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The Foreign Corrupt Practices Act

An Examination of Cases and Enforcement Actions

By Brittany Zeske and
Michael D. Akers

Recently, two American companies came into conflict with the Foreign Corrupt Practices Act (FCPA). The first, Avon Products Inc., began an internal investigation in 2008 regarding possible bribery payments, including travel and entertainment expenses, to officials in China. Now, Avon's investigation is widening to uncover possible payments to officials in Argentina, Brazil, India, Japan, and Mexico from 2004 to 2010. Avon is also performing compliance reviews in various markets. It disclosed the investigation and is cooperating with the SEC and the U.S. Department of Justice (Ellen Byron, "Avon Bribe Investigation Widens," *Wall Street Journal*, May 5, 2011, pp. B1-B2). The second company, Lindsey Manufacturing Co., was recently convicted in a bribery case for violating the FCPA. Lindsey Manufacturing and two of its executives used Mexican sales agents to pay bribes to officials at the Comisión Federal de Electricidad (CFE), a Mexican state-owned utility from which Lindsey Manufacturing sought business. This conviction marks the "first time a company has been convicted at a U.S. trial in a foreign bribery case" (Samuel Rubinfeld, "Conviction in Foreign Bribery Case Is First in U.S. Trial," *Wall Street Journal*, May 11, 2011, p. B4). Prior to this, companies either pleaded guilty or signed a deferred prosecution agreement.

These two cases point to the increased attention to enforcement of the FCPA by the Department of Justice and the SEC. Leaders from both the accounting and legal professions suggest that some reasons for this increased attention to FCPA enforcement are intolerance of fraud and corruption, the Sarbanes-Oxley Act of 2002 (SOX), and growth into remote areas of the world where bribes are accepted business practices.

This article examines the court cases filed by the Department of Justice against



individuals and corporations involving violations of the FCPA from 1998 through 2010. An analysis of these cases provides useful information for the auditors of international clients as well as the management of such organizations.

A Historical Perspective

In the mid-1970s, the SEC performed investigations that resulted in more than 400 American companies admitting to making payments that were illegal, or possibly illegal, to foreign government officials, politicians, and political parties. These payments totaled more than \$300 million. The findings from this investigation diminished public confidence in the integrity of American corporations.

These investigations spurred the SEC to pass the FCPA in 1977. It was enacted to put an end to payments being made to bribe foreign officials and to restore public confidence in American businesses. The provisions of the FCPA "make it unlawful for a U.S. person, and certain foreign issuers of securi-

ties, 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." This antibribery provision applies to both privately held and publicly traded companies. The FCPA also requires companies whose securities are listed in the United States to meet certain accounting provisions, which require corporations covered by the antibribery 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" (www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf). In 1998, the FCPA was amended by the International Antibribery and Fair Competition Act. The 1998 amendments extended antibribery provisions to also apply to foreign firms and persons who participate in corrupt payments while in the United States.

There are five elements to be met in order for a violation of the FCPA to occur.

First, the person making the payment can be either a firm or an individual. Individuals include officers, directors, and employees. Issuers are corporations that have issued securities that are registered in the United States or corporations that need to file reports with the SEC. Since the 1998 amendments, foreign companies and individuals can also be held liable under the FCPA. U.S. parent corporations may be held responsible for corrupt payments made by their foreign subsidiaries. Second, the action must involve “corrupt intent”—that is, the person making the payment must have the corrupt intent to cause a foreign official to act wrongfully in his position. The third element requires that a payment is made or that an offer or promise to pay is made; this includes offering not only money, but also anything else of value. Fourth, the recipient must be a “foreign official, a foreign political party or party official, or any candidate for foreign political office” in order to cause a violation of the FCPA. Lastly, there is a business purpose test to determine whether the payment was made to obtain or retain business, which is prohibited. In such cases, the resulting business does not necessarily have to be with the foreign government or government instrumentality (www.justice.gov/criminal/fraud/fcpa/docs/law-persons-guide.pdf).

International Initiatives

There has also been increased attention toward corrupt payments internationally. Countries in North America, South America, Europe, Asia, Southeast Asia, and the Pacific Rim have foreign anticorruption laws. The United States, for example, ratified the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 1998. The OECD Convention provides elements that a foreign corrupt practices statute should include. Both Canada and Mexico have implemented the OECD Convention—in Canada through adoption of the Corruption of Foreign Public Officials Act (46-47 Elizabeth II Ch. 34) and in Mexico through amendments to its Federal Penal Code. Both of these laws set forth penalties for bribing foreign officials. In South America, Argentina is the only country with foreign anticorruption laws, enacted under the Statute on Ethics in the Exercise of Public Office in 1999, which amended Argentina’s Penal Code to criminalize bribery of foreign officials. There are 23 countries in Europe that have enacted anticorruption laws: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, and the United Kingdom. Twenty of these countries amended their existing laws or enacted new legislation in order to implement the OECD Convention. Lithuania did not implement the OECD Convention; however, it participates on the Council of Europe Criminal Convention on

Corruption and it adopted a new Criminal Code in 2000. Lastly, there are countries in Asia, Southeast Asia, and the Pacific Rim that have FCPA initiatives. Japan, New Zealand, and South Korea have implemented the OECD Convention by amending or enacting legislation to criminalize bribery of foreign officials and to penalize those actions. Australia also amended its Criminal Code Act of 1995 by enacting the Criminal Code Amendment (Bribery of Foreign Public Officials) in 1999 to implement the Convention (www.fcpaenforcement.com/documents/documents.asp?PAGE=4).

There have also been international agreements put into place to enforce the FCPA, including the U.N. Convention Against Corruption, the African Union Convention on Preventing and Combating Corruption, the Organization of American States (OAS) Convention, and the OECD Convention; however, this is not an exhaustive list of the international agreements that exist (see www.fcpaenforcement.com/documents/documents.asp?PAGE=4).

The United Kingdom intensified its battle against corruption with the passage of the 2010 U.K. Bribery Act. This act, which became enforceable in July 2011, covers activities of any person or third parties acting on behalf of a business, such as employees, agents, or subsidiaries. This legislation is more extensive than the FCPA because it pertains to all bribery, whether public or private. The four offenses in the U.K. Bribery Act include bribing a foreign public official and the failure to prevent bribery. And because the U.K. legislation is more extensive than the FCPA, U.S. businesses need to understand that compliance with the FCPA

EXHIBIT 1 Foreign Corrupt Practices Act (FCPA) Court Cases

Year	Number of Cases
1998	4
1999	2
2000	0
2001	6
2002	4
2003	5
2004	5
2005	6
2006	7
2007	19
2008	23
2009	34
2010	31
Total	146

EXHIBIT 2 Perpetrators

Position of Perpetrator	Number Involved
President or Officer	47
Vice President	20
Director	17
Manager	9
Employee	13
Corporation ¹	74

¹For companies whose securities are listed in the United States, no specific individual was charged; instead, the company itself was charged.

The total exceeds 146 because some cases involved multiple individuals or corporations.

EXHIBIT 3
2010 Corruption Perceptions Index (CPI)

Country	Number of FCPA Cases	Score
Netherlands	1	8.8
Germany	1	7.9
United Kingdom	4	7.6
France	1	6.8
United Arab Emirates	4	6.3
Spain	1	6.1
Taiwan	1	5.8
South Korea	1	5.4
Costa Rica	4	5.3
Hungary	2	4.7
Saudi Arabia	6	4.7
Czech Republic	1	4.6
Malaysia	3	4.4
Turkey	2	4.4
Latvia	1	4.3
Croatia	1	4.1
Ghana	1	4.1
Rwanda	3	4.0
Brazil	5	3.7
Montenegro	1	3.7
Romania	1	3.7
Panama	4	3.6
China	15	3.5
Greece	1	3.5
Serbia	1	3.5
Thailand	6	3.5
India	3	3.3
Liberia	1	3.3
Egypt	1	3.1
Mexico	6	3.1
Argentina	3	2.9
Kazakhstan	6	2.9
Senegal	3	2.9
Benin	2	2.8
Indonesia	4	2.8
Vietnam	2	2.7
Ecuador	3	2.5
Azerbaijan	7	2.4
Bangladesh	1	2.4
Honduras	3	2.4
Nigeria	25	2.4
Philippines	1	2.4
Haiti	5	2.2
Iran	1	2.2
Yemen	1	2.2
Kenya	2	2.1
Russia	3	2.1
Kyrgyzstan	2	2.0
Venezuela	3	2.0
Turkmenistan	2	1.6
Uzbekistan	1	1.6
Iraq	17	1.5
Total ¹	180	

Scale: 0 = most corrupt to 10 = least corrupt

¹Total portrayed here exceeds the total number of cases because a case sometimes involved more than one country.

won't guarantee compliance with the U.K. Bribery Act.

Case Studies

The Department of Justice has criminal and civil enforcement responsibilities for activities related to the antibribery provisions for domestic concerns and foreign companies, while the SEC has civil enforcement responsibilities regarding the antibribery provisions for issuers. This article examines all Department of Justice FCPA Enforcement Action cases from 1998 through 2010 (www.justice.gov/criminal/fraud/fcpa/cases/control-systems.html). Nine major criteria were used to analyze the cases: position of the person paying the bribe, country of the foreign official that received the bribe, bribe amount, type of transaction, level of the conspirator, length of imprisonment, imprisonment location, amount of the fine, and amount of the special assessment. The SEC has increased its efforts in recent years to monitor compliance with the FCPA. According to Lanny Breuer, the head of the U.S. Department of Justice Criminal Division, the FCPA allows the United States to target the foreign bribery problem. In addition, the FCPA discourages corruption from occurring in the first place (Dick Carozza, "The Aggressive Enforcers," *Fraud*, May/June 2011, pp. 36–40). *Exhibit 1* shows the number of cases involving violations of the FCPA from 1998 through 2010. This number has significantly increased in recent years; there were 39 cases from 1998 through 2006, compared to 107 cases from 2007 through 2010.

Antonia Chion, the Associate Director of the SEC's Division of Enforcement, stated in a press release, "The SEC will not tolerate violations of the FCPA, regardless of the lengths to which public companies will go to structure their corrupt transactions to avoid detection" (www.sec.gov/news/press/2009/2009-23.htm). Companies should not be putting greed before the law in order to gain business, and the SEC is working to punish this illegal conduct. Thus, the number of FCPA cases and the penalties imposed has increased dramatically, which will hopefully discourage future violations of the FCPA. The following discussion highlights each criterion used when analyzing the cases.

Position of the perpetrator. There were various positions of the perpetrators involved in the FCPA cases—that is, the

individuals involved ranged from high-ranking officials to employees. They included CEOs, directors, managers, and employees. Although there were various positions involved, the majority of the individuals worked in upper-level management. Corporations were also charged with violating the FCPA. *Exhibit 2* shows the breakdown of the positions of corporations and individuals involved in the cases. In some of the cases, more than one individual was charged with violating the FCPA.

Countries involved. In the 146 FCPA cases that were examined, corrupt payments occurred in 52 countries. Transparency International—a nonpartisan organization that was founded in 1993 to fight corruption and has more than 90 national chapters or chapters-in-formation throughout the world—publishes the Corruption Perceptions Index (CPI), which ranks countries by their perceived levels of corruption. The CPI scale ranges from 0 to 10; a score of 0 means a country is highly corrupt, and a score of 10 indicates a country is very clean. The 2010 CPI ranked 178 countries. These results were used to evaluate the countries involved in the FCPA bribery schemes (www.transparency.org/about_us).

The countries involved in the FCPA cases adhere to the expectations of the CPI results. The majority of the countries whose officials received bribes scored lower than 5 on the CPI scale. There were nine countries involved, however, that scored higher than 5. The Netherlands was the highest ranking country to receive a bribe payment, and it was only involved in one such case; it ranked seventh, with a score of 8.8. The remaining countries involved all scored lower than 5 and were perceived as being moderately to highly corrupt. Officials in Nigeria, Iraq, and China received bribes most frequently, cited in 25, 17, and 16 cases, respectively. Iraq appeared to be the most corrupt country involved; it ranked 175th out of 178 countries, with a score of only 1.5. Nigeria ranked slightly higher, scoring 2.4, which put it in the 134th position. China is actually ranked 78th but only had a score of 3.5. Of the 178 countries that the CPI ranked, fewer than 50 countries scored in the top half of the index. *Exhibit 3* shows the CPI scores for all of the countries involved in the FCPA cases (www.transparency.org/policy_research/surveys_indices/cpi/2010/results). Using the number of FCPA cases and the CPI, *Exhibit 4* lists the eight countries that

represent the greatest risk for management of companies and auditors of companies that conduct business in these countries.

Bribe amount. *Exhibit 5* displays the range of bribe amounts for individuals and corporations. The largest bribe paid by individuals was \$300 million and this amount was connected to multiple cases. Several individuals and investors invested money knowing that it would be used for corrupt payments. They agreed to make payments and offers of payments to officials of the Republic of Azerbaijan to induce them to assist several corporations in acquiring a controlling interest in the State Oil Company of Azerbaijan Republic (SOCAR). The \$300 million did not come from just one individual.

Many of the bribes paid in excess of \$1 million were paid by corporations or by individuals who held a fairly high rank in their companies. Individuals in these cases were typically officers or directors, not just employees. These findings are consistent with the results of the Association of Certified Fraud Examiners (ACFE) study that examined the relationship between the position of the perpetrator and the amount of loss caused by fraud. The ACFE surveyed a group of respondents and inquired whether the perpetrator was an employee, a manager, or an owner or executive. The respondents were then asked to give information about the perpetrators in fraud cases, such as the amount of loss, age, job type, gender, and education. The results of the survey concluded that there was a strong correlation between the perpetrator's rank within a company and the median loss. The 2010 study showed that the median loss caused by an owner or executive was \$723,000, while the loss caused by an employee was only \$80,000 (ACFE, "Report to the Nations on Occupational Fraud and Abuse," 2010, pp. 28–40).

Type of transaction. The specific reasons for the bribe payments in the FCPA cases varied; however, the payments were always made to obtain or retain some type of business. Some corporations and individuals were trying to win contracts to sell their products or services. Others were trying to receive preferential treatment by circumventing foreign customs regulations, receiving favorable tax assessments, and avoiding customs or tariffs. Two transactions—payments to Iraq

through the United Nations Oil for Food Program and bribes to a minister of defense in Africa—are particularly interesting.

The majority of the cases pertaining to payments made to Iraqi government officials were made in connection with the Oil for Food Program established by the United Nations in 1995. The program was designed to allow Iraq to sell its oil in exchange for humanitarian goods, such as food and medicine. Program guidelines required the Iraqi government to use the proceeds from oil sales only to purchase humanitarian goods and services, which had to be approved by the United Nations (www.un.org/Depts/oip/background/index.html). In 2000, companies that wanted to sell humanitarian goods to the Iraqi government were required to pay a kickback to the government in order to receive a contract. The kickbacks were usually covered up by being called "after-sales service fees." These payments abused the purpose of the Oil for Food Program and violated the FCPA.

In 2009, there were 15 cases involving 22 individuals that were interrelated. The individuals were executives and employees of military and law enforcement products companies who agreed to pay a total of \$3 million as a commission in order to win part of a \$15 million deal. They thought they were paying bribes to the minister of defense in an African country; however, there was no actual minister of defense involved. Instead, an undercover FBI agent was posing as a sales agent. This was the first time that an undercover operation was used to expose violations of the FCPA on such a large scale and it represented the largest action ever undertaken by the Department of Justice against individuals for FCPA violations (www.justice.gov/opa/pr/2010/January/10-crm-048.html).

Level of conspirator. In the majority of the FCPA cases examined, the bribe recipients were government officials of the country involved. There were also some cases where bribes were paid to foreign customs officials or employees of customs services in order to receive preferential treatment in customs clearance or avoidance of customs. Employees of foreign state-owned entities, who are considered "foreign officials" under the FCPA, also received bribes in a few of the cases. Lastly, in several cases involving Nigeria, the conspirators were offi-

individuals involved ranged from high-ranking officials to employees. They included CEOs, directors, managers, and employees. Although there were various positions involved, the majority of the individuals worked in upper-level management. Corporations were also charged with violating the FCPA. *Exhibit 2* shows the breakdown of the positions of corporations and individuals involved in the cases. In some of the cases, more than one individual was charged with violating the FCPA.

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Type of transaction. The specific reasons for the bribe payments in the FCPA cases varied; however, the payments were always made to obtain or retain some type of business. Some corporations and individuals were trying to win contracts to sell their products or services. Others were trying to receive preferential treatment by circumventing foreign customs regulations, receiving favorable tax assessments, and avoiding customs or tariffs. Two transactions—payments to Iraq

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cials of the National Petroleum Investment Management Services (NAPIMS). In these cases, the defendants were trying to obtain contracts for oil exploration in Nigeria.

Length of imprisonment. The maximum term of imprisonment for violation of the FCPA is five years. In cases where the defendant received more than five years, she had other counts charged against her as well. For example, the defendant could have also conspired to commit money laundering.

Exhibit 6 shows the ranges for length of imprisonment. While terms ranged from two months to 13 years, the majority of those imprisoned spent 24 months or less in jail. In addition to incarceration, defendants usually received a period of supervised release following their imprisonment. These periods normally lasted two or three years. There were also individuals who did not face jail time, but were placed on probation. In four cases, the punishment also included community service, which ranged from 200 to 300 hours. Some of the cases

examined did not provide a judgment document for the defendant.

Imprisonment: facility and location. The judgment documents indicated that the court could recommend the type of facility and location of incarceration. Individuals were typically sentenced to minimum security facilities. For example, in a 2005 case, a defendant was sentenced to a minimum security camp adjacent to FCI Englewood in Colorado. In 2008, the court recommended a minimum security satellite work camp at Lompoc Federal Correctional Complex in Lompoc, California. There was only one case in 2002 that suggested incarceration in a federal prison. In some of these cases, the reason given for a specific location was an attempt to keep the defendant near his family. In cases where a location was not suggested, the judgment document indicated that the defendant should serve his sentence at an institution designated by the United States Bureau of Prisons.

Fine amount. Both individuals and corporations are subject to fines under FCPA. Sanctions may be imposed for both criminal and civil violations of the FCPA as follows:

- **Criminal:** Under FCPA antibribery provisions, corporations, and other businesses are subject to fines up to \$2 million, while officers, directors, employees, and agents are subject to fines up to \$100,000. These fines could be higher under the Alternative Fines Act.

- **Civil:** Under antibribery provisions, firms, officers, directors, employees, or agents of firms are subject to fines up to \$10,000.

It should also be noted that actions that violate the antibribery provisions of the FCPA can result in private cause for the Racketeer Influenced and Corrupt Organization (RICO) Act, where sanctions are for treble damages.

Exhibit 7 and *Exhibit 8* show the fine amounts for individuals and corporations, respectively. While the highest fine assessed for an individual was \$1 million, the majority of the fines were \$50,000 and below. In four cases, the defendant was ordered to pay restitution, which ranged from \$250,000 to \$3.5 million, instead of a fine. For corporations, the fines ranged from \$1,000 to \$448.5 million, with half of the corporations paying \$5 million or less and half paying more than \$5 million.

EXHIBIT 4 Most Corrupt Countries, Based on FCPA Cases and CPI		
Country	Number of FCPA Cases	Score
Nigeria	25	2.4
Iraq	17	1.5
China	15	3.5
Azerbaijan	7	2.4
Kazakhstan	6	2.9
Mexico	6	3.1
Thailand	6	3.5
Saudi Arabia	6	4.7

EXHIBIT 5 Range of Bribe Amounts	
Bribe Amount	Number of Cases ¹
\$ 0 to 500,000	43
\$ 500,001 to 1,000,000	14
\$ 1,000,001 to 5,000,000	35
\$ 5,000,001 to 10,000,000	8
\$ 10,000,001 or more	15

¹ The number of cases doesn't total 146 because in some instances, the documentation didn't specify the amount of the bribe. There were 15 related cases (undercover investigation) with a total bribe of \$3 million.

EXHIBIT 6 Length of Imprisonment	
Jail Term	Number of Cases ¹
1 month to 6 months	6
7 months to 12 months	5
13 months to 24 months	6
25 months to 36 months	3
37 months to 48 months	4
49 months to 60 months	2
60 months or more	3

¹ The number of cases doesn't equal 146 because there are cases where information regarding the imprisonment term was not provided, cases that were announced but not prosecuted, cases where the defendant was placed on probation rather than incarcerated, and cases pending final sentencing.

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