The Rise of the Prosecutorial Efforts in Foreign Corruption: Lessons Learned from Recent FCPA Cases

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I want either less corruption, or more chance to participate in it.[1]

— *Ashleigh Brilliant*

I. INTRODUCTION

The quote from Ashleigh Brilliant captures the end result pursued by laws proscribing bribery in business — corruption should be minimized, if not stamped out, in order to create a level playing field where businesses can compete fairly. This proscription against bribery presents unique challenges for companies doing business abroad. Businesses may recognize that corruption discourages trust in the government and harms people, economies, and the environment; but, they might not be as sensitive to this as when it occurs in their own countries, as businesses may see foreign investment and business abroad only as a means of earning more profit. Until recently, some Western countries, including Germany,[2] have allowed bribes paid by their nationals to foreign persons to be credited as expenses for tax purposes.[3] But, as global networks form and develop among businesses and

1. Ashleigh Brilliant, Participation Quotes, *available at* http://thinkexist.com/quotes/with/keyword/participate/ (last accessed Feb. 25, 2011) (Brilliant is an American author and a syndicated cartoonist).

2. Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1450 (2008) (citing Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES, Nov. 25, 2007, at Cl). Note, however, that now, Germany has been the most vigorous of all countries aside from the United States (U.S.) in enforcing its foreign corrupt practices laws. It is estimated that there are currently 43 prosecutions in Germany and 88 pending investigations. *See* Fritz Heinmann & Gillian Dell, Transparency International, Progress Report 2008: OECD Anti-Bribery Convention, Enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 23, *available at* http://www.minterellison.co. nz/OECD%20Report.pdf (last accessed Feb. 25, 2011).

3. Nick Burkill, Dorsey & Whitney LLP, Doing Business Abroad — International Legal Obligations and Penalties Relating to Corruption 2, *available at* http://www.dorsey.com/files/upload/MP_CCS09_corporate_fraud_business_abroad_burkill.pdf (last accessed Feb. 25, 2011).

governments, it becomes clear that corruption of government officials in one country can harm the economies of countries that are half a world away.[4]

The first effort in the world to criminalize extraterritorial bribery was from the United States (U.S.).[5] The U.S. led the way with the Foreign Corrupt Practices Act (FCPA)[6] of 1977.[7] The enactment of the FCPA was a direct result of the Watergate Special Prosecutor's disclosure that major American corporations were engaged in the systematic bribery of foreign government officials.[8] As a result, it is the U.S. that has the greatest experience in implementing foreign anti-bribery laws and imposing criminal penalties for the bribery of foreign persons abroad.[9] Since 1998 however, beginning with the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[10] by the Organization for Economic Cooperation and Development,[11] various international bodies have enacted conventions that call on states to adopt national legislation to curb bribery of foreign officials.[12]

U.S. companies operating abroad are therefore no longer prejudiced by having to play by more stringent rules than companies from other countries. Now, the major economies of the world have adopted rules that prohibit their nationals from bribing foreign officials.[13] This global effort to counter

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4. Paolo Mauro, Why Worry About Corruption?, *available at* http://www.imf.org /external/pubs/ft/issues6/index.htm (last accessed Feb. 25, 2011).

5. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT'L L. & COM. REG. 83, 87 (2007).

6. Foreign Corrupt Practices Act of 1997 [Foreign Corrupt Practices Act], 15 U.S.C. §§ 78dd-1, et seq. (1997) (U.S.).

7. Krever, *supra* note 5, at 83.

8. DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 1 (2d ed. 1999).

9. Burkill, *supra* note 3, at 2.

10. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, *available at* http://www.oecd.org/ dataoecd/4/18/38028044.pdf (last accessed Feb. 25, 2011).

11. *See* OECD — Better Policies for Better Lives, *available at* http://www.oecd. org/home/ (last accessed Feb. 25, 2011).

12. Some of these are the United Nations Convention against Corruption, the Inter-American Convention against Corruption, the Council of Europe Conventions, the South African Development Protocol against Corruption, the African Union Convention on Preventing and Combating Corruption, and the World Bank Anti-Corruption Strategies.

13. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 315 (2008).

the corruption of foreign officials therefore serves to level the playing field globally.[14] However, recent cases on FCPA enforcement show a curious direction that FCPA enforcement has taken, in particular, the rise of FCPA prosecutions.

The significant increase in the level of FCPA enforcement, the imposition of larger fines, and the use of the penalty of disgorgement of profits — a penalty that is not among the civil or criminal penalties provided by the FCPA[15] — are new developments in the enforcement efforts of the U.S. Securities and Exchange Commission (SEC) and the U.S. Department of Justice (DOJ). Other developments that have arisen are the tendency of the SEC to file criminal cases against the directors and officers of an erring company, the prosecution of bribery of private persons, and the special circumstances in FCPA prosecution in cases involving states possessing elements of non-market economies such as the People's Republic of China (China). What explains the shift in the direction of FCPA enforcement? Is this shift a temporary matter or is it here to stay? What does this shift mean for the FCPA compliance programs for companies?

This Article studies the most recent cases of FCPA enforcement and attempts to sketch a coherent picture of recent FCPA enforcement in order to provide companies with a roadmap that can be used in FCPA compliance efforts. The first section studies the reasons that spurred the significant increase in FCPA enforcement. The second section examines the recent cases on FCPA enforcement and draws lessons that emerge from the experiences of these companies. The third section uses the lessons drawn from the case studies and consolidates them by providing points that should be considered by companies when creating FCPA compliance programs. The last section concludes.

II. INCREASED ENFORCEMENT OF FCPA

The level of FCPA enforcement has increased significantly in recent years. From 1978 to 2000, the SEC and the DOJ averaged approximately three FCPA prosecutions per year.[16] Recent years have seen increased aggressiveness in government enforcement of the FCPA. For the period of 2003 to 2007, there was an average of approximately 20 new FCPA investigations each year.[17] The year 2008 saw open investigations involving

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14. Patrick Glynn, et al., *The Globalization of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY 20 (Kimberly Ann Elliott ed., 1997).

15. *See* Foreign Corrupt Practices Act, 15 U.S.C. art. 3.

16. Huskins, *supra* note 2, at 1449 (citing Eugene R. Erbstoesser, et al., *The FCPA and Analogous Foreign Anti-Bribery Laws — Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAP. MARKETS L.J. 381, 386 (2007)).

17. Shearman & Sterling LLP, Recent Trends and Patterns in FCPA Enforcement, A Study on Anti-Corruption Enforcement Activity Changes 2, *available at*

82 corporations,[18] while 2009 was an even busier year for FCPA enforcement, and has been described as the "most active FCPA trial year yet."[19]

In addition, the increased aggressiveness in prosecution has seen larger penalties imposed by the SEC and DOJ and the imposition by the SEC that companies settling their FCPA cases disgorge profits obtained through such violation. The 2008 settlement of the *Siemens*[20] case involved a combined global settlement amount of more than $1.6 billion.[21]

Lastly, the DOJ has increasingly involved individual defendants in its FCPA prosecution. No longer is the company the sole subject of FCPA prosecution, and this is highlighted with FCPA charges being brought against Representative William Jefferson for offering bribes to senior Nigerian government officials in 2007.[22] The year 2009 saw the DOJ indict eight persons, obtain five guilty pleas, and pursue a rare FCPA trial against an individual.[23]

A number of theories have been raised to explain the significant increase in FCPA enforcement. Some of the most important ones are:

(1) The Enron and WorldCom scandals, which, although not involving foreign bribery, increased government scrutiny of corporate behavior in general;[24]

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http://www.shearman.com/files/upload/FCPA_Trends.pdf (last accessed Feb. 25, 2011).

18. *Id.*

19. Sarah E. Streicker & James T. Parkinson, FCPA Watch: US DOJ and SEC Aggressively Pursuing FCPA Cases; SEC Forms Specialized FCPA Enforcement Unit, *available at* http://www.mayerbrown.com/publications/article.asp?id=7442&nid=6 (last accessed Feb. 25, 2011).

20. United States Securities and Exchange Commission v. Siemens Aktiengesellschaft, *available at* http://www.sec.gov/litigation/complaints/2008/comp20829.pdf (last accessed Feb. 25, 2011) [hereinafter SEC v. Siemens].

21. Thomas O. Gorman, The Siemens FCPA Case: A Record Settlement and a Warning to All, *available at* http://www.secactions.com/?p=655 (last accessed Feb. 25, 2011).

22. Shearman & Sterling LLP, *supra* note 17, at 5.

23. James T. Parkinson, FCPA Guilty Verdict Underscores Enforcement Priority: Individuals Will Be Prosecuted, *available at* http://www.martindale.com/petroleum-refining/article_Mayer-Brown-LLP_766760.htm (last accessed Feb. 25, 2011) [hereinafter Individuals Will Be Prosecuted].

24. David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 483 (2009) (citing STUART H. DEMING,

(2) The enhanced self-reporting requirements of the Sarbanes-Oxley Act of 2002[25] have created heightened awareness of FCPA non-compliance and have motivated companies to bring violations to the attention of the DOJ and the SEC in the hope that such conduct will gain leniency from regulators;[26]

(3) The enforcement priorities of the SEC have shifted towards corporate crime;[27]

(4) The enforcement resources of the SEC for FCPA enforcement have increased;[28]

(5) The DOJ's and the SEC's increased self-awareness of prosecutorial goals, directives, and policy in the wake of recent DOJ memoranda regarding factors to be weighed in deciding whether to charge corporations with criminal acts have driven an increase in FCPA enforcement;[29] and,

(6) The global community's acceptance of international agreements against bribery has enabled increased aggressiveness on the part of U.S. enforcement agencies for reasons of both cultural sensitivity and cooperation.[30]

These reasons point towards a combination of statutory, political, and international events that converged to bring about the significant increase in FCPA enforcement. This increased enforcement will most likely continue in the future. Robert Khuzami, Director of the Division of Enforcement of the SEC, has announced the introduction of specialized units in the SEC's

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THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 41 (2005)).

25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002) (U.S.).

26. Weiss, *supra* note 24, at 483 (citing Gregory S. Bruch, *Recent SEC Foreign Payment Cases and the Road Ahead Under the New SEC Leadership,* A.B.A. Ctr. for Continuing Legal Education National Institution (Mar. 21–22, 2002)).

27. Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, to Heads of Department Components and U.S. Attorneys with regard to Principles of Federal Prosecution of Business Organizations, *available at* http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (last accessed Feb. 25, 2011).

28. Weiss, *supra* note 24, at 483 (citing William F. Pendergast, et al., *The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks,* 1665 PRACTISING L. INST. 113, 156 (2008)).

29. *Id.* at 483.

30. *Id.* at 484 (citing Thomas McVey & Carole Basri, *International Business Risks Increase,* N. Y. L. J., May 10, 1999, at S3).

Enforcement Division.[31] Each of these units will be dedicated to a particular highly specialized and complex area of securities law.[32] One of these,[33] according to Khuzami, "will be the [FCPA] Unit, which will focus on new and proactive approaches to identifying violations of the FCPA."[34] He recognized that the SEC has been active in this area, but reports that "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."[35]

In summary, a combination of factors has led to a significant increase in SEC and DOJ action in FCPA enforcement. The increase in the number of cases, coupled with the increase in the penalties imposed, behooves companies doing business abroad to pay careful attention to FCPA compliance. This increase in enforcement is, however, only half of the story. Recent cases on FCPA enforcement have shown certain prosecutorial innovations on the part of the SEC and the DOJ that increase the stakes in FCPA compliance.

III. SURVEY OF RECENT FCPA ENFORCEMENTS

In order to learn of the nature taken by the increased FCPA enforcement by the DOJ and the SEC, it is necessary to survey the most notable FCPA cases that have arisen in recent FCPA enforcements. A summary of each case is presented and the most important lessons that may be drawn from each case gives pointers to FCPA compliance officers on the matters that they need to take note of.

A. Control Components, Inc. (CCI)

The case of *CCI*[36] is important because apart from the FCPA prosecution, the DOJ resorted to the enforcement of the Travel Act[37] for carrying out

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31. Robert Khuzami, Director of Enforcement, U.S. Securities and Exchange Commission, 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 (last accessed Feb. 25, 2011).

32. *Id.*

33. The other units are the Asset Management Unit, the Market Abuse Unit, the Structured and New Products Unit, and the Municipal Securities and Public Pensions Unit. *Id.*

34. *Id.*

35. *Id.*

36. Plea Agreement, United States v. Control Components, Inc., *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/cci-plea-agree.pdf (last accessed Feb. 25, 2011) [hereinafter CCI Plea Agreement].

37. Travel Act of 1965 [Travel Act], 18 U.S.C. § 1952 (1965) (U.S.).

commercial bribery of officers and employees of privately-owned enterprises. The Travel Act provides for federal prosecution of violations of state commercial bribery statutes, so the Travel Act charge in this Case is noteworthy.

1. Summary of the Case

On 22 July 2009, CCI, a California-based company that manufactures control valves for use in nuclear, oil and gas, and power generation industries, pleaded guilty to violating the anti-bribery provisions of the FCPA and the Travel Act. According to the Criminal Information,[38] from 1998 through 2007, CCI made corrupt payments to officers and employees of numerous state-owned and privately-owned companies around the world, for the purpose of assisting in obtaining or retaining business for CCI. The countries where bribery occurred were in China, Korea, Malaysia, and the United Arab Emirates. CCI admitted to making approximately 236 unlawful payments between 2003 and 2007 for the purpose of obtaining or retaining business. These unlawful payments included bribes totalling $4.9 million to officials of state-owned companies in violation of the FCPA, and bribes totalling $1.95 million made to officials of privately-owned companies in violation of the Travel Act.

CCI agreed to waive indictment and plead guilty to charges of conspiracy in violating the anti-bribery provisions of the FCPA and the Travel Act and two substantive violations of an anti-bribery provision of the FCPA.[39] CCI further agreed to fully cooperate with the DOJ in its investigation into all matters related to the conduct charged in the Information,[40] including its investigation of individual defendants consisting of corporate officers.[41]

The Southern District of California sentenced CCI to pay an $18.2 million criminal fine.[42] CCI was also required to implement a compliance program and retain an independent compliance monitor for three years.[43]

38. Information, United States of America v. Control Components, Inc., *available at* http://www.usdoj.gov/criminal/pr/press_releases/2009/07/07-31-09control-guilty-information.pdf (last accessed Feb. 25, 2011).

39. *Id.*

40. CCI Plea Agreement, *supra* note 36, at 3.

41. In April 2009, the DOJ indicted six former CCI executives, including the former Chief Executive Officer, for violations of the FCPA and the Travel Act. They went to trial on December 2009. *See* Indictment, United States of America v. Stuart Carson, et al., *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/docs/carson-indictment.pdf (last accessed Feb. 25, 2011).

42. CCI Plea Agreement, *supra* note 36, at 11.

43. *Id.*

Based on the same allegations of corrupt payments and subsequent cover-up, the DOJ has also pursued criminal charges against eight former CCI executives. Two former high-ranking officers of CCI have already pleaded guilty to conspiring to violate the FCPA, and six others went to trial on December 2009.[44]

2. Lessons learned from *CCI*

The use of the Travel Act has significant implications in doing business abroad. Originally, the Travel Act was passed in response to the determination of the DOJ that local law enforcement authorities, burdened by the depredations of organized crime, were without the means necessary to strike at the heart of these criminal operations, since their locus was often beyond the state's jurisdiction.[45] The Travel Act imposes criminal sanctions on certain activities that have the effect of furthering unlawful activity,[46] and commercial bribery *per se* is not specifically listed in the Act as among those acts which are penalized.[47] However, in *U.S. v. Pompiono*,[48] the Court held that bribery of persons *other than* public officials, when prohibited by a state law, constitutes an "unlawful activity" for purposes of the Travel Act.[49] Since then, the Travel Act has been used primarily in domestic commercial bribery cases.[50]

With the use of the Travel Act in *CCI*, the DOJ's prosecutorial reach in cases of bribery of private parties could be extended over those cases where the defendant is not an issuer as defined in the 1934 Exchange Act[51] and the FCPA's accounting provisions are unavailable.[52] As one DOJ prosecutor has

44. Streicker & Parkinson, *supra* note 19.

45. D. Bruce Gabriel, *The Scope of Bribery under the Travel Act*, 70 J. CRIM. L. & CRIMINOLOGY 337 (1979).

46. The Travel Act criminalizes travel in interstate or foreign commerce or use of mail or any facility in interstate or foreign commerce, with intent to (a) distribute the proceeds of any unlawful activity, (b) commit any crime of violence to further any unlawful activity, or (c) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. Travel Act, 18 U.S.C. § 1952 (a) (1)-(3).

47. *See* Travel Act, 18 U.S.C. § 1952.

48. United States v. Pompiono, 511 F.2d 953 (4th Cir. 1975) (U.S.).

49. Roger M. Witten, et al., Wilmer Cutler Pickering Hale and Dorr LLP, Updates in Global Anti-Bribery Enforcement, *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9120 (last accessed Feb. 25, 2011).

50. *See, e.g.*, Perrin v. U.S., 444 U.S. 37 (1979) (U.S.); U.S. v. Palfrey, 499 F.Supp.2d 34 (D.D.C. 2007) (U.S.); U.S. v. Welch, 327 F.3d 1081 (10th Cir. 2003) (U.S.); & U.S. v. Solano, 29 Fed. App. 831 (3d Cir. 2002) (U.S.).

51. Securities and Exchange Act of 1934 [SEC Act], 15 U.S.C. § 78a (1934) (U.S.).

52. Witten, *supra* note 49.

stated, where offenses involving commercial bribery are uncovered in the course of FCPA investigations, there is U.S. law enforcement interest in pursuing such charges.[53] Moving forward, such regulatory interest could have significant consequences for companies whose compliance programs focus only on bribery of foreign government officials.

B. Viktor Kozeny and Frederic Bourke

The two cases of *U.S. v. Kozeny*[54] and *U.S. v. Bourke*[55] highlight several important lessons in FCPA prosecution. Among these are (a) clarifications on the defense of extortion on a charge of FCPA violation; (b) an overview of the circumstances that might give rise to a finding of imputed knowledge of improper payments; and (c) the further confirmation of the SEC's and the DOJ's intention to go after individual defendants.[56]

1. Summary of the Case

These Cases arose from activities that have been described as one of the most corrupt investment schemes in the former Soviet Union.[57] In the 1990s, the Government of Azerbaijan sought to privatize the State Oil Company of the Azerbaijan Republic (SOCAR).[58] The President of Azerbaijan had discretionary authority as to whether and when to privatize SOCAR. Frederic Bourke invested $8 million in an investment consortium, of which Victor Kozeny was the promoter, who sought to acquire a stake in the privatization.[59]

Kozeny and Bourke were charged with violating the FCPA by making payments to Azeri officials to encourage SOCAR's privatization and to allow Bourke and his colleagues to participate in that privatization.[60] The indictment states that Bourke and others conspired to bribe Azeri officials

53. *Id.*

54. United States v. Kozeny, et al., 493 F.Supp.2d 693 (S.D.N.Y. 2007) (U.S.).

55. United States v. Kozeny, et al., 582 F.Supp.2d 535 (S.D.N.Y. 2008) (U.S.) [hereinafter *Bourke*].

56. *See generally Bourke*, 582 F.Supp.2d at 537-41.

57. David Glovin, Bourke Gets One Year in Prison in Azerbaijan Bribery Case, Bloomberg, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aiLG14U1Itxk (last accessed Feb. 25, 2011).

58. International Law Advisory, Private Investor Frederic Bourke Sentenced to Prison and $1 Million Fine, *available at* http://www.steptoe.com/publications-6475.html (last accessed Feb. 25, 2011).

59. *Id.*

60. James M. Keneally & Susan E. Park, *"Kozeny": Foreign Laws and the FCPA — Limits to Your Defenses*, 240 N. Y. L. J. 1 (2008).

with cash flown into Azerbaijan by a private plane, jewelry and other gifts, and hundreds of millions of dollars worth of stock.[61]

By the time the *Kozeny* case was filed, Kozeny had evaded prosecution by escaping to the Bahamas.[62] Bourke sought to dismiss the charge claiming that the bribe was given as a result of extortion and that he had reported the bribery case anyway.[63] Hence, these two factors, Bourke argued, relieved him of criminal responsibility under Azeri law, and under the FCPA, the fact that the payment was lawful under the written laws of the foreign official is an affirmative defense to FCPA liability.[64]

The judge disagreed. She ruled, first, that the stain of criminal liability was not fully relieved, because while Azeri law waives liability for bribers who report their acts, the official receiving the bribe could still be prosecuted for bribery and the payer could not receive restitution.[65] Thus, a crime still exists, even if Azeri law no longer punished the briber.[66] Second, the judge opined that there was no case of true extortion because the legislative history of FCPA contemplated a situation where the Azeri government threatened to dynamite an oil rig if it did not receive bribes.[67] In such case, the briber would have no choice but to give bribes if he did not want his oil rig destroyed, so the briber would not possess the requisite criminal intent.[68] This was not the case here.[69]

The Case then proceeded to prosecution. Bourke contended that it was Kozeny who allegedly paid the bribes, and that he had no participation in the bribery.[70] Bourke alleged that he had in fact lost the $8 million he invested with Kozeny. But the prosecution argued that Bourke had "buried

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61. Individuals Will Be Prosecuted, *supra* note 23.

62. Bahamas Business, Kozeny Charged With Bribery in U.S., *available at* http://www.bahamasb2b.com/news/wmview.php?ArtID=6130 (last accessed Feb. 25, 2011).

63. *Id.*

64. *See* Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (c) (1).

65. *Bourke*, 582 F.Supp.2d at 539-40.

66. *Id.* at 539.

67. *Id.* at 540.

68. *Id.*

69. *Id.*

70. Joseph P. Covington, et al., U.S. v. Bourke FCPA Prosecution Highlights Dangers of Turning a Blind Eye to Red Flags, Information by Jenner & Block LLP on Current Legal Matters 1-2, *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2553%5CU.S.%20v.%20Bourke%20FCPA%20Prosecution%20Highlights%20Dangers%20of%20Turning%20a%20Blind%20Eye%20to%20Red%20Flags_072009.pdf (last accessed Feb. 25, 2011).

his head in the sand" and instructed his lawyers to "build a wall" between himself and Kozeny.[71] The prosecution presented circumstantial evidence that proved Bourke made himself "willfully blind" to the bribery, including a recorded phone conversation between Bourke and his attorneys concerning how to shield himself from liability for actions taken by Kozeny, as well as other facts that showed that Bourke knew Azeri officials were involved in the bribery.[72] The prosecution also presented evidence that Bourke had read, but ignored, a Fortune Magazine article that called Kozeny the "Pirate of Prague" in relation to an almost identical bribery scheme in then Czechoslovakia and that Bourke acknowledged that business in Azerbaijan was not done "at arm's length" and that he did not undertake due diligence to avoid corruption.[73]

The judge said that it was still not entirely clear whether Bourke is a victim, a crook, or a little bit of both. But under the Statute, he was guilty of FCPA violations. He was therefore ordered to pay $1 million in fines and to serve three years supervised release after he completes his prison term.[74]

2. Lessons learned from *Kozeny* and *Bourke*

Several lessons can be learned from *Kozeny* and *Bourke*. The first is the treatment of the court of the affirmative defense that the payment of the bribe was lawful under the written laws of the foreign official's country.[75] Before this, there had been little case law interpreting the FCPA's affirmative defense provisions, so *Kozeny* is instructive in stating that the affirmative defenses will be narrowly construed.[76] Azerbaijan law, as do the penal laws of various countries,[77] provides exemption from punishment to the briber if the bribery is reported or confessed. Under *Kozeny*, these laws would not relieve

71. *Id.*

72. *Id.*

73. *Id.*

74. Chad Bray, *Bourke Sentenced to One Year in Azerbaijan Bribery Case*, WALL ST. J., Nov. 10, 2009, *available at* http://online.wsj.com/article/SB10001424052748704402404574528003117098132.html (last accessed Feb. 25, 2011).

75. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (c) (1).

76. Keneally & Park, *supra* note 60, at 2.

77. The penal codes of Saudi Arabia, Kuwait, the United Arab Emirates, Bahrain, Oman, Qatar, and Yemen also exempt the briber from penalties if the briber either reports the crime or if extortion was involved. *See, e.g.*, MENA Taskforce on Business Integrity and Combating Bribery of Public Officials, MENA-OECD Investment Programme: Business Ethics and Anti-Bribery Policies in Selected Middle East and North African Countries 27-28, *available at* http://www.oecd.org/dataoecd/56/63/36086689.pdf (last accessed Feb. 25, 2011) [hereinafter MENA-OECD: Business Ethics].

the briber from prosecution under the FCPA.[78] While foreign law may provide the briber with a safe harbor (thus exempting the briber from prosecution under such foreign law), the FCPA does not, and the briber can still be liable under the FCPA.[79]

Second, the conviction in *Bourke* on the basis of circumstantial evidence is a reminder that the lack of actual knowledge of improper payments will not shield individuals from FCPA liability if a case can be made that the defendant deliberately ignored certain red flags. This reiterates that a person who gives money to another, knowing that all or a portion of what was given will be offered to a foreign official as a bribe, will be considered liable under the FCPA.[80] Knowledge in this case is established if a person is aware of a high probability of the existence of the circumstance; only the actual belief that such circumstance does not exist will suffice to shield the person from liability.[81]

Lastly, *Kozeny* and *Bourke*, together with *CCI*, highlight the trend of FCPA enforcement in 2009 of going after individual defendants. It appears that the SEC and the DOJ are increasingly frustrated at merely imposing fines on corporations which have "no body to be kicked, and no soul to be damned"[82] and have started going after defendants that can be burdened with the rigors of imprisonment. DOJ Deputy Chief of the Fraud Division Mark F. Mendelsohn has said that,

> [t]he number of individual prosecutions has risen — and that's not an accident. That is quite intentional on the part of the [DOJ]. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.[83]

It is interesting to note that Bourke here did not succeed in obtaining business through the bribery paid by his partner, Kozeny. Kozeny is currently a fugitive living in the Bahamas, taking with him the money given to him by Bourke and other sharp institutional players such as the American

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78. *See* MENA-OECD: Business Ethics, *supra* note 77, at 25.

79. Keneally & Park, *supra* note 60, at 3.

80. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (a) (3).

81. *Id.* § 78dd-2 (h) (2).

82. MERVYN A. KING, PUBLIC POLICY AND THE CORPORATION 1 (1977) (citing Edward Thurlow, 1st Baron Thurlow).

83. Chadbourne & Parke LLP, Living with the FCPA in an Era of Enhanced Enforcement, *available at* http://www.chadbourne.com/files/upload/FCPA%20PowerPointRev2.pdf (last accessed Feb. 25, 2011) (citing Corporate Crime Reporter, Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007, *available at* http://www.corporatecrimereporter.com/mendelsohn091608.htm (last accessed Feb. 25, 2011)).

International Group and Columbia University of over $400 million.[84] Thus, FCPA liability does not depend on whether or not the briber successfully obtained any advantage in giving the bribe.

C. Siemens Aktiengesellschaft (Siemens)

Siemens[85] is an instance when the SEC pursued the penalty of disgorgement, in addition to the imposition of fines and penalties. Disgorgement of profits is not among the penalties listed in the FCPA.[86] The imposition of disgorgement is therefore one of the new developments in FCPA enforcement that should be noted.

1. Summary of the Case

In December 2008, the SEC entered into a settlement[87] with Siemens, a Germany-based manufacturer of industrial and consumer products with shares listed in the New York Stock Exchange, for its alleged violations of the FCPA's anti-bribery and accounting provisions.[88] Apart from the noted use of disgorgement in these proceedings, another thing of note is the settlement amount — Siemens agreed to pay a total of $1.6 billion in disgorgement and fines, to both U.S. and German regulators.[89]

The SEC complaint alleges that between 2001 and 2007, Siemens violated the FCPA by engaging in a widespread and systematic practice of paying bribes to foreign government officials to retain business.[90] Siemens created elaborate payment schemes to conceal the nature of its corrupt payments, and the company's inadequate internal controls allowed this conduct to flourish.[91] The bribes were paid in relation to the company's business transactions in Venezuela, China, Israel, Nigeria, Russia, and

84. Luke Johnson, *The Maverick: The spectacular rise and fall of a hyperactive privatiser*, THE TELEGRAPH, *available at* http:// www.telegraph.co.uk/ finance/ 2935803/ The-Maverick-The-spectacular-rise-and-fall-of-a-hyperactive-privatiser.html (last accessed Feb. 25, 2011).

85. SEC v. Siemens, *supra* note 20.

86. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (g).

87. *See* Linda Chatman Thomsen, Director, U.S. Securities and Exchange Commission Division on Enforcement. Speech by SEC Staff: Statement at News Conference Announcing Siemens AG Settlement (Dec. 15, 2008), *available at* http://www.sec.gov/news/speech/2008/spch121508lct.htm (last accessed Feb. 25, 2011).

88. *Id.*

89. *Id.*

90. SEC v. Siemens, *supra* note 20, at 1.

91. *Id.* at 2.

Vietnam. Siemens was said to have earned in excess of $1.1 billion in profits on these transactions.[92]

It was only in 2006 when Siemens' management began to implement reforms to the company's internal controls that internal investigations uncovered massive bribery schemes.[93] Siemens disclosed the results of these investigations and has cooperated with the SEC and the DOJ, and has further agreed to the entry of a court order permanently enjoining it from FCPA violations.[94] The SEC has required Siemens to disgorge $350 million in profits. Siemens will also pay $450 million in criminal fines to the DOJ, making this the largest FCPA settlement in history.[95]

2. Warnings from *Siemens*

The case of Siemens is notable because of the enormous settlement paid by the Company. But apart from the enormous settlement amount, it highlights the continuing use of the penalty of disgorgement in FCPA enforcement.

Even without invoking disgorgement, the SEC and the DOJ are already able to impose large penalties. The provisions of the FCPA impose comparatively modest penalties for violations — criminal fines of not more than $2 million[96] and a civil penalty of not more than $10,000.00[97] for corporations, and criminal fines of not more than $100,000.00[98] and civil penalties of not more than $10,000.00[99] for individual defendants. However, the criminal fines can actually be quite higher, as under the Alternative Fines Act,[100] and the actual fine may be up to twice the benefit that the defendant sought to obtain by making the payment. Over and above these penalties, the SEC has imposed disgorgement on FCPA defendants.

The SEC supports its pursuit of disgorgement both under broad equitable principles and statutory authorization.[101] Disgorgement is an equitable concept that serves to prevent unjust enrichment.[102] Through this

92. *Id.*

93. *Id.*

94. *See generally* U.S. Securities and Exchange Commission, Litigation Release No. 2911 (Dec. 15, 2008) (U.S.).

95. *Id.* Siemens also paid €560 million (approximately $854 million) to German regulators, making the total settlement in excess of $1.6 billion.

96. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (g) (1) (A).

97. *Id.* § 78dd-2 (g) (1) (B).

98. *Id.* § 78dd-2 (g) (2) (A).

99. *Id.* § 78dd-2 (g) (2) (B).

100. Alternative Fines Act of 1969, 18 U.S.C. § 3571 (1969) (U.S.).

101. Weiss, *supra* note 24, at 485.

102. Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (U.S.).

mechanism, courts exercise their power to require a wrongdoer to disgorge his fraudulent enrichment.[103] However, disgorgement may be exercised only over property causally related to the wrongdoing; it may not be used punitively.[104] SEC action is commonly accompanied with disgorgement of illegal gains, and this requires the return of all profits made on illegal trades. However, disgorgement may also be based on a reasonable approximation of profits causally connected to the violation.[105] The amorphous nature of computation of illegal gains subject to disgorgement therefore increases the risk for businesses in FCPA enforcement.

Since *Siemens* was settled, the SEC's calculation of the profits that is subject to disgorgement cannot be examined. As a commentator notes, "Barring a smoking gun memo obtained from the foreign government describing a *quid pro quo*, how could the SEC ever prove that the payment of a certain amount resulted in a specific benefit based on the influence of [the public officer who was bribed]?"[106]

Theoretically, disgorgement is just, in that a wrongdoer should not be allowed to walk away with the profits made from the bribery and simply be made to pay the relatively small statutorily imposed fines specified in the FCPA provision (although the Alternative Fines Act can raise the fines quite high).[107] However, the use of disgorgement in FCPA enforcement presents unique challenges because of various factors: on-the-ground complications of multiple and multinational regulators, overlapping jurisdictions, evidentiary difficulties in bribery cases, and questionable proportionality to the bribery being penalized.[108] The use of disgorgement by the SEC in FCPA enforcement will most likely continue and companies will therefore face increased stakes in FCPA compliance.

D. Diagnostic Products Corp. (DPC) — FCPA Cases in China

Doing business in China presents some special challenges, in professional and cultural matters, and calls for special attention in terms of FCPA compliance, as this Case illustrates.

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103. *Id.*

104. JOHN C. COFFEE, JR. & HILLARY A. SALE, SECURITIES REGULATION CASES AND MATERIAL 752 (11th ed. 2009).

105. *See* SEC v. First City Financial Corp., Ltd., 890 F.2d 1215 (D.C. Cir. 1989) (U.S.).

106. Weiss, *supra* note 24, at 474.

107. *Id.* at 514.

108. *Id.*

1. Summary of the Case

On 20 May 2005, the SEC imposed a cease and desist order on DPC.[109] DPC is a California-based company that develops and manufactures medical diagnostic test systems and related test kits and sells these products through subsidiaries and distributors in over 100 countries.[110] From 1991 to 2002, DPC, through its subsidiary in China, paid improper commission payments totalling approximately $1.6 million to doctors and laboratory employees who controlled purchasing decisions at these state-owned hospitals.[111] The SEC alleged that these payments were improperly recorded as legitimate sales expenses in its books and records.[112]

In late 2002, due to issues raised by the auditors of the Chinese subsidiary, DPC discovered the payments and instructed the subsidiary's management to stop all commission payments.[113] DPC took remedial measures, revised its code of ethics and compliance procedures, and established a compliance program with respect to the FCPA.[114] DPC then cooperated with the SEC and proposed an offer of settlement with the SEC and the DOJ, where upon a finding that DPC violated the anti-bribery and accounting provisions of the FCPA, DPC entered into an undertaking to retain a qualified independent compliance consultant to review annually DPC's compliance with its FCPA policies, and to disgorge profits of more than $2 million with prejudgment interest of more than $700,000.00.[115]

2. Lessons from *DPC*

There are two important lessons that can be drawn from this Case: first, the persons who are considered foreign officials for purposes of the FCPA, and second, the unique business and legal environment in China.

109. In the Matter of Diagnostics Products Corporation, Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and-Desist Order Pursuant to Section 21C of the Securities and Exchange Act of 1934, *available at* http://www.sec.gov/litigation/admin/34-51724.pdf (last accessed Feb. 25, 2011) (U.S.) [hereinafter In the Matter of Diagnostics Products Corporation].

110. *Id.* at 2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. In the Matter of Diagnostics Products Corporation, *supra* note 109, at 4.

DPC highlights the sometimes hidden FCPA exposure that U.S. companies face when engaging in business activities in China.[116] Doing business in China often entails dealings with employees of state-owned companies, like hospitals, and the DOJ and the SEC consider them to be "foreign officials" within the meaning of the FCPA and making payments to them is considered as an FCPA violation. This is potentially significant because there is considerable confusion, even under Chinese law, regarding which entities should be considered state-owned enterprises (SOEs). When the Chinese Company Law[117] was first enacted in 1993, it was intended to provide a legal framework for companies to set up business in China, but it was primarily intended to facilitate the corporatization of state-owned enterprises.[118] Even with the privatization of the SOEs, the Chinese State remains to be a stakeholder in corporations formed under the corporatization process. Through direct and indirect means of control, it is estimated that 85% of Chinese-listed companies were ultimately under state control.[119]

The Opinion of the Chinese Ministry of Finance on the Determination of State-Owned Enterprises[120] issued in 2003 sought to provide clarity to this issue for purposes of enforcing Chinese Criminal Law. But the Opinion only adds to the confusion as it provides that: (a) enterprises and companies that are "owned by the people," whose ownership interest belongs to the state, and which are subject to the regulation of the Chinese Enterprise Law,[121] and (b) enterprises in which a state holds more than 50% of the shares,[122] are both SOEs.[123] A U.S. company can, therefore, be dealing with a Chinese-

116. Roger M. Witten & Kimberly A. Parker, Wilmer Cutler Pickering Hale and Dorr LLP, Foreign Corrupt Practices Act Update, *available at* http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=3466 (last accessed Feb. 25, 2011).

117. Gong Si Fa [Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, revised on Oct. 27, 2005, effective on Jan. 1, 2006) 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 42 (China), *translated in* http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384124.htm (last accessed Feb. 25, 2011).

118. Shi Chenxia, *Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement*, 24 ARIZ. J. INTL & COMP. L. 451, 471 (2007).

119. Guy S. Liu & Pei Sun, *Identifying Ultimate Controlling Shareholders in Chinese Public Corporations: An Empirical Survey* 2 (Royal Inst. of Int'l Aff., Working Paper No. 2, 2003).

120. Ministry of Finance of the People's Republic of China, Opinion of the Chinese Ministry of Finance on the Determination of State-owned Enterprises No. 9 (2003).

121. *Id.* § 1.

122. *Id.* § 2.

123. *Id.*

listed company and it may still be considered dealing with an SOE under Chinese law.

Lastly, *DPC* is also notable because it shows the aggressiveness with which the U.S. government is pursuing alleged violators of the FCPA even when companies voluntarily disclose violations and cooperate with the SEC and the DOJ.[124]

E. FARO Technologies, Inc. (FTI)

Similar to *DPC*, *FTI*[125] involves a company's FCPA compliance failings in China. But the significance of *FTI* is that it was based on FTI's violations of FCPA accounting provisions, leading to violations of federal securities laws, which then gave ground to securities fraud actions under Section 10 (b) of the Securities Exchange Act.[126]

1. Summary of the Case

FTI is a Florida-based company that markets software and portable computerized measurement systems.[127] In 2006, it self-disclosed that its Shanghai-based subsidiary secured sales contracts by paying $444,492.00 in bribes, disguised as "referral fees" to various employees of Chinese SOEs.[128] FTI arrived at a settlement of the case with the DOJ and the SEC which involved the payment of $2.92 million in criminal and civil penalties, but this dwarfs the fall in market capitalization of FTI upon the first public announcement of the FCPA-related investigations — a loss of more than $43 million.[129]

This plunge in market capitalization obviously hurt the shareholders. While the DOJ and SEC investigation was on-going, FTI shareholders filed a securities fraud class action, alleging, among others, that FTI's system of internal controls was inadequate and unable to prevent its FCPA violations, resulting in a fraud upon its shareholders.[130] On 3 October 2008, the U.S.

124. Witten & Parker, *supra* note 116.

125. *In re* FARO Technologies Securities Litigation, 534 F.Supp.2d 1248 (M.D. Fla. 2007) (U.S.).

126. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78a (1934).

127. *See In re FARO Technologies*, 534 F.Supp.2d 1248.

128. *In re FARO Technologies*, 534 F.Supp.2d 1248.

129. Raymund Wong & Patrick Conroy, NERA Economic Consulting, FCPA Settlements: It's a Small World After All, *available at* http://www.nera.com/image/Pub_FCPA_Settlements_0109_Final2.pdf (last accessed Feb. 25, 2011).

130. *In re FARO Technologies*, 534 F.Supp.2d at 1254.

District Court for the Middle District of Florida approved a $6.875 million settlement of the class action.[131]

2. Lessons from *FTI*

Violations of FCPA provisions can be costly. Apart from the criminal and civil penalties, which may be significantly increased under the Alternative Fines Act,[132] and the SEC's tendency to impose disgorgement of profits, shareholders are an additional claimant group that has a stake when a company violates the FCPA. In at least two cases, federal courts have allowed similar Section 10 (b) actions to survive summary judgment.[133] It has been noted that FCPA-inspired shareholder actions are especially frightening for directors and officers of international businesses because many insurance policies contain a "commissions exclusion" that excludes coverage for losses arising from payments to foreign officials.[134] A finding that the directors or officials are liable would therefore make them personally liable. Given the significant increase of FCPA enforcement, the number of shareholder private actions that tag along with DOJ and SEC action, may result in another layer of potential liability for international businesses, including their individual directors and officers.[135]

Further, FCPA enforcement-related fines and penalties also hurt shareholders. The stunning loss in market capitalization in FTI hurt shareholders the most, but SEC-ordered disgorgement, together with criminal and civil fines and penalties, likewise harm shareholders because the assets that are supposed to be devoted to pursue corporate ends are being used to pay regulators for errors of the directors and officers.[136] Shareholder litigation is being used as a tool to recover the damages paid by the company in connection with FCPA settlements and penalties. While these suits are not always successful,[137] a study shows that majority of companies that exhibited significant price reactions of stock prices due to FCPA violations

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131. Jason E. Prince, *A Rose By Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, 52 THE ADVOCATE 22-23 (2009).

132. *See* Alternative Fines Act, 18 U.S.C. § 3571.

133. Prince, *supra* note 131, at 22 (citing SEC v. Siemens, *supra* note 20; *In re* Nature's Sunshine Products Securities Litigation, 486 F.Supp.2d 1301 (D. Utah 2007) (U.S.); & *In re* Immucor Incorporated Securities Litigation, No. 05-2276, 2006 WL 3000133 (N.D. Ga., Oct. 4, 2006) (U.S.)).

134. *Id.*

135. *Id.* at 23.

136. *Id.*

137. Gibson, Dunn & Crutcher LLP, 2009 Mid-Year FCPA Update, *available at* http://www.gibsondunn.com/publications/Pages/2009Mid-YearFCPAClient Alert.aspx (last accessed Feb. 25, 2011).

resulted in Section 10 (b) actions being filed.[138] Companies should take note of this additional source of potential liability in designing FCPA compliance programs.

IV. LESSONS FROM THE CASES

The case studies show that the SEC, the DOJ, and foreign regulators (as seen from their cooperation with the investigations of U.S. regulators) are sending a strong anti-corruption message through aggressive investigations and prosecutions of both individuals and companies. Extremely large fines and penalties are now hallmarks of this new era in FCPA enforcement, as well as the prosecution of individual officers, even when the officer did not directly violate the FCPA. As such, re-examining a company's FCPA compliance program in light of these new developments is an urgent task.[139] This Section draws together the lessons taken from the case studies and consolidates them into key points that should be considered by companies when creating their FCPA compliance programs.

A. Implementation of Cultural Due Diligence

Mendelsohn has noted that because companies face greater competition around the world for less business, increased pressure to engage in bribery is likely; and at the same time, due to financial pressure, may be devoting fewer resources to their legal and compliance departments.[140] This may be a costly mistake given the significant rise in FCPA enforcement and the penalties.

Certain high-risk regions of the world, including parts of Central Asia, Africa (in particular, Nigeria), and China, continue to present significant FCPA compliance challenges, and company management and auditors must proactively implement aggressive controls over operations in such areas.[141] Companies that have significant business dealings in countries with command economies or emerging markets should utilize employees or officers that are not prohibited under the FCPA because those persons work for an SOE.[142]

It is therefore important to research if the country or industry that one is entering has a reputation for bribery and corruption. But the more prudent

138. *Id.*

139. Huskins, *supra* note 2, at 1456-57.

140. George J. Terwilliger, III, et al., White & Case LLP, Update: The Business Crime Enforcement Environment — Finance, FCPA and Regulatory Restructuring, *available at* http://www.whitecase.com/alerts_11172009_1/ (last accessed Feb. 25, 2011).

141. *Id.*

142. Witten & Parker, *supra* note 116.

way to be certain of whether one is operating in a high-risk FCPA region is to conduct cultural due diligence.[143] In mergers and acquisitions, it is prudent for companies to engage in a due diligence investigation of the counterparty's financial standing and various legal risks that may accompany the transaction. "Cultural due diligence is the process of investigating, assessing and defining the cultures of two or more distinct business units through a cultural assessment to discover areas of similarity and difference that will impact integration efforts and achievement of strategic objectives."[144] It should be combined with regular due diligence processes in entering a new business environment to check, among others, the FCPA risks in that particular country.

Cultural due diligence should likewise be used in investigating a joint venture partner. *Bourke* teaches us that he (Bourke) should have done such of his promoter Kozeny. When operating in countries or industries where corruption red flags exist, due diligence should be conducted to identify the specific corruption risks. Once the risks have been identified, appropriate mitigating compliance controls can be designed, implemented, and monitored.[145] This cultural due diligence should also be extended to potential consultants, agents, and distributors.

B. Monitoring of Activities of Foreign Subsidiaries

Strictly speaking, the FCPA does not apply to foreign subsidiaries, since the anti-bribery and accounting provisions of the FCPA are directed to issuers which have a class of securities registered pursuant to the Securities Exchange Act.[146] However, the issuer could be subjected to liability arising from the acts of a foreign subsidiary, particularly with respect to deficient internal accounting controls or the payment of bribes on behalf of the issuer.[147] The SEC will not allow the law to be evaded through the device of foreign subsidiaries, especially since the congressional intent is to cover the acts of foreign subsidiaries under the FCPA.[148] Indeed, three of the cases, *Siemens*, *DPC* and *FTI*, involve the parent getting sued for acts of its

143. *See* Nicole Y. Hines, *Cultural Due Diligence: The Lost Diligence That Must be Found by U.S. Corporations Conducting M&A Deals in China to Prevent Foreign Corrupt Practices Act Violations*, 9 DUQ. BUS. L.J. 19, 51-61 (2007).

144. Debbie Imboden, The Role of Cultural Due Diligence in Business Integration Efforts, *available at* http://ezinearticles.com/?The-Role-of-Cultural-Due-Diligence-in-Business-Integration-Efforts&id=245017 (last accessed Feb. 25, 2011).

145. Individuals Will Be Prosecuted, *supra* note 23.

146. *See* Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m (a) & 78 dd-1 (a).

147. CRUVER, *supra* note 8, at 53.

148. *Id.* (citing The Conference Report, Committee of Conference, Foreign Corrupt Practices, H.R. Rep. No. 831, 95th Cong., 1st Sess. 12 (1977)).

subsidiaries. Further, *Siemens* highlights the risk that foreign companies face when they list in the U.S. stock exchange: they become subject to the U.S. regulatory environment, including FCPA compliance.

There are at least three ways that the acts of a foreign subsidiary can subject the U.S. parent to FCPA liability — where the books or records of a foreign subsidiary are materially deficient in a financial sense (which will likely cause the books and records of the parent to be inaccurate and to be in violation of the FCPA), where the parent is engaged in corrupt practices through a subsidiary, and when the management of the parent knows or should have known that the subsidiary was engaged in foreign corrupt practices.[149]

To avoid FCPA liability therefore, U.S. parent companies should ensure that FCPA accounting standard provisions and anti-bribery prescriptions are fully applied to all subsidiaries, including foreign ones which may be far removed from the U.S. center of operations.

C. Watching Out for FCPA Red Flags with Ongoing Compliance

Again we turn to *Bourke* and *Kozeny* where the Court permitted the use of circumstantial evidence to secure a conviction. The import of this is that if one suspects a fact, for example, that a third party has made or may in the future make an improper payment on one's behalf and realizes that the fact is highly probable, there may be a consequence in not obtaining the final confirmation.[150]

In the report of the Congressional Research Service to the U.S. Congress, it was stated that the "knowing" requirement is retained in the law and is intended to encompass the "conscious disregard" and "willful blindness" standards, including a conscious purpose to avoid learning the truth.[151] While "simple negligence" or "mere foolishness" should not be basis for liability, the so-called "head-in-the-sand" problem — variously described as "conscious disregard," "willful blindness" or "deliberate ignorance" — should be covered so that management officials cannot take refuge from the FCPA by their unwarranted obliviousness to any action (or inaction), language or other "signaling device" that should reasonably alert them of the "high probability" of an FCPA violation.[152]

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149. *Id.* at 53-54.

150. Individuals Will Be Prosecuted, *supra* note 23.

151. CRUVER, *supra* note 8, at 53-54 (citing H.R. Rep. No. 831, 95th Cong., 1st Sess. 12).

152. Michael V. Seitzinger, Congressional Research Service Report to Congress on the Foreign Corrupt Practices Act, *available at* http://www.fas.org/irp/crs/Crsfcpa.htm (last accessed Feb. 25, 2011).

Thus, it is important to regularly repeat internal educational components of corporate compliance programs. Directors, officers, and overseas managers should be required to reaffirm regularly in writing their familiarity with the FCPA and to represent that they have complied and continue to comply with it on an ongoing basis.[153] This will ensure that responsible personnel regularly focus on the FCPA's implications and confirm that they understand the seriousness of the matter and accept, in writing, personal responsibility for their own ongoing compliance.[154] Further, *CCI* tells us that the FCPA enforcement might also go into an investigation of commercial bribery, not under the FCPA, but under the Travel Act.[155] The consolidation of these two cases in FCPA investigations, as seen in *CCI*, tells us that it is no longer enough for FCPA compliance programs to focus only on bribery of foreign government officials, as the company may be operating in a state that criminalizes commercial bribery, thus attracting Travel Act violations.[156]

D. *Cooperation with the SEC and the DOJ*

In all these Cases except for *Bourke*, the SEC and the DOJ entered into plea agreements with defendant corporations to dispose of the case. While this does not always mean a small penalty (the *Siemens* case involving more than $800 million in fines to U.S. regulators was a settlement, and all cases where disgorgement was involved were settled cases), it could lead to less likelihood of the DOJ criminally prosecuting individual directors or officers. As such, the DOJ has increasingly used non-prosecution (or deferred prosecution) agreements in FCPA matters apparently to provide a reward to defendants who voluntarily disclose and cooperate in the DOJ's investigation and, of course, to provide an incentive to other companies to do likewise.[157]

It is observed that in deciding how to dispose of FCPA cases, the DOJ and the SEC give credit to companies that volunteered information and cooperated in the conduct of an internal investigation in ways that make the investigation transparent to the government agencies and shed light on the factual record.[158] Just how much credit is "earned" as a result is sometimes uncertain, and whether the credit given is sufficient is often debated between

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153. CRUVER, *supra* note 8, at 70.

154. *Id.*

155. *Id.*

156. *Id.*

157. Shearman & Sterling LLP, Recent Trends and Patterns in FCPA Enforcement 10, *available at* http://www.shearman.com/files/upload/FCPA_Trends.pdf (last accessed Feb. 25, 2011).

158. *Id.*

the government and cooperating companies, and certainly in the defense bar.[159]

Given this insight, cooperation with the SEC and the DOJ, and voluntary self-disclosures may be a prudent strategy. It also reflects a willingness to hereinafter be in compliance with the law, and could avoid possible badges of wrongdoing that may be considered egregious, such that it may trigger shareholder suits, as in the case of *FTI.*

V. CONCLUSION

The stakes that call for a company to engage in FCPA compliance have never been higher. The significantly increased levels of SEC- and DOJ-FCPA enforcement, the increased fines and penalties, and the possibility of shareholder suits are consequences that erring companies face.

We have seen five cases that illustrate this renewed and intensified SEC and DOJ interest in FCPA enforcement. *CCI* tells us that although not penalized under the FCPA, the bribery of private parties can also be a criminal act under state law and can be part and parcel of FCPA enforcement in certain instances. *Bourke* tells us that one should be careful of the possibility of being dragged into an FCPA enforcement arising from acts that one did not directly do. *Siemens* highlights the awesome power of the SEC in FCPA enforcement, from its power to enforce disgorgement of profits, to join with foreign regulators in investigating erring companies, and to reach foreign companies whose shares are listed in U.S. exchanges. *DPC* tells us of the unique FCPA risks of doing business in China. Finally, *FTI* tells us that shareholders also suffer damages in FCPA incidents, often from the plunge of stock prices, and have been making forays into using FCPA-related internal control issues to support securities class action lawsuits. Each of these Cases provides important lessons that no company doing international business can afford to ignore.

While the extent of steps taken by the SEC and the DOJ may be questionable in certain cases, including the seeming arrogation of the SEC on itself of disgorgement even as this is not supported by statute, the enhanced sensitivity of U.S. and foreign regulators to foreign bribery is here to stay, and companies would do well to implement the suggested prescriptions on upgrading their FCPA compliance programs, to avoid criminal violation and liability. The task of revisiting and upgrading one's FCPA compliance program has never been more urgent.

159. Witten & Parker, *supra* note 116.