

# THE FOREIGN CORRUPT PRACTICES ACT IN THE ULTIMATE YEAR OF ITS DECADE OF RESURGENCE

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## INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977, yet FCPA enforcement was largely non-existent for most its history.<sup>1</sup> But during the past decade, enforcement agencies resurrected the FCPA from near legal extinction. FCPA enforcement activity in 2009, the ultimate year in the decade of the FCPA's resurgence, suggests that FCPA enforcement will remain a prominent feature on the legal landscape throughout this decade. After providing a brief overview of the FCPA and FCPA enforcement, this Article highlights FCPA issues and trends from the 2009 enforcement year and provides a glimpse of the road ahead as the FCPA enters a new decade.

## I. THE FOREIGN CORRUPT PRACTICES ACT SUMMARIZED

The FCPA is part of the Securities Exchange Act of 1934,<sup>2</sup> and it has two main provisions: the antibribery provisions<sup>3</sup> and the books and records and internal control provisions.<sup>4</sup> To better understand the FCPA issues and trends from the 2009 enforcement year, these provisions, as well as FCPA enforcement, are described next.

### A. Antibribery Provisions

The antibribery provisions generally prohibit U.S. companies (whether public or private) and their personnel; U.S. citizens; foreign companies with shares listed on a U.S. stock exchange or otherwise required to file reports with the SEC; or any person while in U.S. territory from: (i) corruptly paying, offering to pay,

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1. See Dionne Searcey, *U.S. Cracks Down on Corporate Bribes*, WALL ST. J., May 26, 2009, at A1, available at <http://online.wsj.com/article/SB124329477230952689.html> (noting that FCPA enforcement was "largely dormant for decades"). See, e.g., SHEARMAN & STERLING LLP, FCPA DIGEST, CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, available at [http://www.shearman.com/files/upload/fcpa\\_digest.pdf](http://www.shearman.com/files/upload/fcpa_digest.pdf) (listing FCPA enforcement actions chronologically); see also Foreign Corrupt Practices Act (FCPA), <http://www.justice.gov/criminal/fraud/docs/statute.html> (last visited Mar. 8, 2010).

2. See 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78dd-3, 78ff (2006).

3. See *infra* Part I.A.

4. See *infra* Part I.B.

promising to pay, or authorizing the payment of money, a gift, or anything of value; (ii) to a foreign official; (iii) in order to obtain or retain business.<sup>5</sup>

Although routinely described as a law applicable only to U.S. companies and citizens,<sup>6</sup> the FCPA, as written and as enforced, can also apply to foreign companies and foreign citizens.<sup>7</sup> In fact, the largest ever FCPA enforcement action (in terms of fines and penalties) is against Siemens Aktiengesellschaft (also known as “Siemens AG”), a German corporation with shares traded on a U.S. exchange since 2001.<sup>8</sup>

The FCPA’s antibribery provisions have three core elements: “anything of value”<sup>9</sup> to a “foreign official”<sup>10</sup> for the purposes of “obtaining or retaining business.”<sup>11</sup> This Part briefly explores these core elements.

1. *“Anything of Value.”*—The FCPA does not define the term “anything of value,” nor is the statute’s legislative history illuminating.<sup>12</sup> FCPA enforcement actions demonstrate that there is no de minimis value associated with this element<sup>13</sup> and 2009 FCPA enforcement actions allege facts concerning “things of value” across a wide spectrum. For instance, in the enforcement action against Kellogg Brown & Root LLC and various other Halliburton Company affiliates, “things of value” provided to Nigerian “foreign officials” included cash-stuffed briefcases or cash-stuffed vehicles left in hotel parking lots.<sup>14</sup> On the other end of the spectrum, the enforcement action against UTStarcom Inc. involved “things of value” provided to Chinese “foreign officials” including “executive training programs at U.S. universities” paid for by the company even though the programs

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5. See 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2006).

6. See, e.g., Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155, 157 (2009) (“The U.S. Foreign Corrupt Practices Act (FCPA) criminally prohibits U.S. corporations from bribing officials of foreign governments in order to obtain business has been in effect for thirty years.”).

7. See 15 U.S.C. §§ 78dd-1, 78dd-3.

8. See, e.g., Press Release, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), available at <http://www.foley.com/files/SiemensSECPressRelease.pdf>; Press Release, 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), available at [http://www.fcpenforcement.com/FILES/tbl\\_s31Publications/FileUpload137/5527/SiemensDOJPressRelease.pdf](http://www.fcpenforcement.com/FILES/tbl_s31Publications/FileUpload137/5527/SiemensDOJPressRelease.pdf).

9. 15 U.S.C. § 78dd-1(a).

10. *Id.* § 78dd-1(a)(1).

11. *Id.* § 78dd-1(a)(1)(B).

12. S. REP. NO. 95-114, at 17 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4115; H.R. CONF. REP. NO. 95-831, at 12 (1977), reprinted in U.S.C.C.A.N. 4121, 4124.

13. See, e.g., *In re The Dow Chem. Co.*, Exchange Act Release No. 55281, 2007 SEC LEXIS 286, at \*7 (Feb. 13, 2007) (nothing that although certain improper payments “were in small amounts—well under \$100 per payment—the payments were numerous and frequent”).

14. See Criminal Information ¶¶ 17-20, *United States v. Kellogg Brown & Root LLC*, No. H-09-071 (S.D. Tex. Feb. 6, 2009), available at [http://fcpenforcement.com/FILES/tbl\\_s31Publications/FileUpload137/5714/KBRCriminalInformation.pdf](http://fcpenforcement.com/FILES/tbl_s31Publications/FileUpload137/5714/KBRCriminalInformation.pdf).

“were not specifically related to [the company’s] products or business.”<sup>15</sup>

2. “*Foreign Official.*”—The FCPA defines “foreign official” as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>16</sup>

There is no dispute that elected foreign government officials, other foreign heads of state, and employees of foreign government agencies such as foreign equivalents of the U.S. Treasury Department, U.S. State Department, etc., are “foreign officials” under the FCPA. Improper payments to such “foreign officials” to “obtain or retain business” are what Congress intended to prohibit by passing the FCPA in 1977.<sup>17</sup>

But the majority of 2009 FCPA enforcement actions (as well as others in recent years) have absolutely nothing to do with such government officials. Rather, the alleged “foreign officials” are often employees of alleged foreign state-owned or state-controlled enterprises (SOEs).<sup>18</sup> The enforcement agencies deem such individuals (regardless of rank or title<sup>19</sup> and regardless of how such

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15. Complaint ¶ 16, SEC v. UTStarcom, Inc., Case No. CV 09-6094 (N.D. Cal., Dec. 31, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp21357.pdf>.

16. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2006).

17. See S.REP.NO. 95-114, at 1-3 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf> (noting in connection with the history of the bill—“[d]uring the 94th Congress, the Committee on Banking, Housing, and Urban Affairs held extensive hearings on the matter of improper payments to foreign *government* officials by American corporations; noting in connection with a summary of the bill—“[the bill] makes it a crime for U.S. companies to bribe a foreign *government* official for the specified corrupt purposes” and “[t]aken together, the accounting requirements and criminal prohibitions of Title I should effectively deter corporate bribery of foreign *government* officials.” (emphasis added); see also H. REP. NO. 94-831, at 5 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/corruptrpt-94-831.pdf> (consolidating similar, but not identical, House and Senate bills and noting that “[b]y incorporating provisions from both bills, the conferees clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official (including a decision not to act) or to induce such official to use his influence to affect a *government* act or decision”) (emphasis added); H. REP. NO. 95-640, at 1 (1977), available at <http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf> (noting in connection with the need for the legislation “[m]ore than 400 corporations have admitted making questionable or illegal payments. The companies, most of them voluntarily, have reported paying out well in excess of \$300 million in corporate funds to foreign *government* officials, politicians, and political parties.”) (emphasis added).

18. See *infra* notes 120-28 and accompanying text.

19. Lay-Person’s Guide to FCPA, available at <http://www.justice.gov/criminal/fraud/docs/dojdocb.html> (“The FCPA applies to payments to *any* public official, regardless of rank or position.”).

individuals may be classified under local foreign law<sup>20</sup>) as “foreign officials” under the theory that their employers (often times a company with publicly traded stock and other attributes of private business) are an “instrumentality” of a foreign government.<sup>21</sup> The enforcement agencies’ interpretation of the key “foreign official” element of an FCPA antibribery violation is far from an academic issue-spotting exercise. Rather, it is at the core of a significant number of 2009 FCPA enforcement actions as demonstrated in Part II.

3. “*Obtain or Retain Business.*”—The third general element of an FCPA antibribery violation is “obtain or retain business.”<sup>22</sup> In other words, the “thing of value”<sup>23</sup> corruptly offered or paid to the “foreign official” must be for the purposes of

- (i) influencing any act or decision of such foreign official . . . (ii) inducing such foreign official . . . to do or omit to do any act in violation of the lawful duty of such foreign official . . . or (iii) securing any improper advantage; or inducing such foreign official . . . to use his . . . influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.<sup>24</sup>

In contrast to the “foreign official” element and many other FCPA elements and issues, this substantive element has been subject to judicial scrutiny. In *United States v. Kay*, a case of first impression, the issue concerned whether payments to Haitian “foreign officials” for reducing customs and sales taxes owed to the Haitian government could fall within the FCPA’s scope.<sup>25</sup> The issue presented was in contrast to a typical FCPA scenario in which a company allegedly makes improper payments to a “foreign official” to secure a foreign government

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20. See Opinion Procedure Release, Dep’t of Justice, No. 94-01 (May 13, 1994), *available at* <http://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). Pursuant to 15 U.S.C. § 78dd-1(e) (2006), parties may submit contemplated actions or business activity to the DOJ and obtain a DOJ opinion whether the contemplated action or business activity violates the FCPA. However, the DOJ’s opinion has no precedential value, and its opinion that the contemplated conduct is in conformance with the FCPA is entitled only to a rebuttable presumption should an FCPA enforcement action be brought because of the conduct. See Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.1-80.16 (2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/frgncrpt.html>.

21. See Procedure Release, *supra* note 20.

22. 15 U.S.C. §§ 78dd-1(a)(9)(B), 78dd-2(a)(1)(B), 78dd-3(a)(1)(B) (2006).

23. *Id.* § 78dd-1(a)(3).

24. *Id.*

25. See *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

contract.<sup>26</sup>

In *Kay*, the Fifth Circuit Court of Appeals concluded, like the lower court, that the “obtain or retain business” element was ambiguous, and it thus analyzed the FCPA’s legislative history.<sup>27</sup> In reviewing the legislative history, the court was convinced that Congress intended to prohibit a range of payments wider than payments that directly influence the acquisition or retention of government contracts.<sup>28</sup> The court thus held that making payments to a “foreign official” to lower taxes and custom duties in a foreign country *can* provide an unfair advantage to the payer over competitors and thereby assist the payer in “obtaining and retaining business.”<sup>29</sup>

But the *Kay* court empathically stated that not *all* such payments to a “foreign official” outside the context of directly securing a foreign government contract violate the FCPA; it merely held that such payments *could* violate the FCPA.<sup>30</sup> According to the court, the key question of whether such payments constitute an FCPA violation depend on whether the payments were intended to lower the company’s costs of doing business in Haiti enough to assist the company in obtaining or retaining business in Haiti.<sup>31</sup> The court then listed several hypothetical examples of how a reduction in customs and tax liabilities could assist a company in obtaining or retaining business in a foreign country.<sup>32</sup> On the other hand, the court also recognized that “[t]here are bound to be circumstances” in which a customs or tax reduction merely increases the profitability of an existing profitable company and presumably does not assist the payer in obtaining or retaining business.<sup>33</sup>

Thus, contrary to popular misperception,<sup>34</sup> *Kay* does *not* hold that *all* payments to a “foreign official” for avoiding customs duties or sales taxes in a foreign country fall within the FCPA’s scope. Rather, the decision merely holds that Congress intended for the FCPA to apply broadly to payments intended to assist the payer, directly or indirectly, in obtaining or retaining business and that payments to a “foreign official” to reduce customs and tax liabilities can, under appropriate circumstances, fall within the statute.

Despite the equivocal nature of the *Kay* holding, the decision clearly

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26. See, e.g., *In re United Indus. Corp.*, Exchange Act Release No. 60005 (May 29, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-60005.pdf> (instituting FCPA enforcement action concerning payments to Egyptian Air Force officials to build a military aircraft depot for Egypt’s Air Force).

27. See *Kay*, 359 F.3d at 743-44.

28. See *id.* at 749-50.

29. See *id.* at 755-56.

30. *Id.*

31. *Id.*

32. See *id.* at 759-60.

33. *Id.* at 760.

34. See *Chadbourn & Park LLP, United States Supreme Court Denies Certiorari in Controversial Foreign Corrupt Practices Act Case: Expansive Enforcement of the FCPA Likely to Continue*, <http://www.chadbourn.com/clientalerts/2008/fcpa/> (last visited Mar. 26, 2010).

energized the enforcement agencies. Post-*Kay* there has been an explosion in FCPA enforcement actions, including actions in 2009, where the alleged improper payments involve customs duties and tax payments or are otherwise alleged to have assisted the payer in securing foreign government licenses, permits, and certifications which assisted the payer in generally doing business in a foreign country.<sup>35</sup>

In short, the FCPA's antibribery provisions generally prohibit those subject to the statute from corruptly paying or offering "anything of value" to a "foreign official" in order to "obtain or retain business." Because of the FCPA's third-party payment provisions, described below, this prohibition is both direct and indirect.

4. *Third-Party Payment Provisions.*—The FCPA's broad third-party payment provisions prohibit those subject to its provisions from directly making payments meeting the above elements, as well as 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."<sup>36</sup> Like other FCPA elements, the enforcement agencies broadly interpret this knowledge requirement. The knowledge element may be satisfied when one has actual knowledge that a third party is providing "anything of value" to a "foreign official" to "obtain or retain business" and also when one "has a firm belief that such circumstance exists or that such result is substantially certain to occur" or "is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist."<sup>37</sup>

#### B. Books and Records and Internal Control Provisions

The FCPA, as originally enacted in 1977 and at present, also contains books and records and internal control provisions.<sup>38</sup> In contrast to the antibribery provisions, the books and records and internal control provisions only apply to

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35. See, e.g., Complaint ¶¶ 1, 51, SEC v. Nature's Sunshine Prods. et al., No. 2:09CV0672 (C.D. Utah July 31, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp21162.pdf> (charging FCPA violations involving payments to Brazilian customs agents to import certain unregistered products into Brazil); Helmerich & Payne, Inc., Non-Prosecution Agreement, Statement of Facts ¶4 (July 9, 2009), available at <http://www.law.virginia.edu/pdf/faculty/garrett/helmerich.pdf> [hereinafter Helmerich & Payne, Inc.]; *In re Helmerich & Payne, Inc.* Cease and Desist Order ¶¶ 5-8, Release No. 60400 (S.E.C. July 30, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-60400.pdf> [hereinafter *In re Helmerich & Payne*] (charging FCPA violations involving payments to various officials and representatives of the Argentine and Venezuelan customs services in connection with the importation and exportation of goods and equipment related to the company's business operations in those countries).

36. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (2006).

37. See *id.* § 78dd-1(f)(2)(A)-(B); see also Kenneth Winer & Gregory Husisian, *The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent?* WHITE-COLLAR CRIME, Oct. 2009, at 10, available at [http://www.foley.com/files/tbl\\_s31Publications/FileUpload137/6535/FCPAWinerHusisian2009.pdf](http://www.foley.com/files/tbl_s31Publications/FileUpload137/6535/FCPAWinerHusisian2009.pdf).

38. 15 U.S.C. § 78m(b)(2)(A)-(B) (2006).

entities with “a class of securities” registered pursuant to the securities laws or entities otherwise “required to file reports” pursuant to the securities laws (collectively “Issuers”).<sup>39</sup> As a practical matter,<sup>40</sup> the books and records and internal control provisions apply only to publicly-held companies with shares traded on a U.S. exchange—a category which can include numerous foreign companies with shares traded on a U.S. exchange.<sup>41</sup>

The books and records provisions require Issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the [I]ssuer.”<sup>42</sup> The companion internal control provisions require Issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that”—among other things:

- (i) transactions are executed in accordance with management’s general or specific authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements . . . (II) to maintain accountability for assets; [and] (iii) access to assets is permitted only in accordance with management’s general or specific authorization . . . .<sup>43</sup>

### *C. Enforcement of the Foreign Corrupt Practices Act*

The FCPA is both a civil statute and a criminal statute, and because it is part of the securities law, both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have enforcement authority. Like other securities law violations (such as insider trading), the issue of intent and a prosecutor’s ability to satisfy the higher burden of proof required for a criminal conviction (beyond a reasonable doubt) may determine whether an FCPA violation is pursued with criminal charges or merely civil charges. In terms of which enforcement agency (DOJ or SEC) will prosecute the charges, the SEC has civil enforcement authority only, and, even more constrained, it only regulates Issuers. The end result is that the DOJ “is responsible for all criminal enforcement” of the statute (both the antibribery and books and records and internal control

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39. *Id.*

40. In rare instances, a company may still be “required to file periodic reports” pursuant to the securities laws, yet not have publicly traded shares. See The FCPA Blog, <http://www.fcpablog.com/blog/2010/1/10/non-public-issuer-discloses-investigation.html> (Jan. 10, 2010, 10:08) (noting that PBSJ Corporation, while not having any publicly traded securities, is nevertheless required to file periodic reports with the SEC given the extent of its shareholders (mostly current and former employees)).

41. See, e.g., Press Release, U.S. Resolves Probe Against Oil Company that Bribed Iranian Official (Oct. 13, 2006), available at [http://www.justice.gov/opa/pr/2006/October/06\\_crm\\_700.html](http://www.justice.gov/opa/pr/2006/October/06_crm_700.html) (“Although Statoil is a foreign issuer, the Foreign Corrupt Practices Act applies to foreign and domestic public companies alike, where the company’s stock trades on American exchanges . . .”).

42. 15 U.S.C. § 78m(b)(2)(A) (2006).

43. *Id.* § 78m(b)(2)(B).

provisions) and civil enforcement of the antibribery provisions against non-Issuers subject to the FCPA jurisdiction.<sup>44</sup> The SEC is responsible “for civil enforcement of the antibribery provisions with respect to [I]ssuers” as well as civil enforcement of the books and records and internal control provisions.<sup>45</sup>

Because improper payments that violate the FCPA’s antibribery provisions are also often disguised or inaccurately recorded on the company’s books and records, many FCPA enforcement actions against Issuers include parallel DOJ and SEC enforcement actions for both antibribery violations and books and records violations.<sup>46</sup> Further, internal control violations are often also pursued in connection with antibribery and books and records violations on the theory that effective internal controls would have prevented the improper payments and improper recording of the payments.<sup>47</sup> Thus, as to Issuers, the FCPA is often a three-headed monster when improper payments are made.

## II. FCPA TRENDS AND ISSUES FROM THE 2009 ENFORCEMENT YEAR

The 2009 FCPA enforcement year saw the emergence of new trends and issues as well as the continuation of certain aggressive enforcement theories. Notable trends and issues from the 2009 FCPA enforcement year include the undeniable fact that FCPA risk is omnipresent, the clear FCPA risks posed by foreign agents, the emerging trend of individual (as opposed to just corporate) FCPA prosecutions, and the troubling continuation of certain aggressive FCPA theories of liability. These trends and issues are described below in more detail.

### A. FCPA Risk Is Omnipresent

For much of the FCPA’s history, the business community largely viewed the FCPA as applying only to large companies, often resource extraction companies, doing business in emerging markets. But with the increase in globalization, and with domestic market saturation, particularly in a recession economy, it is no longer just large resource extraction companies doing business in overseas markets that need to be concerned with the FCPA. Although a company like Exxon Mobil or Raytheon (given its large foreign government customer base) may indeed have a higher FCPA risk profile, the FCPA equally applies to small and medium sized companies, including those in Indiana, doing business or seeking business in countries such as China and India. If the increase in FCPA enforcement over the last decade has taught anything, it is that all companies, in all industries, doing business in all countries face FCPA risk and exposure. This

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44. See Lay-Person’s Guide to FCPA, *supra* note 19.

45. *Id.*

46. See Press Release, UTStarcom Inc. Agrees to Pay \$1.5 Million Penalty for Acts of Foreign Bribery in China (Dec. 31, 2009), *available at* <http://www.justice.gov/opa/pr/2009/December/09-crm-1390.html>; SEC v. UTStarcom, Inc., Litigation Release No. 21357 (Dec. 31, 2009), *available at* <http://www.sec.gov/litigation/litreleases/2009/lr21357.htm> [hereinafter UTStarcom, Inc. Litigation Release].

47. See UTStarcom, Inc. Litigation Release, *supra* note 46.



salient fact is demonstrated by the below chart which lists the 2009 corporate FCPA enforcement actions and provides details as to the industry and foreign jurisdiction(s) involved.

Corporate FCPA Enforcement Actions (2009)—Industries and Jurisdictions<sup>48</sup>

Company	Industry	Jurisdiction(s)
Avery Dennison Corp. <sup>49</sup>	Consumer products, adhesives, and materials	China, Indonesia, and Pakistan
Control Components Inc. <sup>50</sup>	Valve manufacturer serving the power, oil and gas, and pulp and paper industries	China, South Korea, Malaysia, and United Arab Emirates
Helmerich & Payne Inc. <sup>51</sup>	Energy exploration and production	Argentina and Venezuela
ITT Corp. <sup>52</sup>	Engineering and manufacturing company serving the water and fluids management and defense and security industries	China

48. Excluded from the chart are two Iraqi Oil-For Food enforcement actions involving AGCO Corporation and Novo Nordisk A/S. *See, e.g.*, Press Release, 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.foley.com/files/DOJagcopenalty.pdf>; Press Release, 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.foley.com/files/NovoDOJRelease.pdf>. These actions involved kickback payments to the Iraqi government—not to any particular “foreign official,” and thus, the conduct was not actionable under the FCPA’s antibribery provisions. *See id.* Even so, the payments and recording of the payments still resulted in an FCPA enforcement action for books and records and internal control violations. *See id.* This Article will refer to the enforcement actions represented in this chart (minus these two exclusions) as the “2009 Corporate FCPA Enforcement Actions.”

49. Complaint, SEC v. Avery Dennison Corp., No. CV09-5493DSF (C.D. Cal. July 28, 2009), *available at* <http://www.sec.gov/litigation/complaints/2009/comp21156.pdf>.

50. Criminal Information, United States v. Control Components Inc., No. SACR09-00162 (C.D. Cal. July 28, 2009), *available at* [http://www.justice.gov/criminal/pr/press\\_releases/2009/07/07-31-09control-guilty-information.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf).

51. Helmerich & Payne, Inc., *supra* note 35; *In re Helmerich & Payne*, *supra* note 35.

52. Complaint, SEC v. ITT Corp., No. 1:09-cv-00272 (D.D.C. Feb. 11, 2009), *available at* <http://www.sec.gov/litigation/complaints/2009/comp20896.pdf>.

KBR/Halliburton Co. <sup>53</sup>	Engineering, procurement, and construction company serving the oil and gas industry	Nigeria
Latin Node, Inc. <sup>54</sup>	Telecommunications	Honduras and Yemen
Nature's Sunshine Products, Inc. <sup>55</sup>	Nutritional supplements and personal care products	Brazil
United Industrial Corp. <sup>56</sup>	Defense	Egypt
UTStarcom Inc. <sup>57</sup>	Telecommunications	China, Thailand, and Mongolia

As highlighted by the above chart, the FCPA does not discriminate against any one industry doing business in any particular country. The 2009 enforcement year also demonstrates that it is just not Asian, African, or Middle Eastern markets that present FCPA risks as several of the above enforcement actions concerned conduct “closer to home” in the Western Hemisphere—a region that is often overlooked in terms of FCPA compliance. The breadth of 2009 enforcement actions, both in terms of the companies involved and the countries where the alleged conduct took place, show that FCPA risk is present in all industries operating in all countries.

#### *B. Third Party Agents Pose a Risk*

The primary means of doing business or expanding business in a foreign market is often to engage a foreign agent.<sup>58</sup> A foreign agent brings to the table what a non-resident company lacks—an understanding and appreciation for the local business environment and solid relationships with key business actors—both key ingredients to a non-resident company's success in a foreign

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53. Complaint, SEC v. Halliburton Co., No. 4:09-399 (S.D. Tex. Feb. 11, 2009), *available at* <http://www.sec.gov/litigation/complaints/2009/comp20897.pdf>; Criminal Information, *supra* note 14.

54. Criminal Information, United States v. Latin Node, Inc., No. 09-20239-CR-HUCK/O'Sullivan (Mar. 23, 2009 S.D. Fla.), *available at* [http://fcpaenforcement.com/FILES/tbl\\_s31Publications/FileUpload137/5945/Item1LatinNode.pdf](http://fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5945/Item1LatinNode.pdf).

55. Complaint, *supra* note 35.

56. *In re United Indus. Corp.*, Exchange Release No. 6005 (May 29, 2009), *available at* <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>.

57. UTStarcom, Inc. Non-Prosecution Agreement (Dec. 31, 2009), *available at* <http://www.law.virginia.edu/pdf/faculty/garrett/utstarcom.pdf>; Complaint, SEC v. UTStarcom, Inc., *supra* note 15.

58. This section 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.

market.<sup>59</sup>

Use of foreign agents is particularly high in growth markets such as China and India where understanding and navigating through complex bureaucracies is often a key ingredient to business success.<sup>60</sup> 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 non-resident company can do business in the country.<sup>61</sup>

But these 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 company obligated to comply with the FCPA in doing business in overseas markets. The FCPA risks posed by foreign agents is demonstrated by the below chart which lists the 2009 corporate FCPA enforcement actions involving, in whole or in part, foreign agent conduct.

#### Corporate FCPA Enforcement Actions (2009)—Foreign Agents

Company	Conduct
Avery Dennison Corp. <sup>62</sup>	According to the SEC Complaint and Cease and Desist Order, Avery Dennison Corporation's indirect subsidiary Avery (China) Co. Ltd. paid, either directly or <i>indirectly through others including distributors</i> , 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.

59. Jamie Anderson et al., *Global Business—Lessons From the Developing World*, WALL ST. J., at R6, Aug. 17, 2009. This article profiles 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.*

60. See, e.g., *Danone Pulls Out of Disputed China Venture*, WALL ST. J., Oct. 1, 2009, at B1 (noting that “[f]oreign firms have reported billions in sales through Chinese partnerships. International giants such as Procter & Gamble, Starbucks and General Motors have operated wholly or in part through joint ventures in China”).

61. 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).

62. SEC v. Avery Dennis Corp., Litigation Release No. 21156 (July 28, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr21156.htm>; Complaint, *supra* note 49.

Control Components Inc. <sup>63</sup>	According to the DOJ Criminal Information, Control Components Inc. made improper payments through its employees, <i>agents</i> , and <i>consultants</i> to (among others) officers of Chinese and Korean state-owned or state-controlled entities in order to obtain or retain business. Often times, the agents and consultants were used as “pass-through” entities to facilitate the improper payments.
Helmerich & Payne, Inc. <sup>64</sup>	According to the DOJ Non-Prosecution Agreement and the SEC’s Cease and Desist Order, Helmerich & Payne Inc. 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 <i>agents</i> to customs officials in Brazil and Argentina 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.
ITT Corp. <sup>65</sup>	According to the SEC’s Complaint, ITT’s wholly-owned Chinese subsidiary, Nanjing Goulds Pumps Ltd. (NGP), made, either directly or <i>indirectly through third-party agents</i> payments to employees of Chinese Design Institutes (DIs) (some of which were Chinese state-owned entities that assisted in the design of large infrastructure projects in China). 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 who specified and recommended NGP products.
Kellogg Brown & Root LLC/KBR, Inc./Halliburton Co. <sup>66</sup>	According to the DOJ Criminal Information, Kellogg Brown & Root LLC participated in a joint venture that made millions of dollars in “ <i>consulting fee</i> ” payments to a United Kingdom and Japanese agent for use in bribing Nigerian “foreign officials.” Similarly, the SEC complaint alleges that KBR Inc. and Halliburton Co. participated and/or controlled and supervised entities that participated in the joint venture that entered into the sham contracts with the two agents to help facilitate the bribe payments.

63. See Criminal Information, *supra* note 50; Press Release, 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](http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty.pdf).

64. See Helmerich & Payne, *supra* note 35; Press Release, Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America (July 30, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-741.html>.

65. Complaint, *supra* note 52; SEC v. ITT Corp. Litigation Release No. 20896 (Feb. 11, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr20896.htm>.

66. See Complaint, *supra* note 53; Criminal Information, *supra* note 14.

Latin Node, Inc. <sup>67</sup>	According to the DOJ Criminal Information, Latin Node, Inc. made improper payments to officials of Hondutel (the Honduran government-owned telecommunications company) and TeleYemen (the Yemeni government-owned telecommunications company). In Honduras, the DOJ alleged that Latin Node 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 <i>consulting agreement with a company</i> believed to be controlled by a foreign officials' brother. The DOJ alleged that LN Comunicaciones' employees signed checks to Servicios IP knowing and intending that some or all of the money would be passed along to Hondutel officials. In Yemen, the DOJ alleged that Latin Node, while seeking to enter the Yemeni market, learned that <i>Yemen Partner A</i> had obtained an agreement with TeleYemen at a favorable rate through his privately owned company. Latin Node sought to partner with Yemen Partner A to gain entry into the Yemeni market even though Latin Node understood that Yemen Partner A had received the favorable rate by making corrupt payments to certain Yemeni officials.
Nature's Sunshine Products, Inc. <sup>68</sup>	According to the SEC's Complaint, Nature's Sunshine Products, Inc. (NSP), through the conduct of its wholly-owned subsidiary in Brazil, made cash payments to <i>customs broker agents</i> , some of which was later used to pay Brazilian customs officials so that the officials would allow NSP Brazil to import unregistered product into Brazil.
United Industrial Corp. <sup>69</sup>	According to the SEC Cease and Desist Order, United Industrial Corporation's (UIC), indirect wholly owned subsidiary, ACL Technologies Inc. (ACL) made payments to a <i>foreign agent</i> to obtain or retain business with the Egyptian Air Force. 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 Egyptian Air Force officials for the purpose of influencing the officials to direct business to UIC through ACL.

67. See Criminal Information, *supra* note 43; Press Release, Latin Node Inc. Pleads Guilty to Foreign Corrupt Practices Act Violation and Agrees to Pay \$2 Million Criminal Fine (Apr. 7, 2009), available at [www.justice.gov/criminal/pr/press\\_releases/2009/04/04-07-09LatinNode-Plead.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/04/04-07-09LatinNode-Plead.pdf).

68. See Complaint, *supra* note 54; SEC v. Nature's Sunshine Prods., Inc., Litigation Release No. 21162 (July 31, 2009), available at <http://www.sec.gov/litigation/litreleases/2009/lr21162.htm>.

69. See *In re United Indus. Corp.*, Exchange Release No. 60005 (May 29, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>.

UTStarcom Inc. <sup>70</sup>	According to the SEC's Complaint, the company "made payments to <i>purported consultants</i> 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.
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The FCPA risks in utilizing a foreign agent as demonstrated by the above enforcement actions is most striking given that there were a total of nine corporate FCPA enforcement actions in 2009.<sup>71</sup> Thus, all of the 2009 enforcement actions against companies involved (in whole or in part) foreign agent conduct.

Engaging a foreign agent and maintaining a relationship with that agent can expose a company to FCPA liability under both the FCPA's antibribery and books and records and internal control provisions. When a foreign agent is used to make or facilitate an improper payment to a "foreign official" to "obtain or retain business," sham consulting contracts and/or inflated commission payments are often utilized thus leading to improper recordings in the company's books and records. Even if the foreign agent is engaged by a distant subsidiary or affiliate, and even if the improper recording is made in that subsidiary's or affiliate's books and records, a parent company will still likely face books and records exposure. The enforcement theory is that the subsidiary's or affiliate's books and records are consolidated with the parent's books and records for financial reporting purposes. A parent company will also face internal controls exposure on the theory that had the parent implemented sufficient internal controls throughout its organization, the improper payment would never have occurred. This controversial enforcement theory resembles strict liability and is best demonstrated by the 2009 FCPA enforcement action against Halliburton Co.<sup>72</sup>

In the Halliburton enforcement action, the company 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 participated indirectly through subsidiaries. Even though there was no allegation that Halliburton knew of the improper conduct by the two agents (a U.K. agent and a Japanese agent), Halliburton was nevertheless held liable based on the allegation that Halliburton exercised control and supervision over the subsidiaries (such as KBR) that participated in the joint venture.<sup>73</sup>

For instance, 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

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70. Complaint, *supra* note 9; UTStar com., Inc. Litigation Release, *supra* note 46; Press Release, *supra* note 46.

71. See The FCPA Blog, <http://www.fcpablog.com/blog/2009/12/31/2009-fcpa-enforcement-index.html> (Dec. 31, 2009, 3:15).

72. See *supra* notes 53, 66 and accompanying text.

73. See *supra* notes 53, 66 and accompanying text.

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) KBR's former CEO discussed the projects at issue with senior Halliburton officials, who were aware of the joint venture's use of the U.K. Agent, even though the SEC does not allege that this individual 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.<sup>74</sup>

The SEC further 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.<sup>75</sup> 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.<sup>76</sup> As to the Japanese Agent, the SEC alleged that Halliburton conducted no due diligence and that Halliburton's policies and procedures were deficient because it failed to properly scrutinize the agreement with the agent.<sup>77</sup> 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) and thus charged Halliburton with not only FCPA internal control violations, but also books and records violations as well.<sup>78</sup>

The FCPA 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. Parent companies should pay particular attention to the Halliburton action because FCPA exposure may arise not only from agents it engages, but also from agents engaged by all subsidiaries and affiliates over which the parent company exercises control and supervision.

### *C. The Year of the Individual*

Although the 2009 FCPA enforcement year saw the Kellogg, Brown & Root/KBR, Inc./Halliburton Company enforcement action involving a massive bribery scheme in Nigeria (a record-setting enforcement action against a U.S. company given the \$579 million in combined criminal and civil penalties<sup>79</sup>),

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74. See Complaint, *supra* note 53, ¶ 30.

75. See *id.* ¶ 31.

76. See *id.* ¶ 32.

77. See *id.* ¶ 36.

78. See *id.* ¶ 37.

79. Marcia Coyle, *Halliburton and KBR to Pay \$579 Million in Penalties in Nigerian Bribe Case*, NAT'L L.J., Feb. 12, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202428219124>.

corporate FCPA prosecutions largely slowed to a trickle in the second half of 2009. Whether the 100-plus cases widely reported to be in the “pipeline” are taking longer to resolve,<sup>80</sup> being resolved informally with no public disclosure, or about to burst onto the scene in 2010 remains an open question.

Nevertheless, the biggest FCPA issue from the 2009 enforcement year, and a clear emerging trend, is the focus on individual FCPA violators.<sup>81</sup> The DOJ’s pursuit of individuals is no surprise as the deterrent effect of an individual losing his or her liberty is no doubt more powerful than a corporation paying a multi-million fine with corporate money via a non-prosecution or deferred prosecution agreement (NPA/DPA). Assistant Attorney General Lanny Breuer, in a speech before a FCPA audience in November 2009, underscored this point when he said that DOJ’s pursuit of individuals was “no accident.” He said that “prosecution of individuals is a cornerstone of [DOJ’s] enforcement strategy,” and that “the prospect of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”<sup>82</sup>

1. *Casting a Wider Net.*—As indicated by Breuer’s remarks, corporate employees are not the only subjects of FCPA scrutiny. A significant development from the 2009 enforcement year is also a focus on agents or consultants engaged by companies to help facilitate improper payments. For instance, in November 2009, Paul Novak (a former consultant of Willbros International Inc.) pleaded guilty to a substantive count of violating the FCPA and a conspiracy count for his role in facilitating payments to Nigerian foreign officials.<sup>83</sup> The Novak prosecution represents an FCPA triangle of sorts in that individual Willbros employees, as well as the corporation itself, previously settled FCPA enforcement actions based on the same core conduct.<sup>84</sup> In connection with the Novak plea, Breuer said that the “use of intermediaries to pay bribes will not escape prosecution under the FCPA” and that the DOJ “will continue to hold accountable all the players in an FCPA scheme—from the companies and their executives who hatch the scheme, to the consultant they retain to carry it out.”<sup>85</sup>

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80. Roger Witten, *Foreign Corrupt Practices Act Compliance*, 2009 EMERGING ISSUES 472, Dec. 14, 2009 (citing Remarks of Mark Mendelsohn, Deputy Chief, Fraud Section of DOJ’s Criminal Division, The 22nd National Forum on the Foreign Corrupt Practices Act, American Conference Institute (Nov. 17, 2009)).

81. See The FCPA Blog, *supra* note 71 (listing individuals criminally indicted, pleading guilty, or found guilty, of FCPA violations in 2009).

82. Lanny A. Breuer, Assistant Att’y Gen., DOJ, Crim. I Division, The 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), *available at* <http://www.justice.gov/criminal/pr/speeches/2009/11/11-17-09aagbreuer-remarks-fcpa.pdf>.

83. See Press Release, Former Willbros International Consultant Pleads Guilty to \$6 Million Foreign Bribery Scheme (Nov. 12, 2009), *available at* <http://www.justice.gov/opa/pr/2009/November/09-crm-1220.html>.

84. See FCPA Professor, <http://fcpaprofessor.blogspot.com/search/label/Paul%20Novak> (Nov. 13, 2009, 13:37).

85. Press Release, *supra* note 83.



Other agents or consultants criminally indicted in 2009 include U.K. citizens Jeffrey Tesler and Wojciech Chodan for their alleged roles in the KBR/Halliburton Nigeria scheme<sup>86</sup> and Canadian citizen Ousama Naaman for his role in connection with an Iraqi Oil-For-Food matter.<sup>87</sup> Notwithstanding these indictments, there still exists a widely held misperception that foreign nationals are not subject to the FCPA.<sup>88</sup> But in 1998, the FCPA's antibribery provisions were amended to, among other things, broaden the jurisdictional reach of the statute to prohibit "any person" from making improper payments through "use of the mails or any means or instrumentality of interstate commerce" or from doing any other act "*while in the territory of the United States*" in furtherance of an improper payment.<sup>89</sup> Thus, as to these foreign agents/consultants, the DOJ alleged a U.S. nexus in that e-mail communications concerning the bribe payments were sent through U.S. Internet servers and improper payments passed through U.S. bank accounts.<sup>90</sup>

Another significant development from the 2009 enforcement year is a demonstrated commitment by the DOJ to target "foreign official" recipients of bribe payments. In a November 2009 speech at global anti-corruption conference, Attorney General Eric Holder urged nations to work together to ensure that "corrupt officials do not retain the illicit proceeds of their corruption" and announced a "redoubled commitment on behalf of the [DOJ] to recover" funds obtained by foreign officials through bribery.<sup>91</sup>

Because the FCPA only applies to bribe-payers and not bribe-takers,<sup>92</sup> the FCPA is not a tool in DOJ's pursuit of "foreign officials." But other legal avenues are available to the DOJ to hold "foreign official" bribe recipients accountable as two examples from 2009 demonstrate. In January 2009, in the aftermath of the record-setting Siemens enforcement matter, the DOJ filed a forfeiture action against bank accounts located in Singapore (money in these accounts flowed through U.S. financial institutions) that were used to bribe the

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86. See Press Release, 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* [http://www.justice.gov/criminal/pr/press\\_releases/2009/03/03-05-09tesler-charged.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-charged.pdf); see *supra* notes 53, 66 and accompanying text.

87. See Press Release, Canadian National Charged with Foreign Bribery and Paying Kickbacks Under the Oil For Food Program (July 31, 2009), *available at* [http://www.justice.gov/criminal/pr/press\\_releases/2009/07/07-31-09\\_naaman-indict.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/07/07-31-09_naaman-indict.pdf).

88. See Spahn, *supra* note 6, at 157.

89. See 15 U.S.C. § 78dd-3(a) (2006) (emphasis added).

90. See Indictment, United States v. Tesler, No. H-09-098 (S.D. Tex. Feb. 17, 2009), *available at* [http://www.justice.gov/criminal/pr/press\\_releases/2009/03/03-05-09tesler-indictment.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/03/03-05-09tesler-indictment.pdf); Indictment, United States v. Naaman, No. 1:08-cr-00246 (D.D.C. Aug. 7, 2008), *available at* <http://www.mediafile.com/?ztvyjidxzez>.

91. Eric Holder, Att'y Gen., Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009), *available at* <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>.

92. See United States v. Castle, 925 F.2d 831 (5th Cir. 1990).

son of the former Bangladeshi Prime Minister.<sup>93</sup> In announcing the forfeiture action, a DOJ official said that the action “shows the lengths to which U.S. law enforcement will go to recover the proceeds of foreign corruption.”<sup>94</sup> The official said that the DOJ will not only prosecute companies and executives who violate the FCPA, but will also use forfeiture laws “to recapture the illicit facilitating payments often used in such schemes.”<sup>95</sup> In addition, in December 2009, the DOJ criminally indicted (in what is believed to be a first) two “foreign officials” in connection with an FCPA enforcement action. Robert Antoine and Jean Rene Duperval, among others, were charged with money laundering conspiracy and substantive money laundering given that their U.S. bank accounts were connected with the bribery scheme.<sup>96</sup>

2. *The Summer of Trials.*—The year of the individual also saw the summer of FCPA trials against individuals. Business entities involved in FCPA enforcement actions have historically shown zero interest in challenging the enforcement agencies’ aggressive prosecution theories, holding the agencies to their burden of proof, and enduring the uncertainties of trial. In fact, no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years.<sup>97</sup> Thus, corporate FCPA prosecutions are routinely settled through an NPA or DPA. Because an NPA is subject to no judicial scrutiny, and a DPA is subject to no meaningful judicial scrutiny,<sup>98</sup> there is no judicial scrutiny in most FCPA enforcement actions whether factual evidence exists to support each of the legal elements of an FCPA violation. Further, judicial scrutiny of aggressive enforcement theories, upon which so many FCPA enforcement actions are based, is also largely absent.

Individuals involved in an FCPA enforcement action, faced with a loss of liberty, are more inclined to challenge the enforcement agencies and the summer

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93. See Complaint, *United States v. All Assets Held in the Name of Zasz Trading & Consulting* (D.D.C. Jan. 9, 2009), available at [http://www.fcpaenforcement.com/FILES/tbl\\_s31Publications/FileUpload137/5602/ForfeitureDOJComplaint.pdf](http://www.fcpaenforcement.com/FILES/tbl_s31Publications/FileUpload137/5602/ForfeitureDOJComplaint.pdf).

94. Press Release, Department of Justice Seeks to Recover Approximately \$3 Million in Illegal Proceeds from Foreign Bribe Payments (Jan. 9, 2009), available at [http://www.justice.gov/criminal/pr/press\\_releases/2009/01/01-09-09foreign-bribes.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/01/01-09-09foreign-bribes.pdf).

95. *Id.*

96. See Indictment, *United States v. Joel Esquenazi et al.*, No. 09-21010 (S.D. Fla. Dec. 4, 2009), available at [http://www.justice.gov/criminal/pr/press\\_releases/2009/12/12-7fraudhaiti-indict\\_0.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/12/12-7fraudhaiti-indict_0.pdf). According to the indictment, Antoine and Duperval are both former Directors of International Relations at Haiti Teleco—the alleged state-owned national telecommunications company—and thus “foreign officials,” at least under the enforcement agencies’ aggressive interpretation of that term. *Id.*

97. See The FCPA Blog, <http://www.fcpablog.com/blog/2010/2/10/a-gesture-of-justice.html> (Feb. 9, 2010 17:27) (“Not a single corporate defendant, big or small, has fought Foreign Corrupt Practices Act charges in court for the past two decades.”).

98. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 12, 25 (2009), available at <http://www.gao.gov/new.items/d10110.pdf>.

of 2009 was the most active trial period in the history of the FCPA.

*a. Frederic Bourke and Azerbaijan bribery.*—The most noteworthy FCPA trial in 2009 involved Frederic Bourke. The trial centered on Bourke's participation, as an investor, in the privatization of the State Oil Company of the Azerbaijan Republic. This investment was also made by former U.S. Senate Majority Leader George Mitchell and Columbia University (among others), and Bourke reportedly lost \$8 million.<sup>99</sup> In July 2009, a federal jury convicted Bourke for conspiring to pay bribes to Azerbaijan officials in a "massive scheme" to bribe according to the DOJ.<sup>100</sup> The DOJ post-verdict press release states that evidence presented at trial established that Bourke "was a knowing participant in a scheme to bribe senior government officials in Azerbaijan with several hundred million dollars in shares of stock, cash, and other gifts."<sup>101</sup> The release further notes that "the bribes were meant to ensure that those officials would privatize [the oil company] in a rigged auction that only Bourke, fugitive Czech investor Viktor Kozeny and members of their investment consortium could win, to their massive profit."<sup>102</sup>

The Bourke case is arguably the most complex and convoluted case in the FCPA's history.<sup>103</sup> The case included a nearly decade long investigation that spanned the globe, dismissal of FCPA substantive charges on statute of limitations grounds, reinstatement of the FCPA substantive charges, a superseding indictment which then dropped the FCPA substantives charges, and a six-week jury trial during which many observers believe that the jury confused the FCPA's "knowledge" standard with negligence.<sup>104</sup> Further, even though Judge Shira Scheindlin denied Bourke's post-verdict motions, she did reject the DOJ's aggressive interpretation of the FCPA's knowledge element.<sup>105</sup> Moreover,

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99. See Memorandum of Law in Support of Defendant Frederic Bourke, Jr.'s Post-Trial Motion for Entry of a Judgment of Acquittal Pursuant to FED. R. CRIM. P. 29 or for a New Trial Pursuant to FED. R. CRIM. P. 33 at 3, 25, 33, *United States v. Frederic Bourke, Jr.*, 05 Cri. 518, (Aug. 10, 2009) (on file with author); Chad Abraham, *Bourke Plans Extensive Defense in Oil Scam: Part-time Aspen Resident Met with Azerbaijan Leader*, ASPEN TIMES, Dec. 20, 2005, available at <http://www.aspentimes.com/article/20051220/NEWS/112200025>.

100. Press Release, Connecticut Investor Found Guilty in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (July 10, 2009), available at <http://www.justice.gov/opa/pr/2009/July/09-crm-677.html>.

101. *Id.*

102. *Id.*

103. For more on the extensive background of the Bourke case, see Andrew Longstreth, *Azerbaijan Bribes Put One Mogul on Trial, Another in Exile*, LAW.COM (Oct. 9, 2009), available at [http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202434399273&Azerbaijan\\_Bribes\\_Put\\_One\\_Mogul\\_on\\_Trial\\_Another\\_in\\_Exile](http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202434399273&Azerbaijan_Bribes_Put_One_Mogul_on_Trial_Another_in_Exile).

104. See, e.g., The FCPA Blog, <http://www.fcpablog.com/blog/2009/7/20/back-to-bourke.html> (July 19, 2009, 20:38); The FCPA Blog, <http://www.fcpablog.com/blog/2009/7/14/knowning-what-you-dont-know.html> (July 13, 2009, 20:12); The FCPA Blog, <http://www.fcpablog.com/blog/2009/7/12/bourkes-verdict-only-in-america.html> (July 12, 2009, 19:08).

105. See Kenneth Winer & Gregory Husisian, *Recent Opinion Sheds Light on the Relevance*

Judge Scheindlin rejected the ten-year prison sentence sought by the DOJ and sentenced Bourke to 366 days in prison (followed by three years supervised release).<sup>106</sup> At sentencing, even Judge Scheindlin stated that the case troubled her and that after years of supervising the case, it was “still not entirely clear to [her] whether Mr. Bourke is a victim, or a crook, or a little bit of both.”<sup>107</sup> Although the trial phase of the Bourke case is over, the case continues on appeal on grounds including the FCPA’s “knowledge” element and Bourke remains free on bail.<sup>108</sup>

*b. Louisiana Congressman William Jefferson’s freezer cash.*—The second FCPA trial of the summer of 2009 involved former Louisiana Congressman William Jefferson. A federal jury *acquitted* Jefferson on a substantive FCPA charge.<sup>109</sup> That charge, according to the criminal indictment, centered on allegations that Jefferson attempted to bribe (with the infamous cash in the freezer<sup>110</sup>) Nigerian officials including the former Nigerian Vice President to assist himself and others obtain or retain business for a Nigerian telecommunications joint venture.<sup>111</sup> But Jefferson was *convicted* of a variety of charges (solicitation of bribes, honest services wire fraud, money laundering, racketeering and conspiracy).<sup>112</sup> Just what conspiracy remains unclear. The indictment charged conspiracy to solicit bribes, to commit honest services wire fraud, and to violate the FCPA, but the jury was instructed that it only needed to find Jefferson guilty on two out of three of those counts and the jury verdict form did not require the jury to specify which counts it agreed upon.<sup>113</sup> The judge

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*of Due Diligence to the FCPA’s “Knowledge” Element*, 4 CORP. ACCOUNTABILITY REP., at 2-3, Nov. 13, 2009, available at [http://www.foley.com/files/tbl\\_s31Publications/FileUpload137/6597/CorporateAccount2009.pdf](http://www.foley.com/files/tbl_s31Publications/FileUpload137/6597/CorporateAccount2009.pdf).

106. See Press Release, Connecticut Investor Frederic Bourke Sentenced to Prison for Scheme to Bribe Government Officials in Azerbaijan (Nov. 11, 2009) available at <http://www.justice.gov/opa/pr/2009/November/09-crm-1217.html>.

107. Chad Bray, *Bourke Sentenced to One Year in Azerbaijan Bribery Case*, WALL ST. J., Nov. 10, 2009, at B4, available at <http://online.wsj.com/article/SB10001424052748704402404574528003117098132.html>.

108. The FCPA Blog, <http://www.fcpablog.com/blog/2009/11/19/Jefferson-and-bourke-are-released-on-bail.html> (Nov. 18, 2009, 18:18).

109. See Press Release, Former Congressman William J. Jefferson Convicted of Bribery, Racketeering, Money Laundering and Other Related Charges (Aug. 5, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-crm-775.html>.

110. Dana Milbank, *So \$90,000 Was in the Freezer. What’s Wrong with That?*, WASH. POST, May 23, 2009, at A2.

111. See Press Release, Congressman William Jefferson Indicted On Bribery, Racketeering, Money Laundering, Obstruction of Justice, and Related Charges (June 4, 2007), available at [http://www.justice.gov/opa/pr/2007/June/07\\_crm\\_402.html](http://www.justice.gov/opa/pr/2007/June/07_crm_402.html); *US Probes Nigeria Vice-President*, BBC NEWS, Aug. 29, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4192186.stm>.

112. See Press Release, *supra* note 109.

113. See Jonathan Tilove, *William Jefferson Case Will Always Be Remembered for Cash in the Freezer*, TIMES-PICAYUNE (New Orleans), Aug. 5, 2009, available at [http://www.nola.com/news/index.ssf/2009/08/william\\_jefferson\\_case\\_will\\_al\\_1.html](http://www.nola.com/news/index.ssf/2009/08/william_jefferson_case_will_al_1.html).

sentenced Jefferson to thirteen years in federal prison and he remains free on bail pending his appeal.<sup>114</sup> Notwithstanding the fact that a jury found Jefferson not guilty of substantive FCPA charges and notwithstanding the ambiguous nature of the jury's conspiracy verdict, the DOJ still maintains that Jefferson was found guilty of FCPA violations.<sup>115</sup>

*c. Gerald and Patricia Green's Thailand film festival bribes.*—The third FCPA trial of the summer of 2009 involved Los Angeles-area entertainment executives Gerald and Patricia Green. A federal jury convicted the Greens of substantive FCPA violations, conspiracy to violate the FCPA, and other charges.<sup>116</sup> According to the DOJ post-verdict release, evidence introduced at trial showed that “beginning in 2002 and continuing into 2007, the Greens conspired with others to bribe the former governor of the [Tourism Authority of Thailand (TAT)] in order to get lucrative film festival contracts as well as other TAT contracts.”<sup>117</sup> The Greens await sentencing.<sup>118</sup>

These trials were indeed rare and the fact remains that every corporate FCPA enforcement action over the last two decades has been resolved without a trial and nearly every FCPA individual enforcement action has also been resolved without a trial. If nothing else, the FCPA trials in 2009 demonstrate that when a FCPA enforcement action is challenged, the DOJ is not infallible when enforcing the FCPA, that its aggressive interpretations of the statute will not be universally accepted, and that even judges remain fuzzy as to the dividing line between aggressive business conduct and conduct that violates the FCPA.

#### *D. Aggressive and Untested Enforcement Theories*

Ordinarily, aggressive government enforcement of a statute based on tenuous, dubious, and in some cases untested legal theories invites judicial scrutiny in a transparent, adversarial proceeding in which the government must meet its burden of proof and establish that factual evidence exists to support the applicable legal elements and in which valid and legitimate defenses are presented. Such judicial

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114. See Press Release, Former Congressman William J. Jefferson Sentenced to 13 Years in Prison for Bribery and Other Charges (Nov. 13, 2009), *available at* <http://www.justice.gov/opa/pr/2009/November/09-crm-1231.html>; The FCPA Blog, *supra* note 108.

115. For instance, in a November 2009 speech Breuer stated: “In the past few months, we have completed the trials of the Greens in California, of Mr. Bourke in New York and of former Congressman William Jefferson in Virginia. In each of these cases, individuals were found guilty of FCPA violations and face jail time.” Lanny A. Breuer, Assistant Att’y Gen., DOJ, Criminal Division, Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* <http://www.justice.gov/criminal/pr/speeches/2009/11/11-12-09breuer-pharmaspeech.pdf>.

116. Press Release, Film Executive and Spouse Found Guilty of Paying Bribes to a Senior Thai Tourism Official to Obtain Lucrative Contracts (Sept. 14, 2009), *available at* [http://www.justice.gov/criminal/pr/press\\_releases/2009/09/09-14-09green-guilty.pdf](http://www.justice.gov/criminal/pr/press_releases/2009/09/09-14-09green-guilty.pdf).

117. See *id.*

118. The FCPA Blog, <http://fcpablog.com/blog/2010/1/22/sentencing-respite-for-the-greens.html> (Jan. 21, 2010, 17:38).

scrutiny is particularly appropriate when enforcement theories result in multi-million dollar corporate fines and penalties, as is often the case in FCPA enforcement actions.

But such judicial scrutiny is essentially non-existent in the FCPA context given the frequency in which FCPA enforcement actions are resolved through NPAS, DPAs, pleas, or SEC settlements. The result in many cases is that the FCPA means what the enforcement agencies say it means. This feature of the FCPA that distinguishes FCPA enforcement from nearly every other area of law, and this feature was once again prominent during the 2009 FCPA enforcement year.

1. *“Foreign Official.”*—The lack of judicial scrutiny of FCPA enforcement actions is most troubling in connection with the enforcement agencies’ aggressive interpretation of the key “foreign official” element of an FCPA antibribery violation. As described in Part I above,<sup>119</sup> the enforcement agencies’ interpretation of this element includes the theory that all employees (regardless of title or position) of foreign SOEs, including SOE subsidiaries, are deemed “foreign officials” under the FCPA on the theory that such entities are “instrumentalities” of a foreign government.

The enforcement agencies’ interpretation of the “foreign official” element is just that, an interpretation, and it has never been accepted by a court. This interpretation is no different than the DOJ or the SEC telling you that the person you play softball with on Thursday nights is a U.S. “official” merely because he or she works for General Motors or American International Group, Inc., given that both companies are owned or controlled by the U.S. government.

This dubious interpretation is far from an academic issue-spotting exercise, but is rather at the core of a majority of 2009 corporate FCPA enforcement actions as demonstrated by the chart below which lists the enforcement actions along with the alleged “foreign official(s).”

#### 2009 Corporate FCPA Enforcement Actions—The “Foreign Officials”

Company	“Foreign Official(s)”
Avery Dennison Corp. <sup>120</sup>	Chinese foreign officials including: “Traffic Management Research Institute under the Ministry of Public Security located in Wuxi, Jiangsu Province;” “an official at Henan Luqiao, a state-owned enterprise;” “a state-owned end user,” Indonesian customs and tax officials, and Pakistani customs officials.

119. *See supra* text accompanying notes 16-21.

120. Complaint, *supra* note 49, ¶¶ 2, 9, 13-14, 16-17.

Control Components, Inc. <sup>121</sup>	Alleged Vice President, Engineering Managers, General Managers, Procurement Managers, and Purchasing Officers at state-owned entities including, but were not limited to: “Jiangsu Nuclear Power Corporation (China), Guohua Electric Power (China), China Petroleum Materials and Equipment Corporation . . . PetroChina, Dongfang Electric Corporation (China), China National Offshore Oil Company . . . Korea Hydro and Nuclear Power . . . Petronas (Malaysia), and National Petroleum Construction Company (United Arab Emirates) . . .”
Helmerich & Payne Inc. <sup>122</sup>	“Various officials and representatives of the Argentine and Venezuelan customs services.”
ITT Corp. <sup>123</sup>	“Employees of numerous Chinese state-owned entities;” “thirty-two different SOE customers;” “employees of Design Institutes (some of which were SOEs) that assisted in the design of large infrastructure projects in China.”
KBR/Halliburton Co. <sup>124</sup>	“High-level Nigerian government officials;” “Nigerian government officials;” “The Nigerian National Petroleum Corporation (NNPC) was a Nigerian government-owned company charged with development of Nigeria’s oil and gas wealth and regulation of the country’s oil and gas industry. NNPC was a shareholder in certain joint ventures with multinational oil companies. NNPC was an entity and instrumentality of the Government of Nigeria . . .”; “Nigeria LNG Limited (NLNG) was created by the Nigerian government . . . and was the entity that awarded the related . . . contracts. The largest shareholder of NLNG was NNPC, which owned 49% of NLNG. The other owners of NLNG were multinational oil companies. Through the NLNG board members appointed by NNPC, among other means, the Nigerian government exercised control over NLNG . . . NLNG was an entity and instrumentality of the Government of Nigeria . . .”

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121. Criminal Information, *supra* note 50, ¶ 5.

122. Helmerich & Payne, Inc., *supra* note 35, ¶ 4.

123. Complaint, *supra* note 52, ¶¶ 1, 10.

124. Criminal Information, *supra* note 14, ¶¶ 10-14, 18; Complaint, *supra* note 53, ¶¶ 10, 14,

Latin Node Inc. <sup>125</sup>	“Hondutel, the Honduran government-owned telecommunications company headquartered in Tegucigalpa, Honduras, was an ‘instrumentality’ of the Honduran government, and thus its employees and directors were ‘foreign officials’ under the FCPA. . . . TeleYemen, the Yemeni government-owned telecommunications company headquartered in Sana’a, Yemen, was an ‘instrumentality’ of the Yemeni government, and thus its employees and directors were ‘foreign officials’ under the FCPA.”
Nature’s Sunshine Products, Inc. <sup>126</sup>	“Brazilian customs brokers.”
United Industrial Corp. <sup>127</sup>	“[A]ctive [Egyptian Air Force] officials.”
UTStarcom, Inc. <sup>128</sup>	“Government-controlled municipal and provincial telecommunications companies’s employees;” “employees of Chinese government-controlled telecommunications companies;” “managers and other employees of 9 government customers in China;” “a Chinese-government-controlled telecommunications company.” “A government-controlled telecommunications company in Thailand;” “One Mongolian government official to help UTSI obtain a favorable ruling in a dispute over its license.”

As demonstrated by the above chart, the enforcement agencies’ interpretation of the key “foreign official” element of an FCPA antibribery violation to include SOE employees was at the core of 66% (six out of nine) of the 2009 FCPA enforcement actions against business entities. Further, because many of the above enforcement actions (most notably Control Components Inc.) resulted in several related actions against employees where the “foreign officials” were the exact same,<sup>129</sup> the impact of this tenuous and dubious legal interpretation extends far beyond just the enforcement actions profiled above.

The most aggressive application of the enforcement agencies’ “foreign official” interpretation was in the KBR / Halliburton enforcement action in which the enforcement agencies alleged that officers and employees of Nigeria LNG Limited were “foreign officials” despite the fact that NLNG is owned 51% by a

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125. Criminal Information, *supra* note 54, ¶¶ 6, 11.

126. Complaint, *supra* note 35, ¶ 6.

127. *In re United Indus. Corp.*, Exchange Release No. 60005 (May 29, 2009), available at <http://www.sec.gov/litigation/admin/2009/34-60005.pdf>.

128. Complaint, *supra* note 15.

129. See *supra* note 121 and accompanying text.



consortium of private multinational oil companies—Shell, Total, and Eni.<sup>130</sup> In other words, even if an entity is undeniably majority owned by private companies, the enforcement agencies will not retreat from its tenuous and dubious legal interpretation that employees of that entity are “foreign officials” under the FCPA.

DOJ officials have publicly acknowledged that there can be difficult assessments of who qualifies as a “foreign official” under the FCPA.<sup>131</sup> Despite this difficult assessment and despite the lack of any FCPA case law to support its position, the enforcement agencies continue to aggressively interpret the “foreign official” element and have steadfastly refused to provide useful guidance on this issue to those subject to the FCPA.<sup>132</sup> For instance, in a November 2009 speech (before a pharmaceutical industry audience—an industry which has become subject to much FCPA scrutiny based on the interpretation), Breuer said:

consider the possible range of “foreign officials” who are covered by the FCPA: Some are obvious, like health ministry and customs officials of other countries. But some others may not be, such as the doctors, pharmacists, lab technicians and other health professionals who are employed by state-owned facilities. Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a “foreign official” within the meaning of the FCPA.<sup>133</sup>

Even if the enforcement agencies’ aggressive “foreign official” interpretation were to be upheld by a court, those subject to the FCPA could certainly benefit from some clarity as to the factors the enforcement agencies consider when analyzing whether a commercial enterprise (often times a company with publicly traded stock and other attributes of private business) is an SOE.

Instead, in many cases the charging documents contain little more than mere conclusory legal statements as to the key “foreign official” element. For instance, the SEC’s complaint against Oscar Meza, a former employee of Faro Technologies, Inc., charging FCPA anti-bribery violations, is silent as to any factual evidence supporting the theory that employees of unidentified “Chinese state-owned companies” are “foreign officials.”<sup>134</sup> Similarly, in the above-profiled Control Components Inc. action, it is unclear what attributes of the identified entities, such as Petronas (located in Malaysia), made them an “instrumentality” of a foreign government in the eyes of the enforcement

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130. See The Company—Nigeria LNG, <http://www.nlng.com/NR/exeres/F48DE9A7-F3F3-4A8E-929A-0C34F1CFF92B%2Cframeless.htm> (last visited Mar. 9, 2010).

131. See Wrage Blog, <http://wrageblog.org/2009/09/17/the-latest-fcpa-forecast-from-u-s-regulators/> (Sept. 17, 2009, 14:26).

132. Breuer, *supra* note 115.

133. *Id.*

134. See Complaint ¶ 1, SEC v. Oscar H. Meza, No. 1:09-cv-01648 (D.D.C. Aug. 28, 2009), available at <http://www.sec.gov/litigation/complaints/2009/comp21190.pdf>.

agencies.<sup>135</sup>

It remains an open question also whether the enforcement agencies conduct any meaningful investigation before making the significant legal conclusion that a seemingly commercial enterprise is nevertheless an “instrumentality” of a foreign government. For instance, Petronas is “a fully-integrated oil and gas corporation, ranked among Fortune Global 500’s largest corporations in the world”; it has four subsidiaries listed on a stock exchange; and it has ventured globally into more than thirty-two countries worldwide in its aspiration to be “a [l]eading [o]il and [g]as [m]ultinational of [c]hoice.”<sup>136</sup> Would a court conclude that such a profit seeking enterprise, one of the largest in the world, and one that does business all over the world is truly an instrumentality of the Malaysian government?

Why has no one challenged this interpretation of the key “foreign official” element (the foundation on which a significant number of FCPA enforcement actions is based)? Simply put, businesses are not in the business of setting legal precedent and to challenge this interpretation would first require a business to be criminally indicted—something no board of director member is going to allow to happen in this post-Arthur Anderson world—regardless of the ultimate criminal fine or penalty the DOJ is seeking.<sup>137</sup>

Thus, this interpretation continues even though it is beyond ripe for challenge. With foreign government owned sovereign wealth funds making investments around the world (including in U.S. companies)<sup>138</sup> and with SOEs listing public shares on various exchanges and otherwise doing business around the world, there has never been a more critical time for the enforcement agencies to make clear its legal reasoning and support for its tenuous and dubious legal theory. Before another company or individual is subject to an FCPA enforcement based on this tenuous and dubious legal theory, there should be at least be some judicial acceptance of this theory.

2. “Control Person” Liability.—The 2009 FCPA enforcement year also saw the SEC push the outer limits of FCPA liability. In the Nature’s Sunshine Products (NSP) enforcement action, the SEC also charged company executives Douglas Faggioli and Craig Huff.<sup>139</sup> The settled complaint alleges that Faggioli and Huff, as “control persons” of NSP, violated the FCPA books and records and internal control provisions.<sup>140</sup> In language that is sure to induce a cold sweat in

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135. See *supra* note 121 and accompanying text.

136. About Petronas, [www.petronas.com.my/about\\_US.aspx](http://www.petronas.com.my/about_US.aspx) (last visited Mar. 26, 2010).

137. See, e.g., Winer & Husisian, *supra* note 37, at 10 (“Even if the government’s application of the anti-bribery provisions of the FCPA is excessively aggressive, no company or individual wants to have to test the government’s application in court.”).

138. See, e.g., Dinny McMahon, *China Gives Glimpse of U.S. Holdings*, WALL ST. J., Feb. 9, 2010, at C1 (noting that state-owned China Investment Corp. has a combined \$9.63 billion in equity stakes in various U.S. companies including American International Group, Inc., Apple Inc., and News Corp.).

139. Complaint, *supra* note 35.

140. *Id.* ¶¶ 43-48, 69.

any executive, the SEC generally alleged that both Faggioli and Huff had “supervisory responsibilities” over NSP’s senior management and policies. Yet as “control persons,” the SEC alleged that Faggioli and Huff “failed to make and keep books, records and accounts, which in reasonable detail, accurately and fairly reflected the transactions of NSP” and that they failed to devise and maintain an adequate system of internal accounting controls.<sup>141</sup>

Although the SEC has in past FCPA enforcement actions charged business executives under other indirect theories of liability,<sup>142</sup> the charges against Faggioli and Huff are the first time the SEC has used a “control person” theory of liability in an FCPA enforcement action. Phillip Urofsky, a former DOJ attorney responsible for prosecuting FCPA cases currently in private practice, noted that the NSP case is the “first FCPA action in which the SEC has charged individuals under the Exchange Act’s control liability theory.”<sup>143</sup> He also noted that this case departed from the SEC’s prior practice in that previous SEC FCPA cases included “direct allegations that the individuals . . . charged were involved in the action, in creating the false books and records or creating controls or authorizing payment of the bribes.”<sup>144</sup> Urofsky calls the SEC’s invocation of control person liability in the FCPA context “unique and unprecedented.”<sup>145</sup> As demonstrated by the NSP enforcement action, the FCPA enforcement trend is clearly greater scrutiny of business executives and a greater SEC expectation that executives play a meaningful role in ensuring enterprise-wide FCPA compliance.

### III. THE ROAD AHEAD FOR THE FOREIGN CORRUPT PRACTICES ACT

As the FCPA enters a new decade, the Obama Department of Justice is expected to keep FCPA enforcement a top priority. Not only is the United States expected to ramp-up enforcement of the FCPA, but other countries, most notably the United Kingdom, are also expected to ramp-up enforcement of anti-corruption laws as well.<sup>146</sup> This Section ends with a discussion of two bills currently in the U.S. Congress that could affect FCPA compliance and enforcement in the new decade.

#### *A. Enforcement Priority Remains High*

FCPA prosecution is expected to remain a top priority in the Obama administration and thus a prominent feature on the legal landscape throughout this decade. Both Attorney General Holder and Assistant Attorney General

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141. *Id.* ¶¶ 67-69.

142. See FCPA Professor, <http://fcpprofessor.blogspot.com/2009/08/more-on-control-person-and-similar.html> (Aug. 25, 2009, 15:42).

143. Amanda Bronstad, *SEC Trots Out a New Weapon: Control Person Liability*, NAT’LLJ, Aug. 20, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433157801&hbxlogin=1>.

144. *Id.*

145. *Id.*

146. See *infra* notes 150-53 and accompanying text.

Breuer come from a white collar defense background and have familiarity with the statute. The DOJ's increased focus on the FCPA has been documented over the past few years. In his November 2009 speech, Breuer noted that the DOJ "will continue to focus [its] attention on areas and on industries where we can have the biggest impact in reducing foreign corruption."<sup>147</sup> Breuer noted that the FCPA-specific FBI squad "has been growing in size and in expertise over the past two years." He announced that the DOJ has "begun discussions with the Internal Revenue Service's Criminal Investigation Division about partnering with [the DOJ] on FCPA cases" as well as "pursuing strategic partnerships with certain U.S. Attorney's Offices throughout the United States where there are a concentration of FCPA investigations."<sup>148</sup>

The SEC has also ramped up its FCPA resources. In August 2009, Robert Khuzami (the SEC's Director of the Division of Enforcement), announced that the SEC will be creating a specialized FCPA unit. Khuzami said:

The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the Foreign Corrupt Practice Act, which prohibits U.S. companies from bribing foreign officials for government contracts and other business. While we have been active in this area, more needs to be done, including being more proactive in investigations, working more closely with our foreign counterparts, and taking a more global approach to these violations.<sup>149</sup>

### *B. Increased International Enforcement*

The past year also saw an enforcement ramp up of anti-corruption laws around the globe, including most notably in the United Kingdom. In July 2009, the U.K. Serious Fraud Office (SFO) (an enforcement agency similar to the DOJ) announced the first prosecution brought in the United Kingdom against a company for overseas corruption as it charged Mabey & Johnson Ltd. with making improper payments to secure public contracts in Jamaica and Ghana as well as in connection with the Iraqi Oil-For-Food program.<sup>150</sup> In October 2009, Halliburton announced that the SFO is conducting an inquiry into M.W. Kellogg Company (a U.K. joint venture owned by a Halliburton affiliate) related to the same Nigeria scheme at issue in the record-setting FCPA enforcement action.<sup>151</sup>

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147. Breuer, *supra* note 82.

148. *Id.*

149. Robert Khuzami, Director, Div. of Enforcement, SEC, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), *available at* <http://www.sec.gov/news/speech/2009/spch080509rk.htm>

150. See Press Release, Mabey & Johnson Ltd Prosecuted by the SFO (July 10, 2009), *available at* <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey-johnson-ltd-prosecuted-by-the-sfo.aspx>.

151. See Halliburton Co., Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, Form 10-Q, Comm'n File No. 001-03492, at 10 (Sept. 30, 2009), *available at* <http://ir.halliburton.com/phoenix.zhtml?c=67605&p=irol-secText&TEXT=aHR0cDovL2Nj>

Such parallel or “tag-along” enforcement actions in other jurisdictions as to the same core conduct at issue in a U.S. FCPA prosecution is expected to become a new norm in this decade.

Also relevant to the U.K.’s enforcement ramp up is a new Bribery Bill expected this year.<sup>152</sup> In anticipation of this new law, in July 2009 the SFO released a memo titled “Approach of the Serious Fraud Office to Dealing with Overseas Corruption” in which the SFO announced that it will be using “all of the tools at [its] disposal in identifying and prosecuting cases of corruption” as well as adopting investigative strategies similar to the DOJ.<sup>153</sup>

Other global anti-corruption developments in 2009 include the announcement by Canadian authorities of a “special unit” dedicated to investigating international bribery and enforcing its FCPA-like statute (the Corruption of Public Officials Act)<sup>154</sup> as well as the Secrecy International investigation in Australia which could result in that country’s first prosecution of a company for foreign bribery.<sup>155</sup>

### C. Legislative Activity

Congress enacted the FCPA in 1977 and amended it in 1988 and 1998.<sup>156</sup> Given this approximate ten-year cycle, the statute would seem primed for a tune-up and the current year may see some U.S. legislative activity, as two bills currently in Congress could impact FCPA compliance and enforcement.

1. *The Energy Security Through Transparency Act.*—In September 2009, “The Energy Security Through Transparency Act” (S-1700) was introduced and it seeks to amend section 13 of the Securities Exchange Act by adding a new section “Disclosure of Payment by Resource Extraction Issuers.”<sup>157</sup>

Bribery and corruption are bad; however, that does not mean that every attempt to curtail bribery and corruption is good. Although perhaps a well-intentioned bill, S. 1700 is, as described below, so broad that it would essentially require “Resource Extraction Issuers” to disclose any payments made to just

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152. See, e.g., Bribery Bill, 2009-10, H.L. Bill [69] (U.K.), available at <http://services.parliament.uk/bills/2009-10/bribery.html>.

153. Approach of the Serious Fraud Office to Dealing with Overseas Corruption, available at [http://www.sfo.gov.uk/media/28313/approach of the SFO to dealing with overseas corruption.pdf](http://www.sfo.gov.uk/media/28313/approach%20of%20the%20SFO%20to%20dealing%20with%20overseas%20corruption.pdf).

154. See Mark Morrison et al., *Canada’s Corruption of Foreign Public Officials Act: What You Need to Know and Why*, BLAKES BULL.: WHITE COLLAR CRIME, Sept. 2009, at 1, available at [http://www.blakes.com/english/legal\\_updates/white\\_collar\\_crime/sept\\_2009/CFPOA.pdf](http://www.blakes.com/english/legal_updates/white_collar_crime/sept_2009/CFPOA.pdf).

155. Richard Baker & Nick McKenzie, *When the Buck Stops at the Top*, AGE (MELBOURNE), Nov. 28, 2009, available at <http://www.theage.com.au/national/when-the-buck-stops-at-the-top-20091127-jx11.html>.

156. Legislative History, <http://www.justice.gov/criminal/fraud/fcpa/history> (last visited Mar. 9, 2010).

157. See Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. sec. 6 (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-1700> (follow “full text” hyperlink).

about anybody in connection with the “commercial development of oil, natural gas, or minerals”—including perfectly legitimate and legal payments.

Under this proposed act, the SEC shall issue final rules that would require:

- a “Resource Extraction Issuer” (a defined term which means an issuer that: “(i) is required to file an annual report with the Commission; and (ii) engages in the commercial development of oil, natural gas, or minerals”);
- to include in its annual report;
- “information relating to any payment”;
- made by the issuer, “a subsidiary or partner” of the issuer, “or an entity under the control of the issuer”;
- to a “foreign government” (a defined term which means a “foreign government, an officer or employee of a foreign government, an agent of a foreign government, a company owned by a foreign government, or a person who will provide a personal benefit to an officer of a government if that person receives a payment, as determined by the [SEC]”);
- for “the purpose of the commercial development of oil, natural gas, or minerals.”<sup>158</sup>

The final rules to be issued by the SEC would require that the annual report include: “(i) the type and total amount of such payments made for each project” of the issuer “relating to the commercial development of oil, natural gas, or minerals; and (ii) the type and total amount of such payments made to each foreign government.”<sup>159</sup> Thereafter, the Act requires that “to the extent practicable, the [SEC] shall make available online, to the public, a compilation of the information required to be submitted” under the above rules.<sup>160</sup>

Under the act, a “Resource Extraction Issuer” is defined to mean an issuer that “engages in the commercial development of oil, natural gas, or minerals.”<sup>161</sup> The term “commercial development of oil, natural gas, or minerals” in turn “includes the acquisition of a license, exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, as determined by the [SEC].”<sup>162</sup>

A significant question posed by these broad definitions, among others, is whether selling equipment to a core resource extraction company, which is then used to explore for oil, natural gas, or minerals a “significant action relating to oil, natural gas, or minerals?” Or is selling exploration software to a core resource extraction company, which is then used to explore for oil, natural gas, or minerals a “significant action relating to oil, natural gas, or minerals?”

Further, under the act, the term payment: “(i) means a payment that is (I) made to further the commercial development of oil, natural gas, or minerals; and (II) not de minimis; and (ii) includes taxes, royalties, fees, licenses, production entitlements, bonuses, and other material benefits, as determined by the

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158. *Id.* sec. 6(m)(1)-(2).

159. *Id.* sec. 6(m)(2)(A).

160. *Id.* sec. 6(m)(3)(A).

161. *Id.* sec. 6(m)(1)(D)(ii).

162. *Id.* sec. 6(m)(1)(A).

[SEC].”<sup>163</sup>

Ignoring the imperfect and imprecise definition of “Resource Extraction Issuer,” it is one thing to require such issuers to disclose royalties paid to a foreign government. But the act seeks disclosure and reporting of much more. The act could conceivably require disclosure of every single dollar a “Resource Extraction Issuer” pays to anybody in connection with the “commercial development of oil, natural gas, or minerals” if the money ultimately makes its way to a foreign government, an officer or employee of a foreign government, a company owed by a foreign government, or any person who will provide a personal benefit to an officer of a government.

Further problematic is the fact that S-1700 does not contain a knowledge requirement. Thus, a “Resource Extraction Issuer” will have a disclosure obligation if it makes a payment to any person, who then unbeknownst to the “Resource Extraction Issuer,” makes a payment to a person “who will provide a personal benefit to an officer of a government.”<sup>164</sup>

Not only is S-1700 incredibly broad and in many cases unintelligible, but it also seeks to impose disclosure obligations on issuers (at least Resource Extractions issuer) that Congress considered and rejected when it enacted the FCPA. For instance, the original versions of what became the “FCPA” (i.e. the “Foreign Payments Disclosure Act” and other similar bills) started out with disclosure provisions, including provisions requiring all U.S. companies to disclose all payments over \$1,000 to any foreign agent or consultant and any and all other payments made in connection with foreign government business.<sup>165</sup> As to these proposed disclosure provisions, many lawmakers, including most notably Senator Proxmire (a Democrat from Wisconsin and a congressional leader on the FCPA issue), were concerned that the disclosure obligations were too vague to enforce and would require the disclosure of thousands of payments that were perfectly legal and legitimate. Proxmire said during congressional hearings: “I would think [the corporations subject to the disclosure requirements] would want some certainty. They want to know what they have to report and what they don’t have to report. They don’t want to guess and then find themselves in deep trouble because they guess wrong.”<sup>166</sup>

The final House report on what would become the “FCPA” is even more emphatic in rejecting a disclosure regime contemplated by S-1700. The report states (when discussing the various disclosure provisions previously debated, but rejected):

Most disclosure proposals would require U.S. corporations doing business abroad to report all foreign payments including perfectly legal payments such as for promotional purposes and for sales commissions.

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163. *Id.* sec. 6(m)(1)(C)(i)-(ii).

164. *Id.* sec. 6(m)(1)(B).

165. Prohibited Bribes to Foreign Officials: Hearing on S. 3133, 3379, & 3418 Before the Committee on Banking, Housing and Urban Affairs, 94th Cong. 13 (1976) (statement of William Proxmire, Committee Chairman, Committee on Banking, Housing and Urban Affairs).

166. *Id.*

A disclosure scheme, unlike outright prohibition, would require U.S. corporations to contend not only with an additional bureaucratic overlay but also with massive paperwork requirements.<sup>167</sup>

2. *The Foreign Business Bribery Prohibition Act.*—The other bill currently in Congress is H.R. 2152 (“The Foreign Business Bribery Prohibition Act”) and it could be a game-changer in terms of creating the much-needed FCPA case law to define the statute’s contours.<sup>168</sup> At present, there is no private right of action under the FCPA. Enforcement of the law is solely in the hands of the DOJ and SEC.<sup>169</sup> The act, introduced in April 2009, seeks to amend the FCPA by creating a private right of action for any U.S. company that can prove it lost business because a “foreign concern” gained that same business by violating the FCPA.<sup>170</sup>

Under the act, a plaintiff would need to prove that: (i) the “foreign concern” violated the FCPA’s anti-bribery provisions; and (ii) the violation prevented the plaintiff from obtaining or retaining business and assisted the foreign concern in obtaining or retaining business.<sup>171</sup> In other words, if a U.S. company can prove that it lost business because a “foreign concern” gained that same business by violating the FCPA, the U.S. company could bring a lawsuit seeking damages. Under the proposed act, the damages would be the higher of the total amount of the contract or agreement that the “foreign concern” gained in obtaining or retaining the business or the total amount of the contract or agreement that the plaintiff failed to gain.<sup>172</sup> The act also allows treble damages along with attorneys’ fees and costs.<sup>173</sup>

With increased media scrutiny on the business practices of foreign companies, including allegations that certain companies have been able to obtain or retain business by making bribe payments,<sup>174</sup> the act could provide U.S. companies a legal avenue to recover for such lost business.

The act also has the potential to change FCPA enforcement by creating an avenue for much needed judicial scrutiny of the FCPA’s elements. Because a private plaintiff will have to prove the same elements enforcement agencies have to establish to initiate an FCPA enforcement action, and because a private plaintiff would not carry the “big stick” the enforcement agencies carry, FCPA

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167. H.R. REP., *supra* note 17, at 3.

168. See Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-2152> (follow “full text” hyperlink).

169. See *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024, 1029-30 (6th Cir. 1990).

170. See H.R. 2152, sec. 2 (f)(1).

171. See *id.*

172. See *id.* sec. 2(f)(3).

173. See *id.* sec. 2(f)(3)(b).

174. See Sharon LaFraniere & John Grobler, *China Spreads Aid in Africa, with a Catch*, N.Y. TIMES, Sept. 21, 2009, at A1, available at <http://www.nytimes.com/2009/09/22/World/Africa/22namibia.html>; see also Joshua Partlow, *Afghan Minister Accused of Taking Bribe*, WASH. POST, Nov. 18, 2009, available at [http://www.washingtonpost.com/wp-dyn/content/article/2009/11/17/AR2009111704198\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/11/17/AR2009111704198_pf.html).



case law, as opposed to merely FCPA resolutions via NPAs or DPAs, surely seems likely if Congress enacts H.R. 2152. Thus, if Congress enacts H.R. 2152, it could inject a plaintiff's component into the FCPA bar, and result in much needed substantive FCPA case law.<sup>175</sup>

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175. *See* *United States v. Kozeny*, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) (noting the “surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years”).