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FCPA Enforcement Against U.S. and Non-U.S. Companies

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FCPA ENFORCEMENT AGAINST U.S. AND NON-U.S. COMPANIES

*Michael S. Diamant, Christopher W.H. Sullivan & Jason H. Smith**

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INTRODUCTION

The U.S. Foreign Corrupt Practices Act (“FCPA”), which prohibits bribery of non-U.S. government officials, was born of a policy judgment that U.S. persons, U.S. companies, and businesses that avail themselves of regulated U.S. capital markets should not profit from overseas corruption.¹ It is one of several

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1. See Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 929, 1009–10 (2012).

U.S. criminal laws that extends to conduct beyond the United States' borders.² In recent years, the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") have enforced the FCPA aggressively, imposing billions in corporate fines and penalties. Today, many companies operating overseas prioritize FCPA compliance and are increasingly investing in policies, procedures, and professionals aimed at preventing, detecting, and responding to FCPA-related issues.

In its forty-two years of existence, the FCPA has attracted critics who believe that the FCPA handicaps U.S. companies by making it more difficult for them to compete against foreign companies not restricted by the law. For instance, President Donald Trump, in his previous life as a business mogul, once called the FCPA a "horrible law [that] should be changed" because it puts U.S. businesses at a "huge disadvantage" compared to companies from countries without aggressive international anti-corruption enforcement regimes.³ In addition, in 2010, the U.S. Chamber Institute for Legal Reform published a paper arguing that the FCPA makes U.S.-regulated businesses less competitive than foreign competitors that are not subject to the law.⁴ Further, Jay Clayton, the current Chairman of the SEC, previously headed a New York City Bar Association committee that, in 2011, wrote a paper highlighting the perceived disparity in the FCPA's impact on U.S.-regulated companies in international business.⁵

Although several countries with large economies have more recently worked toward a multinational network of anti-corruption enforcement, increasingly resulting in coordinated, multi-jurisdictional anti-corruption actions,⁶

2. See, e.g., 18 U.S.C. § 831(c) (2012) (certain transactions involving nuclear materials); 18 U.S.C. § 1512(h) (2012) (threatening a federal witness or informant); 18 U.S.C. § 1956(f) (2012) (money laundering).

3. *Squawk Box, Trump: Dimon's Woes & Zuckerberg's Prenuptial* (CNBC Television Broadcast May 15, 2012), <https://www.cnn.com/video/2012/05/15/trump-dimons-woes-zuckerbergs-prenuptial.html>. In February 2017, now-President Trump reportedly complained to then-Secretary of State and former ExxonMobil CEO Rex Tillerson that the FCPA costs the United States millions of jobs and billions of dollars in lost sales overseas. See Dexter Filkins, *Rex Tillerson at the Breaking Point*, THE NEW YORKER (Oct. 16, 2017), <https://www.newyorker.com/magazine/2017/10/16/rex-tillerson-at-the-breaking-point>.

4. Andrew Weissmann & Alixandra Smith, U.S. Chamber Inst. For Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 6* (2010), http://www.instituteforlegalreform.com/uploads/sites/1/restoringbalance_fcpa.pdf.

5. NEW YORK CITY BAR ASS'N, *THE FCPA AND ITS IMPACT ON INTERNATIONAL BUSINESS TRANSACTIONS-SHOULD ANYTHING BE DONE TO MINIMIZE THE CONSEQUENCES OF THE U.S.'S UNIQUE POSITION ON COMBATING OFFSHORE CORRUPTION?* (Dec. 2011), <https://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf>.

6. Recent multi-jurisdictional anti-corruption enforcement data show that non-U.S. enforcers are increasingly exacting penalties against non-U.S. companies that eclipse those imposed by their U.S. counterparts for the same course of conduct. In 2016 and 2017, more than \$8 billion in cumulative corporate penalties resulted from multinational anti-corruption actions. Of that amount, DOJ's and the SEC's portion of penalties constituted approximately \$1.9 billion, or about 23% of penalties stemming from multinational anti-corruption actions. *2017 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update/>.

there are still places in the world where corruption is the norm rather than the exception, and DOJ and the SEC continue to bring more enforcement actions for overseas bribery than their counterparts in every other country with similar anti-corruption laws.⁷ For these reasons, it is intuitive to think that the FCPA affects U.S. businesses disproportionately.

But the FCPA can be, and has been, enforced against non-U.S. companies and citizens for conduct outside of the United States. Indeed, non-U.S. companies have been subject to many notable FCPA enforcement actions. For instance, the largest monetary resolution in FCPA history, involving over \$850 million, was reached with Russia-headquartered Mobile TeleSystems in March 2019.⁸ In fact, eight of the ten largest monetary settlements in FCPA history involved companies based in France, Israel, Russia, Singapore, and the United Kingdom, among other foreign jurisdictions.⁹ Fifteen of the twenty-three persons sentenced in FCPA cases in 2017 were non-U.S. citizens.¹⁰

This Article explores how U.S. authorities have enforced the FCPA against non-U.S. companies and tests the perception that the FCPA disproportionately impacts U.S. businesses. After briefly discussing the FCPA, its enforcement, and its reach, this Article examines corporate FCPA enforcement activity since the statute's enactment in 1977. It finds that foreign firms have actually fared worse under the FCPA despite the fact that DOJ and the SEC have brought more enforcement actions against domestic companies in absolute terms. The average cost of resolving an FCPA enforcement action to non-U.S. corporations of resolving an FCPA enforcement action has been more than *four times higher* than it has been for domestic corporations: \$72.3 million to \$17.6 million. In

7. Forty-three nations have ratified or acceded to the Organisation for Economic Co-operation and Development's ("OECD") Convention of Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed on December 17, 1997, and requires signatories to enact and enforce anti-corruption standards akin to the FCPA. See OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>. According to Trace International's Global Enforcement Report 2016, from 1977 through 2016, the United States pursued nearly 70% of all enforcement actions relating to alleged bribery of foreign officials, with nearly seven times the number of the next highest country. See TRACE INTERNATIONAL REPORT 7 (TRACE 2017), Global Enforcement Report 2016 at 7, https://traceinternational.org/Uploads/PublicationFiles/TRACEGlobalEnforcementReport2016_1.pdf.

8. See Press Release, Department of Justice, Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter Into Resolutions of \$850 Million with the Department Of Justice For Paying Bribes In Uzbekistan, (Mar. 7, 2019), <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>.

9. As of the date of publication, the top ten FCPA monetary resolutions with U.S. enforcement authorities are as follows: (1) Mobile TeleSystems (\$850 million); (2) Siemens AG (\$800 million); (3) Alstom S.A. (\$772 million); (4) KBR/Halliburton (\$579 million); (5) Teva (\$519 million); (6) Telia (\$483 million); (7) Och-Ziff (\$412 million); (8) BAE Systems (\$400 million); (9) Total S.A. (\$398 million); and (10) VimpelCom (\$398 million). Of these, Mobile TeleSystems, Siemens, Alstom, Teva, Telia, BAE Systems, Total S.A., and VimpelCom are non-U.S. companies.

10. 2017 Year-End FCPA Update, GIBSON, DUNN & CRUTCHER (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update/>.

recent years, the difference has been even more pronounced—in 2017, the averages were \$150.3 million and \$16.1 million, respectively. This Article also explores other ways in which FCPA enforcement has more dramatically affected foreign companies. For instance, U.S. enforcement authorities have more frequently required post-resolution obligations for foreign corporations. Between 2004 and 2018, nearly 60 percent of foreign companies involved in FCPA enforcement actions were subject to post-resolution obligations in the form of an independent compliance monitor, self-reporting, or a combination of the two, compared to only 54 percent of domestic companies. Finally, this Article offers some theories to explain these data.

I. THE FCPA AND ITS ENFORCEMENT

Following reports of numerous U.S. businesses making millions of dollars of questionable payments to foreign government officials to secure business, President Carter signed the FCPA into law in December 1977.¹¹ With limited exceptions, the FCPA makes it unlawful for certain entities and individuals to corruptly confer benefits on non-U.S. government officials to secure business. Specifically, the FCPA's anti-bribery provisions prohibit:

the 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 . . . any foreign official for purposes of . . . influencing any act or decision of the foreign official . . . securing any improper advantage; or . . . inducing such foreign official to use his influence with a foreign government or instrumentality thereof . . . in order to assist [the company] in obtaining or retaining business for or with, or directing business to, any person.¹²

The FCPA also has “accounting provisions” that apply to certain entities and individuals.¹³ The accounting provisions require these entities to (1) make and keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets and (2) devise and maintain reasonable internal accounting controls aimed at preventing and detecting unauthorized payments.¹⁴ The accounting provisions do not require that a false record or deficient control be linked to a bribe, so an inaccurately recorded payment or a deficiency of internal controls could lead to enforcement even if it does not violate the FCPA's anti-bribery provisions.¹⁵

DOJ and the SEC have increasingly enforced the FCPA against corporations. The first two decades of the statute's existence passed with relatively few

11. F. JOSEPH WARIN, MICHAEL S. DIAMANT, & ELIZABETH G. SILVER, *THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE* 4 (2016).

12. 15 U.S.C. § 78dd-1(a).

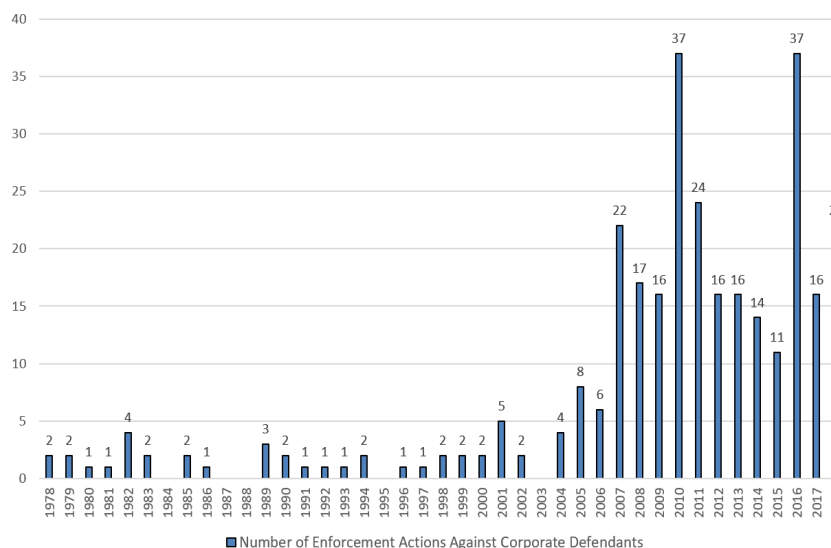
13. 15 U.S.C. § 78m(b).

14. *Id.*

15. *See id.*

enforcement actions (in comparison to recent years), with DOJ and the SEC initiating an average of approximately three FCPA enforcement actions annually.¹⁶ As shown in FIGURE 1, a graph tracking the total number of FCPA corporate enforcement actions initiated by year, the late 2000s saw a surge in enforcement activity. In 2004, DOJ and the SEC brought four combined corporate actions. The number doubled the next year and then shot up dramatically in 2007, when DOJ and the SEC initiated twenty-two combined FCPA actions against corporations. Since then, annual enforcement levels have been consistently robust—from 2011 through the end of 2018, DOJ and the SEC averaged more than nineteen combined FCPA enforcement actions per year against corporations—with a peak of thirty-seven in 2016.

FIGURE 1, COMBINED DOJ/SEC FCPA ENFORCEMENT ACTIONS PER YEAR AGAINST CORPORATE DEFENDANTS, 1978–2018.¹⁷



FCPA violations can attract severe penalties. For criminal violations of the anti-bribery provisions, corporations can be fined up to \$2 million for each criminal count or twice the pecuniary gain or loss resulting from the bribe, which can be significantly greater and entail costly collateral consequences, such as potential U.S. government suspension and debarment.¹⁸ Individuals who violate the anti-bribery provisions can be imprisoned up to five years and fined \$250,000 per violation.¹⁹

16. See Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008).

17. *2018 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER (Jan. 7, 2018), <https://www.gibsondunn.com/2018-year-end-fcpa-update/>.

18. 15 U.S.C. § 78dd-2(g)(1); 18 U.S.C. § 3571(d) (1987).

19. 15 U.S.C. § 78dd-2(g)(2); 18 U.S.C. § 3571(b)(3); 18 U.S.C. § 3571(d).

Violations of the accounting provisions can result in corporate fines of up to \$25 million per violation, while individuals face up to a \$5 million fine and twenty years in prison.²⁰ In addition to penalties, civil violations often require ill-gotten profits to be disgorged,²¹ which can involve multiple millions of dollars.²²

As FCPA enforcement levels have increased, so too have their price tags. In 2004, the largest corporate monetary resolution in the history of FCPA enforcement was \$24.8 million, which Lockheed paid a decade earlier in 1995.²³ Since 2004, the *average* cost of a corporate FCPA enforcement action exceeded \$20 million in all but three years. Twenty-two corporate resolutions with DOJ and the SEC have eclipsed \$100 million, and the Lockheed resolution today does not even make the top 60.

Whether initiated because of a concern raised through internal reporting channels or by an enforcer, an FCPA enforcement action typically comes at the end of a long internal investigation involving attorneys, auditors, efforts to locate, preserve, and produce documents requested by the government, significant management and personnel time and focus, and even the loss of employees who are disciplined for misconduct. When FCPA issues are resolved and gain publicity, collateral consequences can follow, including civil lawsuits, foreign actions, suspension or debarment from government contracting, and more time and money to remediate the issues and improve corporate compliance and internal controls.

DOJ and the SEC also often require companies to retain, at their own cost, compliance monitors as a condition of an FCPA resolution. The prospect of an FCPA monitorship, which usually lasts between eighteen and thirty-six months, and its associated cost, effort, and scrutiny is highly unpleasant for a company that just emerged from a long, expensive, and invasive investigation and simply wants to get back to business.²⁴ The monitor is an independent party usually tasked with ensuring that an offending company complies with the terms of the resolution and implements anti-corruption policies, procedures, and controls reasonably designed to detect and prevent FCPA violations. The monitor evaluates the company's anti-corruption compliance program, determines if it is reasonably designed and implemented, makes recommendations for improve-

20. 15 U.S.C. § 78ff(a).

21. See §§ 78u(d), 78dd-2(g), 78dd-3(e).

22. See, e.g., Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), <https://www.sec.gov/news/press/2008/2008-294.htm>.

23. *2014 Year-End FCPA Update*, GIBSON DUNN (Jan. 5, 2015), <http://www.gibsondunn.com/publications/Pages/2014-Year-End-FCPA-Update.aspx>.

24. See F. Joseph Warin, Michael S. Diamant & Christopher W.H. Sullivan, *Corporate Monitors and the Monitorship Process* in FROM BAKSHEESH TO BRIBERY: UNDERSTANDING THE GLOBAL FIGHT AGAINST CORRUPTION AND GRAFT (T. Markus Funk & Andrew S. Boutros eds., Apr. 2019); F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011) (for discussion on how DOJ and the SEC utilize monitors as part of FCPA resolutions).

ment, and sets forth his or her observations in periodic written reports to the company and U.S. government. To do so, the monitor interviews employees, reviews documents, makes site visits to domestic and international locations, and conducts various analyses and testing—all of which will be called for in the company’s settlement papers. Because FCPA cases can reveal systemic cultural and internal controls problems at a company, DOJ and the SEC often impose a monitor as one of the terms of an FCPA resolution. In fact, since 2004, nearly thirty percent of companies resolving FCPA actions with DOJ and the SEC had to retain a monitor.²⁵

II. THE FCPA’S JURISDICTIONAL REACH

When considering how DOJ and the SEC enforce the FCPA against U.S. and non-U.S. corporations, it is helpful to understand the ways the anti-bribery and accounting provisions can reach those companies.

A. *Entities and Persons Covered By The Anti-Bribery Provisions*

The anti-bribery provisions apply to “covered entities,” which include (1) “issuers”—companies that have a class of securities registered under § 12 of the Securities Exchange Act of 1934 (“Exchange Act”) or are required to file periodic reports with the SEC under § 15(d) of the Exchange Act;²⁶ (2) “domestic concerns”—U.S. citizens, nationals, and residents, as well as any business entity that has its principal place of business in the United States or is organized under U.S. laws;²⁷ and (3) any other person who acts in furtherance of a corrupt payment while within U.S. territory.²⁸ The provisions also sweep in any officer, director, employee, agent, or stockholder acting on behalf of a covered person or entity.²⁹ In the sections below, we detail how these mechanisms can be applied to reach a wide array of foreign entities.

1. Foreign Issuers

Under the first anti-bribery provision, the term “issuer” encompasses foreign companies with Level II or Level III American Depositary Receipts (“ADRs”) on a U.S. exchange.³⁰ A foreign company that qualifies as an issuer is therefore subject to the first anti-bribery provision even if the relevant mis-

25. From 2004 to the end of 2018, 187 companies reached FCPA resolutions with DOJ and/or the SEC. Of these companies, 534, or 28.3%, had to retain a compliance monitor.

26. 15 U.S.C. § 78dd-1(a).

27. 15 U.S.C. § 78dd-2(h)(1).

28. 15 U.S.C. § 78dd-3.

29. 15 U.S.C. §§ 78dd-1(a), (g); 15 U.S.C. 78dd-2(a); 15 U.S.C. 78dd-3(a).

30. 15 U.S.C. §§ 78l, 78o(d); *see also* U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012) (“RESOURCE GUIDE”).

conduct occurred outside the United States.³¹ For example, Siemens AG settled FCPA charges for \$800 million, of which \$350 million went to the SEC as disgorgement and \$450 million to DOJ in fines, stemming in part from alleged bribes paid to government officials in Asia, Africa, Europe, the Middle East, and the Americas.³² U.S. enforcement authorities relied on Siemens's shares being listed on the New York Stock Exchange.³³ Likewise, DOJ charged the Norwegian company Statoil ASA for allegedly bribing an Iranian official, pointing to the fact that the company's ADRs were listed on the New York Stock Exchange as the basis for FCPA jurisdiction.³⁴

Unlike an issuer organized under the laws of the United States, however, a foreign issuer is subject to the first anti-bribery provision only if it makes "use of the mails or any means or instrumentality of interstate commerce" in furtherance of an illicit payment.³⁵ Nonetheless, DOJ and the SEC have broadly interpreted "interstate commerce" to encompass not only "trade, commerce, transportation, or communication among the several States," but also that "between any foreign country and any State or between any State and any place or ship outside thereof."³⁶ Additionally, the term includes the "intrastate use of . . . any interstate means of communication" or "any other interstate instrumentality."³⁷ Relying on this, the government has asserted that the following acts involve the use of interstate commerce: (1) traveling across state borders or internationally to or from the United States;³⁸ (2) placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States;³⁹ and (3) sending a

31. *Id.*

32. Press Release, SEC Charges Siemens AG for Engaging in Worldwide Bribery, U.S. Securities and Exchange Commission (Dec. 15, 2008), <https://www.sec.gov/news/press/2008/2008-294.htm>.

33. See Criminal Information at 3, *United States v. Siemens Aktiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008), <http://fcpa.stanford.edu/fcpac/documents/2000/000855.pdf>; Complaint at 4, *SEC v. Siemens Aktiengesellschaft*, No. 08-cv-02167 (Dec. 12, 2008), <https://www.sec.gov/litigation/complaints/2008/comp20829.pdf>; *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines*, U.S. DEP'T OF JUSTICE (Dec. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>. Though trading on the New York Stock Exchange was the basis upon which U.S. authorities brought FCPA charges against Siemens, the company has since delisted its shares on that exchange and no longer has any reporting obligations to the SEC. See Delisting New York Stock Exchange (NYSE), Siemens AG, https://www.siemens.com/investor/pool/en/investor_relations/delisting_faq_en.pdf.

34. See Criminal Information at 2, *United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. 2006), <http://fcpa.stanford.edu/fcpac/documents/1000/000490.pdf>.

35. § 78dd-1(a). In contrast, a U.S. issuer is subject to the anti-bribery provisions even if the company did not use the mails or any means or instrumentality of interstate commerce. § 78dd-1(g)(1).

36. RESOURCE GUIDE, at 11; see also §§ 78dd-2(h)(5), 78dd-3(f)(5).

37. §§ 78dd-2(h)(5), 78dd-3(f)(5) (emphasis added).

38. RESOURCE GUIDE, at 11.

39. See, e.g., *SEC v. Straub*, 921 F. Supp. 2d 244, 262 (S.D.N.Y. 2013) (finding that "the use of the Internet is an 'instrumentality of interstate commerce' ") (citing *United States v. MacEwan*,

wire transfer from or to a U.S. bank or otherwise using the U.S. banking system.⁴⁰

2. Territorial Jurisdiction

The third anti-bribery provision makes it unlawful for any other person, while in U.S. territory, to use means of interstate commerce (such as wire transfers or e-mail), or do any other act, in furtherance of a corrupt offer or payment.⁴¹ Through § 78dd-3, the FCPA's anti-bribery prohibition can reach foreign entities that operate outside of the United States if they make use of "the mails or any means or instrumentality of interstate commerce" or engage in any "act in furtherance of" a corrupt offer or payment "while in the territory of the United States."⁴² Thus, a foreign non-issuer company can be subject to the FCPA's anti-bribery provisions even if it does not use an instrumentality of interstate commerce.⁴³

Based on FCPA settlements, committing an "act in furtherance" of a corrupt payment requires minimal effort. For example, the government has asserted that the jurisdictional threshold was met through e-mails from Taiwan to California listing a line item for "promotional and advertising expenses," which were approved in the United States, based on funds allocated for improper payments.⁴⁴ Similarly, the FCPA's legislative history indicates that the phrase "while in the territory of the United States" should encompass "all areas over which the United States asserts territorial jurisdiction."⁴⁵ As such, Congress intended the phrase to be "interpreted broadly so that an extensive physical connection to the bribery act is not required."⁴⁶ Following Congress's lead, DOJ and the SEC have maintained that a foreign non-issuer commits an act

445 F.3d 237, 244 (3d Cir. 2006)); *SEC v. Solucorp. Indus. Ltd.*, 274 F. Supp. 2d 379, 419 (S.D.N.Y. 2003)); Criminal Information at 5, *United States v. Teva LLC.*, No. 12-cr-20967 (S.D. Fla. Dec. 22, 2016), <https://www.justice.gov/opa/press-release/file/920236/download> (alleging that employees and agents of Teva Russia "sent emails through the United States").

40. *See, e.g.*, Criminal Information at 8, *United States v. Statoil, ASA*, No. 06-cr-960 (S.D.N.Y. 2006), <http://fcpa.stanford.edu/fcpac/documents/1000/000490.pdf> (noting that Statoil wire-transferred money to an Iranian official through a U.S. bank in New York City).

41. 15 U.S.C. § 78dd-3.

42. *Id.*

43. RESOURCE GUIDE, at 11–12.

44. *See* F. Joseph Warin, Michael S. Diamant, & Elizabeth G. Silver, *THE U.S. FOREIGN CORRUPT PRACTICES ACT: ENFORCEMENT AND COMPLIANCE* 8 (2016) (citing Criminal Information at 6, *United States v. Syncor Taiwan, Inc.*, No. 1:02-cr-0124 (C.D. Cal. Dec. 5, 2002), <http://fcpa.stanford.edu/fcpac/documents/3000/001572.pdf>); *see also* Criminal Information at 15, *United States v. DaimlerChrysler Automotive Russia SAO*, No. 1:10-cr-00064 (D.D.C. Mar. 22, 2010) (alleging territorial jurisdiction on the basis of wire transfers from Daimler accounts in Germany to financial institutions in the United States).

45. S. REP. NO. 105-277 at 6 (1998).

46. *Id.* (quoting *ORG. FOR ECON. CO-OPERATION AND DEV., COMMENTARIES ON CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS* ¶ 24 (1997)).

while in U.S. territory if it “causes an act to be done” in the United States by an agent,⁴⁷ even if the company itself is not physically present and took no relevant action in U.S. territory.

This interpretation has led to a theory of liability based on correspondent bank activity. Because foreign banks often do not have a branch in the United States, they rely frequently upon U.S. correspondent accounts to facilitate transactions in U.S. dollars.⁴⁸ The government seems to have taken the view that wire transfers through U.S. correspondent accounts by a foreign actor could satisfy the third anti-bribery provision’s territorial requirements. For example, in a \$218.8 million FCPA enforcement action against JGC Corp., a Japanese engineering and construction firm, DOJ premised FCPA liability on conspiracy and aiding-and-abetting charges.⁴⁹ While the government seemed to assert that those charges were sufficient to confer FCPA jurisdiction, DOJ also suggested that JGC’s wire transfers through a correspondent bank account established a standalone territorial nexus.⁵⁰

Nevertheless, U.S. courts have thus far shown reluctance to accept such a broad understanding of territorial jurisdiction. In *United States v. Goncalves*, the U.S. District Court for the District of Columbia granted a foreign defendant’s oral motion for acquittal where DOJ asserted jurisdiction based on him having mailed a purchase agreement from the United Kingdom to Washington, D.C., in furtherance of a corrupt scheme.⁵¹ Though the court did not issue a written opinion, the judge indicated from the bench that anti-bribery jurisdiction requires the defendant to have committed the violative act while physically within U.S. territory.⁵²

3. Agent of an Issuer, Domestic Concern, or Entity Acting within U.S. Territory

Under the anti-bribery provisions, any foreign officer, director, employee, agent, or stockholder acting on behalf of an issuer or domestic concern⁵³ may be

47. RESOURCE GUIDE, at 11 n.55.

48. See Natasha N. Wilson, Note, *Pushing the Limits of Jurisdiction over Foreign Actors Under the Foreign Corrupt Practices Act*, 91 WASH. U.L. REV. 1063, 1072 (2014).

49. Criminal Information at 13, 19. See *United States v. JGC Corp.*, No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), <http://fcpa.stanford.edu/fcpac/documents/2000/001314.pdf>.

50. *Id.*

51. Order Granting Motion to Dismiss at 1, *United States v. Goncalves*, 1:09-cr-00335-RJL (D.D.C. Feb. 23, 2012), <http://www.justice.gov/criminal/fraud/fcpa/cases/goncalvesa/2012-02-24-goncalvesa-courts-dismissal-order.pdf>.

52. See Hearing Transcript at 10, *United States v. Goncalves* (D.D.C. Aug. 12, 2011) (approving of the “more cautious, conservative interpretation” whereby “each act has to be while in the territory of the United States”).

53. A domestic concern refers to (1) “any individual who is a citizen, national, or resident of the United States;” or (2) “any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in

found liable for violating the FCPA if such person made use of the mails or any means or instrumentality of interstate commerce in furtherance of an improper payment.⁵⁴ The same is true of a person who acts on behalf of a foreign non-issuer entity while in the territory of the United States if such person made use of the mails or any means or instrumentality of interstate commerce or takes any other action in furtherance of an improper payment.⁵⁵ This was the theory DOJ posited when bringing FCPA conspiracy and aiding-and-abetting charges against Marubeni Corporation, which maintains its headquarters in Tokyo and was not alleged to have committed any relevant misconduct within U.S. territory.⁵⁶ According to DOJ, TSKJ, a four-company venture consisting of a “domestic concern” and a U.S.-issuer, retained Marubeni Corporation to bribe Nigerian government officials in exchange for contracts to design and build a liquefied natural gas plant.⁵⁷ DOJ’s Information premised FCPA jurisdiction over Marubeni Corporation on its status as an “agent” of a domestic concern and U.S.-issuer.⁵⁸

The SEC has gone even further by charging a foreign subsidiary as the agent of its parent company. In a \$125 million FCPA resolution with Amsterdam-based Snamprogetti Netherlands B.V., the SEC maintained that Snamprogetti served as an agent of ENI, an Italian company and U.S. issuer, without alleging any specific facts to prove an agency relationship. Rather, the SEC simply noted that Snamprogetti was a “wholly-owned subsidiary” over which ENI “exercised control and supervision.”⁵⁹

Nonetheless, at least one U.S. district court has reasoned that the anti-bribery provision does not extend to a foreign subsidiary acting as an agent “of an issuer or domestic concern.”⁶⁰ After examining the FCPA’s legislative history, the court concluded that an “agent” refers solely to “foreign nationals or residents,” not foreign subsidiaries.⁶¹

4. Parent-Subsidiary Relationship

Just as a subsidiary can be liable for violating the FCPA on behalf of a covered entity, U.S. authorities, and more especially the SEC, have asserted that a

the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.” 15 U.S.C. § 78dd-2(h)(1) (2012).

54. §§ 78dd-1(a), 78dd-2(a)

55. § 78dd-3(a).

56. See Criminal Information at 2, 5, *United States v. Marubeni Corp.*, No. 4:12-cr-00022 (S.D. Tex. Jan. 17, 2002), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/01/24/2012-01-17-marubeni-information.pdf>.

57. *Id.* at 2.

58. *Id.* at 5–6.

59. See Complaint at 3–4, *SEC v. ENI, S.p.A. et al*, No. 4:10-cv-2414 (S.D. Tex. July 7 2010), <https://www.sec.gov/litigation/complaints/2010/comp-pr2010-119.pdf>.

60. *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992).

61. *Id.*

parent company can be accountable for the actions of its subsidiary in two circumstances: First, a parent company that participates sufficiently in a given activity—by, for example, “direct[ing] its subsidiary’s misconduct or otherwise directly participat[ing] in the bribe scheme”—may be directly liable for such conduct.⁶² Second, according to traditional principles of agency law, a parent company may be directly liable for the actions of its subsidiary based on the “fundamental characteristic” of control.⁶³ If a parent company enjoys a certain measure of “knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction,” then the government will consider the subsidiary to be the agent of the parent.⁶⁴ As such, the subsidiary’s conduct and knowledge are “imputed to its parent.”⁶⁵ DOJ has likened these concepts to “traditional principles of *respondeat superior*,” where the parent may be liable for the acts of its subsidiary “undertaken within the scope of [its] employment and intended, at least in part, to benefit the company.”⁶⁶

5. Aiding and Abetting and Conspiracy

Foreign non-issuers can only be held liable under the anti-bribery provisions if they are agents, employees, officers, directors, or shareholders of a U.S. issuer or domestic concern or take an act in furtherance of a corrupt scheme, including the payment of a bribe, while in the territory of the United States. DOJ has nevertheless asserted that foreign non-issuers can be held liable for conspiring to violate the FCPA or aiding and abetting an FCPA violation even if the foreign non-issuer could not be independently charged with a substantive FCPA violation. For example, in the eyes of DOJ, if the foreign non-issuer aids and abets an issuer, domestic concern, or entity that has acted within U.S. territory, substantive jurisdiction is established.⁶⁷ Applying this theory, DOJ reached a \$218.8 million FCPA resolution with JGC Corporation for aiding and abetting Kellogg, Brown & Root, Inc., a domestic concern, even though JGC engaged in no relevant action within U.S. territory.⁶⁸

A recent decision by the Second Circuit, however, should temper any view that foreign non-issuers (who are also not agents, employees, officers, directors, or shareholders of a U.S. issuer or domestic concern) can be liable for FCPA conspiracy or aiding and abetting charges arising from conduct that took place

62. RESOURCE GUIDE, at 27.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See RESOURCE GUIDE, at 34 (discussing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

68. Criminal Information at 18, *United States v. JGC Corp.*, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-6-11jgc-corp-info.pdf>; <https://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-2188>.

entirely outside of U.S. soil. In *United States v. Hoskins*, the Second Circuit held that a nonresident foreign national may not be charged with conspiracy to violate the FCPA unless he is himself an agent of an issuer or domestic concern or committed an act while physically present within U.S. territory.⁶⁹ In a detailed analysis of the FCPA's legislative history, the Second Circuit found that Congress evinced an "affirmative policy" to exclude foreign nationals who operate outside U.S. territory when they do not act as agents, employees, directors, officers, or shareholders of a U.S. issuer or domestic concern.⁷⁰ In enumerating the particular individuals who may be held liable under the FCPA, the Second Circuit reasoned that Congress manifested an intention to avoid creating standalone FCPA liability for unspecified defendants through use of conspiracy and complicity statutes.⁷¹ Further, irrespective of Congress's intention to limit criminal FCPA liability to particular categories of defendants, the Second Circuit found that there was no "clearly expressed congressional intent" to rebut a presumption against using conspiracy liability to broaden the extraterritorial reach of a statute.⁷²

B. Entities and Persons Covered By The Accounting Provisions

The accounting provisions further expand the reach of the FCPA. Although the accounting provisions do not themselves apply directly to foreign non-issuer subsidiaries, a foreign company may be liable for violating the accounting provisions either as an issuer or as a non-issuer entity.

1. Foreign Issuer

The accounting provisions apply to any issuer, including foreign companies. Although a foreign issuer is strictly liable for civil violations of the accounting provisions,⁷³ it must have acted "knowingly" to be subject to criminal liability.⁷⁴ In both scenarios, however, an issuer is responsible for its subsidiaries' compliance.⁷⁵ Failures at the subsidiary level may incur liability for the parent company.⁷⁶

69. See *United States v. Hoskins*, 902 F.3d 69, 77 (2d Cir. 2018).

70. *Id.* at 93.

71. *Id.*

72. *Id.* at 93.

73. See *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998) (finding that a violation of the accounting provisions "need not be knowing in order to lead to civil liability").

74. Securities Regulation Act 15 U.S.C. § 78m(b)(4)–(5) (2012). A natural person, however, is subject to criminal liability only if he acted "willfully." See 15 U.S.C. § 78ff(a) (2012).

75. DEP'T OF JUSTICE, *supra* note 30, at 39.

76. See, e.g., Complaint at 2, 11, *SEC v. Vimpelcom LTD*, No. 1:16-cv-01266 (S.D.N.Y. Feb. 18, 2016), <http://fcpa.stanford.edu/fcpac/documents/4000/003207.pdf> (bringing an enforcement action against the defendant for its wholly owned subsidiary's violations of the accounting provisions); Complaint at 5, *In re Chiquita Brands Int'l, Inc.*, No. 1:01-cv-02079 (D.D.C. Oct. 3, 2001), <http://fcpa.stanford.edu/fcpac/documents/4000/002568.pdf> (same).

If a parent company owns 50% or less of a subsidiary, the statute requires a “good faith” effort to ensure that the subsidiary implements a system of internal accounting controls as specified in the FCPA.⁷⁷ In evaluating whether a company made a good faith effort, courts consider “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.”⁷⁸ The SEC has relied on the notion of “operational control” to assert liability in cases of minority ownership.⁷⁹

2. Foreign Non-Issuer

A foreign non-issuer may also be directly liable for causing an issuer’s violations of the accounting provisions. This situation could occur in the following four circumstances: First, a foreign non-issuer could “cause to be falsified, any book, record or account subject to [the books and records provision].”⁸⁰ Proof that a defendant acted knowingly or willfully is unnecessary for civil liability under the books and records provision. Rather, the government must merely show that a defendant acted unreasonably in failing to keep and maintain detailed and accurate records.⁸¹ Second, a foreign non-issuer could incur civil or criminal liability for “knowingly circumvent[ing] or knowingly fail[ing] to implement a system of internal accounting controls or knowingly falsify[ing] any book, record, or account.”⁸² Here, to impose even civil liability, the government must demonstrate that a defendant acted knowingly.⁸³ Third, a foreign non-issuer could face civil or criminal liability for aiding and abetting an issuer’s violation of the accounting provisions.⁸⁴ Fourth, a foreign non-issuer that

77. 15 U.S.C. § 78m(b)(6) (2004).

78. *Id.*

79. *See, e.g.*, Complaint at 4, 8, SEC v. Bellsouth Corp., (N.D. Ga. Jan. 15, 2002) (No. 1:02-cv-0113), <http://fcpa.stanford.edu/fcpac/documents/4000/002817.pdf> (finding BellSouth Corporation civilly liable for its subsidiary’s violations because its “operational control” gave it “the ability” to ensure compliance).

80. 17 C.F.R. § 240.13b2-1 (2019).

81. *See* SEC v. Softpoint, Inc., 958 F. Supp. 846, 865–66 (S.D.N.Y. 1997); WARIN, *supra* note 11, at 22.

82. 15 U.S.C. 78m(b)(5) (2012).

83. *See* SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298, 1324 (N.D. Ala. 2003) (noting that the government failed to meet its burden of showing that the defendant knowingly violated the internal controls provision).

84. DEP’T OF JUSTICE, *supra* note 30, at 43, 45. *See also* Complaint at 14, SEC v. Halliburton Co., No. 4:09-cv-399 (S.D. Tex. Feb. 11, 2009) (charging subsidiary KBR, Inc., for aiding and abetting violations of the accounting provisions by “knowingly or recklessly” offering substantial assistance to its parent Halliburton Co.); Complaint at 3, SEC v. Panalpina, Inc., No. 4:10-cv-4334 (S.D. Tex. Nov. 4, 2010) (“Panalpina, Inc. also aided and abetted its issuer customers’ violations of Sections 30A, 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act . . .”).

conspires with an issuer to violate the accounting provisions may incur criminal liability.⁸⁵

C. Personal Jurisdiction

Beyond the foregoing jurisdictional requirements of the FCPA, a basic constitutional threshold—whether the defendant had “minimum contacts” with the United States and that the exercise of personal jurisdiction would be reasonable⁸⁶—must be met before a foreign individual or entity can be brought before a U.S. court on FCPA charges. Few courts have ruled on what minimum contacts are required in the FCPA context; however, precedent suggests that personal jurisdiction is not a significant barrier to the FCPA’s application over foreign individuals or entities.

In 2013, two district court judges, both from the U.S. District Court for the Southern District of New York, reached divergent conclusions concerning what constitutes sufficient “minimum contacts” to confer personal jurisdiction over foreign defendants charged with civil violations of the FCPA’s accounting provisions.

In *Straub*, the SEC alleged that the defendants, who were Hungarian citizens and residents, participated in two schemes to bribe public officials in Macedonia and Montenegro.⁸⁷ First, in 2005 and 2006, the defendants allegedly bribed Macedonian officials through intermediaries to block a competitor from entering the market; and second, in 2005, the defendants allegedly used consultants to bribe Montenegrin officials to facilitate an acquisition.⁸⁸ The three executives then allegedly caused the bribes to be falsely recorded in Magyar Telekom’s books and records, which were consolidated into the books and records of its parent company, Deutsche Telekom AG.⁸⁹ Both entities were publicly traded on the New York Stock Exchange.⁹⁰ Though none of the executives had ever set foot in the United States in relation to the alleged bribery scheme, the *Straub* court found sufficient minimum contacts with the United States because Magyar was an issuer and the executives allegedly falsified Magyar’s books and records while knowing that prospective U.S. investors likely would be influenced by the resulting false financial statements that would be filed with the SEC.⁹¹

85. *Id.* at 45. *See also* Criminal Information at 6, *United States v. SSI International Far East, LTD.*, No. 06-CR-398 (D. Or. Oct. 10, 2006), <http://fcpa.stanford.edu/fcpac/documents/1000/000476.pdf> (asserting jurisdiction over SSI International, a foreign non-issuer, for conspiring to violate the accounting provisions).

86. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

87. *SEC v. Straub*, 921 F. Supp. 2d 244 (S.D.N.Y. 2013).

88. *Id.* at 249.

89. *Id.* at 250.

90. *Id.*

91. *Id.* at 255–56.

Less than two weeks after the *Straub* decision, however, another judge in the United States District Court for the Southern District of New York granted a defendant's motion to dismiss for lack of personal jurisdiction a separate FCPA case arising from the SEC and DOJ investigation of German manufacturer (and issuer) Siemens AG.⁹² In *SEC v. Sharef*, the SEC alleged that the defendant, Herbert Steffen, a German citizen, pressured another Siemens executive to authorize bribes and participated in at least one phone call in furtherance of a \$100 million bribery scheme in Argentina with a co-defendant who was then located in the United States.⁹³ The court ruled that Steffen lacked sufficient minimum contacts with the United States to confer personal jurisdiction.⁹⁴ The court's decision relied on the following circumstances: first, the executive whom Steffen pressured to make certain bribes did not agree to do so until he communicated with several "higher ups" whose responses he perceived to be instructions to make the bribes. Steffen did not actually authorize the bribes.⁹⁵ Second, Steffen was not alleged to have directed, ordered, or even been aware of efforts to cover up the payments. Nor was he alleged to have played any role in the falsification of Siemens' financial statements.⁹⁶

Whereas the *Straub* decision focused on the bribery scheme's connection to the United States, *Sharef* focused predominantly on Steffen's personal conduct and ties to the United States. This may explain why *Sharef* found insufficient minimum contacts notwithstanding the fact that the bribery scheme described in *Sharef* appeared to have more significant ties to the United States than the bribery scheme at issue in *Straub*. For example, Steffen's co-defendants held numerous meetings in the United States and paid bribes to Argentine officials via bank accounts in New York and Miami.⁹⁷

III. METHODOLOGY

We should explain how this Article classifies "foreign" (or non-U.S.) and "domestic" (or U.S.) entities. That distinction can be complex where multinational corporations are involved. For purposes of this Article, we examined a number of factors, with no single factor being dispositive, to determine whether to classify a company as "U.S." or "non-U.S." These included the location of the company's headquarters, the country of its legal incorporation, its center of operations and predominant location of its workforce, where it originated, and the dominant country from which its revenue is derived. For example, we count Weatherford International as a domestic company, even though Weatherford is a multinational corporation incorporated and headquartered in Switzerland, be-

92. See generally *SEC v. Sharef*, 924 F. Supp. 2d 539, 549 (S.D.N.Y. 2013).

93. *Id.* at 542–43.

94. *Id.* at 549.

95. *Id.* at 546.

96. *Id.* at 547.

97. *Id.* at 543.

cause it was founded in Texas, a plurality of its employees are based in the United States,⁹⁸ its corporate offices are in Houston,⁹⁹ and nearly half of its revenue was generated in North America in 2014 and 2015.¹⁰⁰

To measure the monetary impact of FCPA enforcement, this considers the amount owed through penalties, fines, or disgorgement to DOJ and the SEC—even though the FCPA’s indirect impacts can be felt far beyond the immediate price tag of an FCPA resolution. Monetary resolutions for purposes of this Article do not include amounts owed to foreign governments or agencies, even if contemplated in a company’s settlement with the U.S. government. In addition, settlements that involved both a parent and subsidiary are calculated together, with the combined settlement amount being attributed to the parent company. For example, in September 2017, Swedish telephone firm Telia Company AB reached a \$508.6 million resolution with DOJ, \$40.5 million of which was on behalf of Telia’s subsidiary, Coscom LLC.¹⁰¹ This amount, however, can be offset by as much as \$274 million for any criminal penalties paid to Dutch authorities.¹⁰² Separately, the SEC entered into a cease-and-desist order based on the same underlying conduct requiring Telia to disgorge \$457 million.¹⁰³ But approximately half of that amount, \$208.5 million, was credited because it was earmarked as payment to Swedish authorities in connection with the same underlying conduct.¹⁰⁴ Consequently, after deducting offsets for amounts set aside for foreign authorities, Telia’s monetary resolution for FCPA violations is counted as approximately \$483 million for purposes of this Article.

IV. THE FCPA’S MONETARY IMPACT ON U.S. VERSUS NON-U.S. CORPORATIONS

U.S. corporations have been the subject of FCPA enforcement actions more often than their foreign counterparts. Of the 306 corporate DOJ and SEC FCPA enforcement actions initiated from 1978 through 2018, 198 (or nearly two-thirds) involved a domestic entity, though in recent years the difference has been shrinking significantly. As shown in FIGURE 2, in many years enforcement actions initiated against foreign corporations have nearly kept pace with

98. WEATHERFORD INT’L PLC 2016 10K (Feb. 15, 2017), <https://www.weatherfordannualreport.com/media/downloads/2016-weatherford-annual-report.pdf>.

99. *Id.* at 19.

100. *Id.* at 91–92.

101. Letter from DOJ to Counsel for Telia, (Sept. 21, 2017), <https://www.justice.gov/usao-sdny/press-release/file/997851/download>, at 7.

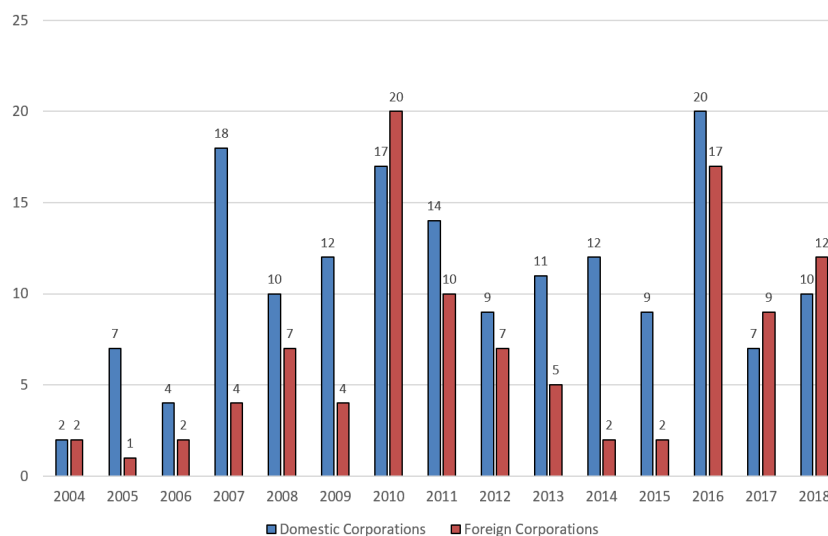
102. *Id.* at 8–9.

103. Telia Company AB, Order Instituting Cease-and-Desist Proceedings, Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Securities Exchange Act Rel. No. 81669, Accounting and Auditing Enforcement Rel. No. 3898, Admin. Proc. File No. 3-18195 (Sept. 21, 2017).

104. *Id.*

those against domestic corporations, even exceeding them in 2010, 2017, and 2018, and equaling them in 2004.

FIGURE 2, COMBINED DOJ/SEC FCPA CORPORATE ENFORCEMENT ACTIONS PER YEAR, 2004–2018.



This may be the case for a number of reasons. First, prosecuting a U.S. corporation may generally consume less time and fewer resources than a non-U.S. corporation, whose critical documents and employees are frequently located overseas and, in many instances, require coordination with foreign authorities to obtain.

Second, despite the FCPA's broad reach, its jurisdictional hurdles have historically precluded enforcement against foreign entities. Before a 1998 amendment to the FCPA, among foreign entities, only foreign issuers were subject to FCPA liability and even then, only the FCPA's accounting and internal controls provisions applied. Indeed, for a long period in FCPA history, foreign companies had good reason to believe their exposure to FCPA liability was limited and, consequently, had less incentive to expend considerable resources enhancing their anti-corruption compliance programs.

In response to the call of the OECD Convention that each signatory "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory," the 1998 amendments extended the FCPA's application in two significant respects: first, the anti-bribery provision was expanded to encompass foreign entities that further a corrupt payment while in the United States through the instrumentalities of interstate commerce. Second, the amended FCPA covers anti-bribery violations that occur entirely outside the United

States, provided the defendant is an issuer, an agent of an issuer, a domestic concern, or an agent of a domestic concern.¹⁰⁵

Even after the 1998 amendment, the jurisdictional thresholds of the FCPA can preclude prosecution of certain foreign entities. As an example, foreign bribe recipients cannot be prosecuted under the FCPA, which instead targets the supply side of bribery. In *United States v. Castle*, the government tested whether it could charge foreign officials for conspiring to violate the FCPA by receiving a bribe.¹⁰⁶ The Fifth Circuit held that Congress intentionally omitted the recipients of bribes from the FCPA, instead focusing on those who pay bribes.¹⁰⁷ This holding is less significant now because in recent years DOJ has routinely charged foreign official recipients of bribe payments under the money laundering statute where they use the U.S. financial system to launder the proceeds.¹⁰⁸

The FCPA has been enforced against U.S. companies more frequently, but there is no question that foreign corporations have disproportionately borne the lion's share of FCPA fines and penalties. Foreign companies are 35% of all FCPA corporate resolutions but account for more than 69% (\$7.8 billion) of all FCPA monetary settlement amounts since that statute was enacted. Foreign companies' average monetary settlement amounts have exceeded those of domestic corporations by \$54,699,843, or 312%. From 1978 through 2018, the average FCPA monetary resolution in an action against a domestic corporation was \$17,559,982, compared with \$72,259,825 for foreign corporations. And while FCPA enforcement actions against foreign corporations were uncommon until approximately 2004, the same trend holds true when focusing only on 2004 through 2018. During those years, the average FCPA monetary resolution against U.S. companies was \$21,182,931, compared with \$75,016,934 for non-U.S. companies. In other words, in FCPA enforcement actions from 2004 through 2018, non-U.S. companies have been subject to monetary penalties that on average are nearly four times greater than those imposed on U.S. companies. In absolute terms, monetary resolutions from 2004 through 2018 against foreign companies have totaled \$7.8 billion compared with \$3.4 billion against domestic corporations.

As shown in FIGURES 3 and 4, foreign companies have faced stratospheric monetary penalties compared with domestic companies in recent years. The contrast was particularly acute in 2017, when foreign corporations paid an average of \$150,349,415 (or \$1.05 billion in total) compared with an average of \$16,103,333 (or \$96.6 million in total) for domestic corporations.

105. International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 77dd-1 to 77dd-3 (2019) (as amended in 1998 by Pub. L. No. 105-366).

106. 925 F.2d 831 (5th Cir. 1991).

107. *Id.* at 834.

108. 2017 Year-End FCPA Update, GIBSON, DUNN & CRUTCHER (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update>; 2018 Mid-Year FCPA Update, GIBSON, DUNN & CRUTCHER (Jul. 9, 2018), <https://www.gibsondunn.com/2018-mid-year-fcpa-update/>.

FIGURE 3, TOTAL AMOUNTS OF MONETARY RESOLUTIONS, 2013–2018.

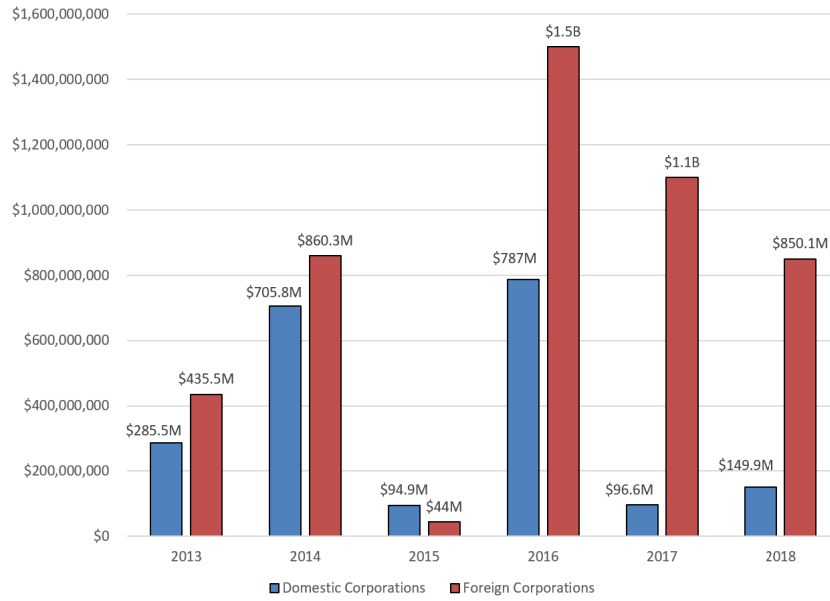
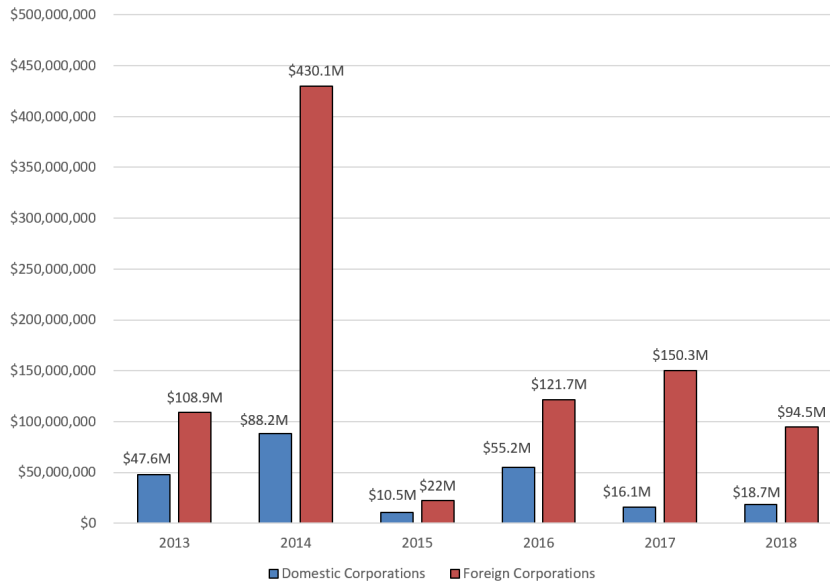


FIGURE 4, AVERAGE AMOUNTS OF MONETARY RESOLUTIONS, 2013–2018.



IV. THE FCPA'S INDIRECT IMPACTS ON U.S. VERSUS NON-U.S. CORPORATIONS

Monetary penalties are not the only component of an FCPA resolution that impact a company's bottom line. Post-resolution obligations, including monitorships, self-reporting, or some combination of the two, often accompany FCPA settlements. In many instances, the cost and collateral consequences of these post-resolution obligations rival or even eclipse the impact of the monetary settlement itself. This is particularly true of corporate compliance monitors, whose duties can last anywhere from a few months to several years. The monitor requires both financial and human resources of the company, while bringing with it the possibility of unearthing new corruption problems unrelated to those giving rise to the settlement. Such revelations, in turn, can trigger reporting requirements, paving the way for a second round of costly FCPA resolutions.

Since the FCPA's inception, monitorships have been imposed on non-U.S. companies more frequently than U.S. ones. Approximately 21% of U.S. companies have been required to retain an independent monitor as a condition of settlement, compared with nearly 30% for foreign corporations. Compared to those imposed on U.S. corporations, the government has imposed lengthier reporting periods on foreign companies, whose monitorships last an average of nearly 31 months, or more than two-and-a-half years.

Another way that the FCPA indirectly impacts foreign companies more heavily than domestic ones is through tag-along foreign enforcement actions. Increasingly, FCPA resolutions involve successive prosecutions by foreign enforcers arising from the same core set of allegations, thereby requiring the company to expend additional time and resources addressing FCPA allegations not only with U.S. enforcers but also with foreign authorities. Even if a corporation brokers a resolution with the U.S. government, such agreements cannot preclude the possibility that foreign jurisdictions will bring an enforcement action based on the same facts. For example, Halliburton and its affiliates reached a \$579 million resolution (the third largest in FCPA history) with DOJ and the SEC in 2009 for the alleged payment of bribes to Nigerian officials.¹⁰⁹ Less than two years later, Halliburton reached a resolution with the Nigerian government based on the same conduct.¹¹⁰ In a follow-on settlement with Nigeria, Halliburton agreed to pay \$32.5 million, as well as \$2.5 million for attorneys' fees and other expenses to Nigeria.¹¹¹ DOJ and the SEC can also bring FCPA follow-on enforcement actions stemming from an investigation of a foreign authority. A notable example is Siemens, whose resolution with the SEC and DOJ

109. Press Release, Securities & Exchange Commission, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), <https://www.sec.gov/news/press/2009/2009-23.htm>.

110. *Halliburton Confirms Agreement to Settle with Federal Government of Nigeria*, BUSINESS WIRE, Dec. 21, 2010 <https://www.businesswire.com/news/home/20101221005624/en/Halliburton-Confirms-Agreement-Settle-Federal-Government-Nigeria>.

111. *Id.*

followed raids initiated by the Munich Public Prosecutor's Office in Germany.¹¹²

In absolute terms, as shown in FIGURE 5, more foreign companies have entered FCPA resolutions with U.S. authorities that also involve an investigation or settlement with an overseas foreign enforcer, notwithstanding that far more U.S. companies have been subject to FCPA enforcement actions than non-U.S. ones. Indeed, more than 45% of all non-U.S. corporations that have reached FCPA resolutions have done so with the involvement of a foreign enforcer in some form. Of those, approximately half have also reached a settlement with an overseas enforcer for largely the same conduct that was resolved with the U.S. authorities. By contrast, only about 12% of U.S. companies that have entered DOJ and SEC FCPA resolutions have done so where a foreign enforcer was involved in some capacity.

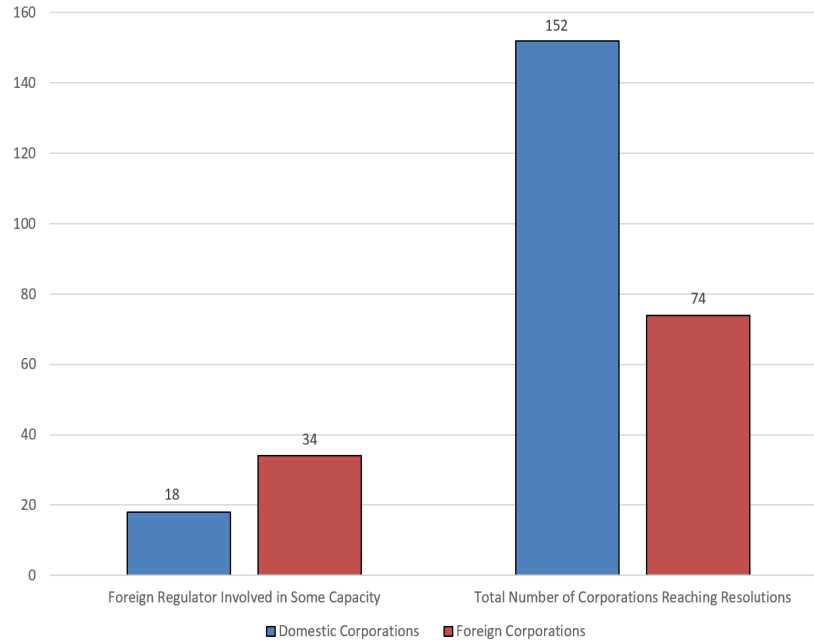
The trend of coordinated, multi-jurisdictional anti-corruption actions involving DOJ and/or the SEC and any one (or more) of a growing number of their foreign counterparts has only accelerated in recent years.¹¹³ Major corporate FCPA resolutions now routinely involve the SEC and DOJ participating in cross-border resolutions by, among other things, crediting a company's payments to foreign enforcement authorities in calculating the U.S. criminal fine.¹¹⁴

112. Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

113. See 2017 Year-End FCPA Update, *supra* note 108.

114. See 2018 Mid-Year FCPA Update, *supra* note 108. In May 2018, Deputy Attorney General Rod J. Rosenstein introduced a new DOJ "Policy on Coordination of Corporate Resolution Penalties," which requires, among other things, that DOJ should coordinate with and consider fines, penalties, and/or forfeiture paid to enforcement authorities investigating the same company for the same conduct. *Id.*

FIGURE 5, CORPORATIONS RESOLVING DOJ/SEC FCPA ENFORCEMENT ACTIONS WHERE FOREIGN ENFORCERS ARE INVOLVED, 1978–2018.

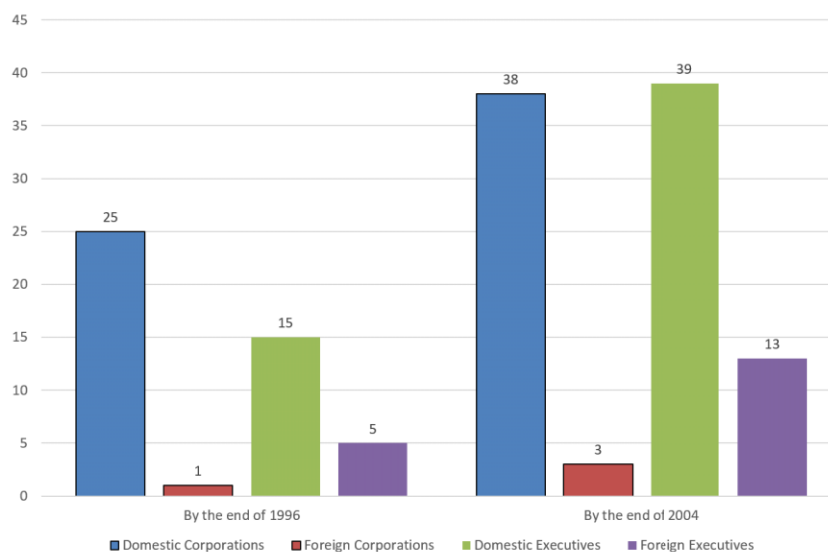


V. THEORIES BEHIND THE TRENDS

It is not obvious that there is one apparent reason, but a number of theories could, in combination, explain the seemingly disparate treatment of non-U.S. and U.S. entities at the hands of U.S. enforcement authorities. As a preliminary matter, U.S. companies have had more time to enhance their anti-corruption compliance programs, revisit their business practices, and improve the way they handle investigations in an era of vigorous FCPA enforcement. As shown in FIGURE 6, by 1996, when an FCPA resolution was reached for the first time with a non-U.S. corporation, 25 U.S. companies had already resolved FCPA allegations. Also by this time, 15 U.S. executives had pleaded guilty to, or otherwise resolved, FCPA charges, compared with only 5 foreign executives. By the end of 2004, when FCPA resolutions with non-U.S. companies begin to appear with increasing regularity, thirty-eight U.S. companies and 39 executives of U.S. companies had already reached FCPA resolutions, compared with only 3 foreign corporations and 13 foreign executives. In addition, DOJ must by statute provide a written opinion at the request of an issuer or domestic concern indicating whether DOJ would take enforcement action against the requester under the anti-bribery provisions for prospective conduct the requester is con-

sidering.¹¹⁵ Published on DOJ's FCPA website, these releases provide valuable insights into how DOJ interprets the FCPA. The vast majority of the 61 opinion procedures releases issued by DOJ to date were requested by U.S. companies, providing another avenue for U.S. companies to become more sensitized to the FCPA and more aware of its scope. Further, until the passage of the 1998 amendment expanding the FCPA's extraterritorial application, foreign companies had good reason to believe their exposure was more limited and, consequently, had less incentive to expend considerable resources enhancing their anti-corruption programs. And of course, it is human nature to focus on legal risks that are most proximate to the corporate headquarters. It is understandable that a U.S. company would focus more on the priorities and concerns of U.S. enforcers than would a non-U.S. entity.

FIGURE 6, CORPORATIONS AND EXECUTIVES REACHING DOJ/FCPA RESOLUTIONS, 1978-1996 AND 1978-2004.



Another possible explanation for the disparity of FCPA enforcement on U.S. versus non-U.S. companies is the passage of the Sarbanes-Oxley Act ("SOX") in 2002. Section 404 of SOX requires issuers to evaluate and report on the effectiveness of their internal controls over financial reporting.¹¹⁶ Pursuant to SEC rules on section 404, issuers must include a report in their annual disclosure articulating, among other things, management's assessment of the issuer's internal financial controls, as well as any material weaknesses in the issuer's financial reporting controls identified by management.¹¹⁷ DOJ has

115. 28 C.F.R. § 80.1 (2019).

116. Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7262(b) (2018).

117. *Id.* at § 404.

pointed to SOX as one of the animating forces behind increased voluntary disclosures to enforcement authorities.¹¹⁸ Voluntary disclosures can result in DOJ offering declinations and significant reductions in monetary penalties (up to 50% off the low end of the U.S. Sentencing Guidelines fine range).¹¹⁹

SOX also establishes anti-retaliation protections for, among other groups, employees, officers, and agents of publicly traded companies who disclose potential violations of securities laws and other financial fraud laws.¹²⁰ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) greatly enhanced the whistleblower protections in SOX by providing financial incentives to whistleblowers who report information to the SEC that leads to a successful enforcement action.¹²¹ Whistleblower awards can be substantial, ranging from 10–30% of monetary sanctions collected by the SEC.¹²² The largest single award to date, announced in 2014, was \$30 million.¹²³

By virtue of their status as non-issuers that do not file reports with the SEC, most non-U.S. companies are exempt from section 404 reporting and do not face the prospect of a Dodd-Frank whistleblower.¹²⁴ These factors may contribute to U.S. corporations voluntarily disclosing FCPA issues at higher rates than their non-U.S. counterparts. From 2004 through 2018, 86% of domestic corporations that reached FCPA resolutions were issuers subject to section 404 reporting requirements and Dodd-Frank whistleblower protections. Of those, 65% reached FCPA resolutions after making a voluntary disclosure. In that same timeframe, nearly 30% of non-U.S. companies that reached FCPA resolutions were not subject to section 404 reporting requirements, and only 57% of those companies voluntarily disclosed. In light of the significant reductions in

118. *Examining Enforcement of the Foreign Corrupt Practices Act, Hearing before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary*, 111th Cong. 8 (2010) (statement of Greg Andres, Acting Attorney General, Department of Justice) (“We are getting a significant number of disclosures from corporations about their own criminal conduct. I think that, in part, relates to the passage of Sarbanes-Oxley legislation, which encourages corporations to review their own books and records.”); *Foreign Corrupt Practices Act, Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 112th Cong. 7 (2011) (statement of Greg Andres, Acting Attorney General, Department of Justice) (“At least one likely cause for this increase in cases is disclosures by companies consistent with their obligations under the Sarbanes-Oxley Act, which requires senior corporate officers to certify the accuracy of their financial statements. This has led to more companies discovering FCPA violations and making the decision to disclose them to the SEC and DOJ.”).

119. Rod Rosenstein, Deputy Attorney General, Dep’t of Justice Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34thinternational-conference-foreign>.

120. 18 U.S.C. § 1514A (2010).

121. 15 U.S.C. § 78u-6 (2010).

122. *Id.*

123. Press Release, Securities & Exchange Commission, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <https://www.sec.gov/news/press-release/2014-206#VCBZ4C5dUV0>.

124. 15 U.S.C. § 7262(7); 15 U.S.C. § 7262(b).

monetary penalties that are available in a voluntary disclosure scenario, it is possible that the lighter monetary impact on domestic companies is in part a function of SOX-prompted disclosures.

In addition, U.S. companies naturally are more likely to come onto the government's radar (intentionally or unintentionally), whereas non-U.S. companies likely need to engage in more serious and widespread conduct to come to the attention of DOJ and the SEC. And as a general matter when compared to non-U.S. companies, U.S. companies may be more likely to earn cooperation credit regardless of whether they made a voluntary disclosure, on account of the deftness with which sophisticated U.S. companies tend to address FCPA under the guidance of experienced U.S. counsel. There have been notable recent corporate FCPA enforcement actions in which the government has criticized non-U.S. companies for not cooperating in the investigations, leading to larger penalties.¹²⁵

IV. CONCLUSION

Though past criticism from President Trump, SEC Chairman Clayton, and others suggested that the FCPA is an unfair burden on U.S. companies attempting to do business overseas, non-U.S. corporations have felt the statute's enforcement sting to an even greater extent. This is true not only on a dollar-for-dollar basis—for every dollar domestic companies have paid in FCPA penalties on average, foreign companies have paid \$2.24—but also in terms of the FCPA's indirect impact. Notably, non-U.S. companies have historically been more likely to be subject to monitorships, post-resolution reporting, and follow-on resolutions from overseas enforcers. The statute's disproportionate impact on non-U.S. companies has caused some foreign observers to perceive the FCPA as a tool of economic nationalism rather than a disadvantage to U.S. corporations. Though the FCPA has affected non-U.S. companies more acutely than their U.S. counterparts, the statute's jurisdictional reach can level the playing field for U.S. corporations. Congress even amended the FCPA in 1998 with this motivation in mind by expanding the anti-bribery provision to reach foreign entities and conduct that occurred outside the United States, provided certain conditions are met. Current trends suggest that future FCPA enforcement is likely to involve increased cooperation with foreign enforcers and cross-crediting as part of more globalized settlements. This likely will enhance foreign enforcement efforts and help level the playing field with regard to compa-

125. See Press Release, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges, Department of Justice (Dec. 22, 2014), <https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>; Press Release, Department of Justice, Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an \$88 Million Fine (Mar. 19, 2014), <https://www.justice.gov/opa/pr/marubeni-corporation-agrees-plead-guilty-foreign-bribery-charges-and-pay-88-million-fine>.

nies not otherwise subject to the FCPA. This, in turn, may close some of the gap in enforcement outcomes between non-U.S. and U.S. businesses.

