cooperation is another important factor. The Panalpina matter helps illustrate this point. On November 4, 2010, the Department announced that it had resolved its investigation of Panalpina World Transport (Holding) Ltd. ("Panalpina"), a global freight forwarding and logistics services firm based in Basel, Switzerland, its U.S. subsidiary, and five oil and gas service companies and subsidiaries. According to publicly-filed documents, Panalpina and its U.S.-based subsidiary admitted that between 2002 and 2007, it paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia, and Turkmenistan. Because of their criminal conduct, the companies involved in the schemes agreed to pay a total of over $150 million in criminal penalties. As part of its efforts to cooperate with the Justice Department's investigation, Panalpina engaged counsel to lead investigations encompassing 46 jurisdictions, hired an outside audit firm to perform forensic analysis, and promptly reported the results of its internal investigation in over 60 meetings and calls with the Department and the SEC.

The Panalpina resolution was consistent with the Principles, which require federal prosecutors to consider resolving, where appropriate, FCPA investigations through deferred or non-prosecution agreements. As the Principles recognize, these agreements "occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation," especially where the collateral consequences of an indictment to the corporation could be significant.

B. Enforcement Actions

As the Daimler, Panalpina, and Siemens matters discussed above illustrate, the Department focuses its FCPA and related enforcement on matters where the allegations of criminal conduct are clear, egregious, and fall squarely within the FCPA. There are other examples of egregious conduct, including the following:

- **The Bonny Island matter: payments of over $180 million intended, in part, as foreign bribes.** On February 11, 2009, Kellogg Brown & Root LLC (KBR), a global engineering, construction and services company based in Houston, pleaded guilty to FCPA violations. KBR admitted that it paid two agents approximately $182 million, and that KBR had intended for these payments to be used, in part, for bribes to Nigerian government officials in exchange for engineering, procurement and construction contracts. KBR's former CEO, Albert "Jack" Stanley, also pleaded guilty for his role in the scheme. In addition, three foreign corporate business partners of KBR have all reached criminal resolutions with the Department in the Bonny Island matter: Snamprogetti Netherlands B.V. / ENI S.p.A (from Holland/Italy), Technip S.A (from France), and, most recently, JGC (from Japan).

- **The Maxwell Technologies matter: payments of over $2.5 million intended, in part, for foreign bribe payments.** On January 31, 2011, Maxwell Technologies Inc., a publicly-traded manufacturer of energy-storage and power-delivery products based in San Diego, pleaded guilty to charges related to the FCPA. Maxwell admitted that its wholly-owned Swiss subsidiary paid its agent in China more than $2.5 million, and that it intended for these payments to be used, in part, for bribes to officials at state-owned entities in exchange for business contracts.

- **The Alcatel-Lucent matter: payments of millions in foreign bribes.** On December 27, 2010, the Department announced that Alcatel-Lucent S.A. and three of its subsidiaries had resolved an FCPA investigation with the Department. Alcatel-Lucent's three subsidiaries paid millions of dollars in improper payments to foreign officials for the purpose of obtaining and retaining business in Costa Rica, Honduras, Malaysia and Taiwan. For example, one of the subsidiaries paid more than $9 million in bribes to foreign officials in Costa Rica in exchange for business contracts.

C. Corporate Governance Legislation & United States Treaty Obligations

Many have commented about the recent increase in FCPA enforcement actions. At least one likely cause for those cases is increased disclosures by companies consistent with their obligations under the Sarbanes-Oxley Act ("SOX"), which requires senior corporate officials to certify the accuracy of their financial statements, including that those statements accurately reflect companies' payments to third parties. The SOX certification process has led to more companies discovering FCPA violations and making the decision to disclose them to the SEC and DOJ.

Of note, United States' treaty obligations also impact the Department's enforcement of the FCPA. For example, the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "OECD Antibribery Convention"), to which the United States and 37 other countries are signatories, as well as the United Nations Convention Against Corruption, are important.

The United States was a driving force behind the negotiation and conclusion of the OECD Antibribery Convention, which was approved by the United States Senate on July 31, 1998, and entered into force on February 15, 1999. In particular, the OECD Antibribery Convention requires the United States and all signatory countries to criminalize bribery of a "foreign public official," which the OECD Antibribery Convention broadly defines to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise."

The Department is proud of our FCPA enforcement record, and of our continued partnership with the Securities and Exchange Commission and the Department of Commerce. Others have taken notice as well. On October 20, 2010, following a lengthy official review, the Organisation for Economic Co-operation and Development (OECD) noted that:

> The creation of a dedicated FCPA unit in the SEC, continued enforcement of books and records and internal controls provisions by the DOJ and SEC, increased focus on the prosecution of individuals and the size of sanctions have had a deterrent effect and, combined with guidance on the implementation of these standards, has raised awareness of U.S. accounting and auditing requirements among all issuers.

IV. GUIDANCE

The Department also takes seriously our obligation to provide guidance in this area: our goal is not simply to prosecute FCPA violations, but also to prevent corruption at home and abroad and promote a level playing field in business transactions.

In the past year we have made great efforts to provide more information and transparency. Senior officials from the Department, as well as others from the Securities and Exchange Commission and the Department of Commerce, often speak publicly about the Department's enforcement efforts, highlighting relevant considerations and practices. Department officials have addressed compliance officials, general counsels and other business executives both in the United States and abroad. In addition, the Department worked closely with the OECD to develop the Good Practice Guidance on Internal Controls, Ethics, and Compliance, which was issued in February 2010, and establishes a framework of what an effective compliance program should contain.

Moreover, through our Opinion Release Procedure, the Department advises companies on how to comply with the FCPA. This procedure, provided for in Title 15, United States Code, Sections 78dd-l(e) and 78dd-2(f), is unique in U.S. criminal law and allows companies and individuals to request a determination in advance as to whether proposed conduct would constitute a violation of the FCPA. Requests for opinions under this provision require the Department to issue a response within 30 days of a completed request.

The resulting opinions, which are available on the Department's FCPA-dedicated website (http://www.justice.gov/criminal/fraud/fcpa/), provide additional guidance on the Department's interpretation and enforcement of the FCPA. For example, the Department has issued at least five advisory opinions concerning whether a party fit within the definition of "foreign official." In one such opinion, issued on September 1, 2010, the Department explained that a consultant who was otherwise a "foreign official" would not be acting as a "foreign official" under a particular business arrangement given the facts and circumstances posed. Similarly, opinions have been issued regarding what constitute "bona fide" expenditures in promoting a product and what are considered excessive travel and entertainment costs for foreign government officials.

Our website also contains a copy of the FCPA statute in 15 different languages, the relevant legislative history, and a "Lay Person's Guide" to the FCPA, a plain language explanation of the Act. Further, we include on our website the relevant documents from our FCPA prosecutions and resolutions dating back to 1998 (and thus include more than 140 FCPA prosecutions, including charging documents, plea agreements, deferred prosecution agreements, press releases, and other relevant pleadings).

V. CONCLUSION

As discussed above, international bribery is bad for United States' businesses, weakens economic development, undermines confidence in the marketplace, and distorts competition. FCPA enforcement is vital to United States' business interests, to ensuring the integrity of the world's markets and sustainable development globally, and to making the international business climate more transparent and fair for everyone.

We look forward to working with Congress as we continue our important mission to prevent, deter, and prosecute foreign corruption.

JUSTICE NEWS

Associate Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act

Washington, D.C. ~ Tuesday, November 8, 2011

Thank you, Homer, for that kind introduction. This is the third year in a row that I have had the privilege of addressing this conference. It is an honor each time, and I am delighted to be here with you again today.

In at least one respect, this past year has been no different from the two years that preceded it: The Justice Department has been vigorously enforcing the Foreign Corrupt Practices Act and achieving strong results. As we speak, in federal court in Washington, D.C., we are in the middle of our fourth FCPA trial of the year – more than in any prior year in the history of the Act. And just two weeks ago, we secured the longest prison sentence – 15 years – ever imposed in an FCPA case .

In other respects, however, the world has witnessed historic changes in the last year that highlight the importance of our mission to fight corruption at home and abroad, including by enforcing the FCPA. Having addressed you on two prior occasions, I know that you are all well aware of the Justice Department's enforcement record. And during this conference, you will be hearing many expert analyses of our recent enforcement trends. So, what I want to do with you today, rather than tell you about our cases, is to place our FCPA work in context and share with you my perspective on recent efforts to amend the Act.

Last December, in what led to a period that many have referred to as the "Arab Spring," a young Tunisian man named Mohammed Bouazizi had his fruit cart confiscated from him and subsequently set himself on fire. As President Obama said in a speech last May, Bouazizi's "act of desperation tapped into the frustration felt throughout [Tunisia]," leading hundreds and then thousands of protesters to take to the streets and demand the ouster of a dictator who had held power for more than 20 years.

Why did Bouazizi and his countrymen and women feel so desperate? There were undoubtedly many reasons. But one was surely the pervasive corruption they were up against.

Corruption is commonly defined as the "abuse of entrusted power for personal gain." Bouazizi faced corruption at the most personal level. His fruit stand and electronic scale were arbitrarily taken from him by a municipal inspector, who also humiliated him with a slap across the face, and authorities refused to give him back his property. Bouazizi's tale is not unique across North Africa and the Middle East. And, of course, the problem of corruption is not limited to that region of the world.

Corruption corrodes the public trust in countries rich and poor and has particularly negative effects on emerging economies. When a developing country's public officials routinely abuse their power for personal gain, its people suffer. At a concrete level, roads are not built, schools lie in ruin and basic public services go unprovided. At a more abstract, but equally important, level, political institutions lose legitimacy, and people lose hope that they will ever be able to improve their lot.

The fight against corruption is a law enforcement priority of the United States, and it is also a personal priority of mine. There are few more destructive forces in society than the effect of widespread corruption on a people's hopes and dreams, and I believe it is incumbent upon us to work as hard as we can to eradicate corruption across the globe.

Putting aside for a moment our enforcement of the FCPA, as head of the Criminal Division I have set out to combat corruption in three principal ways. First, through criminal prosecution of domestic officials who abuse their power for personal gain. Second, by assisting foreign nations to strengthen their government institutions so that they can more effectively resist the corrosive effects of corruption. And third, by focusing on identifying and repatriating the proceeds of foreign official corruption.

In the United States, thankfully, we do not contend with the same, systemic corruption that Mohammed Bouazizi was facing. Nevertheless, corruption remains a problem here, and we treat it that way. At the Justice Department, we have a dedicated group of criminal prosecutors – in the Public Integrity Section – whose sole task, along with the nation's 94 U.S. Attorneys' Offices, is to prosecute corrupt federal, state and local officials. These are not easy cases. But they are essential to preserving the integrity of our democratic institutions. Moreover, we could not be effective abroad if we did not lead by example here at home.

Indeed, I have not been shy about spreading our message. When I travel abroad – to Romania, for example, where I was last month, or to Ghana and Liberia, where I led a U.S. delegation last spring with Assistant Secretary of State William Brownfield, or to Russia and the Ukraine, where I have also traveled as Assistant Attorney General – I always raise the issue of corruption, often challenging foreign audiences to make the fight against corruption a national priority, just as we have done in the United States.

We cannot eradicate corruption solely by bringing prosecutions in U.S. courtrooms. We need strong partners across the globe who are equally committed to that fight and who have the capacity to carry through on that commitment. For that reason, in partnership with the U.S. Department of State, we have for years placed legal advisors and law enforcement professionals in countries around the world, including throughout North and Sub-Saharan Africa and the Middle East, to work with foreign prosecutors, judges and police to develop and sustain effective criminal justice and law enforcement institutions.

In a shining example of these capacity-building efforts, after years of work by Criminal Division prosecutors, the first-ever jury trial in post-Soviet Georgia is beginning this week. The trial is a historic event for the developing Georgian democracy and a feat about which we can all be proud .

Since I became Assistant Attorney General, we have also devoted countless resources to helping the Mexican government improve its prosecutorial and investigative institutions. Members of my leadership team and I have traveled to Mexico dozens of times in support of these efforts. As just one example, over the past several months prosecutors and others in my Division have worked tirelessly with Mexican officials to help them develop a viable witness security program.

Which leads me to one more point I want to make about our capacity-building work. It is performed by heroes. We may all to some degree underestimate the sacrifice of those who travel without their families to Mexico and Iraq and other hotspots to assist foreign nations develop their criminal justice institutions. But, having met so many of these public servants – as they leave and when they come back – I have developed profound admiration for the work they do and believe we should all be grateful for their service.

Finally, I am firmly convinced that we cannot win our fight against global corruption unless we deprive corrupt foreign officials of the ability to use the United States as a safe haven for their ill-gotten gains. That is the purpose of our now fully operational Kleptocracy Asset Recovery Initiative . With this initiative, which I told you last year we were developing, we are working hard to identify, and recover, the proceeds of foreign official corruption through civil forfeiture.

Last month, we announced our most significant Kleptocracy actions to date: two civil forfeiture complaints filed against $70 million in assets allegedly belonging to Teodoro Nguema Obiang Mangue, a government minister for Equatorial Guinea and the son of that country's president. According to the complaints, despite an official government salary of less than $100,000 per year, Minister Obiang corruptly amassed wealth of more than $100 million. Among the items that we are seeking to forfeit are $1.8 million worth of Michael Jackson memorabilia, a $38.5 million Gulfstream G-V jet, a $30 million house in Malibu, California and a 2011 Ferrari valued at more than $530,000.

With our comprehensive approach to fighting corruption – through criminal prosecutions of corrupt officials, foreign institution building, the Kleptocracy Initiative, and, of course, enforcement of the FCPA – it is my great hope that we may give even louder voice to the Mohammed Bouazizis of the world, who want, and deserve, an even playing field.

Indeed, the fight against corruption is an urgent battle – one that, at this historic moment, we must forcefully pursue.

As we have been working – in all the ways I've mentioned – to fight corruption at home and abroad, I am aware that there have been a number of efforts made this year to amend the FCPA, by the Chamber of Commerce and others. We in the Justice Department are always open – and I personally am – to working with Congress on ways to improve our criminal laws. That said, I want to be clear about one thing with respect to these proposals: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.

Indeed, at this crucial moment in history, watering down the Act – by eliminating successor liability in the FCPA context, for example – would send exactly the wrong message. Particularly since it has become increasingly clear over the past year that the trend across the globe is toward criminalization of foreign bribery. The U.K. Bribery Act took effect in July. Russia recently passed an anti-bribery law; has ratified the U.N. Convention against Corruption; and is expected soon to accede to the OECD Anti-Bribery Convention. China, too, recently passed an anti-bribery law and is an observer at the OECD's Working Group on Bribery.

Of course, passage of foreign bribery laws in China and Russia will not cure the problem of corruption in either country. When I traveled to Russia earlier this year, I made the same point there. A stark reminder that the road ahead is long is that, in a report released last week, China and Russia ranked 27th and 28th, respectively, out of 28 countries on Transparency International's 2011 Bribe Payers Index, which ranks the world's largest economies according to the perceived likelihood that the country's companies will pay bribes abroad. Nevertheless, the steps taken in China, Russia and elsewhere are important ones. The history of the FCPA illustrates why. Its passage in 1977 was a milestone. But it took decades for the Act to become as strong an enforcement tool as it is today. Having come this far, on what I believe is a noble journey, we cannot, and should not, start going backwards. On the contrary, the United States must continue leading the charge against transnational bribery.

As I told you last year, we absolutely take considered suggestions about FCPA enforcement into account. Indeed, over the past year, I've met with a number of industry groups to hear their perspectives. Recently, for example, I participated in a business roundtable discussion at the Department of Commerce, during which industry representatives expressed their views on a wide range of issues related to the FCPA. I was personally taken by the thoughtfulness of the roundtable's participants and have come to appreciate very much the continuing dialogue my team and I have been having with the private sector. In addition, last year, in response to the OECD's Phase 3 Review of our enforcement efforts, we began further developing our "lay person's guide" to the FCPA and consolidating within it much of the information that is already available on the Criminal Division's website . And, in 2012, in what I hope will be a useful and transparent aid, we expect to release detailed new guidance on the Act's criminal and civil enforcement provisions.

As you know, the FCPA was the first effort of any nation to specifically criminalize the act of bribing foreign officials. In 1976, following certain prosecutions for illegal use of corporate funds arising out of the Watergate scandal, the U.S. Securities and Exchange Commission issued a report in which it determined that foreign bribery by U.S. corporations was "serious and sufficiently widespread to be a cause for deep concern." S.E.C. investigations revealed that hundreds of U.S. companies had made corrupt foreign payments involving hundreds of millions of dollars. With this background, the Senate concluded that there was a strong need for anti-bribery legislation in the United States. "Corporate bribery is bad business," the Senate Banking Committee said in its report on the legislation. "In our free market system it is basic that the sale of products should take place on the basis of price, quality and service. Corporate bribery is fundamentally destructive of this basic tenet."

That was true then, and it's absolutely true now. In the United States, we have taken a strong stand against corruption, and the tide has been turning that same way in many countries across the globe – both as measured by the number of nations that have passed anti-bribery statutes in the past decade and by the recent popular uprisings that have been fueled, at least in part, by public outrage over corruption.

This is precisely the wrong moment in history to weaken the FCPA. To the contrary, whether or not certain clarifications to the Act are appropriate, now is the time to ensure that the FCPA remains a strong tool for fighting the ill effects of transnational bribery. There is no argument for becoming more permissive when it comes to corruption. Indeed, for the reasons I have articulated, we may together have no greater mission than to work toward eradicating corruption across the globe. The FCPA is an important mechanism for holding individuals and corporations accountable for fostering corruption abroad, and for motivating others to act responsibly. We must ensure that it stays that way.

As Assistant Attorney General, I have made fighting corruption around the world a top priority for the Criminal Division. At a time when people across the globe are taking to the streets in frustration over the widespread corruption that exerts a stranglehold over their aspirations, the urgency of this fight is plain. We must, and we will, devote ourselves to continuing it.

Thank you.

Ministry of JUSTICE

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing
(section 9 of the Bribery Act 2010)

Foreword

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade. That is why the entry into force of the Bribery Act on 1 July 2011 is an important step forward for both the UK and UK plc. In line with the Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

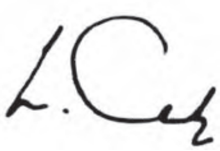
Readers of this document will be aware that the Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

I have listened carefully to business representatives to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance.
I encourage small businesses to turn to this for a concise introduction to how they can meet the requirements of the law.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards. It also establishes a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish.

Everyone agrees bribery is wrong and that rules need reform. In implementing this Act, we are striking a blow for the rule of law and growth of trade. I commend this guidance to you as a helping hand in doing business competitively and fairly.



Kenneth Clarke
Secretary of State for Justice
March 2011

Contents

Introduction

1 The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1 The Act creates a new offence under section 7 which can be committed by commercial organisations[1] which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.

2 The Act extends to England & Wales, Scotland and Northern Ireland. This guidance is for use in all parts of the United Kingdom. In accordance with section 9(3) of the Act, the Scottish Ministers have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted.

3 This guidance explains the policy behind section 7 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1).

4 The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

5 If your organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

1 See paragraph 35 below on the definition of the phrase ‘commercial organisation’.

6 As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.

7 The language used in this guidance reflects its non-prescriptive nature. The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language. The commentary following each of the principles is expressed more broadly.

8 All terms used in this guidance have the same meaning as in the Bribery Act 2010. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.

Government policy and Section 7 of the Bribery Act

9 Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2010 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts (raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment) and wide jurisdictional powers (see paragraphs 15 and 16 on page 9).

10 The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business[2], and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 1, 6 and 7 offences is provided under the separate headings below.

11 The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

12 The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities – for example to the Serious Fraud Office (SFO) which operates a policy in England and Wales and Northern Ireland of co-operation with commercial organisations that self-refer incidents of bribery (see 'Approach of the SFO to dealing with overseas corruption' on the SFO website). The commercial organisation's willingness to co-operate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

2 Conduct amounting to bribery of a foreign public official could also be charged under section 1 of the Act. It will be for prosecutors to select the most appropriate charge.

13 In order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence. Where the prosecution cannot prove beyond reasonable doubt that a sections 1 or 6 offence has been committed the section 7 offence will not be triggered.

14 The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle.[3]

Jurisdiction

15 Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 2[4] or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

16 However, as regards section 7, the requirement of a close connection with the UK does not apply. Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere. So, provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction (see more on this at paragraphs 34 to 36).

3 See section 5 and Schedule 1 to the Interpretation Act 1978 which provides that the word 'person' where used in an Act includes bodies corporate and unincorporate. Note also the common law 'identification principle' as defined by cases such as Tesco Supermarkets v Nattrass [1972] AC 153 which provides that corporate liability arises only where the offence is committed by a natural person who is the directing mind or will of the organisation.

4 Although this particular offence is not relevant for the purposes of section 7.

Section 1:
Offences of bribing another person

17 Section 1 makes it an offence for a person ('P') to offer, promise or give a financial or other advantage to another person in one of two cases:

- **Case 1** applies where P intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.
- **Case 2** applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

18 'Improper performance' is defined at sections 3, 4 and 5. In summary, this means performance which amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery in both the public and private sectors is covered.

19 For the purposes of deciding whether a function or activity has been performed improperly the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of that function or activity. Where the performance of the function or activity is not subject to UK law (for example, it takes place in a country outside UK jurisdiction) then any local custom or practice must be disregarded – unless permitted or required by the written law applicable to that particular country. Written law means any written constitution, provision made by or under legislation applicable to the country concerned or any judicial decision evidenced in published written sources.

20 By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.

Section 6: Bribery of a foreign public official

21 Section 6 creates a standalone offence of bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.

22 A 'foreign public official' includes officials, whether elected or appointed, who hold a legislative, administrative or judicial position of any kind of a country or territory outside the UK. It also includes any person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises. Foreign public officials can also be an official or agent of a public international organisation, such as the UN or the World Bank.

23 Sections 1 and 6 may capture the same conduct but will do so in different ways. The policy that founds the offence at section 6 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to others at the official's request, assent or acquiescence. Such activity is very likely to involve conduct which amounts to 'improper performance' of a relevant function or activity to which section 1 applies, but, unlike section 1, section 6 does not require proof of it or an intention to induce it. This is because the exact nature of the functions of persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve. To require the prosecution to rely entirely on section 1 would amount to a very significant deficiency in the ability of the legislation to address this particular mischief. That said, it is not the Government's intention to criminalise behaviour where no such mischief occurs, but merely to formulate the offence to take account of the evidential difficulties referred to above. In view of its wide scope, and its role in the new form of corporate liability at section 7, the Government offers the following further explanation of issues arising from the formulation of section 6.

Local law

24 For the purposes of section 6 prosecutors will be required to show not only that an 'advantage' was offered, promised or given to the official or to another person at the official's request, assent or acquiescence, but that the advantage was

one that the official was not permitted or required to be influenced by as determined by the written law applicable to the foreign official.

25 In seeking tenders for publicly funded contracts Governments often permit or require those tendering for the contract to offer, in addition to the principal tender, some kind of additional investment in the local economy or benefit to the local community. Such arrangements could in certain circumstances amount to a financial or other 'advantage' to a public official or to another person at the official's request, assent or acquiescence. Where, however, relevant 'written law' permits or requires the official to be influenced by such arrangements they will fall outside the scope of the offence. So, for example, where local planning law permits community investment or requires a foreign public official to minimise the cost of public procurement administration through cost sharing with contractors, a prospective contractor's offer of free training is very unlikely to engage section 6. In circumstances where the additional investment would amount to an advantage to a foreign public official and the local law is silent as to whether the official is permitted or required to be influenced by it, prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise.

Hospitality, promotional, and other business expenditure

26 Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour. The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes. It is, however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.

27 In order to amount to a bribe under section 6 there must be an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage. In this regard, it may be in some circumstances that hospitality or promotional expenditure in the form of travel and accommodation costs does not even amount to 'a financial or other advantage' to the relevant official because it is a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself.

28 Where the prosecution is able to establish a financial or other advantage has been offered, promised or given, it must then show that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. Where the prosecution cannot prove this to the requisite standard then no offence under section 6 will be committed. There may be direct evidence to support the existence of this connection and such evidence may indeed relate to relatively modest expenditure. In many cases, however, the question as to whether such a connection can be established will depend on the totality of the evidence which takes into account all of the surrounding circumstances. It would include matters such as the type and level of advantage offered, the manner and form in which the advantage is provided, and the level of influence the particular foreign public official has over awarding the business. In this circumstantial context, the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.

29 The standards or norms applying in a particular sector may also be relevant here. However, simply providing hospitality or promotional, or other similar business expenditure which is commensurate with such norms is not, of itself, evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant.

30 Levels of expenditure will not, therefore, be the only consideration in determining whether a section 6 offence has been committed. But in the absence of any further evidence demonstrating the required connection, it is unlikely, for example, that incidental provision of a routine business courtesy will raise the inference that it was intended to have a direct impact on decision making, particularly where such hospitality is commensurate with the reasonable and proportionate norms for the particular industry; e.g. the provision of airport to hotel transfer services to facilitate an on-site visit, or dining and tickets to an event.

31 Some further examples might be helpful. The provision by a UK mining company of reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems are circumstances that fall outside the intended scope of the offence. Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match are facts that are, in themselves, unlikely to raise the necessary inferences. However, if the choice of New York as the most convenient venue was in doubt because the organisation's senior executives could easily have seen the official with all the relevant documentation when they had visited the relevant country the previous week then the necessary inference might be raised. Similarly, supplementing information provided to a foreign public official on a commercial organisation's background, track record and expertise in providing private health care with an offer of ordinary travel and lodgings to enable a visit to a hospital run by the commercial organisation is unlikely to engage section 6. On the other hand, the provision by that same commercial organisation of a five-star holiday for the foreign public official which is unrelated to a demonstration of the organisation's services is, all things being equal, far more likely to raise the necessary inference.

32 It may be that, as a result of the introduction of the section 7 offence, commercial organisations will review their policies on hospitality and promotional or other similar business expenditure as part of the selection and implementation of bribery prevention procedures, so as to ensure that they are seen to be acting both competitively and fairly. It is, however, for individual organisations, or business representative bodies, to establish and disseminate appropriate standards for hospitality and promotional or other similar expenditure.

Section 7: Failure of commercial organisations to prevent bribery

33 A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

Commercial organisation

34 Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase.

35 As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

36 As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the United Kingdom satisfies the test in the Act, the final arbiter, in any particular case, will be the courts as set out above. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the

London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a 'relevant commercial organisation' for the purposes of section 7. Likewise, having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies.

Associated person

37 A commercial organisation is liable under section 7 if a person 'associated' with it bribes another person intending to obtain or retain business or a business advantage for the organisation. A person associated with a commercial organisation is defined at section 8 as a person who 'performs services' for or on behalf of the organisation. This person can be an individual or an incorporated or unincorporated body. Section 8 provides that the capacity in which a person performs services for or on behalf of the organisation does not matter, so employees (who are presumed to be performing services for their employer), agents and subsidiaries are included. Section 8(4), however, makes it clear that the question as to whether a person is performing services for an organisation is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and the organisation. The concept of a person who 'performs services for or on behalf of' the organisation is intended to give section 7 broad scope so as to embrace the whole range of persons connected to an organisation who might be capable of committing bribery on the organisation's behalf.

38 This broad scope means that contractors could be 'associated' persons to the extent that they are performing services for or on behalf of a commercial organisation. Also, where a supplier can properly be said to be performing services for a commercial organisation rather than simply acting as the seller of goods, it may also be an 'associated' person.

39 Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of sub-contractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty. It is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g. risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain.

40 As for joint ventures, these come in many different forms, sometimes operating through a separate legal entity, but at other times through contractual arrangements. In the case of a joint venture operating through a separate legal entity, a bribe paid by the joint venture entity may lead to liability for a member of the joint venture if the joint venture is performing services for the member and the bribe is paid with the intention of benefiting that member. However, the existence of a joint venture entity will not of itself mean that it is 'associated' with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will therefore not trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture.

41 The situation will be different where the joint venture is conducted through a contractual arrangement. The degree of control that a participant has over that arrangement is likely to be one of the 'relevant circumstances' that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was 'performing services for or on behalf of' a participant in that arrangement. It may be, for example, that an employee of such a participant who has paid a bribe in order to benefit his employer is not to be regarded as a person 'associated' with all the other participants in the joint venture. Ordinarily, the employee of a participant will be presumed to be a person performing services for and on behalf of his employer. Likewise, an agent engaged by a participant in a contractual joint venture is likely to be regarded as a person associated with that participant in the absence of evidence that the agent is acting on behalf of the contractual joint venture as a whole.

42 Even if it can properly be said that an agent, a subsidiary, or another person acting for a member of a joint venture, was performing services for the organisation, an offence will be committed only if that agent, subsidiary or person intended to obtain or retain business or an advantage in the conduct of business for the organisation. The fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe. By the same token, liability

for a parent company could arise where a subsidiary is the 'person' which pays a bribe which it intends will result in the parent company obtaining or retaining business or vice versa.

43 The question of adequacy of bribery prevention procedures will depend in the final analysis on the facts of each case, including matters such as the level of control over the activities of the associated person and the degree of risk that requires mitigation. The scope of the definition at section 8 needs to be appreciated within this context. This point is developed in more detail under the six principles set out on pages 20 to 31.

Facilitation payments

44 Small bribes paid to facilitate routine Government action – otherwise called 'facilitation payments' – could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence and therefore potential liability under section 7.

45 As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 Recommendation of the Organisation for Economic Co-operation and Development[5] recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.

46 The Government does, however, recognise the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent. It will also require collaboration between international bodies, governments, the anti-bribery lobby, business representative bodies and sectoral organisations. Businesses themselves also have a role to play and the guidance below offers an indication of how the problem may be addressed through the selection of bribery prevention procedures by commercial organisations.

47 Issues relating to the prosecution of facilitation payments in England and Wales are referred to in the guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.[6]

5 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.
6 Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions.

Duress

48 It is recognised that there are circumstances in which individuals are left with no alternative but to make payments in order to protect against loss of life, limb or liberty. The common law defence of duress is very likely to be available in such circumstances.

Prosecutorial discretion

49 Whether to prosecute an offence under the Act is a matter for the prosecuting authorities. In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence, and, if so, whether a prosecution is in the public interest. If the evidential test has been met, prosecutors will consider the general public interest in ensuring that bribery is effectively dealt with. The more serious the offence, the more likely it is that a prosecution will be required in the public interest.

50 In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute. The operation of prosecutorial discretion provides a degree of flexibility which is helpful to ensure the just and fair operation of the Act.

51 Factors that weigh for and against the public interest in prosecuting in England and Wales are referred to in the joint guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions referred to at paragraph 47.

The six principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is provided at Appendix A. These are designed to illustrate the application of the principles for small, medium and large organisations.

Principle 1
Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Commentary

1.1 The term 'procedures' is used in this guidance to embrace both bribery prevention policies and the procedures which implement them. Policies articulate a commercial organisation's anti-bribery stance, show how it will be maintained and help to create an anti-bribery culture. They are therefore a necessary measure in the prevention of bribery, but they will not achieve that objective unless they are properly implemented. Further guidance on implementation is provided through principles 2 to 6.

1.2 Adequate bribery prevention procedures ought to be proportionate to the bribery risks that the organisation faces. An initial assessment of risk across the organisation is therefore a necessary first step. To a certain extent the level of risk will be linked to the size of the organisation and the nature and complexity of its business, but size will not be the only determining factor. Some small organisations can face quite significant risks, and will need more extensive procedures than their counterparts facing limited risks. However, small organisations are unlikely to need procedures that are as extensive as those of a large multi-national organisation. For example, a very small business may be able to rely heavily on periodic oral briefings to communicate its policies while a large one may need to rely on extensive written communication.

1.3 The level of risk that organisations face will also vary with the type and nature of the persons associated with it. For example, a commercial organisation that properly assesses that there is no risk of bribery on the part of one of its associated persons will accordingly require nothing in the way of procedures to prevent bribery in the context of that relationship. By the same token the bribery risks associated with reliance on a third party agent representing a commercial organisation in negotiations with foreign public officials may be assessed as significant and accordingly require much more in the way of procedures to mitigate those risks. Organisations are likely to need to select procedures to cover a broad range of risks but any consideration by a court in an individual case of the adequacy of procedures is likely necessarily to focus on those procedures designed to prevent bribery on the part of the associated person committing the offence in question.

1.4 Bribery prevention procedures may be stand alone or form part of wider guidance, for example on recruitment or on managing a tender process in public procurement. Whatever the chosen model, the procedures should seek to ensure there is a practical and realistic means of achieving the organisation's stated anti-bribery policy objectives across all of the organisation's functions.

1.5 The Government recognises that applying these procedures retrospectively to existing associated persons is more difficult, but this should be done over time, adopting a risk-based approach and with due allowance for what is practicable and the level of control over existing arrangements.

Procedures

1.6 Commercial organisations' bribery prevention policies are likely to include certain common elements. As an indicative and not exhaustive list, an organisation may wish to cover in its policies:

- its commitment to bribery prevention (see Principle 2)
- its general approach to mitigation of specific bribery risks, such as those arising from the conduct of intermediaries and agents, or those associated with hospitality and promotional expenditure, facilitation payments or political and charitable donations or contributions; (see Principle 3 on risk assessment)
- an overview of its strategy to implement its bribery prevention policies.

1.7 The procedures put in place to implement an organisation's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. The following is an indicative and not exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced:

- The involvement of the organisation's top-level management (see Principle 2).
- Risk assessment procedures (see Principle 3).
- Due diligence of existing or prospective associated persons (see Principle 4).
- The provision of gifts, hospitality and promotional expenditure; charitable and political donations; or demands for facilitation payments.
- Direct and indirect employment, including recruitment, terms and conditions, disciplinary action and remuneration.
- Governance of business relationships with all other associated persons including pre and post contractual agreements.
- Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.
- Transparency of transactions and disclosure of information.
- Decision making, such as delegation of authority procedures, separation of functions and the avoidance of conflicts of interest.
- Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.
- The reporting of bribery including 'speak up' or 'whistle blowing' procedures.
- The detail of the process by which the organisation plans to implement its bribery prevention procedures, for example, how its policy will be applied to individual projects and to different parts of the organisation.
- The communication of the organisation's policies and procedures, and training in their application (see Principle 5).
- The monitoring, review and evaluation of bribery prevention procedures (see Principle 6).

Principle 2
Top-level commitment

The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Commentary

2.1 Those at the top of an organisation are in the best position to foster a culture of integrity where bribery is unacceptable. The purpose of this principle is to encourage the involvement of top-level management in the determination of bribery prevention procedures. It is also to encourage top-level involvement in any key decision making relating to bribery risk where that is appropriate for the organisation's management structure.

Procedures

2.2 Whatever the size, structure or market of a commercial organisation, top-level management commitment to bribery prevention is likely to include (1) communication of the organisation's anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Internal and external communication of the commitment to zero tolerance to bribery

2.3 This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site. Effective formal statements that demonstrate top level commitment are likely to include:

- a commitment to carry out business fairly, honestly and openly
- a commitment to zero tolerance towards bribery
- the consequences of breaching the policy for employees and managers
- for other associated persons the consequences of breaching contractual provisions relating to bribery prevention (this could include a reference to avoiding doing business with others who do not commit to doing business without bribery as a 'best practice' objective)
- articulation of the business benefits of rejecting bribery (reputational, customer and business partner confidence)
- reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing)
- key individuals and departments involved in the development and implementation of the organisation's bribery prevention procedures
- reference to the organisation's involvement in any collective action against bribery in, for example, the same business sector.

Top-level involvement in bribery prevention

2.4 Effective leadership in bribery prevention will take a variety of forms appropriate for and proportionate to the organisation's size, management structure and circumstances. In smaller organisations a proportionate response may require top-level managers to be personally involved in initiating, developing and implementing bribery prevention procedures and bribery critical decision making. In a large multi-national organisation the board should be responsible for setting bribery prevention policies, tasking management to design, operate and monitor bribery prevention procedures, and keeping these policies and procedures under regular review. But whatever the appropriate model, top-level engagement is likely to reflect the following elements:

- Selection and training of senior managers to lead anti-bribery work where appropriate.
- Leadership on key measures such as a code of conduct.
- Endorsement of all bribery prevention related publications.
- Leadership in awareness raising and encouraging transparent dialogue throughout the organisation so as to seek to ensure effective dissemination of anti-bribery policies and procedures to employees, subsidiaries, and associated persons, etc.
- Engagement with relevant associated persons and external bodies, such as sectoral organisations and the media, to help articulate the organisation's policies.
- Specific involvement in high profile and critical decision making where appropriate.
- Assurance of risk assessment.
- General oversight of breaches of procedures and the provision of feedback to the board or equivalent, where appropriate, on levels of compliance.

Principle 3
Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Commentary

3.1 For many commercial organisations this principle will manifest itself as part of a more general risk assessment carried out in relation to business objectives. For others, its application may produce a more specific stand alone bribery risk assessment. The purpose of this principle is to promote the adoption of risk assessment procedures that are proportionate to the organisation's size and structure and to the nature, scale and location of its activities. But whatever approach is adopted the fuller the understanding of the bribery risks an organisation faces the more effective its efforts to prevent bribery are likely to be.

3.2 Some aspects of risk assessment involve procedures that fall within the generally accepted meaning of the term 'due diligence'. The role of due diligence as a risk mitigation tool is separately dealt with under Principle 4.

Procedures

3.3 Risk assessment procedures that enable the commercial organisation accurately to identify and prioritise the risks it faces will, whatever its size, activities, customers or markets, usually reflect a few basic characteristics. These are:

- Oversight of the risk assessment by top level management.
- Appropriate resourcing – this should reflect the scale of the organisation's business and the need to identify and prioritise all relevant risks.
- Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
- Due diligence enquiries (see Principle 4).
- Accurate and appropriate documentation of the risk assessment and its conclusions.

3.4 As a commercial organisation's business evolves, so will the bribery risks it faces and hence so should its risk assessment. For example, the risk assessment that applies to a commercial organisation's domestic operations might not apply when it enters a new market in a part of the world in which it has not done business before (see Principle 6 for more on this).

Commonly encountered risks

3.5 Commonly encountered external risks can be categorised into five broad groups – country, sectoral, transaction, business opportunity and business partnership:

- ***Country risk:*** this is evidenced by perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
- ***Sectoral risk:*** some sectors are higher risk than others. Higher risk sectors include the extractive industries and the large scale infrastructure sector.
- ***Transaction risk:*** certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
- ***Business opportunity risk:*** such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.
- ***Business partnership risk:*** certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

3.6 An assessment of external bribery risks is intended to help decide how those risks can be mitigated by procedures governing the relevant operations or business relationships; but a bribery risk assessment should also examine the extent to which internal structures or procedures may themselves add to the level of risk. Commonly encountered internal factors may include:

- deficiencies in employee training, skills and knowledge
- bonus culture that rewards excessive risk taking
- lack of clarity in the organisation’s policies on, and procedures for, hospitality and promotional expenditure, and political or charitable contributions
- lack of clear financial controls
- lack of a clear anti-bribery message from the top-level management.

Principle 4
Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Commentary

4.1 Due diligence is firmly established as an element of corporate good governance and it is envisaged that due diligence related to bribery prevention will often form part of a wider due diligence framework. Due diligence procedures are both a form of bribery risk assessment (see Principle 3) and a means of mitigating a risk. By way of illustration, a commercial organisation may identify risks that as a general proposition attach to doing business in reliance upon local third party intermediaries. Due diligence of specific prospective third party intermediaries could significantly mitigate these risks. The significance of the role of due diligence in bribery risk mitigation justifies its inclusion here as a Principle in its own right.

4.2 The purpose of this Principle is to encourage commercial organisations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing on their behalf.

Procedures

4.3 As this guidance emphasises throughout, due diligence procedures should be proportionate to the identified risk. They can also be undertaken internally or by external consultants. A person 'associated' with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section 'Government Policy and section 7', the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship. So, for example, the appropriate level of due diligence required by a commercial organisation when contracting for the performance of information technology services may be low, to reflect low risks of bribery on its behalf. In contrast, an organisation that is selecting an intermediary to assist in establishing a business in foreign markets will typically require a much higher level of due diligence to mitigate the risks of bribery on its behalf.

4.4 Organisations will need to take considerable care in entering into certain business relationships, due to the particular circumstances in which the relationships come into existence. An example is where local law or convention dictates the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

4.5 ‘Due diligence’ for the purposes of Principle 4 should be conducted using a risk-based approach (as referred to on page 27). For example, in lower risk situations, commercial organisations may decide that there is no need to conduct much in the way of due diligence. In higher risk situations, due diligence may include conducting direct interrogative enquiries, indirect investigations, or general research on proposed associated persons. Appraisal and continued monitoring of recruited or engaged ‘associated’ persons may also be required, proportionate to the identified risks. Generally, more information is likely to be required from prospective and existing associated persons that are incorporated (e.g. companies) than from individuals. This is because on a basic level more individuals are likely to be involved in the performance of services by a company and the exact nature of the roles of such individuals or other connected bodies may not be immediately obvious. Accordingly, due diligence may involve direct requests for details on the background, expertise and business experience, of relevant individuals. This information can then be verified through research and the following up of references, etc.

4.6 A commercial organisation’s employees are presumed to be persons ‘associated’ with the organisation for the purposes of the Bribery Act. The organisation may wish, therefore, to incorporate in its recruitment and human resources procedures an appropriate level of due diligence to mitigate the risks of bribery being undertaken by employees which is proportionate to the risk associated with the post in question. Due diligence is unlikely to be needed in relation to lower risk posts.

Principle 5
Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Commentary

5.1 Communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation's procedures and to the organisation's commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation's procedures and deal with any bribery related problems or issues that may arise.

Procedures

Communication

5.2 The content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities.

5.3 Internal communications should convey the 'tone from the top' but are also likely to focus on the implementation of the organisation's policies and procedures and the implications for employees. Such communication includes policies on particular areas such as decision making, financial control, hospitality and promotional expenditure, facilitation payments, training, charitable and political donations and penalties for breach of rules and the articulation of management roles at different levels. Another important aspect of internal communications is the establishment of a secure, confidential and accessible means for internal or external parties to raise concerns about bribery on the part of associated persons, to provide suggestions for improvement of bribery prevention procedures and controls and for requesting advice. These so called 'speak up' procedures can amount to a very helpful management tool for commercial organisations with diverse operations that may be in many countries. If these procedures are to be effective there must be adequate protection for those reporting concerns.

5.4 External communication of bribery prevention policies through a statement or codes of conduct, for example, can reassure existing and prospective associated persons and can act as a deterrent to those intending to bribe on a commercial organisation's behalf. Such communications can include information on bribery prevention procedures and controls, sanctions, results of internal surveys, rules governing recruitment, procurement and tendering. A commercial organisation may consider it proportionate and appropriate to communicate its anti-bribery policies and commitment to them to a wider audience, such as other organisations in its sector and to sectoral organisations that would fall outside the scope of the range of its associated persons, or to the general public.

Training

5.5 Like all procedures training should be proportionate to risk but some training is likely to be effective in firmly establishing an anti-bribery culture whatever the level of risk. Training may take the form of education and awareness raising about the threats posed by bribery in general and in the sector or areas in which the organisation operates in particular, and the various ways it is being addressed.

5.6 General training could be mandatory for new employees or for agents (on a weighted risk basis) as part of an induction process, but it should also be tailored to the specific risks associated with specific posts. Consideration should also be given to tailoring training to the special needs of those involved in any 'speak up' procedures, and higher risk functions such as purchasing, contracting, distribution and marketing, and working in high risk countries. Effective training is continuous, and regularly monitored and evaluated.

5.7 It may be appropriate to require associated persons to undergo training. This will be particularly relevant for high risk associated persons. In any event, organisations may wish to encourage associated persons to adopt bribery prevention training.

5.8 Nowadays there are many different training formats available in addition to the traditional classroom or seminar formats, such as e-learning and other web-based tools. But whatever the format, the training ought to achieve its objective of ensuring that those participating in it develop a firm understanding of what the relevant policies and procedures mean in practice for them.

Principle 6
Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

Commentary

6.1 The bribery risks that a commercial organisation faces may change over time, as may the nature and scale of its activities, so the procedures required to mitigate those risks are also likely to change. Commercial organisations will therefore wish to consider how to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. In addition to regular monitoring, an organisation might want to review its processes in response to other stimuli, for example governmental changes in countries in which they operate, an incident of bribery or negative press reports.

Procedures

6.2 There is a wide range of internal and external review mechanisms which commercial organisations could consider using. Systems set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will help provide insight into the effectiveness of procedures designed to prevent bribery. Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform continuing improvement of anti-bribery policies.

6.3 Organisations could also consider formal periodic reviews and reports for top-level management. Organisations could also draw on information on other organisations' practices, for example relevant trade bodies or regulators might highlight examples of good or bad practice in their publications.

6.4 In addition, organisations might wish to consider seeking some form of external verification or assurance of the effectiveness of anti-bribery procedures. Some organisations may be able to apply for certified compliance with one of the independently-verified anti-bribery standards maintained by industrial sector associations or multilateral bodies. However, such certification may not necessarily mean that a commercial organisation's bribery prevention procedures are 'adequate' for all purposes where an offence under section 7 of the Bribery Act could be charged.

Appendix A
Bribery Act 2010 case studies

Introduction

These case studies (which do not form part of the guidance issued under section 9 of the Act) look at how the application of the six principles might relate to a number of hypothetical scenarios commercial organisations may encounter. The Government believes that this illustrative context can assist commercial organisations in deciding what procedures to prevent persons associated with them from bribing on their behalf might be most suitable to their needs.

These case studies are illustrative. They are intended to complement the guidance. They do not replace or supersede any of the principles. The considerations set out below merely show in some circumstances how the principles can be applied, and should not be seen as standard setting, establishing any presumption, reflecting a minimum baseline of action or being appropriate for all organisations whatever their size. Accordingly, the considerations set out below are not:

- comprehensive of all considerations in all circumstances
- conclusive of adequate procedures
- conclusive of inadequate procedures if not all of the considerations are considered and/or applied.

All but one of these case studies focus on bribery risks associated with foreign markets. This is because bribery risks associated with foreign markets are generally higher than those associated with domestic markets. Accordingly case studies focussing on foreign markets are better suited as vehicles for the illustration of bribery prevention procedures.

Case study 1 – Principle 1
Facilitation payments

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of non-payment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2010.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate:
  - questioning of legitimacy of demands
  - requesting receipts and identification details of the official making the demand
  - requests to consult with superior officials
  - trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official
  - informing those demanding payments that compliance with the demand may mean that A (and possibly C) will commit an offence under UK law
  - informing those demanding payments that it will be necessary for C to inform the UK embassy of the demand.
- Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.
- Use of any UK diplomatic channels or participation in locally active non-governmental organisations, so as to apply pressure on the authorities of B to take action to stop demands for facilitation payments.

Case study 2 – Principle 1
Proportionate Procedures

A small to medium sized installation company is operating entirely within the United Kingdom domestic market. It relies to varying degrees on independent consultants to facilitate business opportunities and to assist in the preparation of both pre-qualification submissions and formal tenders in seeking new business. Such consultants work on an arms-length-fee-plus-expenses basis. They are engaged by sales staff and selected because of their extensive network of business contacts and the specialist information they have. The reason for engaging them is to enhance the company's prospects of being included in tender and pre-qualification lists and of being selected as main or sub-contractors. The reliance on consultants and, in particular, difficulties in monitoring expenditure which sometimes involves cash transactions has been identified by the company as a source of medium to high risk of bribery being undertaken on the company's behalf.

In seeking to mitigate these risks the company could consider any or a combination of the following:

- Communication of a policy statement committing it to transparency and zero tolerance of bribery in pursuit of its business objectives. The statement could be communicated to the company's employees, known consultants and external contacts, such as sectoral bodies and local chambers of commerce.
- Firming up its due diligence before engaging consultants. This could include making enquiries through business contacts, local chambers of commerce, business associations, or internet searches and following up any business references and financial statements.
- Considering firming up the terms of the consultants' contracts so that they reflect a commitment to zero tolerance of bribery, set clear criteria for provision of bona fide hospitality on the company's behalf and define in detail the basis of remuneration, including expenses.
- Consider making consultants' contracts subject to periodic review and renewal.
- Drawing up key points guidance on preventing bribery for its sales staff and all other staff involved in bidding for business and when engaging consultants
- Periodically emphasising these policies and procedures at meetings – for example, this might form a standing item on meeting agendas every few months.
- Providing a confidential means for staff and external business contacts to air any suspicions of the use of bribery on the company's behalf.

Case study 3 – Principles 1 and 6

Joint venture

A medium sized company ('D') is interested in significant foreign mineral deposits. D proposes to enter into a joint venture with a local mining company ('E'). It is proposed that D and E would have an equal holding in the joint venture company ('DE'). D identifies the necessary interaction between DE and local public officials as a source of significant risks of bribery.

D could consider negotiating for the inclusion of any or a combination of the following bribery prevention procedures into the agreement setting up DE:

- Parity of representation on the board of DE.
- That DE put in place measures designed to ensure compliance with all applicable bribery and corruption laws. These measures might cover such issues as:
    - gifts and hospitality
    - agreed decision making rules
    - procurement
    - engagement of third parties, including due diligence requirements
    - conduct of relations with public officials
    - training for staff in high risk positions
    - record keeping and accounting.
- The establishment of an audit committee with at least one representative of each of D and E that has the power to view accounts and certain expenditure and prepare regular reports.
- Binding commitments by D and E to comply with all applicable bribery laws in relation to the operation of DE, with a breach by either D or E being a breach of the agreement between them. Where such a breach is a material breach this could lead to termination or other similarly significant consequences.

Case study 4 – Principles 1 and 5
Hospitality and Promotional expenditure

A firm of engineers ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the following:

- Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.
- Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.
- The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:
    - that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F
    - that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials
    - that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations
    - that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected
    - criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances
    - that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for
    - for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration
    - accounting (book-keeping, orders, invoices, delivery notes, etc).
- Regular monitoring, review and evaluation of internal procedures and compliance with them.
- Appropriate training and supervision provided to staff.

Case study 5 – Principle 3
Assessing risks

A small specialist manufacturer is seeking to expand its business in one of several emerging markets, all of which offer comparable opportunities. It has no specialist risk assessment expertise and is unsure how to go about assessing the risks of entering a new market.

The small manufacturer could consider any or a combination of the following:

- Incorporating an assessment of bribery risk into research to identify the optimum market for expansion.
- Seeking advice from UK diplomatic services and government organisations such as UK Trade and Investment.
- Consulting general country assessments undertaken by local chambers of commerce, relevant non-governmental organisations and sectoral organisations.
- Seeking advice from industry representatives.
- Following up any general or specialist advice with further independent research.

Case study 6 – Principle 4
Due diligence of agents

A medium to large sized manufacturer of specialist equipment ('G') has an opportunity to enter an emerging market in a foreign country ('H') by way of a government contract to supply equipment to the state. Local convention requires any foreign commercial organisations to operate through a local agent. G is concerned to appoint a reputable agent and ensure that the risk of bribery being used to develop its business in the market is minimised.

G could consider any or a combination of the following:

- Compiling a suitable questionnaire for potential agents requiring for example, details of ownership if not an individual; CVs and references for those involved in performing the proposed service; details of any directorships held, existing partnerships and third party relationships and any relevant judicial or regulatory findings.
- Having a clear statement of the precise nature of the services offered, costs, commissions, fees and the preferred means of remuneration.
- Undertaking research, including internet searches, of the prospective agents and, if a corporate body, of every person identified as having a degree of control over its affairs.
- Making enquiries with the relevant authorities in H to verify the information received in response to the questionnaire.
- Following up references and clarifying any matters arising from the questionnaire or any other information received with the agents, arranging face to face meetings where appropriate.
- Requesting sight or evidence of any potential agent's own anti-bribery policies and, where a corporate body, reporting procedures and records.
- Being alert to key commercial questions such as:
  - Is the agent really required?
  - Does the agent have the required expertise?
  - Are they interacting with or closely connected to public officials?
  - Is what you are proposing to pay reasonable and commercial?
- Renewing due diligence enquiries on a periodic basis if an agent is appointed.

Case study 7 – Principle 5
Communicating and training

A small UK manufacturer of specialist equipment ('J') has engaged an individual as a local agent and adviser ('K') to assist with winning a contract and developing its business in a foreign country where the risk of bribery is assessed as high.

J could consider any or a combination of the following:

- Making employees of J engaged in bidding for business fully aware of J's anti-bribery statement, code of conduct and, where appropriate, that details of its anti-bribery policies are included in its tender.
- Including suitable contractual terms on bribery prevention measures in the agreement between J and K, for example: requiring K not to offer or pay bribes; giving J the ability to audit K's activities and expenditure; requiring K to report any requests for bribes by officials to J; and, in the event of suspicion arising as to K's activities, giving J the right to terminate the arrangement.
- Making employees of J fully aware of policies and procedures applying to relevant issues such as hospitality and facilitation payments, including all financial control mechanisms, sanctions for any breaches of the rules and instructions on how to report any suspicious conduct.
- Supplementing the information, where appropriate, with specially prepared training to J's staff involved with the foreign country.

Case study 8 – Principle 1, 4 and 6
Community benefits and charitable donations

A company ('L') exports a range of seed products to growers around the globe. Its representative travels to a foreign country ('M') to discuss with a local farming co-operative the possible supply of a new strain of wheat that is resistant to a disease which recently swept the region. In the meeting, the head of the co-operative tells L's representative about the problems which the relative unavailability of antiretroviral drugs cause locally in the face of a high HIV infection rate.

In a subsequent meeting with an official of M to discuss the approval of L's new wheat strain for import, the official suggests that L could pay for the necessary antiretroviral drugs and that this will be a very positive factor in the Government's consideration of the licence to import the new seed strain. In a further meeting, the same official states that L should donate money to a certain charity suggested by the official which, the official assures, will then take the necessary steps to purchase and distribute the drugs. L identifies this as raising potential bribery risks.

L could consider any or a combination of the following:

- Making reasonable efforts to conduct due diligence, including consultation with staff members and any business partners it has in country M in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product. It could do this by obtaining information on:
  - M's local law on community benefits as part of Government procurement and, if no particular local law, the official status and legitimacy of the suggested arrangement
  - the particular charity in question including its legal status, its reputation in M, and whether it has conducted similar projects, and
  - any connections the charity might have with the foreign official in question, if possible.
- Adopting an internal communication plan designed to ensure that any relationships with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence.
- Adopting company-wide policies and procedures about the selection of charitable projects or initiatives which are informed by appropriate risk assessments.
- Training and support for staff in implementing the relevant policies and procedures of communication which allow issues to be reported and compliance to be monitored.
- If charitable donations made in country M are routinely channelled through government officials or to others at the official's request, a red flag should be raised and L may seek to monitor the way its contributions are ultimately applied, or investigate alternative methods of donation such as official 'off-set' or 'community gain' arrangements with the government of M.
- Evaluation of its policies relating to charitable donations as part of its next periodic review of its anti-bribery procedures.

Case study 9 – Principle 4
Due diligence of agents

A small UK company ('N') relies on agents in country ('P') from which it imports local high quality perishable produce and to which it exports finished goods. The bribery risks it faces arise entirely as a result of its reliance on agents and their relationship with local businessmen and officials. N is offered a new business opportunity in P through a new agent ('Q'). An agreement with Q needs to be concluded quickly.

N could consider any or a combination of the following:

- Conducting due diligence and background checks on Q that are proportionate to the risk before engaging Q; which could include:
  - making enquiries through N's business contacts, local chambers of commerce or business associations, or internet searches
  - seeking business references and a financial statement from Q and reviewing Q's CV to ensure Q has suitable experience.
- Considering how best to structure the relationship with Q, including how Q should be remunerated for its services and how to seek to ensure Q's compliance with relevant laws and codes applying to foreign public officials.
- Making the contract with Q renewable annually or periodically.
- Travelling to P periodically to review the agency situation.

Case study 10 – Principle 2
Top level commitment

A small to medium sized component manufacturer is seeking contracts in markets abroad where there is a risk of bribery. As part of its preparation, a senior manager has devoted some time to participation in the development of a sector wide anti-bribery initiative.

The top level management of the manufacturer could consider any or a combination of the following:

- The making of a clear statement disseminated to its staff and key business partners of its commitment to carry out business fairly, honestly and openly, referencing its key bribery prevention procedures and its involvement in the sectoral initiative.
- Establishing a code of conduct that includes suitable anti-bribery provisions and making it accessible to staff and third parties on its website.
- Considering an internal launch of a code of conduct, with a message of commitment to it from senior management.
- Senior management emphasising among the workforce and other associated persons the importance of understanding and applying the code of conduct and the consequences of breaching the policy or contractual provisions relating to bribery prevention for employees and managers and external associated persons.
- Identifying someone of a suitable level of seniority to be a point-person for queries and issues relating to bribery risks.

Case study 11
Proportionate procedures

A small export company operates through agents in a number of different foreign countries. Having identified bribery risks associated with its reliance on agents it is considering developing proportionate and risk based bribery prevention procedures.

The company could consider any or a combination of the following:

- Using trade fairs and trade publications to communicate periodically its anti-bribery message and, where appropriate, some detail of its policies and procedures.
- Oral or written communication of its bribery prevention intentions to all of its agents.
- Adopting measures designed to address bribery on its behalf by associated persons, such as:
  - requesting relevant information and conducting background searches on the internet against information received
  - making sure references are in order and followed up
  - including anti-bribery commitments in any contract renewal
  - using existing internal arrangements such as periodic staff meetings to raise awareness of 'red flags' as regards agents' conduct, for example evasive answers to straightforward requests for information, overly elaborate payment arrangements involving further third parties, ad hoc or unusual requests for expense reimbursement not properly covered by accounting procedures.
- Making use of any external sources of information (UKTI, sectoral organisations) on bribery risks in particular markets and using the data to inform relationships with particular agents.
- Making sure staff have a confidential means to raise any concerns about bribery.

SFO - Serious Fraud Office

Anti-Corruption Summit 2011, Washington D.C.

05 October 2011

The changing enforcement landscape and its impact on global enterprise

Anti-Corruption Summit 2011, Covington & Burling LLP

1201 Pennsylvania Avenue NW

Washington DC

Wednesday, 5 October 2011

Speech by Richard Alderman

Director, Serious Fraud Office, UK

Good morning

It is good to be here in Washington this morning. It is particularly enjoyable to be here with you to share this anti-corruption summit, which has been organised by Covington & Burling.

I am very grateful to my friends in Covington's for inviting me here today and for the very many helpful contacts we have had on these important issues concerning anti-corruption over the years. It has been an excellent dialogue and we have all benefited from this.

I want to set the context for this address by talking about the policy background to the UK's Bribery Act and what the SFO sees as the key public interest considerations. After that I can talk about a number of specific issues concerning the Act including in particular, how the SFO and the private sector are working together to combat corruption.

I see two important features underlying the Bribery Act and the attack on corruption.

The first is the ethical case. Society has moved on dramatically over the last 20 years and has become increasingly intolerant of corporations that get involved in corruption. It is widely seen as being wrong and corporations that do not understand that are misunderstanding the public mood. This could have serious reputational issues for them.

The ethical case has been demonstrated dramatically this year as well by the events that we have been seeing in a number of North African countries together most recently with the events we have seen in India as well as China. It is abundantly clear that the citizens of societies where there is endemic corruption are increasingly intolerant of this. Corruption has featured as an important part of the various protests that I have been following during the course of this year. Corruption is up there with lack of democracy in a number of countries, lack of accountable institutions, the lack of jobs particularly for young people and lack of transparency.

What we are also seeing increasingly is the use of social media in reporting and commenting on instances of corruption. There are websites in India and China that are proving to be very effective here. I have commented before on the potential for the growing use of Facebook and Twitter for reporting demands for or offers of bribes straightaway. The power of this is very great. A corporation that offers a bribe or a foreign official who demands one could suddenly find that they have worldwide notoriety in less than a second. This should make anyone pause and think.

Corporations that do not recognise all of this are taking serious risks in my view not least because they are closing their eyes to political and reputational risk and all that that entails. For example, like many others no doubt, we are looking through WikiLeaks to see what this can tell us about contracts that were entered into in the past. As corporations enter into contracts now they need to think about what those contracts could look like perhaps under a successor government or even after regime change.

What I also emphasise is that anti-corruption (and the UK's Bribery Act) should be seen as part of fair competition. We have many good companies in the UK (and I know that there are many gold standard corporations in the US) who have zero tolerance for corruption. They do not want to find that they are undermined competitively by those who seek to use corruption to obtain a business advantage in negotiations.

I believe very strongly that we owe it to those corporations to enforce the law very vigorously in respect of those who seek to use corruption. In this way, we can ensure that corporations can compete on the basis of the quality and the price of what they offer and not on the basis of some shady deal involving money being paid covertly.

This is, of course, good for the corporations as well as for the relevant societies for various reasons. Corruption with its lack of transparency, brings about all sorts of undesirable features in a corporation including falsification of documents and accounts. Long-term sustainable businesses cannot be built on that basis. In the SFO I believe very strongly that we are in the business of helping to create growing businesses that are built on strong ethical foundations. Ultimately, all of us in society depend on this. Without this, the business will at some stage, in my view, end because of some severe reputational issue or because the accounts unravel.

Of course, all of this is good as well for societies. We see many cases where the result of taking off a few percentage points for this person and a few more for that person means that the money available for the goods or services for the poorer citizens of other countries is significantly reduced and so what is provided is very much substandard (and sometimes dangerous).

I emphasise these points because it is important that you understand the mindset of the SFO if you come to have discussions with us. You will find on our part the determination to fight corruption and a readiness to engage with you on ways in which that can be done because we believe in supporting ethical corporations.

Let me give you one example of that before I pass on to some more specific Bribery Act issues.

A feature of our work that has become increasingly important is the work we do with corporations on the difficult issues they are confronting in particular jurisdictions where corruption is endemic. Corporations come to us and tell us they do not wish to pay bribes. They ask for our help. Quite often, this concerns facilitation payments. It can be a particular problem for US corporations because these payments are lawful under the FCPA in certain circumstances but are unlawful under our Bribery Act and our previous law.

What we have been doing is to encourage corporations to work together and with us and other authorities in order to try to work on the underlying problem. I have been very impressed by what a number of corporations have been doing. They come to me to tell me what they are doing because they are slightly nervous that the SFO will pick this up and may even start making enquiries or investigate. This is not what we want to do. If there is a genuine attempt being made to solve the problem of corruption then I want to let the corporations get on with that so far as possible and indeed to provide any help that I can in the SFO.

We have had a number of discussions of this nature. I do not underestimate the difficulties here and the constraints. It appears to me though to be absolutely the right thing to do. This is because in my view one of the likely issues in the coming years is not going to be what we do about the supply side of bribery, but what happens about the demand side of bribery. It is an issue that I am concerned about in the SFO and one where I want us to contribute.

Let me now turn to the UK's Bribery Act. This came into force on July 1st following publication two months before that of detailed guidance by the UK's Ministry of Justice about adequate procedures together with guidance by our Director of Public Prosecutions and me on prosecution policy. Even before July 1st, as you will know, there was great activity concerning the Bribery Act and what should be done in order to put in place the right procedures.

The Bribery Act creates a new offence at the corporate level of failing to prevent bribery. The defence to this is that there are adequate procedures to prevent that bribery. Let me emphasise that this is a complete defence. It is not a matter of mitigation. If an act of bribery occurs somewhere in your worldwide corporation and you had adequate procedures, then no criminal offence has been committed. This is something that has been reassuring to corporations.

Of course what this means is that there has been great interest in the meaning of adequate procedures. The guidance from our Ministry of Justice sets out the UK Government's approach to this in considerable and to my mind, helpful detail. Let me though give you a flavour of what you might expect if you came to us to talk about your adequate procedures. I should add here that many corporations do that. You may find this surprising but we do have a regular succession of corporations coming to the SFO to seek our views on their procedures and what they are doing. We stress that we can give no guarantee and certainly no certificate to the effect that their procedures are adequate but we are able to give them helpful advice. The feedback we get is that these are positive and pragmatic discussions.

Some of the themes you will hear from us will be these. First, what is the approach of the most senior management in the corporation? They set the lead. Employees of corporations are very shrewd. They know what really matters to top management. They will know if something matters or does not matter. We will want to know therefore what top management is doing in order to ensure that the importance of good ethical business is known to every member of that company. We hear for example of contracts that corporations do not enter into because they could be secured only by corruption. This is a good practical example of the importance placed upon anti-corruption. There are others as well.

We also want to know about risk assessment. This is something that corporations ought to be doing anyway but my own perception is that this has been intensified because of the Bribery Act. How do you assess the risks in your corporation? Is this simply a paper and routine exercise or is it genuine? It certainly ought to be genuine because this could bring down your corporation if you get it wrong and overlook some key risk.

We will want therefore to talk through your risk assessment process. We shall of course be particularly interested if you find you have a considerable problem about something that was not flagged up in the risk assessment. This may or may not mean that the risk assessment process was flawed. We want to know what you are doing about this and indeed how you are developing the risk assessment process in future. We will offer any thoughts we have about any risks you should be thinking about but are not.

What we will also want to be sure about is this. Please take it from me that simply handing us a large pile of documents with lots of boxes ticked on checklists will not be enough to satisfy us that you have adequate procedures. That is a paper exercise. It is part of what is needed but only part. We shall want to know what lies behind this and what the real issues are. Personally, I believe we are not alone in wanting to know this. When we are talking about corruption with all the reputational issues that are involved here, senior management should actually be asking exactly the same questions that the SFO will be asking in this respect.

I have mentioned that corporations come and talk to us about all of these issues. Please feel free to contact us if you would find this helpful in order to talk through what you are doing. It is not a threatening process and please do not worry that if you came to us and expressed a few doubts about whether your procedures are adequate that you would find yourself on the wrong end of a prosecution before you left the SFO building. This simply does not happen. The object of these discussions is to be constructive and supportive. I hope you will find that if you approach us.

One other issue which corporations are increasingly coming to talk to us about concerns their potential liability under the extended reach of our Bribery Act. If your corporation carries on business or any part of its business in the UK then you are within the reach of the Bribery Act. This is all part of the competition agenda. UK corporations that have a good ethical culture should not be at risk of being undermined by corporations in other countries that use corruption in order to obtain a business advantage over them. I personally feel this very strongly and want to see vigorous action by the SFO here.

That message has undoubtedly got across to corporations in a number of different countries. I know that the profile of the Bribery Act in those countries amongst corporations and advisors is becoming increasingly important. I welcome this. This enables us to support our good ethical corporations.

I have said in public on a number of occasions that proceeding against foreign corporations under the Bribery Act for corruption committed in other countries is a high priority for the SFO. What we are actively looking for is a case where a foreign corporation (with a UK business presence) has disadvantaged a good ethical UK company by using corruption in another country. This is likely to have had a detrimental impact on the UK company with a possible loss of jobs in the UK. There is therefore a very strong UK public interest in an investigation in those circumstances.

These are cases I want to bring before the UK courts. We are reaching out to companies, whistleblowers, NGO's and many others for information in respect of these transactions and we have already received some interesting information. We are currently having to consider whether the appropriate response in certain cases is to reach out to the company for a discussion or whether to commence a formal investigation. You will I am sure hear much more of this in the time to come.

I want finally in this overview of what is happening, to talk about mergers and acquisitions. I know how important this subject is. Some time ago we said publicly in the SFO that we were prepared to assist corporations that were in the process of carrying out a merger or acquisition and discovered problems during the course of due diligence. We made this willingness clear about two years ago although I have to say that there was little take up at that stage. That seems to be changing now. I have been struck in recent months by the fact that a number of corporations have been to see us about some sensitive potential acquisitions where they are identifying some real issues about corruption during the course of due diligence.

Ultimately, the decision about an acquisition is a commercial one and will involve an analysis of risk and reputation as well as many other issues. The corporation and its advisors though want to try to manage the regulatory risk so far as possible by seeking views from the SFO. We have been ready to engage in this. What we do is to talk to the corporation and its advisors about what they are finding and what they propose to do about it if the acquisition takes place. It is quite clear to me as a result of the discussions that a negative response from the SFO is sufficiently important to put the acquisition in jeopardy. On the other hand, a positive view from us on the basis of what the corporation intends to do could enable the acquisition to go ahead.

My view on this, simply stated, is that society benefits if an ethical corporation takes over and sorts out a corporation that has corruption problems. It is something I am keen for the SFO to promote, so far as we legitimately can. There are lots of practical and legal issues emerging from this concerning corporations and indeed individuals, which I do not have time to go into at this stage although they might come up during the question and answer session.

Let me conclude by summarising again what the SFO approach is in respect of corporations whether based in the UK or in other countries. First and foremost, we wish to support good ethical corporations that are endeavouring to do what is right in very difficult circumstances. It seems to me that the public interest is firmly in support of providing that level of engagement to corporations and providing them with assistance in getting it right. This promotes growth in the economy and jobs.

This promotes as well an ever increasing ethical culture because gold standard corporations will want to see that corporations that do business for them also live up to that gold standard.

What this means for the SFO is detailed discussions with corporations about this and a level of trust on both sides which, I personally believe, is developing.

The next part of the SFO's approach is enforcement. There will always be those who do not want to comply with the law and indeed see great advantages in operating outside the law. In my view only a criminal investigation and prosecution will remedy this. I do not believe for one moment that the good ethical corporations I see daily will engage in this type of activity but there are, no doubt, others who would wish to do so. Enforcement is necessary in these circumstances and we give a high priority to this.

I am grateful that Covington's have given time for a question and answer session. I shall be interested in your own views on the issues that there are under our Bribery Act. However, let me conclude by thanking Covington's once again for organising this prestigious conference and for inviting me to be here today.

Thank you very much.

FINANCIAL FRAUD LAW REPORT

VOLUME 4 NUMBER 1 JANUARY 2012

The FINANCIAL FRAUD LAW REPORT is published 10 times per year by A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207, For subscription information and customer service, call 1-800-572-2797. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., PO Box 7080, Miller Place, NY 11764, smeyerow@optonline.net, 631.331.3908 (phone) / 631.331.3664 (fax). Material for publication is welcomed — articles, decisions, or other items of interest. POSTMASTER: Send address changes to the Financial Fraud Law Report, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207. *ISSN 1936-5586*

Understanding The U.K. Bribery Act and How Liability Arising Thereunder May Be Limited

CARLOS F. ORTIZ AND MADELEINE MOISE CASSETTA

The authors of this article explain certain highlights of the U.K. Bribery Act 2010, its requirements and the potential consequences in the absence of effective compliance programs. In addition, the authors compare the Act to the Foreign Corrupt Practices Act and describe its impact on businesses.

The U.K. Bribery Act 2010 (the "Act") casts a deeper, wider net than ever in pursuit of bribery offenses. British business organizations as well as international business organizations with subsidiaries in the U.K. or just conducting business in the U.K. are subject. Under the Act, companies and even senior officers may be held liable for bribes paid by employees or agents outside the U.K. unless the particular company can demonstrate, for example, that it had in place adequate procedures to prevent bribery.

As the Act differs significantly from the Foreign Corrupt Practices Act ("FCPA") in certain aspects, as will be highlighted herein, business organizations subject to the Act need to ensure that their anti-bribery programs are compliant also under the Act. This requires an understanding of the Act, its requirements and the potential consequences in the absence of ef-

Carlos F. Ortiz is a shareholder and head of the Investigations, Compliance and White Collar Criminal Defense Practice Team at LeClairRyan. Madeleine Moise Cassetta is an associate, at LeClairRyan. The authors may be contacted at carlos.ortiz@leclairryan.com and madeleine.cassetta@leclairryan.com, respectively.

Published by A.S. Pratt in the January 2012 issue of the *Financial Fraud Law Report*

fective compliance programs, which are briefly discussed below. Although many questions are yet to be answered by the U.K. courts, the six principles developed by the U.K. government and the guidance provided by Richard Alderman, the Head of the Serious Fraud Office ("SFO"), with respect to the Act's reach and implementation provide a good start for ensuring adequate compliance procedures for a proper anti-corruption program.

BACKGROUND

Prior to July 1, 2011, U.K. operated under outdated anti-corruption legislation, which had been little developed over 90 years. On July 1, 2011, the Act, which — as its title clearly reveals — is concerned with bribery, went into effect. Since it received Royal Assent in April 2010, the Act and its possible implications for overseas companies have been widely discussed, criticized and feared; and, rightly so. While the U.K. Justice Minister tried to ease the fears of foreign companies, Mr. Alderman sent out a clear warning: "You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK."[1]

HIGHLIGHTS OF THE ACT

The act of "bribery" is defined as: (1) offering, promising, giving a financial or other advantage to another person with the intent to induce that person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity; and (2) offering, promising, or giving a financial or other advantage to another person, knowing or believing that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.[2]

The Offenses

The Act sets out a total of four offenses — two general offenses: (1) that of bribing, and (2) of being bribed; and two new offenses: (1) bribing a foreign public official, and (2) failing to prevent bribery (the corporate offense). While all four offenses are important, certainly, the two new offenses are most concerning to foreign companies and, therefore, merit a careful overview.

The Offense of Bribing a Foreign Public Official

In determining who is a foreign public official ("FSO"), the SFO uses, as a starting point, the test set out by the Organization for Economic Cooperation and Development ("OECD") in connection with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions from 1998, *i.e.*, whether or not the foreign state is in a position to influence the foreign company.[3] For example, banking officials in countries where the state has a major stake in the bank and is actively involved in the operations of the bank, are likely to be considered foreign public officials.[4]

The offense[5] is committed when a person bribes or offers an advantage to an FSO:

- With the intention of influencing him or her in that capacity;
- In order to obtain or retain business or advantages in the conduct of business; and
- Local law does neither permit nor require the FSO to be so influenced.

Thus, to commit the offense of bribing an FSO, it is not necessary that the person offering the advantage intends that the FSO act "improperly." It suffices that the advantage is given to influence the FSO and there is no applicable written local law permitting the FSO to be so influenced.

The Corporate Offense

This offense is set out in Section 7, and deals with "relevant commercial organizations," defined as a body or partnership incorporated or formed in the U.K. irrespective of where it carries on business, or an incorporated body or partnership, which carries on a business or part of a business in the U.K. irrespective of the place of incorporation or formation.[6] Thus, as the Ministry of Justice summarized in its published Guidance, "[t]he key concept here is that of an organization which 'carries on a business.'"[7] And, although the government speaks in terms of "common sense" in determining whether or not an organization carries on business in the U.K., the courts will be the ultimate arbiter of that, taking into account the particular facts in each individual case. It should, however, be noted that the U.K. courts have in prior examples, albeit under the Financial Services and Markets Act 2000, applied a rather low threshold to overcome the carrying on business in the U.K. test.[8]

A business organization is liable if a person "associated" with it bribes another person, intending to obtain or retain business or a business advantage for the organization. The Act defines a person "associated" with a business organization as a person, either an individual or an incorporated or unincorporated body, who "performs services" for or on behalf of the organization.[9] Section 8 of the Act clarifies that the capacity in which the person acts is irrelevant, meaning that employees, agents, and subsidiaries may be considered to perform services for an organization — an issue to be determined by considering all relevant circumstances.[10] The government provides the examples of contractors, suppliers, and separate legal entities in joint ventures as possible embodiments of an "associated" person in certain circumstances.[11]

There must be proof of intent to obtain, or retain business or any other advantage in the conduct of business for liability to accrue. For example, the government explains that

> a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the parts of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe.[12]

Furthermore, the government has acknowledged that in certain circumstances, individuals are left with no choice but to make the payment in order to protect against loss of life, limb, or liberty. In such cases, the government has explained that the common law defense of duress may be available.[13]

The Liability of Senior Officers

According to Section 14 of the Act, if an offense under Sections 1, 2 or 6 has been committed with the "consent and connivance" of any "senior officer" or "a person purporting to act in such a capacity," that person may be guilty of the same offense committed by the organization.[14] The Act explains, however, that such liability cannot be imposed "unless the senior officer or person has a close connection with the United Kingdom."[15] A person is considered to have a close connection with the U.K., if and only if at the time the act or omission was done or made, he or she was, inter alia, a British citizen or resident or a body incorporated under the law of any part of the U.K.[16] "Senior Officer" is defined as "a director, manager, secretary or other similar officer."[17]

Facilitation Payments

Under the FCPA, facilitation payments, or what is commonly known as "grease payments" are exempted. This is not so under the Act. Under the Act, liability for such payments could be triggered under either Section 6 or Section 1, dealing with the general offenses of bribery, and, therefore, potentially also under Section 7. However, although facilitation payments are illegal, given the prosecutorial guidelines recently promulgated with respect to the offenses under the Act, it is uncertain whether offenses will be prosecuted unless the facilitation payments are seen as systemic or symptomatic of a wider lack of adequate procedures at the corporate level.[18] Nevertheless, it may be advisable as good practice for companies to prohibit such payments and to work to identify and eliminate them, or at least to document any attempts to that effect.

Hospitality Payments

Similar to the FCPA, the Act does not ban hospitality payments as long as they are "sensible and proportionate" under the circumstances.[19]

Thus, proper judgment should be used in connection with promotional or other business expenses seeking to improve the image of an organization, present products or services, or establish cordial relations.

Penalties[20]

The penalties for breaching the provisions of the Act are raised significantly by the new law. The Act provides that an offense committed by a body is punishable by an unlimited fine, while an individual guilty of an offense may be convicted to imprisonment for a term not exceeding 10 years, or a fine, or both. Businesses also risk being debarred from competing for public contracts under the Public Contracts Regulations 2006[21] (which gives effect to EU law in the U.K.) and incurring negative publicity and damage to their reputation.

The Reward of Being Proactive

The Act is not all about punishment. It also contains incentives to organizations to develop policies to prevent bribery. Most importantly, organizations with appropriate policies and procedures in place may assert the defense of "adequate procedures" as explained in Section 7(2). And, while the determination of what counts as "adequate procedures" is dependent on the nature, size, and complexity of a business, the U.K. government has developed six principles to help organizations decide whether there is anything that they need to do differently.

1. Proportionate Procedures

Organizations should implement procedures that are proportionate to the bribery risks it faces, and the nature, scale and complexity of its activities.

2. Top Level Commitment

Proving "adequate procedures" requires the commitment to an anti-corruption culture that comes from the board of directors down. Policies should be visible both within the organization and to external partners and subsidiaries.

3. Risk Assessment

Businesses must understand the risks they face in their particular operations, specifically with respect to the geographical location and type of transaction. For example, activities undertaken in some developing countries are likely to warrant a higher degree of investigation and consideration.

4. Due Diligence

Due diligence must be employed to identify the potential risks, including enquiring about intended transaction partners and agents, and the risks posed specifically by the geographical location or sector of the intended operation.

5. Communication (including training)

The policies and procedures must be promulgated throughout the organization, backed by training, if appropriate, and clear penalties for breach.

6. Monitoring and Review

Policies should be reviewed periodically to ensure they develop in light with business needs.

PROSECUTION AND ENFORCEMENT

Prosecuting an offense under the Act is a matter for the prosecuting authorities and will follow the same guidelines and procedures as for any other criminal offenses. In March 2011, the SFO and the Director of Public Prosecutions published a joint guidance for prosecutors for offenses under the Act. Thus, as will any other criminal offenses, prosecutions under the Act must pass the two-stage test in the Code for Crown Prosecutors: (1) the evidential stage, and (2) the public interest stage.[22] The general rule is that if a conviction is not more likely than not, prosecutors should not go on to consider whether a prosecution is in the public interest, no matter how serious or sensitive the matter is. Moreover, the Guidance on Corporate Prosecutions includes self-reporting as a public interest factor weighing against prosecution (under stage 2).

It should also be noted that unlike in the U.S., the U.K. procedure does not permit deferred prosecution agreements. Instead, the U.K. courts retain their discretion to sentence guilty defendants as they see fit. In fact, in some recent cases, the courts have criticized the SFO for trying to push "agreed" fines through the court process.[23]

HOW DOES THE ACT COMPARE TO THE FCPA?

It cannot be denied that the Act is broader than the FCPA in a number of ways. Table 1 contains a comparison of the Act and the FCPA.

Most notably, of course, is the absence of the defense for facilitation payments in the Act. Also, the FCPA does not contain an equivalent to the corporate offense for failing to prevent bribery (although it does include provisions regarding the keeping of books and records that accurately reflect business transactions and the maintenance of effective internal controls). Moreover, unlike the FCPA, the Act does not require proof of "corrupt" intention.

Finally, of importance is also the lack of the "opinion procedure" available under the FCPA, although the SFO has indicated that it may be sympathetic to such an approach where overseas corruption is discovered in the context of due diligence carried out in an M&A transaction.[24] In fact, Mr. Alderman indicated that, where an acquiring company discovers corrupt activities in the target company, either before or after the transaction, the SFO's doors are open for discussion so that companies "come and talk to us about it so that they can have the assurance that...they will be left to get on and sort out these problems in their own way in order to ensure a proper ethical culture in the target company."[25]

IMPACT ON BUSINESS

No business sector may escape the reach of the Act—be it in the retail, pharmaceutical, financial or any other sector. Companies need to perform careful due diligence on third parties that act on their behalf. For example, rather recently, Mr. Alderman warned the U.K. pharmaceutical industry, noting that both the U.S. Department of Justice and the SFO are keeping it on the radar. In his words, Mr. Alderman cautioned that "*the amount of information sharing that goes on between [SFO] and the DOJ and the SEC about all these issues*" should not be underestimated.[26] Therefore, companies subject to the Act need to carefully review their anti-corruption policies, internal controls and overall compliance in this regard.

NEXT STEPS

Although it remains to be seen how aggressively and expansively the U.K. authorities will interpret and implement the Act's provisions, companies with a U.K. presence, which have not yet looked into their operations or implemented the necessary changes to comply with the new law, should act quickly. In particular, a review of the policies and procedures in place in light of the six guiding principles is more than warranted. Drafting a good faith written compliance program based upon the risk assessment performed and planning for its implementation may be the type of concrete steps the SFO would want to see. In sum, companies would be well served to be able to demonstrate that they have taken the adequate steps to prevent acts of bribery from taking place in connection with their operations.

Table 1: Comparison of main provisions of the FCPA and the U.K. Bribery Act 2010

Provisions	FCPA	Bribery Act
Jurisdiction	U.S. companies and citizens; foreign companies listed on U.S. stock exchange; any person acting while in the U.S.	U.K. nationals or residents and organizations that are established in the U.K., incorporated in the U.K., or conduct part of business in the U.K.
Private-to-private bribery	No.	Yes. The act applies to the private as well as to the public sector with the exception of the *Foreign Public Official* (FSO) offense in Section 6.
Receipt of a bribe	No.	Yes.
Bribery of FSO	Yes.	Yes.
Failure to prevent act of bribery (corporate strict liability)	No.	Yes, unless "adequate procedures" are in place designed to prevent bribery.
Intent	Yes. The defendant must have acted "corruptly," "willfully" and "knowingly." Knowledge includes "willful blindness."	Mixed. Section 1, 2 and 6 offenses require some kind of intent, while the FSO offense in Section 7 does not require intent.

Facilitation Payments	Permitted under limited circumstances, e.g., in the performance of a "routine governmental action."	Not permitted.
Business Promotion Expenses	Permitted if they are reasonable and bona fide.	Although neither specifically permitted nor prohibited, appear to be permitted as long as reasonable and proportionate.
Failure to keep accurate books and records	Yes.	Not specifically covered by the Act, but may constitute a failure to have "adequate procedures" in place.
Third party liability	Yes.	Yes.
Allowable under local law defense	Yes.	In the case of an FSO offense, no violation of the Act if permissible under written laws of foreign country; otherwise, only a factor to be considered)
Penalties	Business organizations: criminal fine of up to $2,000,000 per violation. Individuals: criminal fine of up to $250,000 per violation and imprisonment for up to five years.	Business organizations: unlimited fines. Individuals: up to 10 years imprisonment and unlimited fines.
Statute of limitations	Five years.	None.

NOTES

[1] Russel, Jonathan, The Telegraph, "Serious Fraud Office risks clash with Ministry of Justice over Bribery Act," July 1, 2011, *available at* http://www.telegraph.co.uk.finance/yourbusiness/bribery-act/.

[2] U.K. Bribery Act, 2010, § 1(2), (3).

[3] Alderman, Richard, Director, Serious Fraud Office, Address at Debevoise & Plimpton LLP, Private Equity and the UK Bribery Act (June 21, 2011), http://www.sfo.gov.uk (follow "About Us" hyperlink; then follow "Director's speeches — Speeches 2011" hyperlink).

[4] *Id.*

[5] U.K. Bribery Act, 2010, § 6.

[6] *Id.*, § 7(5).

[7] U.K. Ministry of Justice, The Bribery Act 2010, Guidance about procedures which relevant business organizations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010) ("Guidance") p. 11, ¶ 34 (2011).

[8] *See, e.g., Financial Services Authority v. Fradley* [2005] EWCA Civ 1183. In *Fradley*, the defendant was running a horseracing betting arrangement out of Ireland. The FSA submitted that defendant continued to carry on business in the U.K. because he continued to maintain a bank account and an accommodation address in the jurisdiction. Additionally, many of the investors were residents in the U.K. The court concluded that "the communications with clients and prospective clients, and the maintenance of a bank account and an accommodation address, all of which took place in the United Kingdom, were all business activities…of sufficient regularity and substance to constitute the carrying on of business here…." *Id.* ¶ 53.

[9] U.K. Bribery Act, 2010, § 8.

[10] *Id.*, § 8(5).

[11] *See* Guidance, *supra* note 7, pp. 16-18, ¶¶ 37-43.

[12] *Id.*, p. 17, ¶ 42.

[13] *Id.*, p. 19, ¶ 48.

[14] U.K. Bribery Act, 2010, § 14(2).

[15] *Id.*, § 14(3).

[16] *Id.*, § 12(4)(a)-(i).

[17] *Id.*, § 14(4)(a).

[18] Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious

Fraud Office and the Director of Public Prosecutions (2011), *available at* http://www.sfo.gov.uk (follow "Press Room" hyperlink; then follow "Latest releases 2011; then follow Press releases 2011).

[19] As Mr. Alderman explained, "What is sensible and proportionate will need to be judged by reference to who you are talking about and what is generally regarded as acceptable and safe practice. When we are talking about senior individuals in large pension funds or Sovereign Wealth Funds, then you would not expect to put them up at very modest hostels after traveling Economy.... However...I would not expect you...to arrange a business trip of a few days for these individuals, followed by a month at your private island somewhere, which has a warm climate and excellent golf and fishing." Alderman, *supra* note 3.

[20] U.K. Bribery Act, 2010, § 11.

[21] The 2006 Regulations do not currently include the crime of failure to prevent bribery.

[22] U.K. Crown Prosecution Services (CPS), The Code for Crown Prosecutors, p. 7, ¶ 4.1 (Feb. 2010), *available at* http:cps.gov.uk/publications (follow "Code for Crown Prosecutors" hyperlink).

[23] *See R v. Innospec Limited* [2010] EW Misc 7. In paragraph 26 of the Sentencing Remarks of Lord Justice Thomas, the judge wrote: "[i]t is clear, therefore, that the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect to the offense charged [as the] imposition of a sentence is a matter for the judiciary." The judge further concluded that "the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again." It should be noted that the judge ultimately upheld the fine due to the extensive negations conducted in the case.

[24] U.K. Serious Fraud Office, *Approach of the Serious Fraud Office to Dealing with Overseas Corruption*, ¶ 24 (July 2009), *available at* http://sfo.gov.uk.

[25] Alderman, Richard, Director, Serious Fraud Office, Address at Kingsley Napley & Carmichael Fisher, Breakfast Seminar (June 21, 2011), http://www.sfo.gov.uk (follow "About us" hyperlink; then follow "Director's speeches — Speeches 2011" hyperlink).

[26] Alderman, Richard, Director, Serious Fraud Office, Address at the Association of the British Pharmaceutical Industry Legal Day (Oct. 4, 2010), http://www.sfo.gov.uk (follow "About us" hyperlink; then follow "Director's speeches — Speeches 2010" hyperlink).