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Ordinarily, mere settlement of a legal action is not noteworthy. However, in the Foreign Corrupt Practices Act ("FCPA") context, such settlements are noteworthy because of the lack of substantive FCPA case law.[1] This lack of substantive FCPA case law means that settled FCPA enforcement actions serve as de facto case law and often provide the only legal signposts concerning the FCPA enforcement agencies' priorities and interpretations of the law. Further, corporate FCPA compliance policies and procedures are often calibrated to the enforcement agencies' priorities and interpretations of law as reflected in the settled FCPA enforcement actions. The end result is that FCPA settlements are significant legal events to those subject to the aggressively enforced law, including companies which must comply with the FCPA in doing business in overseas markets.

The February 2009 action against Halliburton Company ("Halliburton") is one such significant FCPA settlement.[2] As discussed in this article, the enforcement action against Halliburton and its affiliated entities sends a "proceed with caution" message to any company seeking to engage a foreign agent to assist in obtaining or retaining business.[3] The action and its resolution also reinforce the importance of the minimum due diligence metrics the FCPA enforcement agencies expect a company to undertake *before* engaging a foreign agent. Parent companies should pay particular attention to the Halliburton action because the due diligence expectations will apply not only to agents it engages, *but also* to agents engaged by all subsidiaries and affiliates over which the parent company exercises control and supervision.

This article first addresses how foreign agents can greatly expand a company's overseas business opportunities and how engagement of foreign agents has become the norm when seeking business opportunities abroad. Next, a limited FCPA background is provided to properly understand the FCPA risks of engaging foreign agents. Thereafter, this article provides an in-depth discussion of topically relevant facts from the Halliburton enforcement action. Finally, this article ends with a discussion of FCPA due diligence strategies that a company should employ when engaging foreign agents in order to minimize FCPA risks.

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[1] *See, e.g.*, U.S. v. Kozeny, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) ("there has been surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years . . . .").

[2] Press Release, Securities and Exchange Commission, Litigation Release No. 20897A (Feb. 11, 2009) *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm

[3] This article uses the generic term "foreign agent" to refer to a wide range of foreign third-party business partners such as foreign representatives, foreign distributors, foreign consultants, foreign customs brokers, and foreign joint venture partners.

I. AS COMPANIES CONTINUE TO EXPAND INTO FOREIGN MARKETS, ENGAGEMENT OF FOREIGN AGENTS IS THE NORM

Seeking business in foreign markets is a critical growth strategy for any company. Perhaps ten to twenty years ago, only titans of American business were doing business or seeking business in international markets. Now, however, with domestic profit sources reaching a saturation point or drying up in a recessionary environment, U.S. companies must look to overseas markets to survive.[4] It is not just companies "on the coasts" that are turning to overseas markets to boost growth and meet profit targets; rather, companies in America's industrial heartland, including Ohio-based companies, are also turning to overseas markets to sustain growth.

The importance of overseas business growth for Ohio companies is apparent from the below information included in a recent Ohio Trade Development Mission trip:

> In 2007, Ohio companies exported more than $42 billion in goods, an increase of 12 percent over 2006. Ohio is currently the eighth-largest exporting state in the nation, and [Ohio is] the only state to increase exports every year since 1998. In addition over the six-year period 2001-2006, Ohio's exports increased nearly 20 percent faster than U.S. exports overall.[5]

Bespeaking the importance of foreign business opportunities for Ohio companies, as well as the overall economic well-being of the state, the Ohio Department of Development's Global Markets Division ("Global Markets Division") assists Ohio-based companies to better understand global trade opportunities and expand into foreign markets.[6] The Global Markets Division manages and maintains offices in several foreign countries, including China, India, South Africa, Brazil and Mexico, that are "staffed by experienced business professionals whose goal is to promote Ohio exports[.]"[7] In addition, the Global Markets Division "organizes business missions, often led by the Governor or Lieutenant Governor of Ohio, to initiate and nurture relationships with potential international business partners[]" and provides "opportunities to meet high-level business and government executives face-to-face[.]"[8] In short, expanding business opportunities in foreign

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[4] *See, e.g.*, Bart Koster & Maaike Noordhuis, *AkzoNobel's Hans Wijiers sees Emerging-Market Growth*, WALL ST. J., Nov. 30, 2009, at B4 (noting that as the "'two traditional dominant markets, the U.S. and European Union, have matured and stabilized and will become less dominant . . . [t]he focus for growth will be in emerging markets like China, India, and Brazil.'"). *See also*, Garry Bruton et al., *Before Heading to China . . .*, WALL ST. J., Nov. 30, 2009, at R6.

> Considering that China has undergone rapid and sustained economic growth over the past 30 years and today is the largest recipient of foreign direct investment in the world, it isn't surprising that many companies feel the need not only to respond to competition from Chinese-made products but also to enter and compete in the Chinese market itself.

Id.

[5] Letter from Governor Ted Strickland and Lt. Governor Lee Fisher announcing the Ohio 2008 Trade Development Mission to Serbia and Hungary (Nov. 3-7, 2008) (on file with author).

[6] *See* Ohio Dept. of Dev., *Ohio Global Markets*, *available at* http://development.ohio.gov/cms/uploadedfiles/Root/Quick_Navigation/L8-GMD_Brochure.pdf.

[7] *Id.*

[8] *Id.*

markets will continue to be a critical component of any company's future success in the current economic environment.

The primary means of expanding in a foreign market is to engage a foreign agent. A foreign agent "brings to the table" what the U.S. company lacks: an understanding and appreciation for the local business environment and solid relationships with key business actors, both key ingredients to a U.S. company's success in a foreign market. "[C]ompanies need to find local partners familiar with the terrain, and rely on those partners to help guide their operations and develop strategies unique to each market."[9]

Use of foreign agents is particularly strong in high-growth markets, such as China and India, where understanding and navigating through complex bureaucracies is often a key ingredient to business success.[10] Further, in many foreign countries, including most notably those in the Middle East, engaging a local agent or having a local sponsor is a *requirement* before a U.S. company can do business in the country.[11]

Yet, as explained below and as demonstrated by the many recent FCPA enforcement actions based in whole or in part on foreign agent conduct, the most attractive features of a foreign agent, i.e., knowledge of the local business environment and relationships with key business actors, also present the most troublesome risks for a U.S. company obligated to comply with the FCPA in doing business in overseas markets.

II. THE FCPA RISKS OF ENGAGING FOREIGN AGENTS

The FCPA has two main provisions: the anti-bribery provisions and the books and records and internal control provisions. [12] The Department of Justice ("DOJ") generally enforces the criminal anti-bribery provisions and willful violations of the books and records and internal control provisions, and the Securities and Exchange Commission ("SEC") generally enforces the civil books and records and internal control provisions.[13]

Both the anti-bribery provisions and the books and records and internal control provisions are relevant to ensuring that a U.S. company maintains an FCPA-compliant relationship with its foreign agents.[14]

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[9] Jamie Anderson, Martin Kupp & Ronan Moaligou, Global Business, *Lessons from the Developing World* WALL ST. J., Aug. 17, 2009, at R6. In this article, the authors profile two companies that have penetrated markets in the developing world through engagement of local partners. *Id.* One company was able to succeed in rural Nigeria by working with local people who understood "local dynamics" and a "deep understanding of how to manage the local environment." *Id.* Another company flourished in India by "benefit[ing] from [the] wisdom" of local businesspeople already running business in the market. *Id.*

[10] *See, e.g.*, James T. Areddy, *Danone Pulls Out of Disputed China Venture*, Wall St. J. Oct. 1, 2009, at B1 (Noting that "[f]oreign firms have reported billion in sales through Chinese partnerships."). "International giants such as Procter & Gamble, Starbucks and General Motors have operated wholly or in part through joint venture in China." *Id.*

[11] *See, e.g.*, Lisa Middlekauff, *To Capitalize on a Burgeoning Market? Issues to Consider Before Doing Business in the Middle East*, 7 Rich. J. GLOBAL L. & BUS. 159, 170 (2008).

[12] *See* 15 U.S.C. § 78dd-1 (2010) (anti-bribery provisions); *see also* 15 U.S.C. § 78m(b) (books and records and internal control provisions).

[13] *See* 15 U.S.C. § 78dd-1, 15 U.S.C. § 78m(b).

[14] *See* 15 U.S.C. § 78m(b)(2)(A)-(B) (as explained previously, the books, records, and internal control provisions only apply to issuers, *e.g.*, publicly-traded companies with shares traded on a U.S. exchange or companies otherwise required to file reports with the SEC). The "best practices" for all U.S. companies—whether public or private—is to "make and keep books, records, and accounts, which, in reasonable detail, accurately and

A. Anti-bribery Provisions

The anti-bribery provisions generally prohibit U.S. companies and their personnel, U.S. citizens, foreign companies listed on a U.S. stock exchange, or any person while in the U.S. from corruptly paying, offering to pay, promising to pay, or authorizing the payment of money, a gift, or anything of value to a foreign official in order to obtain or retain business.[15] As applied to U.S. companies and citizens, the FCPA has extra-territorial application, meaning that an FCPA anti-bribery violation can occur even if the prohibited conduct takes place entirely outside of the U.S.[16]

The anti-bribery provisions are broadly and aggressively interpreted by the enforcement agencies.

For instance, the "foreign official" element is statutorily defined as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof[.]"[17] Under the enforcement agencies' unchallenged and untested interpretation of the element, an individual is a "foreign official" under the FCPA not only by being a high-ranking member of the government or by virtue of an appointment to a government ministry or agency such as a tax or customs official, but also by being employed by a commercial enterprise owned or controlled, in whole or in part, by a foreign government – (a so-called state-owned or state-controlled entity ("SOE") – under the theory that the entity is an "instrumentality" of a foreign government.[18] Under this aggressive interpretation, it does not matter if the SOE has publicly-traded shares or if it operates in numerous countries. Once a company is deemed an "instrumentality" of a foreign government, the enforcement agencies will consider every single employee of the company to be a "foreign official" for purposes of the FCPA, regardless of how local law may characterize the employee.[19]

Indeed, in the Halliburton action, certain of the charged conduct involved "foreign officials" who were not government officials or employees, but rather employees of a commercial enterprise: either Nigerian National Petroleum Corporation ("NNPC") or Nigeria LNG Limited ("NLNG").[20] According to the DOJ, and without elaborating or providing any specifics, NNPC was an "entity and instrumentality of the Government of Nigeria" and its officers and employees were, thus, "foreign officials" under the FCPA.[21] Likewise, because NLNG's largest shareholder was NNPC, which owned forty-nine percent of NLNG, and its board members were appointed by NNPC, the DOJ charged that NLNG's officers and employees

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fairly reflect" its transactions and dispositions of its assets and to "devise and maintain a system of internal accounting controls[.]" *See id.*

[15] *See* 15 U.S.C. § 78dd-1(a)(1), 2(a)(1), 3(a)(1).

[16] *See id.* § 78dd-1(g), 2(i).

[17] *Id.* § 78dd-1(f)(1)(A).

[18] *See* Information, ¶¶ 13, 14, United States v. Kellogg Brown & Root LLC, 590 F. Supp. 2d 850 (S.D. Tex. 2008) (No. H-07-1485).

[19] *See* DEPARTMENT OF JUSTICE, OPINION PROCEDURE RELEASE NO. 94-01 (May 13, 1994), *available at* www.justice.gov/criminal/fraud/fcpa/opinion/1994/9401.html (opining that a general director of a state-owned enterprise, being transformed into a joint stock company, is a "foreign official" under the FCPA *despite* a foreign law opinion that the individual would not be regarded as either a government employee or a public official in the foreign country).

[20] *See* 15 U.S.C. § 78dd-1(g), 2(i).

[21] *See* Information, *supra* note 17, ¶ 13.

were "foreign officials" under the FCPA, *despite the fact* that fifty-one percent of NLNG is owned by a consortium of *private* oil companies.[23]

This aggressive interpretation of a key FCPA element is important to understand not only when engaging foreign agents who will interact with foreign government officials, but also when engaging foreign agents who will interact with commercial enterprises which may be wholly or partially owned or controlled by a foreign government.

Most relevant to properly understanding the Halliburton action and its implications for engaging foreign agents are the FCPA's broad third party payment provisions. Under these provisions, those subject to the anti-bribery provisions are not only directly prohibited from providing anything of value to a "foreign official" to obtain or retain business, but they are also prohibited from providing anything of value to "any person, while knowing" that all or a portion of the thing of value will be given directly or indirectly to a "foreign official" to obtain or retain business.[24]

Like other FCPA elements, this knowledge requirement is broadly interpreted and can be satisfied not only when a company has actual knowledge that a third party is providing anything of value to a "foreign official" to obtain or retain business, but also when a company is willfully blind or consciously disregards facts which suggest that a third party may provide anything of value to a "foreign official" on its behalf to obtain or retain business.[25]

Because of the FCPA's broad third party payment provisions, a company should engage in thorough and comprehensive FCPA due diligence of a foreign agent *prior* to engagement because the agent's conduct may expose the company to FCPA liability. For this same reason, it is also critical that a company monitor the agent's activities during the period of engagement.

There are several legitimate policy questions that can be asked regarding whether a company *should* be required to engage in more due diligence of an agent it engages in Beijing or Bombay compared to Biloxi or Boston, yet those policy questions are beyond the scope of this article. This article merely points out the reason *why* engaging an agent in Beijing or Bombay is different than engaging an agent in Biloxi or Boston: it is different because the FCPA, specifically the FCPA's broad third party payment provisions, can impute the foreign agent's improper conduct to the company engaging the foreign agent.

B. Books and Records and Internal Control Provisions

While less "headline grabbing" than its companion anti-bribery provisions, the FCPA's books and records and internal control provisions are equally relevant to properly understanding the Halliburton action and its implications for engaging foreign agents.[26]

These provisions apply only to "issuers," generally defined as any company which has securities traded on a U.S. exchange or is otherwise required to file reports with the SEC, and these provisions require issuers to: (i) make and keep books and records which, in reasonable detail, accurately and fairly reflect business transactions and disposition of assets; and (ii) "devise and maintain a system of internal accounting controls sufficient to provide reasonable

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[23] *See id.* ¶ 14; *see* Nigeria LNG, *The Company*, *available at* http://www.nigerialng.com/NR/exeres /F48DE9A7-F3F3-4A8E-929A-0C34F1CFF92B%2C frameless.htm (last visited Feb. 15, 2010).

[24] 15 U.S.C. § 78dd-1(a)(3).

[25] *See id.* § 78dd-1(f)(2).

[26] 15 U.S.C.§ 78m(b).

assurances" that, among other things, business transactions are properly authorized and recorded.[27]

An issuer can be separately charged with violating the FCPA's books and records and internal control provisions *even if* FCPA anti-bribery charges are not filed against the issuer.[28] The books and records provisions are often implicated when dealing with foreign agents because improper payments to a foreign official are often funneled through foreign agents and disguised in a company's books and records as legitimate consulting or service fees.[29] Moreover, ineffective due diligence procedures for engaging and monitoring foreign agents can implicate the FCPA's internal control provisions on the theory that the agent would not have participated in the improper payment scheme if it was subject to effective internal controls.[30]

Although the FCPA, as written, requires issuers only to "proceed in good faith to use its influence" to cause its minority owned subsidiaries or affiliates to devise and maintain a system of effective internal controls,[31] the Halliburton action, and other similar actions, instruct that an issuer complies with the internal control provisions only when it enforces its internal control procedures down to all related entities which contribute to the issuer's financial results.

U.S. company exposure to an FCPA enforcement action based on the conduct of a foreign agent is not merely an academic hypothetical. In addition to the Halliburton enforcement action discussed in the next section, the below table lists the 2009 corporate FCPA enforcement actions involving, in whole or in part, foreign agent conduct.[33]

2009 FCPA Enforcement Actions Involving Foreign Agents

Date	Company	Conduct	Outcome
2/2009	ITT Corp.[34]	According to the SEC's Complaint, between 2001 and 2005, ITT Corp.'s wholly-owned Chinese subsidiary, Nanjing Goulds Pumps Ltd. ("NGP"), made, either directly or **indirectly through third party agents**, approximately $200,000 in payments to employees of Chinese Design Institutes ("DIs"), some of which were Chinese state-owned entities ("SOEs"), and assisted in the	SEC enforcement action for violations of the FCPA's books and records and internal control provisions.[38] $1.7 million penalty.[39]

[27] *See id.* § 78m(b)(2).

[28] *See* Complaint, ¶¶ 43-45, Sec. and Exch. Comm'n v. Halliburton Co., Civ. Action No. 4:09-399 (S.D. Tex filed Feb. 11, 2009) (charging Halliburton Company with FCPA books and records and internal control violations only). Unlike the anti-bribery provisions, the books and records and internal controls provisions enforced by the SEC do not contain a *mens rea* requirement. *See supra* note 25.

[29] *See supra* note 16 and accompanying text.

[30] *See supra* note 16 and accompanying text.

[31] 15 U.S.C. § 78m(b)(6).

[33] The term "corporate FCPA enforcement action" is used to distinguish these actions from individual FCPA prosecutions. Individuals employed by the offending company are often subject to a "tag-along" FCPA enforcement action based on the same core set of facts.

[34] *See* Complaint, Sec. and Exch. Comm'n v. ITT Corp., 1:09-CV 00272 (D.D.C. filed Feb. 11, 2009), *available at* http://www.sec.gov/litigation/complaints/2009/comp20896.pdf; Press Release, Securities and Exchange Commission, Litigation Release No. 20896, Feb. 11, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr20896.htm.

		design of large infrastructure projects in China.[35] The SEC alleged that NGP employees made certain of the payments, through agents using inflated commissions to the agents, with the understanding that the agents would then make payment to the DI employees that specified and recommended NGP products.[36] The SEC Complaint alleged that the payments were improperly recorded in NGP's books and records as commission payments or cost of goods sold and that these improper entries were consolidated and included in ITT Corp.'s financial statements filed with the SEC.[37]	
4/2009	Latin Node, Inc.[40]	According to the DOJ Criminal Information, Latin Node, Inc. violated the FCPA's anti-bribery provisions in connection with improper payments made to officials of Hondutel (the Honduran government-owned telecommunications company) and TeleYemen (the Yemeni government-owned telecommunications company).[41] In Honduras, the DOJ alleged that Latin Node, Inc. caused LN Comunicaciones (a wholly-owned Guatemalan subsidiary) and Servicios IP, S.A. (a Guatemalan company nominally owned by two LN Comunicaciones employees) to sign a purported **consulting**	DOJ enforcement action for violations of the FCPA's anti-bribery provisions.[46] $2 million fine.[47]

[38] *See* Press Release, Securities and Exchange Commission, Litigation Release No. 20896, *available at* http://www.sec.gov/litigation/litreleases/2009/lr20896.htm.

[39] *Id.*

[35] *See* Complaint ¶¶15-16, *ITT Corp.*, 1:09-CV 00272.

[36] *Id.* at ¶ 12.

[37] *Id.* at ¶ 16.

[40] *See* Press Release, Department of Justice, Latin Node Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay $2 Million Criminal Fine (Apr. 7, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/04/04-07-09LatinNode-Plead.pdf.

[41] *See id.*

		agreement with a company believed to be controlled by a foreign official's brother.[42] The DOJ alleged that LN Comunicaciones's employees signed checks totaling $300,000 to Servicios IP, knowing and intending that some or all of the money would be passed along to Hondutel officials.[43] In Yemen, the DOJ alleged that Latin Node, Inc., while seeking to enter the Yemeni market, learned that **Yemen Partner A** (a dual U.S.-Egyptian citizen) had obtained an agreement with TeleYemen at a favorable rate through his privately-owned company.[44] Latin Node, Inc. sought to partner with Yemen Partner A to gain entry into the Yemeni market, even though Latin Node, Inc. understood that Yemen Partner A had received the favorable rate by making corrupt payments to certain Yemeni officials.[45] According to the Information, Latin Node, Inc. entered into a revenue sharing agreement with Yemen Partner A under which it agreed to pay Yemen Partner A forty percent of its profits to use his favorable agreement and equipment in Yemen, even though the company understood and agreed that some or all of the money paid to Yemen Partner A would be passed along to TeleYemen officials.	
5/2009	Novo Nordisk[48]	According to the DOJ Criminal Information	DOJ and SEC enforcement action for

[46] *See id.*
[47] *Id.*

[42] *See id.*
[43] *See id.*
[44] *See id.*
[45] *See id.*
[48] *See* Press Release, Department of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-For-Food Program (May 11, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/05/05-11-09novo-guilty.pdf); Complaint, Sec. and Exch. Comm'n v. Novo Nordisk A/S, 1:09-CV-00862 (D.D.C.), , *available at*

		and SEC Complaint, Novo Nordisk A/S ("Novo") made or authorized improper payments to obtain contracts to provide insulin and other medicines to the former Iraqi Government under the United Nations Oil-for-Food Program.[49] Novo acknowledged responsibility for approximately $1.4 million in improper kickback payments made to its **Jordanian agent,** with the understanding that the agent would pass along the payments to the former Iraqi Government to obtain contracts.[50] According to the SEC Complaint, in order to conceal the conduct, Novo inflated the agent's commission "under the guise of . . . increased distribution and marketing costs[]" and failed to properly record the inflated commission payments in its books and records.[51]	violations of the FCPA's books and records and internal control provisions.[52] $18 million in combined fines and penalties.[53]
5/2009	United Industrial Corp.[54]	According to the SEC Cease and Desist Order, United Industrial Corp. ("UIC") violated the FCPA's anti-bribery and books and records and internal control provisions in connection with payments made by its indirect wholly-owned subsidiary, ACL Technologies, Inc. ("ACL"), to a **foreign**	SEC enforcement action for violations of the FCPA anti-bribery and books and records and internal control provisions.[58]

http://www.sec.gov/litigation/complaints/2009/comp21033.pdf; Press Release, Securities and Exchange Commission Litigation Release No. 21033, May 11, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21033.htm).

[49] *Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-For-Food Program*, Department of Justice News Release, May 11, 2009, *available at* http://www.justice.gov/criminal/pr/press_releases/2009/05/05-11-09novo-guilty.pdf

[50] *See* Complaint at ¶¶ 18-22, *Novo Nordisk*, 1:09-CV-00862.

[51] *Id.* at ¶ 28.

[52] Press Release, Securities and Exchange Commission Litigation Release No. 21033, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21033.htm).

[53] *See id.*

[54] *See* Cease and Desist Order, In the Matter of United Industrial Corp., , Securities and Exchange Commission Release No. 60005 ,May 29, 2009,, *available at* http://www.sec.gov/litigation/admin/2009/34-60005.pdf

		agent to obtain or retain business with the Egyptian Air Force ("EAF").[55] As described in the Order, ACL's former president authorized payments to the agent, while knowing or consciously disregarding the high probability that the agent would offer, provide, or promise at least a portion of the payments to EAF officials for the purpose of influencing the officials to direct business to UIC through ACL.[56] According to the SEC, the payments to the agent were mischaracterized on UIC's books and records as legitimate business expenses.[57]	$340,000 penalty.[59]
7/2009	Control Components, Inc.[60]	According to the DOJ Criminal Information, Control Components, Inc. ("CCI") made improper payments through its employees, **agents, and consultants** to (among others) officers of Chinese and Korean state-owned or state-controlled entities in order to obtain or retain business.[61] Often times, the agents and consultants were used as "pass-through" entities to facilitate the improper payments.[62]	DOJ enforcement action for violations of the FCPA's anti-bribery provisions and for conspiracy to violate the FCPA.[63] $18.2 million fine.[64]

[58] *See id.* at ¶ I.
[55] *Id. at* ¶ 1.
[56] *Id.*
[57] *Id.*
[59] *Id.* at ¶ IV.

[60] *See* Press Release, Department of Justice, Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine (July 31, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty.pdf; Information, U.S. v. Control Components Inc., SA CR No. SACR09-00162 (C.D.Cal.), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf..
[61] Information at ¶¶ 15-17, *Control Components*, SA CR No. SACR09-00162.
[62] *See id.* at ¶¶ 31b-d.
[63] Department of Justice News Release, *See Control Components Inc. Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $18.2 Million Criminal Fine*, *available at* http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty.pdf
[64] *Id.*

7/2009	Nature's Sunshine Products, Inc.[65]	According to the SEC's Complaint, Nature's Sunshine Products, Inc. ("NSP"), through the conduct of its wholly-owned subsidiary in Brazil ("NSP Brazil"), made approximately $1 million in cash payments to **customs broker agents**.[66] Some of this money was later used to pay Brazilian customs officials so that the officials would allow NSP Brazil to import unregistered product into Brazil.[67] According to the SEC, the payments were booked by NSP Brazil as "importation advances," and NSP failed to disclose the payments in its SEC filings.[68]	SEC enforcement action for (among other things) violations of the FCPA's anti-bribery provisions and books and records and internal control provisions.[69] $600,000 penalty.[70]
7/2009	Avery Dennison Corp.[71]	According to the SEC Complaint and Cease and Desist Order, Avery Dennison Corp.'s ("Avery") indirect subsidiary Avery (China) Co. Ltd. ("Avery China") paid, either directly or **indirectly through others including distributors**, several kickbacks, sightseeing trips, and gifts to Chinese foreign officials with the purpose and effect of improperly influencing decisions by the foreign officials to assist Avery China to obtain or retain business.[72] According to the SEC, Avery failed to	SEC enforcement action for violations of the FCPA's books and records and internal control provisions.[74] $520,000 penalty.[75]

[65] *See* Securities and Exchange Commission, Litigation Release No. 21162, July 31, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21162.htm; Complaint, Sec. and Exch. Comm'n v. Nature's Sunshine Products, Inc., 2:09CV0672 (D.Utah), *available at* http://www.sec.gov/litigation/complaints/2009/comp21162.pdf.

[66] *See* Complaint at ¶¶ 1-8, *Nature's Sunshine Products*, 2:09CV0672.

[67] *See* Complaint at ¶¶ 1-8, *Nature's Sunshine Products*, 2:09CV0672.

[68] *See id.* at ¶ 39.

[69] *See* Securities and Exchange Commission, Litigation Release No. 21162, July 31, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.

[70] *Id.*

[71] Securities and Exchange Commission, Litigation Release No. 21156, July 28, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21156.htm; Complaint, Sec. and Exch. Comm'n v. Avery Dennison Corp., CV09-5493 (C.D.Cal.), *available at* http://www.sec.gov/litigation/complaints/2009/comp21156.pdf.

[72] *See* Complaint at ¶ 2, *Avery Dennison Corp.*, CV09-5493.

		accurately record these payments and gifts in the company's books and records and failed to implement or maintain a system of internal accounting controls sufficient to detect and prevent such illegal payments or promises of illegal payments.[73]	
7/2009	Helmerich & Payne, Inc.[76]	According to the DOJ Non-Prosecution Agreement and the SEC's Cease and Desist Order, Helmerich & Payne, Inc. ("H&P") acknowledged responsibility for the conduct of two wholly-owned second tier subsidiaries, Helmerich & Payne (Argentina) Drilling Company and Helmerich & Payne de Venezuela C.A., for payments made by subsidiary employees and **agents** to customs officials to induce the officials to allow import and export of goods that were not within applicable regulations, thereby evading higher duties and taxes on the goods.[77] According to the SEC, the payments were falsely described on company books and records as "additional assessments," "extra costs," "extraordinary expenses," etc.[78]	DOJ and SEC enforcement action for violations of the FCPA's books and records and internal control provisions.[79] $1.375 million in combined fines and penalties.[80]

[74] *See* Securities and Exchange Commission, Litigation Release No. 21156, July 28, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21156.htm

[75] *See id.*

[73] *Id.* at ¶ 3.

[76] *See Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America*, Department of Justice News Release, July 30, 2009,*available at* http://www.justice.gov/opa/pr/2009/07/07-30-09helmerich-pays.pdf. **;** Non-Prosecution Agreement, Department of Justice, *available at* http://www.law.virginia.edu/pdf/faculty/garrett/helmerich.pdf; Cease and Desist Order, In the Matter of Helmerich & Payne, Securities and Exchange Commission Release No. 60400, July 30, 2009, *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf.

[77] *See* Non-Prosecution Agreement, Department of Justice, *available at* http://www.law.virginia.edu/pdf/faculty/garrett/helmerich.pdf; *See also* Cease and Desist Order, Matter o *Helmerich*, Securities and Exchange Commission Release No. 60400, July 30, 2009, *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf; Cease and Desist Order, In the Matter of Helmerich & Payne, Securities and Exchange Commission Release No. 60400

[78] Cease and Desist Order at ¶ 10 , *Helmerich*, Securities and Exchange Commission Release No. 60400, July 30, 2009, *available at* http://www.sec.gov/litigation/admin/2009/34-60400.pdf.

[79] *Id.* at ¶ IV.

9/2009	AGCO Corp.[81]	According to the SEC Complaint, AGCO Corp. acknowledged responsibility for improper payments made by its subsidiaries and its **agents** to the former Government of Iraq in order to obtain contracts with the Iraqi Ministry of Agriculture under the United Nations Oil-For-Food program.[82] According to the SEC, certain AGCO Corp. subsidiaries made, **through a Jordanian agent**,[83] approximately $5.9 million in kickback payments to Iraq in the form of "after-sales service fees" to secure contracts.[84] These payments were disguised or improperly recorded in the subsidiaries' books and records.[85]	DOJ and SEC enforcement actions for violations of the FCPA's books and records and internal control provisions.[86] $19.9 million in combined fines and penalties.[87]
12/2009	UTStarcom, Inc.[88]	According to the SEC's Complaint, the company "made payments to **purported**	DOJ and SEC enforcement actions for violations of the FCPA's anti-bribery

[80] *See Helmerich & Payne Agrees to Pay $1 Million Penalty to Resolve Allegations of Foreign Bribery in South America* , Department of Justice News Release, July 30, 2009,*available at* http://www.justice.gov/opa/pr/2009/07/07-30-09helmerich-pays.pdf.

[81] *See* Press Release, Department of Justice, AGCO Corp. to Pay $1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-For-Food Program (Sept. 30, 2009), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/09/09-30-09agco-penalty.pdf; Information, U.S. v. AGCO Limited (D.D.C.), *available at* http://www.justice.gov/criminal/pr/press_releases/2009/09/09-30-09agco-penalty-information.pdf; Securities and Exhchange Commission, Litigation Release No. 21229, ,Sept. 30, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21229.htm; Complaint, Sec. and Exch. Comm'n v. AGCO Corp., 1:09-cv-01865 (D.D.C.), *available at* http://www.sec.gov/litigation/complaints/2009/comp21229.pdf

[82] *See AGCO Corp. to Pay $1.6 Million in Connection with Payments to the Former Iraqi Government Under the U.N. Oil-For-Food Program* , Department of Justice News Release , Sept. 30, 2009).

[83] Information at ¶ 10, *AGCO Limited*, 1:09-cv-01865.

[84] Securities and Exhchange Commission, Litigation Release No. 21229, Sept. 30, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21229.htm

[85] *See id.*

[86] *Id.*

[87] *Id.*

[88] Securities and Exchange Commission, Litigation Release No. 21357, Dec. 31, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21357.htm; Complaint, Sec. and Exch. Comm'n v. UTStarcom, Inc., CV09-6095 (N.D.Cal.), *available at* http://www.sec.gov/litigation/complaints/2009/comp21357.pdf; *UTStarcom Inc. Agrees to Pay $1.5 Million Penalty for Acts of Foreign Bribery in China* Department of Justice

		consultants in China and Mongolia who provided no documented services, under circumstances that showed a high probability that the payments would be used to bribe" foreign officials.[89]	and books and records and internal control provisions.[90] $3 million in combined fines and penalties.[91]

As these enforcement actions demonstrate, engaging a foreign agent and maintaining a relationship with a foreign agent expose a company to FCPA liability under both the FCPA's anti-bribery provisions and the FCPA's books and records and internal control provisions. This FCPA risk is present regardless of the company's industry and regardless of whether the foreign agent was engaged by a distant subsidiary.

The FCPA risk involved in utilizing a foreign agent is perhaps most striking considering that, in 2009, there were a total of eleven corporate FCPA enforcement actions.[92] As demonstrated by the above ten cases and the Halliburton enforcement action discussed below, all eleven cases, or 100% of the 2009 enforcement actions against companies, involved, in whole or in part, foreign agent conduct.

The largest FCPA enforcement action involving foreign agent conduct was the 2009 action against Halliburton and its affiliated entities.[93] This enforcement action most emphatically sends a "proceed with caution" message to any company seeking to engage a foreign agent to assist in obtaining business: Halliburton was held liable under the FCPA's books and records and internal control provisions based on the conduct of agents utilized, not by Halliburton, but by a joint venture in which Halliburton's participation was indirect through subsidiaries.[94] Even though there was no allegation that Halliburton knew of the agent's improper conduct, it was nevertheless held accountable under the FCPA based on the allegation that Halliburton exercised control and supervision over the subsidiaries participating in the joint venture.

News Release, Dec. 31, 2009, *available at* http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html (all visited Jan. 5, 2010).

[89] Complaint at ¶¶ 1-2, *UTStarcom*, CV09-6095.

[90] Securities and Exchange Commission, Litigation Release No. 21357, Dec. 31, 2009, *available at* http://www.sec.gov/litigation/litreleases/2009/lr21357.htm

[91] *Id.*

[92] *See* Posting to The FCPA Blog, http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html (Dec. 31, 2009, 3:15EST).

[93] *See* Press Release No. 20897, Securities and Exchange Commission, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations – Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897.htm.

[94] *See* Press Release No. 20897, Securities and Exchange Commission, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations – Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897.htm.

III. THE HALLIBURTON ENFORCEMENT ACTION

In February 2009, Halliburton, a publicly traded energy services company based in Houston and Dubai, agreed to settle an SEC FCPA enforcement action charging it with violations of the FCPA's books and records and internal controls provisions in connection with a bribery scheme carried out by its predecessor companies in Nigeria.[95]

The bribery scheme is detailed in a parallel DOJ FCPA enforcement action against Kellogg Brown & Root LLC, a wholly-owned subsidiary of KBR, Inc., itself a former Halliburton wholly-owned subsidiary and currently a separate publicly traded company.[96] In the DOJ enforcement action, Kellogg Brown & Root LLC pleaded guilty to a five-count Criminal Information charging it with FCPA anti-bribery violations and conspiracy to violate the FCPA.[97]

As charged in the Criminal Information, Kellogg Brown & Root LLC and its predecessor companies (together, "KBR") were part of a joint venture in Nigeria to design, build, and expand liquefied natural gas ("LNG") facilities.[98] Joint venture profits, revenues, and expenses were shared equally among the four joint venture partners.[99] The joint venture's steering committee was composed of high-level executives from each of the four member companies, including Albert Stanley, an officer and director of KBR.[100] The Information charged that the steering committee made major decisions on behalf of the joint venture, including whether to hire agents to assist the joint venture in winning contracts, who to hire as agents, and how much to pay the agents.[101]

The Information further charged that the joint venture operated through three Portuguese special-purpose corporations, including a corporation ("Company #3") specifically used to enter into consulting agreements with joint venture agents.[102] The Information charged that KBR held its interest in Company #3 indirectly rather than directly, and that KBR avoided placing U.S. citizens on Company #3's board of managers "as a further part of KBR's intentional efforts to insulate itself from FCPA liability" for bribery of Nigerian government officials through the joint venture agents.[103]

The criminal conduct centered on two agents hired by the joint venture and on KBR's efforts to use these agents to pay bribes to Nigerian government officials and employees of the

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[95] *See* Press Release No. 20897, Securities and Exchange Commission, SEC Charges KBR, Inc. with Foreign Bribery; Charges Halliburton Co. and KBR, Inc. with Related Accounting Violations – Companies to Pay Disgorgement of $177 Million; KBR Subsidiary to Pay Criminal Fines of $402 Million; Total Payments to be $579 Million (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897.htm.

[96] *See* Press Release, Department of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* www.justice.gov/opa/pr/2009/February/09-crm-112.html.

[97] *See* Plea Agreement at ¶ 1, *Kellogg*, Crim. No. H-09-071 (S.D. Tex. Filed Feb. 11, 2009).

[98] *See* Information at ¶ 4, *Kellogg* , Crim. No. H-09-071 (S.D. Tex. Filed Feb. 6, 2009).

[99] *See id.*

[100] *See id.* In September 2008, Mr. Stanley pleaded guilty to conspiracy to violate the FCPA for his role in the bribery scheme. *See* Press Release, Department of Justice, Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges (Sept. 3, 2008), *available at* http://www.justice.gov/opa/pr/2008/September/08-crm-772.html. Pursuant to the plea agreement accepted by the court, Mr. Stanley will pay a $10.8 million criminal fine and faces a seven-year federal prison sentence. *See id.*

[101] *See* Information at ¶ 4, *Kellogg* , Crim. No. H-09-071.

[102] *See id.* ¶ 9.

[103] *Id.*

alleged government-owned commercial entity responsible for awarding LNG contracts.[104] The first agent was a citizen of the United Kingdom (the "U.K. Agent") who used a Gibraltar-based consulting company as a vehicle to enter into agent contracts and to receive payments from the joint venture.[105] The Information charged that the joint venture paid the consulting company more than $130 million to bribe high-ranking Nigerian government officials, including top-level executive branch officials.[106]

The second agent was a global trading company headquartered in Tokyo (the "Japanese Agent"), which was also hired by the joint venture to help it obtain business in Nigeria by paying bribes to Nigerian officials.[107] The Information charged that the joint venture paid the consulting company more than $50 million to bribe lower-level Nigerian government officials, including employees of the alleged government-owned commercial entity tasked with developing LNG facilities.[108]

According to the Criminal Information, payments to these agents were largely orchestrated and coordinated by Mr. Stanley, and the payments were made to the officials in cash-stuffed briefcases or left in vehicles parked in hotel parking lots.[109] The Information charged that these and other payments assisted the joint venture in securing four contracts valued at more than $6 billion.[110]

Based on the same core conduct charged in the DOJ's Criminal Information, the SEC filed a civil complaint against Halliburton, charging that Halliburton, as the parent company of the KBR entities, failed to devise adequate FCPA internal controls relating to foreign sales agents and failed to maintain and enforce even the internal controls it had relating to foreign agents.[111]

The SEC alleged that Halliburton exercised control and supervision over KBR and that during the relevant time period: (i) "KBR's board of directors consisted solely of senior Halliburton officials[;]" (ii) the senior Halliburton "officials hired and replaced KBR's senior officials, determined salaries, and set performance goals[;]" (iii) "Halliburton consolidated KBR's financial statements into its own, and all of KBR's profits flowed directly to Halliburton and were reported to investors as Halliburton profits[;]" and (iv) "[Mr.] Stanley discussed the Nigerian LNG projects with senior Halliburton officials, who were aware of the joint venture's use of the U.K. Agent[.]"[112]

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[104] *See id.* ¶¶ 10-12.

[105] *See id.* ¶¶ 10-11.

[106] *See id.* ¶ 11. In March 2009, the U.K. agent, Jeffrey Tesler, was criminally indicted for his role in the bribery scheme. *See* Press Release, Department of Justice, Two UK Citizens Charged by United States with Bribing Nigerian Government Officials to Obtain Lucrative Contracts as Part of KBR Joint Venture Scheme (Mar. 5, 2009), *available at* www.justice.gov/opa/pr/2009/March/09-crm-192.html. The eleven-count indictment (one count of conspiracy to violate the FCPA and ten counts of violating the FCPA's antibribery provisions) alleges that Mr. Tesler willfully and knowingly conspired and agreed with Mr. Stanley, the JV, and the individual JV companies, including KBR, to bribe the Nigerian officials in an effort to obtain and retain business for KBR and the JV. *See* Indictment at ¶ 18, U.S. v. Jeffrey Tesler and Wojciech J. Chodan, Crim. No. H-09-098 (S.D. Tex. filed Feb. 17, 2009.

[107] *See* Information at ¶ 12, *Kellogg* , Crim. No. H-09-071.

[108] *See id.*

[109] *See id.* ¶ 20q-r.

[110] *See id.* ¶ 15.

[111] *See* Complaint, *supra* note 29 at ¶ 45.

[112] *See id.* ¶ 30.

The SEC does not allege, however, that Mr. Stanley or anyone else at KBR told Halliburton officials that the U.K. Agent would use money obtained from the joint venture to bribe Nigerian officials.

The SEC alleged that, while Halliburton's legal department conducted a due diligence investigation of the U.K. Agent, the due diligence was inadequate because Halliburton's policies did not require a specific description of the agent's duties and because the agent did not agree to any accounting or audit of fees received.[113] Further, the SEC alleged that Halliburton and KBR attorneys never learned the identity of the owners of the Gibraltar-based consulting company used by the U.K. Agent and did not check all of the agent's references, some of which turned out to be false.[114]

According to the SEC, Halliburton approved the use of the U.K. Agent, even though a senior Halliburton legal officer knew that the due diligence investigation had failed to uncover "significant information" about the agent.[115] Although the SEC Complaint does not detail the specific information not uncovered, it appears that the term refers to Halliburton's failure to learn the identity of the owners of the agent's consulting company and its failure to check the agent's references.[116] As to the Japanese Agent, the SEC alleged that Halliburton conducted no due diligence and that Halliburton's policies and procedures were deficient because the agreement with the agent was not properly scrutinized.[117] The SEC further alleged that payments to the U.K. and Japanese Agents were falsely characterized as legitimate "consulting" or "services" fees in numerous Halliburton and KBR records when, in fact, they were bribes; thus, the SEC charged Halliburton with violating the FCPA books and records provisions as well.[118]

In the same action, the SEC also charged KBR, Inc. with a civil violation of the FCPA's anti-bribery provisions, with books and records and internal control violations, and with aiding and abetting Halliburton's FCPA violations.[119] Together, Halliburton and KBR, Inc. agreed to disgorge approximately $177 million in profits obtained as a result of the bribery scheme.[120] Combined with the $402 million criminal fine paid by Kellogg Brown & Root LLC in the DOJ action, the combined $579 million in DOJ and SEC fines and penalties against the Halliburton entities represent the second-largest FCPA settlement to date and the largest-ever against a U.S. company.[121]

IV. FCPA DUE DILIGENCE STRATEGIES FOR ENGAGING A FOREIGN AGENT

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[113] *See id.* ¶ 31.

[114] *See id.* ¶ 32.

[115] Complaint at ¶ 33, Sec. & Exch. Comm'n, No. 4:09-cv-00399 (S.D. Tex. filed Feb. 11, 2009).

[116] *See id.* ¶ 32.

[117] *Id.* ¶ 36.

[118] *Id.* ¶ 37.

[119] *Id.* ¶¶ 38-41, 46-52.

[120] Litigation Release No. 20897A, Securities and Exchange Commission (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm; Final Judgment at 1, 11, Sec. & Exch. Comm'n., No. 4:09-cv-00399 (S.D. Tex. filed Feb. 11, 2009).

[121] Litigation Release No. 20897A, Securities and Exchange Commission (Feb. 11, 2009); Plea Agreement at ¶ 17, United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. filed Feb. 11, 2009). The largest FCPA settlement to date is the December 2008 enforcement action against Siemens Aktiengesellschaft which resulted in $800 million in combined DOJ and SEC fines and penalties. *E.g.*, Press Release, Department of Justice, Release No. 08-1105 (Dec. 15, 2008) *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

It is noteworthy that the SEC's Complaint against Halliburton makes no mention of the company having any knowledge that the U.K. Agent would use money obtained from the joint venture to bribe Nigerian officials.[122] Rather, Halliburton's FCPA books and records and internal controls liability was premised on the following:

- It exercised control and supervision over KBR, the entity participating in the joint venture;
- It performed insufficient due diligence on the joint venture's agents; and
- It ultimately derived an economic benefit from KBR's interest in the joint venture and the contracts secured by the joint venture's agents by improper payments to foreign officials.[123]

An additional striking feature of the Halliburton action is that the company actually did conduct some due diligence on the U.K. Agent.[124] This fact contrasts with several FCPA enforcement actions where the factual basis for the internal controls violation was the company's complete lack of any FCPA due diligence of a foreign agent.[125]

Yet, according to the SEC, the due diligence undertaken by Halliburton was insufficient, and the action demonstrates that FCPA due diligence expectations have been raised.[126] It is not enough to conduct "some" due diligence on foreign agents.[127] Rather, the due diligence must be thorough, comprehensive, and designed to uncover FCPA issues. The Halliburton action and other recent FCPA enforcement actions provide a road map for any company to follow when engaging foreign agents in order to minimize FCPA risks. As explained below, FCPA risks are best minimized through pre-engagement due diligence of the foreign agent, specific engagement procedures, and post-engagement monitoring of the foreign agent.

A. Pre-Engagement Due Diligence of a Foreign Agent

Prior to engaging a foreign agent, a company should: "(i) require the agent to complete a detailed FCPA questionnaire; (ii) have the agent execute an FCPA acknowledgment letter; and (iii) use these materials and other information to assemble a complete and thorough due diligence file on the agent."[128]

The FCPA questionnaire should be designed to identify any FCPA "red flags."[129] At a minimum, the agent should provide:

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[122] *See* Complaint, *supra* note 116, at ¶¶ 30-32.

[123] *Id.* at ¶¶ 30-36.

[124] *Id.* at ¶¶ 31-34.

[125] *See, e.g.*, Faro Technologies, Inc., DOJ Non-Prosecution Agreement, App. A ¶¶ 21-25, (November 14, 2007) (noting that, among other internal control violations, Faro entered into an agreement with a Chinese agent "without performing due diligence of any kind."). While conducting effective due diligence is not a legal defense to an FCPA violation, a company's failure to conduct due diligence on a foreign agent can expose a company to a "willful blindness" finding, which is sufficient knowledge under the FCPA to hold a company liable for FCPA antibribery violations based on the conduct of its agents. *See* 15 U.S.C. § 78dd-2(h)(3) (2009).

[126] *See* Complaint, *supra* note 116, at ¶¶ 31-36.

[127] See i*d.* at ¶¶ 31-34.

[128] David W. Simon & Mike Koehler, *Engaging Foreign Agents: Heeding the Lessons from the Halliburton FCPA Enforcement Action*, FIN. FRAUD L.REP., July/Aug. 2009, at 58, 60.

[129] *Id.*

> [(i) c]ontact information of its owners or principals and board of directors, including the percentage of ownership by each and other businesses in which each might have an interest; [(ii) i]nformation on related companies (i.e., parent or subsidiary); [(iii) b]usiness, banking, and credit references; and [(iv) r]elationships with current or former foreign officials or political parties.[130]

"The Halliburton action instructs that effective due diligence does not end upon gathering this information. Rather, effective due diligence requires analyzing the information and conducting appropriate follow-up inquiries."[131] For instance, the SEC was critical of Halliburton for not learning the identity of the owners of the Gibraltar-based company used by the U.K. Agent and for not checking all of the Agent's references.[132] In other words, half-hearted due diligence will not pass regulatory scrutiny if a company finds itself in an FCPA enforcement action due to the conduct of its foreign agent.[133]

The FCPA acknowledgement letter from a prospective foreign agent should explain the FCPA's broad prohibitions and the company's commitment to FCPA compliance.[134] The purpose of the letter is to make clear to any prospective agent, *during the initial negotiation phase*, that the company takes FCPA compliance seriously and that it will expect the same from the agent.[135]

[130] *Id.* at 60-61.
[131] *Id.* at 61.
[132] *See* Complaint, *supra* note 116, at ¶ 32.
[133] *See* Simon & Koehler, *supra* note 129, at 61.
[134] *Id.* at 61.
[135] *Id.*

In addition to having the prospective foreign agent complete an FCPA questionnaire and execute an FCPA acknowledgement letter, thorough FCPA due diligence should actually be conducted on the prospective foreign agent, and a complete due diligence file with all findings should be created and maintained by the company.[136] "The file should include a report summarizing the company's due diligence efforts, the resolution of any red flags raised during the due diligence process, and a list of company personnel or counsel who performed specific due diligence activities."[137]

At a minimum, the due diligence report should discuss: (i) "[w]hy the agent's services are necessary and whether its fees are reasonable;" (ii) "[t]he agent's business experience and qualifications;" (iii) "[a] summary of the agent's business, banking, and credit references; and" (iv) "[t]he identification and resolution of any FCPA red flags."[138]

Common FCPA red flags in the agent context include:

> The agent is related or otherwise connected to a foreign official; [t]he agent places reliance on political/government contacts as opposed to knowledgeable staff and investment of time to promote company interests; [t]he agent is unwilling to agree in writing to abide by the FCPA and other relevant laws and company policies; [t]he agent is unwilling to agree in writing to subject its fee payments to audit by the company; and/or [t]he agent wants to keep the representation secret."[139]

B. Engagement of a Foreign Agent

All relationships with a foreign agent should be memorialized in a written agreement.[140] "[H]owever, deficient FCPA due diligence is not remedied solely by contractual language prohibiting the foreign agent from violating the FCPA."[141] FCPA enforcement actions involving foreign agent conduct demonstrate that the enforcement agencies expect the following provisions in the foreign agent's written contract:

> [(i) a]gent representations and warranties that it is not owned or controlled by a foreign government and that no foreign official holds an ownership interest in it, and that it will abide by the company's FCPA compliance policies and procedures; [(ii) t]he right of the company to audit, at its discretion, the agent's books and records; [(iii) t]he right of the company to terminate the agreement if it has a good-faith belief that the agent has made improper payments; and [(iv) t]he right of the company to disclose the agent's conduct to enforcement agencies.[142]

The importance of these minimum provisions is highlighted by the Halliburton action, in which the SEC was critical of the company because it did not have audit rights over the agent and, more generally, the company did not require a specific description of the agent's duties.[143]

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[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 61-62.
[143] *Id.* at 62.

C. Post-Engagement Monitoring of a Foreign Agent

"Monitoring and supervision of a foreign agent should continue during the period the agent is engaged by the company."[144] At a minimum, a company should have each of its agents certify, on an annual basis, that it is in compliance, and that it will continue to comply, with the company's FCPA policies and procedures. In addition, any red flags identified by the agent's activities should be fully investigated and the relationship reevaluated based on the results.[145]

V. CONCLUSION

Identifying and securing business in foreign markets is a critical growth strategy for any company. The primary means of doing so is to engage a foreign agent as the agent "brings to the table" what the U.S. company lacks: an understanding and appreciation for the local business environment and solid relationships with key business actors, both key ingredients to a U.S. company's success in a foreign market. Yet, these attractive features of a foreign agent also present the most troublesome risks for a U.S. company obligated to comply with the FCPA in doing business in overseas markets. As demonstrated by the 2009 corporate FCPA enforcement actions, 100% of which were based in whole or in part on foreign agent conduct, companies can ill afford to engage foreign agents without first considering and addressing FCPA risks.

In this regard, the Halliburton enforcement action is particularly instructive, and the key FCPA compliance lesson is that a parent company must employ effective due diligence procedures not just on its own foreign agents, but also on foreign agents engaged by all subsidiaries and affiliates over which the parent company exercises control and supervision. "In cascading FCPA due diligence policies throughout the corporate organization, a parent company should not be guided by traditional notions of corporate law" such as when "the acts of a subsidiary or affiliate attributable to the parent company for liability purposes."[146] This is true because, "when it comes to enforcement of the FCPA's books and records and internal controls provisions, the SEC seems to have adopted a "substance over form" enforcement approach[,]" as illustrated by the Halliburton action where KBR, itself a subsidiary of Halliburton, had an indirect, rather than direct, interest in the company used by the joint venture to engage foreign agents.[147]

Indeed, the SEC, in pursuing FCPA books and records and internal controls violations, will likely not view itself as being bound by corporate formalities and hierarchies, but rather will focus, as it did in the Halliburton action, on whether the parent company: (i) exercised control and supervision over the related entity; (ii) performed adequate due diligence over the entity's agents; and (iii) obtained an economic benefit from the agent's activities.[148]

"For this reason, parent companies with foreign subsidiaries or affiliates should particularly heed the lessons of the Halliburton action[.]"[149] The due diligence standards the

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[144] Simon & Koehler, *supra* note 129, at 62.
[145] Simon & Koehler, *supra* note 129, at 62.
[146] Simon & Koehler, *supra* note 129, at 62.
[147] *Id;* Complaint, *supra* note 29, ¶¶ 3-4, 9.
[148] Simon & Koehler, *supra* note 129, at 62.
[149] *Id.*

enforcement agencies have come to expect when a company engages a foreign agent will apply not only to the foreign agents it engages, *but also* to the foreign agents engaged by all entities over which the parent company exercises control and supervision.[150]

[150] *Id.*