5. INTERNATIONAL BRIBERY

A. The Policy Context

A major campaign is underway within the United States, and globally, to combat bribery in the conduct of international business. For nearly two decades, this effort has been producing vast amounts of work for law firms.

The primary legal locus of this activity, and the primary focus of our study, is the Foreign Corrupt Practices Act—"the FCPA." The statute is long and complex and the case law is relatively slim because corporations have not generally been keen to litigate these cases. This chapter will develop a framework for what the major legal issues are in this area, though students should understand that the law is both rapidly evolving and underdeveloped and there are plenty of opportunities for policy discussion.

Because international corruption enforcement is such a fast-developing area, it makes sense to start with a portion of a law review piece that gives something of an overview and also poses some questions about what might be at stake from a policy perspective.

THE MARKET FOR GLOBAL ANTICORRUPTION ENFORCEMENT

Rachel Brewster and Samuel W. Buell, 80 LAW & CONTEMP. PROBS. 193 (2017)[1]

In a brief couple of decades, America's enforcement of its Foreign Corrupt Practices Act (FCPA)—civilly by the Securities and Exchange Commission (SEC) and criminally by the Department of Justice (DOJ)—has gone from practically nonexistent to one of the largest and busiest fields of corporate crime practice in the world. Corporate enforcement has been a growth area in American law throughout that period. No other area has expanded so rapidly nor so expensively for corporate defendants as enforcement under the umbrella of the FCPA. The expansive statute prohibits covered corporations and their employees from offering bribes to foreign officials and political leaders for the purpose of advancing business interests.

A question that has naturally arisen is what precisely created a lively market for anti-corruption enforcement. The FCPA rested mostly dormant for over two decades before American prosecutors and securities enforcers eagerly embraced the statute at the beginning of the twenty-first century. In the nearly quarter century from the statute's enactment in 1977 through the year 2000, the federal government pursued only fifty-two FCPA enforcement actions. No more than five such actions were brought in a single year, and in four of those years, zero actions were commenced. Then, from 2001 through 2015, the government initiated 379 FCPA cases, reaching an annual high of 56 cases in 2010.

This explosion in FCPA practice, as some have called it, is not limited to numbers of

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cases and settlements. FCPA prosecutions and enforcement actions include some of the biggest-ticket matters the government brings in the corporate sector. From 1977 through 2000, the government collected approximately $129 million in FCPA sanctions. Since 2000, over $8 billion has flowed into government coffers from FCPA enforcement actions, most of which has been dictated by terms of settlements between SEC or DOJ with corporate defendants.

What has created this surge in FCPA cases? This article explores both supply channels for cases—the international cooperation between law enforcement officials that made more rigorous enforcement of the FCPA politically possible—as well as the demand pressures that generate cases—the incentives and behaviors of U.S. prosecutors and enforcement attorneys. . . .

Congress passed the FCPA in the late 1970s after the Watergate hearings and the subsequent SEC investigation of corporations' political activities revealed that U.S. companies were bribing foreign government officials. Perhaps most notable was the case of Lockheed: the defense contractor received a $250 million government loan to avoid bankruptcy and spent over $100 million of those funds on bribes to various government officials. Though the FCPA is often described in terms of post-Watergate moralism (and it certainly was partly that), the statute was predominately a response to a national security concern. In the Cold War of the late 1970s, the success of the capitalist model as the ultimate winner of the global competition for economic and social ordering did not appear assured. National security interests were bound up in supporting a particular model of capitalism in which large transnational corporations were the major actors in global markets. As a result, revelations of corporate bribes to foreign government officials concerned members of Congress because they played into Soviet narratives of how markets were corrupted by corporations, controlled by capital-holding elites, and hopelessly rigged against labor.

The Lockheed case was particularly maddening because Lockheed was viewed overseas as an arm of the U.S. Department of Defense—thus tying corrupt corporate actions to the American government in foreign reporting. In passing the FCPA, legislators were responding to a future threat as well as realized losses. Friendly right-of-center administrations in Japan and Italy had lost elections to left-of-center and communist parties after revelations that those administrations had accepted bribes from U.S. companies.

But the security concerns that led to the passage of the FCPA did not support robust enforcement of the law. The statute represented one state's unilateral policy regulating foreign markets. While the FCPA provided prosecutors with significant extraterritorial jurisdiction, prosecutors' law enforcement powers were still territorially limited. International cooperation is essential to effective enforcement. The ability of a state to prosecute a foreign corporation is limited—particularly if cases depend upon internal corporate records—if neither foreign law enforcement officials, nor the company, are helpful. And, at the time, foreign governments were not generally helpful. Most Western governments failed to see the problem with foreign bribery and refused to impose civil or criminal rules against it. Indeed, most European governments subsidized foreign bribery by making it a tax-deductible business expense.

The lack of foreign support for the FCPA created a domestic enforcement problem as well. If the statute could only effectively be enforced against U.S. corporations, then American businesses faced a significant disadvantage in foreign markets. A robust enforcement policy would arguably decrease U.S. exports, particularly for large government procurement sales contracts—a market in which bribes were commonly offered with bids—because only U.S. corporations would fear FCPA enforcement. The expanding U.S. trade deficit in the early 1980s and the concurrent fear of the loss of American economic hegemony to European and Japanese companies further raised the economic costs and the political stakes of prosecuting FCPA cases.

To develop a robust FCPA enforcement program, the U.S. government needed international cooperation. Acting alone, Congress could give the statute a broad jurisdictional scope, including coverage over all companies who list on a U.S. exchange and commit bribery anywhere, but the lack of international cooperation made foreign cases difficult to maintain. Without the foreign company component of the enforcement portfolio, strong FCPA enforcement arguably lacked political support.

From the original passage of the FCPA in 1977, and again in 1988 amendments to the statute, Congress recognized the need for international coordination of anti-corruption rules. In 1975 and 1988, Congress called for the State Department to engage in state-to-state negotiations to establish an international anti-bribery standard that would be enforced in multiple jurisdictions. The State Department sought to form anti-bribery agreements with other states in multiple fora in the 1970s and early 1980s, but with little success. Within the United Nations, the United States pushed for an anti-corruption treaty under the auspices of the UN's Economic and Social Council, but it failed to win support among developing states. Within the General Agreement on Tariffs and Trade's Tokyo Round, the United States attempted to bring anti-corruption principles into international trade negotiations. This similarly failed when the United States was unwilling to offer greater access to the American market in return.

The State Department finally decided that the best forum was the OECD, which had a smaller membership but included almost all developed states. The OECD generally only passed non-binding resolutions, so it was not the obvious choice if the United States wanted a binding treaty, but it appeared to hold the greatest potential for cooperation. Yet even in the OECD, other developed governments were unwilling to reconsider their lax approach to foreign bribery or even its tax-deductible status. Foreign bribery was simply not an issue that other governments saw a need to regulate.

In the 1990s, however, elite views of the need to address foreign corruption, particularly the cost of bribery to development, started to shift. In the 1970s, a prevalent view was that corruption could be "market enhancing," meaning that markets would function better if governments, and particularly developing state governments, could be pushed out of the marketplace through bribes.

That corruption could be market enhancing was not simply an academic view. Many Western governments and international institutions concurred. World Bank policymakers labeled corruption a political issue, rather than an economic one. Under World Bank decisionmaking procedures, policymakers were supposed to avoid "political" issues within the host governments. Labeling corruption as political allowed the World Bank to implicitly endorse bribery by their contractors and ignore the economic effects of corruption on host countries. Major Western governments similarly viewed corruption as a constructive means of concluding contracts with developing governments and, on the whole, understood these relationships to be development promoting, or at least not particularly harmful to development goals. As a result, American lobbying for programs to curtail the corporate supply of bribes was not particularly persuasive.

The 1990s brought change in this consensus regarding the relationship between bribery and the market. Economists and policymakers in international institutions such as the World Bank and the International Monetary Fund started to re-evaluate the effects of corruption on development. Instead of trying to push the government out of the marketplace, more policymakers discussed the constructive role of governments in establishing markets, regulating markets, and moderating their effects.

Many World Bank policymakers became convinced that corruption was one of the greatest obstacles to development rather than market grease. Corruption incentivized governments to become more engaged in markets (as sources of personal monetary gain), biased government spending to projects where large bribes were possible, and decreased government accountability. In 1996, the World Bank reclassified corruption as an economic issue, and adopted a robust anti-bribery program that monitored the Bank's contractors and subcontractors for any illicit payments to governments.

This shift in thinking also took place outside of governance institutions. A number of economists focusing on Africa left the World Bank to form Transparency International (TI), an NGO focused on increasing government transparency as a means of decreasing corruption. TI raised the salience of corruption as a political issue, particularly in Western Europe. Similarly, scholars such as Susan Rose-Ackerman built a stronger case that bribery was not economically efficient and harmed developing states. These different sources of changing political and economic views combined to challenge the older consensus and re-conceptualize the role of corruption in the functioning of markets.

This conceptual change started to gain traction in national governments' policies when a series of corruption scandals erupted in European capitals between 1995 and 1996. In Germany, France, and the United Kingdom, domestic corruption allegations dominated national politics and became major electoral issues in all three countries. Political candidates promised to change their governments' approach to corruption, both nationally and internationally. One outlet to make good on these promises was the

OECD, and U.S. efforts to establish an anti-corruption agreement there accelerated. OECD members agreed to a binding legal instrument (an oddity for the OECD), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which required each state to adopt its own foreign anti-bribery law. The Convention, signed in 1997 and entered into force in 1999, also required governments to provide each other with legal assistance in prosecuting foreign bribery cases.

The OECD Convention changed the political economy of bringing anti-bribery cases within the United States. The treaty did not meaningfully change the extraterritorial scope of the FCPA, but it provided the necessary international support for a much wider range of cases. In particular, it allowed prosecutors to bring cases against American corporations and their overseas competitors. U.S. prosecutors did not face diplomatic and political resistance from these cases in which the activity had previous been legal and tolerated abroad. Further, the DOJ and SEC could seek foreign investigative and other legal assistance on anti-bribery cases—assistance they have received even from OECD states that have failed to prosecute firms themselves. This change allowed the DOJ and the SEC to bring more FCPA cases without steeply raising competitive costs for American-based corporations.

The DOJ has not been shy about advertising its enforcement strategy as "fair" to American industry. Former Assistant Attorney General Lanny A. Breuer explicitly argued that the FCPA did not hurt U.S. business because of the scale of foreign prosecutions, noting, "[W]e do not only prosecute U.S. companies and individuals under the FCPA. Indeed, over the last five years, more than half of our corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies." Other DOJ officials have similarly stated that FCPA prosecutions are aimed at establishing equal liability for foreign and domestic firms for foreign bribery. Former Assistant Attorney General Alice Fisher argued that targeting foreign firms as well as domestic ones was part of the Department's effort to address corruption's long-term harm in emerging markets.

The OECD treaty was an essential part of opening the door to greater American enforcement of the FCPA. U.S. prosecutors needed more than the broad extraterritorial jurisdiction provided by the statute. They also needed foreign support. Other governments had to lend political support to the idea that corruption should be prosecuted. In addition, foreign prosecutors and police had to help gather evidence and provide other legal assistance. After the passage of the OECD Convention, extraterritorial prosecutions for violations of the FCPA were more viable. OECD governments were adopting, if not also enforcing, their own domestic legislation prohibiting foreign bribery and had formally committed themselves to mutual legal assistance. And U.S. prosecutors had further incentives, particular to their political and professional environments, for entering this new legal arena.

The OECD Anti-Bribery Convention was critical, not because other OECD countries began prosecuting cases themselves but because they started supporting U.S. cases.

Although the FCPA offered prosecutors extraterritorial jurisdiction to pursue these cases before the OECD Convention, prosecutors had generally adopted a restrained approach. The treaty invigorated the FCPA by giving American prosecutors the means to take a much more aggressive position towards domestic and foreign firms without being seen as disproportionately harming American industry. . . .

For at least the last two administrations, the executive branch has pursued an express policy to prioritize and increase prosecutions of FCPA violations by large corporations. Both White House staffs and the political appointee suites in the DOJ have described this policy initiative as an effort to root out corruption and bribery in global commerce. The effort has included more FCPA prosecutions, almost all of which concluded in settlements; hiring of more FCPA prosecutors; and increased efforts to use civil legal mechanisms to freeze and seize the assets of corrupt foreign officials (the Department's so-called "kleptocracy" initiative). This impetus from policy levels has been important, perhaps even essential, to growth of the field. Prosecutors' interests, left unchanneled, could have led them to prioritize other forms of corporate misconduct than bribery of foreign officials.

A longstanding and atypical coordinating device has empowered this top-down initiative. The United States Attorneys' Manual is an ostensibly binding set of rules concerning the conduct of federal prosecutors that is nonetheless unenforceable in court. In relevant part, it prohibits instituting a criminal investigation or prosecution for violation of the FCPA without the "express authorization" of DOJ's Criminal Division in Washington, wherein an office called the Fraud Section supervises FCPA prosecutions as well as initiates many of them. The Manual contains this sort of control provision for only a few federal criminal statutes, which are otherwise enforced at the pleasure of United States Attorneys and other supervisory federal prosecutors without Washington interference. The Manual explains that centralized control and monitoring are needed in this instance because "violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction" and may involve "high-level foreign government officials."

The rationale for DOJ's control rule for FCPA cases may be outdated. Many federal prosecutions, from business crime to drugs to terrorism to piracy, now routinely implicate the same concerns about interaction with other nations. Prosecutors are free to wield many statutes abroad without DOJ Criminal Division supervision, as for example with the use of the wire fraud statute to prosecute the FIFA corruption cases in the Eastern District of New York. Prosecutors could evade the Manual's requirements, in some corruption cases at least, simply by choosing a different legal theory. But now, as a result of DOJ's longstanding FCPA policy, bureaucratic institutions are firmly in place: a fully staffed Fraud Section in Washington understands its mandate to include robust FCPA enforcement. Consequently, FCPA enforcement does not depend on the perhaps changing priorities of United States Attorneys and their staffs over time.

But one can take Washington's FCPA initiative at face value without having to take it entirely seriously. That is to say, it is possible that officials in the Clinton, Bush, and Obama Administrations have believed that the U.S. legal system can make corruption less endemic in large commercial transactions in the developing world. That might seem quixotic, a bit like using a hand pump to drain Lake Michigan. The scale of global corruption plainly overwhelms the Department's thirty or forty lawyers bringing their dozen or two prosecutions per year. But perhaps there is some logic, or at least sincerity, in the DOJ's effort. If enough large corporations sufficiently fear even one potentially devastating FCPA prosecution—and their managers certainly have been complaining incessantly about that legal risk—they might start to refuse to play the corruption game in enough important markets that some of those markets will begin to change.

Critics might say that DOJ's political appointees have become enamored with the FCPA because of its prosecution friendliness, jurisdictional breadth, and relatively low bar for liability. The SEC's power to gather evidence of the same violations in parallel civil enforcement proceedings has further made FCPA cases the low-hanging fruit of corporate crime. If one wants to look like one is prosecuting major corporate crimes, the FCPA provides a much easier path than, for example, deploying the laws governing securities fraud against large banks for marketing failed mortgage-backed securities. In addition, DOJ appointees in Washington have unusually direct control over the Fraud Section, a unit that has a specialized charter and expertise in FCPA cases, which can be used by DOJ to initiate corporate prosecutions.

A similar dynamic could affect the SEC's priorities, perhaps even more. The SEC has jurisdiction only over the securities laws, which include the FCPA but also, most importantly, the laws against securities fraud. Without diverting into the doctrinal details, FCPA violations are generally far easier to prove than securities fraud. This is especially true in SEC actions because the FCPA includes a provision—frequently invoked by the SEC but rarely by the DOJ—that makes it a violation of the statute simply to fail to maintain "books and records" that are accurate in all material respects. The SEC commonly invokes this provision, which is nearly impossible for defendants to contest, as a fallback or settlement option when it initiates FCPA cases.

Finally, there is the most cynical view. There are some abroad, especially in Europe, who believe that the United States may be using global corporate enforcement, especially FCPA enforcement, as a means of assisting U.S. firms in the competition for dominance among multi-nationals. Some have maintained that the U.S. policy of prosecuting foreign firms is discriminatory and violates general international legal principles of equal treatment before the law.

One study involving a large original data set found that foreign firms tended to suffer higher penalties than U.S. firms in DOJ resolutions. However, as the author was careful to discuss, potential selection effects complicate inferences from this data. Foreign firms represented only eighteen percent of the corporate defendants in the study, and it is plausible that American prosecutors tend to prosecute only larger cases against foreign firms while prosecuting a more diverse set of domestic firms.

Another study of FCPA settlements found that the DOJ assessed greater penalties against foreign firms than domestic ones, even accounting for the size of the bribe and whether the firm voluntarily disclosed the illegal activity. These authors also wondered about some of the many questions such findings raise. For instance, do U.S. regulators make stronger cases against foreign firms due to coordination with foreign regulators? Are U.S. firms more successful than foreign ones at lowering their sanctions in settlement because of greater sophistication in dealing with U.S. regulators?

For a brute capture story to be convincing, one would need to point to a path through which U.S. firms influence the decisions of line prosecutors about which firms to choose as targets for FCPA actions. The structure and professional culture of DOJ divisions and U.S. Attorney's Offices, as well as the civil service protections enjoyed by career prosecutors, are not amenable to this kind of influence. As a matter of course, these offices do not provide opportunities for advocates of U.S. firms, such as the Chamber of Commerce, an opportunity to be heard in matters of prosecutorial discretion. The SEC gives its potential defendants the opportunity to formally argue against enforcement action in a written document to the Commissioners themselves called a Wells submission. But these are litigation documents—briefs on the legal merits—not lobbying submissions designed to exploit interest group pressures.

In respect to their enforcement arms, the DOJ and SEC differ significantly from other executive branch institutions like the Departments of Agriculture or Commerce in which industry groups routinely enjoy transparent access to decisionmaking and, by law, to the rulemaking process. Conventional political discourse in Washington, at least in its rhetoric, condemns efforts to "politicize" the government's prosecution of criminal offenses. Accordingly, the White House routinely and vocally disavows any influence over Justice Department investigations and prosecutions. Any skew of FCPA case selection towards foreign firms would thus have to result from subtler and perhaps unconscious effects on the decisions of line prosecutors and enforcers.

The U.S. corporate crime prosecutor operates within the context of a particular political economy. The prosecutor also works within an influential professional economy. In investigations of why the government has so quickly increased the volume of FCPA enforcement matters, the forces of this economy have been underemphasized if not unnoticed. For several reasons, the legal professional economy has been directing the federal prosecutor's attentions overseas in recent years.

The typical, though not mandatory, career path of the white collar prosecutor in Main Justice or a major U.S. Attorney's Office is as follows: graduation with a strong academic record from a top law school, often followed by a federal judicial clerkship; several years as an associate at a global or at least national law firm with a corporate practice, often including junior work on the defense of corporations and their managers in civil and criminal government enforcement actions; a stint of somewhere between four and ten years as a federal prosecutor; and then, for most, a partner or of-counsel position at the same sort of large law firm. More recently, others have taken up senior in-house counsel or compliance positions at major corporations as companies have discovered the benefits of having the advice and experience of former prosecutors and enforcement lawyers readily at hand.

This is the so-called “revolving door” of corporate white collar practice. This door has come to spin faster as the practice of defending corporations in internal investigations and enforcement matters has mushroomed over the last two decades, now constituting a major slice of the revenues of America’s 100 largest law firms.

There is a familiar capture story told about this career arc. In her first period of law firm service, the young lawyer becomes inculcated with the views of the corporate sector towards criminal enforcement. She thus begins government service with an ideological slant in favor of the plight of the white collar target over others in the criminal justice system. Then, as she advances through the Justice Department ranks and begins to meet corporate adversaries across the table and on the rare occasion in court, she inevitably begins to think about the implications of her relationships with those adversaries for her exit from the government. Wishing to curry favor with future employers, she cultivates a reputation for “reasonableness” by crediting arguments she hears from opposing counsel and settling most or all of her cases with corporate defendants and their managers on lenient terms.

This facially plausible story omits important facts, principally on two dimensions: the psychology of this cohort of lawyers and the actual market for former Justice Department prosecutors. First, as to psychology, this lawyer tends to be ambitious and interested in government practice for the opportunity it affords to impact some corner of social policy. These are people who went to law school “to make a difference” and who eventually realize that, given their material and familial goals in life, their relatively short stint in government may end up being their one chance to do something big and important. This is a powerful drive and it directs the lawyer into big cases and towards trials and punitive sentences, not away from them. If these highly credentialed lawyers only care about material rewards, they have easier and more lucrative paths readily available to them in the private sector without enduring the more Spartan conditions of government service.

Federal law is highly amenable to these motivations. The American prosecutor is famously the king or queen of discretion: discretion to decide whom to prosecute for what offenses and whom to leave unmolested by legal action. Though the SEC’s processes are more bureaucratized than those of the DOJ, initial discretion also rests with the securities enforcement attorney. The discretionary authority to charge is both initial—in the sense that the prosecutor starts the case and the case does not start without the prosecutor—and nearly absolute—in the sense that judicial review of the charging or declination decision is available only for invidious discrimination and never for qualitative judgment.

No prosecutor is vested with more of this discretion than the federal prosecutor charged with handling corporate crime. That prosecutor, whether she works in one of the Justice Department’s ninety-three U.S. Attorney’s Offices spread across the land or in one of the offices at "Main Justice" in Washington that deal exclusively with business crime, has no conventional lawyer's caseload that is brought to her for prosecution by agents of a roving police force. Instead, in consultation with investigative agents, civil enforcement agencies, and her colleagues and supervisors, she chooses the few cases she wishes to expend her time and energies pursuing. Indeed, she enjoys not just the discretion to prosecute but also the discretion to investigate in the first instance.

In the sphere of international business, the jurisdictional provisions of the relevant statutes allow the federal prosecutor to consider extending her reach to a great deal of conduct that occurs abroad. American criminal law treats most complex white collar crimes, especially if conspiracy charges are involved, as "continuing offenses" that are committed at all places and times when and where acts occur during the period of the offense. Often all the prosecutor needs to file her indictment in a U.S. district court is a wiring through that district, or a company's incorporation or headquartering in the United States, or in the case of the FCPA, some material part of the bribery offense that was "within the territory of the United States."

As for principles of international law regarding states' assertions of extraterritorial jurisdiction, United States law affords them a very limited role in this area—using them at most as tie-breakers on close questions of statutory interpretation. Congress is free to legislate extraterritorially; there is no Constitutional prohibition against it. However, Congress must clearly state its intention to legislate extraterritorially to overcome a judicially enforced presumption against extraterritorial application of statutes. As a body of legislation expressly designed to reach overseas, the FCPA easily fits this bill.

In criminal law, possession of the body is nine-tenths of the law when it comes to jurisdiction to adjudicate. Only the individual defendant who manages to position himself beyond successful extradition proceedings will end up in a winning posture. A recent study found only one case in which a federal court rewarded a defendant's due process challenge to the assertion of U.S. criminal jurisdiction over him. Even kidnaped defendants have been denied jurisdictional relief once the government has, by brute force, successfully positioned them before U.S. courts. Extraterritorial prosecution—or, perhaps better, prosecution with minimal territorial contact—is, as a matter of law, readily available to American prosecutors deploying the FCPA.

Like many bureaucratic actors who exercise substantial discretion, the federal business crime prosecutor acts for a combination of reasons, some that are direct and purposeful and others that arise indirectly. The sum total of the enforcement decisions of "line" attorneys is an essential aspect of government policy. Enforcement, it bears emphasis, is a type of law or at least a lawmaking practice. . . .

It is widely believed that FCPA defense may be the most expensive and thus lucrative service that law firms sell in the field of internal investigations and defense against government enforcement. For example, Siemens spent at least $1 billion on professional services, mostly provided by the law firm Debevoise & Plimpton and the accounting firm Deloitte, in dealing with its massive bribery scandal. Walmart has spent at least

$400 million so far managing its FCPA problem relating to bribery in Mexico, and the meter is still running on that unresolved case.

In winning these rewarding representations from corporate clients, firms will want to demonstrate that their stable of partners includes former DOJ lawyers who handled the largest, most complicated, and most global FCPA matters. The senior prosecutor naturally will understand that grabbing some of those cases in the prime of her prosecutorial career will position her well for a secure career following government service.

In the case of FCPA enforcement, the relationship between the private and public sectors is more complex than, and perhaps just as powerful as, the metaphorical revolving door by which the private captures the public. This symbiotic relationship characterizes the enforcement of corporate criminal offenses, and their civil analogues, in general. It arises from a kind of organic process over the last several decades by which the government, through incremental moves by enforcement lawyers and their defense counterparts, has come to cope with the massive problem of detecting and investigating corporate wrongdoing.

In short, the government uses corporate criminal liability as a lever to compel firms to monitor their own employees, discover wrongdoing, and report it to the government. In turn, the government allows firms to settle criminal matters short of indictment and prosecution and on somewhat more lenient terms. Firms trade self-policing and self-reporting for lower sanctions. . . .

The United States remains the most important enforcer of foreign anti-corruption laws by a significant margin. The United States has brought more cases both total and relative to its world exports, and has imposed greater penalties than any other state. Though success in establishing a global enforcement market was made possible by the OECD treaty's requirement for mutual legal assistance and cooperation, the treaty has not been equally effective in convincing other OECD members to enforce their own foreign anti-corruption laws. The majority of OECD states still have little to no enforcement of their own foreign anti-bribery laws. Both the OECD Anti-Bribery Working Group and Transparency International have documented how most members of the treaty have failed to provide any political support or material resources to foreign anti-bribery prosecutions.

Within the last decade, however, a few countries have begun to prioritize anti-corruption law. Germany, Switzerland, and the United Kingdom have all significantly revised their laws and started investing political capital in investigations and prosecutions. Some of these cases have been brought in active coordination with U.S. authorities but others involve independent investigations and sanctions. Notably, several states have amended their laws to permit increased flexibility for prosecutors to settle cases. For instance, the United Kingdom revised its Foreign Anti-Bribery Act in 2011 to permit deferred prosecution agreements as seen in the United States. The French government is also attempting to revise its anti-bribery laws, the so-called Loi Sapin II. The French proposal would establish a foreign anti-bribery agency with power to enter into non-prosecution agreements and U.S.-style corporate monitoring.

It remains uncertain whether greater foreign prosecution efforts will complement or challenge the current U.S. dominance in anti-bribery enforcement. So far, other OECD states' efforts seem to be complementary. Many early European bribery prosecutions were brought in conjunction with U.S. investigations and prosecutions—for instance, the Siemens case with the German government and the BAE case with the UK government. In addition, one empirical study of foreign government behavior found that coordination with the United States on a bribery case was the best predictor that a state would later bring its own independent prosecutions. . . .

Recent U.S. administrations have emphasized or deemphasized "the fight against corruption" in various ways. Consider the following statement of the current (Biden) administration on these matters.

UNITED STATES STRATEGY ON COUNTERING CORRUPTION

December 2021 White House Report

When government officials abuse public power for private gain, they do more than simply appropriate illicit wealth. Corruption robs citizens of equal access to vital services, denying the right to quality healthcare, public safety, and education. It degrades the business environment, subverts economic opportunity, and exacerbates inequality. It often contributes to human rights violations and abuses and can drive migration. As a fundamental threat to the rule of law, corruption hollows out institutions, corrodes public trust, and fuels popular cynicism toward effective, accountable governance.

Moreover, the impacts of corruption frequently reverberate far beyond the immediate environment in which the acts take place. In today's globalized world, corrupt actors bribe across borders, harness the international financial system to stash illicit wealth abroad, and abuse democratic institutions to advance anti-democratic aims. Emerging research and major journalistic exposés have documented the extent to which legal and regulatory deficiencies in the developed world offer corrupt actors the means to offshore and launder illicit wealth. This dynamic in turn strengthens the hand of those autocratic leaders whose rule is predicated on the ability to co-opt and reward elites.

On June 3, 2021, President Biden established the fight against corruption as a core national security interest of the United States. As he wrote in National Security Study Memorandum-1 (NSSM-1), "corruption threatens United States national security, economic equity, global anti-poverty and development efforts, and democracy itself….[B]y effectively preventing and countering corruption and demonstrating the advantages of transparent and accountable governance, we can secure a critical advantage for the United States and other democracies."

Pursuant to NSSM-1, Federal departments and agencies have conducted an interagency review to take stock of existing U.S. Government anti-corruption efforts and to identify and seek to rectify persistent gaps in the fight against corruption. In parallel with this review, departments and agencies have begun to accelerate and amplify their efforts to prevent and combat corruption at home and abroad; bring transparency to the United States' and international financial systems; and make it increasingly difficult for corrupt actors to shield their activities.

This first United States Strategy on Countering Corruption builds on the findings of the review and lays out a comprehensive approach for how the United States will work domestically and internationally, with governmental and non-governmental partners, to prevent, limit, and respond to corruption and related crimes. The Strategy places special emphasis on the transnational dimensions of the challenges posed by corruption, including by recognizing the ways in which corrupt actors have used the U.S. financial system and other rule-of-law based systems to launder their ill-gotten gains. To curb corruption and its deleterious effects, the U.S. Government will organize its efforts around five mutually reinforcing pillars of work:

- Modernizing, coordinating, and resourcing U.S. Government efforts to fight corruption;
- Curbing illicit finance;
- Holding corrupt actors accountable;
- Preserving and strengthening the multilateral anti-corruption architecture; and,
- Improving diplomatic engagement and leveraging foreign assistance resources to advance policy goals

By pursuing concrete lines of effort that advance strategic objectives under each of these pillars, and integrating anti-corruption efforts into relevant policy-making processes, the United States intends to lead in promoting prosperity and security for the American people and people around the world.

From the small-town hospital administrator who demands bribes in exchange for life-saving services, to the globe-trotting kleptocrat who offshores an embezzled fortune, corruption harms both individuals and societies. The effects of corrupt acts are frequently both direct and indirect. When government officials steal from public coffers or fix a contract to reward a political crony, these actors directly transfer funding from essential services to private interests. Corruption also indirectly contributes to reduced public trust in state institutions, which in turn can add to the appeal of illiberal actors who exploit popular grievances for political advantage.

Whether grand corruption perpetrated by powerful elites, or administrative corruption carried out by lower-level officials interacting directly with the public, corrupt acts harm the public interest, hamper countries' development, and diminish state capacity. Corruption has been shown to significantly curtail the ability of states to respond effectively to public health crises and to address climate change, migration, and inequities of all forms, while contributing to state fragility. Countries with high levels of corruption are more likely to have populations that suffer from human rights abuses, and are less likely to address those abuses. And states with endemic corruption are more vulnerable to terrorist networks, transnational organized and gang-related criminals, and human traffickers.

Corruption's increasingly globalized nature—fueled in part by transnational illicit finance and criminal networks, as well as exploitation of the licit financial system—imposes steep costs on ordinary citizens and good governance alike. In particular, transnational corruption driven by political and economic elites with the aid of complicit financial and legal service providers undermines lower income countries' ability to advance the welfare of their citizens and perpetuates aid dependency. According to the United Nations Conference on Trade and Development's Economic Development in Africa Report 2020, for example, every year an estimated $88.6 billion—equivalent to 3.7 percent of Africa's GDP—leaves the continent in the form of illicit capital flight.

Corrupt actors exploit deficiencies in anti-money laundering and countering the financing of terrorism (AML/CFT) systems and processes—as well as in other critical transparency, reporting, business, real estate, and tax regimes—to use public contracting, concessions, and procurement processes for personal enrichment. Corrupt elites and non-state armed groups enrich themselves through illicit proceeds and trade of high-value commodities, including gold, wildlife, timber, petroleum, and other natural resources. Across an ever-more connected and digital world, corrupt actors exploit oversight and regulator weaknesses in jurisdictions around the world to divert and hide the proceeds of their acts. And by leaving their financial systems vulnerable to illicit assets—through anonymous shell companies, opaque transactions, and under-regulated professional service providers—rule-of-law-based societies continue to provide entry points for corrupt actors to launder their funds and their reputations. Such activity negatively impacts average citizens in the United States, tilting the economic playing field against working Americans, enabling criminals to flourish and foreign adversaries to subversively peddle their influence, perpetuating growth-dampening inequality, and contributing to pricing out families from home ownership through real estate purchases.

In parallel, authoritarian regimes and their proxies have been shown to engage in bribery and other corrupt acts as a means to advance their strategic goals, while exploiting the international financial system to offshore illicit gains, and influence elections and policies in democratic states. Corruption in the form of state-directed cross-border investments from authoritarian states, for example, has had a corrosive effect on institutions in developing countries. Such practices harm the competitive landscape of financial markets, and often have long-term corrosive impacts on governance and human rights standards. The U.S. Government will continue to study the weaponization of corruption to understand its use and impacts on the United States, other democracies, and countries around the world, as well as how to thwart and build resilience against this evolving threat.

While the U.S. Government has long recognized countering corruption as an important foreign policy goal, a growing understanding of corruption's strategic impact and the increasing interconnectedness of the global economy underscores the need for a new approach. For the U.S. Government to effectively counter contemporary corruption, we must recognize the transnational dimensions of the challenge, and respond in a manner that is both systemic and tailored to local conditions. Doing so will require addressing vulnerabilities in the U.S. and international financial systems; bolstering international best practices, regulations, and enforcement efforts; supporting the role of non-governmental actors; building political will and recognizing when it is absent; and consistently pursuing accountability through a combination of diplomatic engagement, foreign assistance, and enforcement actions.

The United States will continue to evaluate and implement measures as needed to further safeguard our financial system, and will work with likeminded partners and relevant multilateral institutions to do the same. We will make it harder to hide the proceeds of ill-gotten wealth in opaque corporate structures, reduce the ability of individuals involved in corrupt acts to launder funds through anonymous purchases of U.S. real estate, and bolster asset recovery and seizure activities. We will innovate, adapt, partner, and learn, so as to maximize the potential for diplomatic tools, including foreign assistance and targeted sanctions, to stem corruption and to hold corrupt actors accountable, while expanding efforts to ensure that foreign assistance and engagement do not inadvertently contribute to corrupt practices. And we will continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA) and other statutory and regulatory regimes via criminal and civil enforcement actions.

Countering corruption is not a simple task. Changing embedded cultures of corruption requires significant political will, and achieving sustained progress can take decades. Positive change requires consistent leadership, public accountability, an empowered and impartial judiciary, and a diverse and independent media. Mindful of these realities, the United States will increase support to state and non-state partners committed to reform, boost the capacity of other governments to tackle corruption, and empower those, including activists, investigative journalists, and law enforcement on the front lines of exposing corrupt acts. We will bolster and promote public-private partnerships to more consistently bring in the private sector as critical actors in the fight against corruption, help level the playing field and improve the international business climate, and lead in international fora as we work to curb the ability of actors to hide ill-gotten wealth behind anonymity. Our closest engagement will be with our most committed allies and partners, including with respect to the influence of strategic corruption deliberately employed by authoritarian governments. . . .

As the largest economy in the international financial system, the United States bears particular responsibility to address our own regulatory deficiencies, including in our AML/CFT regime, in order to strengthen global efforts to limit the proceeds of corruption and other illicit financial activity. We will therefore address deficiencies in the U.S. anti-money laundering regime, including by effectively collecting beneficial ownership information on those who control anonymous shell companies, and by increasing transparency in real estate transactions. Recognizing how quickly money and other commodities move across borders, we will also work with allies and partners to address governance weaknesses and other deficiencies, tighten global regimes, increase information sharing and law enforcement cooperation, and prevent the establishment of safe havens as we work to close old ones. . . .

The FCPA, and many other countries' anti-bribery statutes, have been enacted in whole or in part to fulfill obligations under the following international convention.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

b) "foreign country" includes all levels and subdivisions of government, from national to local;

c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies. . . .

OECD Convention on Combating Bribery of Foreign Public Officials in International BusinessTransactions
Ratification Status as of May 2018

Country	Deposit of Instrument of Acceptance/Approval/ Ratification/Accession	Entry into Force of the Convention	Entry into Force of Implementing Legislation
Argentina	8 February 2001	9 April 2001	10 November 1999
Australia	19 October 1999	18 December 1999	17 December 1999
Austria	20 May 1999	19 July 1999	1 October 1998
Belgium	27 July 1999	25 September 1999	3 April 1999
Brazil	24 August 2000	23 October 2000	11 June 2002
Bulgaria	22 December 1998	15 February 1999	29 January 1999
Canada	17 December 1998	15 February 1999	14 February 1999
Chile	18 April 2001	17 June 2001	8 October 2002
Colombia	20 November 2012	19 January 2013	14 November 2012
Costa Rica	24 May 2017	23 July 2017	15 May 2017
Czech Republic	21 January 2000	21 March 2000	9 June 1999
Denmark	5 September 2000	4 November 2000	1 May 2000
Estonia	14 December 2004	12 February 2005	1 July 2004
Finland	10 December 1998	15 February 1999	1 January 1999
France	31 July 2000	29 September 2000	29 September 2000
Germany	10 November 1998	15 February 1999	15 February 1999
Greece	5 February 1999	15 February 1999	1 December 1998
Hungary	4 December 1998	15 February 1999	1 March 1999
Iceland	17 August 1998	15 February 1999	30 December 1998
Ireland	22 September 2003	21 November 2003	26 November 2001
Israel	11 March 2009	10 May 2009	21 July 2008
Italy	15 December 2000	13 February 2001	26 October 2000
Japan	13 October 1998	15 February 1999	15 February 1999
Korea	4 January 1999	15 February 1999	15 February 1999
Latvia	31 March 2014	30 May 2014	21 March 2014
Lithuania	16 May 2017	15 July 2017	3 May 2017
Luxembourg	21 March 2001	20 May 2001	11 February 2001
Mexico	27 May 1999	26 July 1999	18 May 1999
Netherlands	12 January 2001	13 March 2001	1 February 2001
New Zealand	25 June 2001	24 August 2001	3 May 2001

Norway	18 December 1998	15 February 1999	1 January 1999
Peru	28 May 2018	27 July 2018	1 January 2018
Poland	8 September 2000	7 November 2000	4 February 2001
Portugal	23 November 2000	22 January 2001	9 June 2001
Russian Federation	17 February 2012	17 April 2012	16 May 2011
Slovak Republic	24 September 1999	23 November 1999	1 November 1999
Slovenia	6 September 2001	5 November 2001	23 January 1999
South Africa	19 June 2007	18 August 2007	27 April 2004
Spain	14 January 2000	14 March 2000	2 February 2000
Sweden	8 June 1999	7 August 1999	1 July 1999
Switzerland	31 May 2000	30 July 2000	1 May 2000
Turkey	26 July 2000	24 September 2000	11 January 2003
United Kingdom	14 December 1998	15 February 1999	14 February 2002
United States	8 December 1998	15 February 1999	10 November 1998

Problem 5-1

Should the United States use its criminal courts to attempt to deter corruption in other countries, particularly in the developing world? Are there other legitimate purposes for the US to bring prosecutions related to bribery in the conduct of international business? If so, what factors should prosecutors look for in choosing these cases?

The ultimate policy question, of course, is whether the FCPA and the government's enforcement campaign have been beneficial. This is an extremely difficult question to answer empirically, in addition to being normatively controversial given disagreement about optimal policy goals. For one recent take with updated enforcement data, see Mike Koehler, *Has the FCPA Been Successful in Achieving its Objectives?*, 2019 U. ILL. L. REV. 1267 (2019). For the most thoughtful and extended treatment to date, see KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY (2019). Meanwhile, the popularity of such efforts among enforcers in developed nations continues to grow rapidly. *See generally* Jennifer Arlen and Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

B. The FCPA Statutory Scheme and UK Bribery Act

Before taking up the text of the statutes themselves, the following article gives an overview of the FCPA's structure and key provisions.

FOREIGN CORRUPT PRACTICES ACT

Bridget Vuona, 56 AM. CRIM. L. REV. 979 (2019)

In 1977, Congress amended the Securities Exchange Act of 1934 ("Exchange Act") and enacted the Foreign Corrupt Practices Act ("FCPA"). The FCPA's passage followed an extensive Securities and Exchange Commission ("SEC") investigation and voluntary disclosure program in the 1970s, which revealed that U.S. companies had paid millions of dollars in bribes to secure business from foreign officials. Seeking to restore public confidence in the business community, Congress passed the FCPA, which regulates international corruption using two approaches: the accounting provisions and the anti-bribery provisions.

First, the accounting provisions require regular reports to the SEC, mandate maintenance of accurate records, and require the establishment of internal compliance controls. These provisions apply to both domestic and foreign companies traded on U.S. stock exchanges. Second, the FCPA's anti-bribery provisions criminalize the transfer of money or other gifts to foreign officials and political actors with the intent to influence the obtainment or retainment of business. The anti-bribery prohibitions apply to conduct by securities issuers, U.S. citizens and entities, and certain foreign nationals and entities. Both the SEC and the United States Department of Justice ("DOJ") have jurisdiction to enforce the FCPA's anti-bribery provisions with civil or criminal enforcement actions, respectively.

Understanding the FCPA has become imperative for businesses due to increased enforcement and severe fines. While the SEC and the DOJ jointly averaged only three prosecutions annually between 1978 and 2000, the number of enforcement actions per year since then has drastically increased. Notably, 2010 experienced a peak of seventy-four total actions with penalties of a record $1.8 billion. Although subsequent years have yet to exceed the 2010 peak, both the DOJ and SEC remain committed to FCPA enforcement. For example, the agencies brought fifty-three actions in 2016, wherein the twenty-seven corporations charged with FCPA violations paid an average of $223.4 million in criminal penalties--the highest average in history. Additionally, the number of DOJ enforcement actions per year reached its second-highest peak in 2017, making up twenty-nine of the combined thirty-nine actions.

The past decade's uptick in number of actions and average penalties paid results from federal efforts to further strengthen the FCPA, including the SEC's creation of an FCPA

Unit in 2010, the DOJ's implementation of a cooperation policy requiring individual accountability ("The Yates Memorandum") in 2015, the DOJ's development of a pilot cooperation program in 2016, and the institution of DOJ's formal "FCPA Corporate Enforcement Policy" in 2017. These measures aim to incentivize individuals and companies to voluntarily self-disclose FCPA related misconduct and otherwise cooperate with DOJ investigations.

In addition, developments in the substantive law have aided enforcement efforts and promoted increased compliance. Among these developments is a broad interpretation of FCPA jurisdiction that encompasses conduct occurring outside U.S. territory, including conduct with an attenuated territorial nexus to the U.S.

Finally, increased enforcement and compliance also stems from more robust international cooperation. . . .

The FCPA amended the Exchange Act to impose record-keeping and internal control requirements on securities issuers, as codified in 15 U.S.C. § 78m(b)(2) and (b) (5) (collectively referred to as the "accounting provisions"). This marked a major shift in securities law by treating inaccurately recorded payments as potential accounting violations regardless of their materiality to investor decisions. The DOJ has equal authority with the SEC to pursue violations of the record-keeping and internal controls provisions of the FCPA. The SEC, however, has taken the lead in pursuing civil liability for violations of these provisions given its expertise in accounting matters and primary role in protecting the integrity of the financial markets as well as the provisions' exclusive applicability to "issuers" under the FCPA. . . .

Elements of the accounting provisions include (1) the covered parties, (2) the record-keeping, or "books and records," provision, and (3) the internal controls provision.

The FCPA accounting provisions apply to "issuers" under the Exchange Act, which includes publicly-held companies and companies that hold American Depository Receipts. An "issuer" either has securities registered with the SEC under § 12 of the Exchange Ac or is required to file periodic reports with the SEC pursuant to § 15(d) of the Exchange Act. Additionally, issuers owning more than fifty percent of foreign subsidiary stock are also required to ensure that the subsidiary complies with the accounting provisions. A corporation classified as an issuer, therefore, must satisfy the accounting provisions whether or not it directly engages in foreign operations.

The record-keeping provisions require all 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 issuer." The requirement applies to records in a wide variety of forms, regardless of their materiality to investor decisions. The FCPA defines "reasonable detail" as a "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

These provisions serve three goals: ensuring that businesses accurately report transactions, preventing the falsification of records to conceal illegal transactions, and promoting the correct characterization of all transactions so that financial statements conform to accounting principles. Overall, by creating affirmative record-keeping duties for all issuer transactions, the regulations facilitate the SEC's detection of business improprieties. By requiring accurate recording and disclosure of payments, the books and records provisions have the collateral effect of deterring foreign bribe payments.

The FCPA accounting provisions also require issuers to create and maintain internal controls that reasonably ensure transactions are properly authorized. Congress intended this provision to ensure that issuers use accepted accounting methods when recording economic transactions.

Compliance depends on the overall reasonableness of the internal controls. The SEC considers several factors in evaluating such systems: (1) the role of the board of directors; (2) communication to employees of corporate procedures and policies; (3) assignment of authority and responsibility; (4) competence and integrity of personnel; (5) accountability for performance and compliance; and (6) objectivity and effectiveness of the internal audit function. If a company's board of directors creates an internal audit committee, this committee must reasonably assure that FCPA provisions are followed through internal accounting oversight. . . .

Individuals designated as "control persons" may be liable for accounting violations that occur even without their knowledge or participation. Under the "control person" theory, codified in § 20(a) of the Exchange Act, individuals who directly or indirectly "control any person liable" under the chapter are themselves liable to the same extent unless the controlling person "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." Circuit Courts of Appeals are divided as to whether culpable participation is a necessary element of control person liability. Those courts requiring culpable participation look for proof that the controlling person "knew or should have known that the primary violator, over whom that person had control, was engaging in fraudulent conduct."

Under either accounting provision, an individual must "knowingly" circumvent or fail to "implement a system of internal accounting controls" or falsify "any book, record or account." Although the SEC does not intend to prosecute inadvertent accounting violations, it has found that willful blindness--or conscious avoidance--satisfied the intent requirement.

There are two exceptions to criminal liability under the FCPA accounting provisions. First, § 78m(b)(4) does not impose criminal liability for technical or insignificant accounting errors. Second, a good faith exception applies to issuers who hold fifty-percent or less of a corporation's voting power. Accordingly, a parent corporation that owns fifty-percent or less of a subsidiary or affiliate need only exercise good-faith efforts to influence the minority-owned subsidiary or affiliate's decision to comply with FCPA accounting practices. . . .

The Anti-Bribery Provisions of the FCPA prohibit (1) covered parties from (2) performing the qualifying jurisdictional act--either (a) taking any action within or outside the territory of the United States, depending on the covered party or (b) utilizing "the mails or any means or instrumentality of interstate commerce"—(3) in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value, (4) knowingly, corruptly, or willfully, (5) directly or indirectly to a foreign official, foreign political party or official, or a candidate for foreign political office (6) to influence any official act or decision, or to secure any improper advantage in order to obtain or retain business.

"Covered parties" currently include: (1) issuers, and their officers, directors, employees, agents, and shareholders; (2) domestic concerns, and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States. An "issuer" is a company that has securities listed on a national securities exchange in the United States or that is required to file periodic reports with the SEC. "Domestic concerns" include "any individual who is a citizen, national, or resident of the United States [or] any corporation ... which has its principal place of business in the United States, or which is organized under the laws of a state of the United States." Within the category of "domestic concerns" is the sub-category of "United States persons." Finally, the FCPA also applies to "any natural person other than a national of the United States or any corporation, business trust, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof" *while acting in the territory of the United States*. For ease of reference, this third category of covered persons is often referred to by its statutory enumeration: "78dd-3" parties.

It is important to note that the qualifying jurisdictional acts do not neatly correspond to three categories of covered parties discussed above. In other words, although categorized as one of three "covered parties," the persons and entities included within each category may satisfy the jurisdictional element of the statute in different ways.

For certain covered parties, the government may point to "use of the instrumentalities of interstate commerce" in making prohibited bribes to establish FCPA anti-bribery jurisdiction. For U.S. issuers and "U.S. persons," proving use of the instrumentalities of interstate commerce is one of two ways to satisfy the FCPA's jurisdictional requirement. Alternatively, for foreign issuers and foreign nationals *permanently residing in the U.S.*, proving use of the instrumentalities of interstate commerce is the *exclusive* means of establishing jurisdiction.

"Interstate commerce" has not been defined by the FCPA, but it has been described in legislative history as "trade, commerce, transportation, or communication among the several states, or between any foreign country and any state or between any state and any place or ship on trade thereof." Use of the instrumentalities of interstate commerce can be proven through minimal contact with the United States; the conduct must touch the U.S. at some point, but does not have to occur within the territorial U.S.

Storing or routing emails through American servers, and using U.S. mail or wires, a U.S.-licensed cell phone while outside the U.S., and money denominated in U.S. dollars all constitute use of the instrumentalities of interstate commerce.

Three changes in the 1998 Amendments to the FCPA expanded the reach of the anti-bribery provisions beyond the initial jurisdictional grounds discussed above. These amendments brought the FCPA into conformity with the Organization for Economic Cooperation and Development ("OECD")'s anti-bribery convention's definition of "territorial" and "nationality" jurisdiction. First, the amendments extended anti-bribery jurisdiction over any foreign person or entity unaffiliated with issuers and domestic concerns while acting *inside* U.S. territory ("territorial jurisdiction" or "78dd-3 jurisdiction"). Second, with regard to U.S. issuers and persons, the amendments embraced "nationality jurisdiction" over certain U.S. entities. Nationality jurisdiction subjects "U.S. issuers" and "United States persons" (whether acting alone or on behalf of a U.S. issuer) to FCPA liability when, assuming all other elements of the offense are met, they take any action while outside the U.S. Third, the Amendments expanded the statute to also reach foreign nationals employed by or acting as agents of U.S. issuers or domestic concerns, wherever they act.

The DOJ has broadly interpreted the provision "in the territory of the United States" for the purposes of establishing § 78dd-3 jurisdiction over foreign persons. For instance, the DOJ filed complaints alleging jurisdiction where wire transfers cleared through one or more U.S. bank accounts and the defendant used that bank account in the United States.

The SEC and DOJ have attempted to further expand the jurisdictional reach of the FCPA in developing the concept of "accessory liability." Under this theory of liability, a foreign national or company that does not directly act in the United States may still be liable if it "aids and abets, or conspires with an issuer or domestic concern." After the Second Circuit Court of Appeals' recent decision in *United States v. Hoskins*, however, it is no longer clear whether the government will continue to pursue charges against foreign nationals and corporations under this theory.

Currently, the FCPA's long reach only touches the payor--the receiving foreign official is immune. The exclusion of the recipients of bribes from criminal liability reflects "an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law" and "reinforce[s] the proposition that Congress had absolutely no intention of prosecuting the foreign officials involved . . . ." This decision was motivated by both diplomatic and jurisdictional considerations.

Under any of the jurisdictional prongs, prosecutors may charge employees without filing charges against their corporate employer. The DOJ's recent emphasis on prosecuting individuals and its formalized cooperation credit policy strongly incentivizes corporations to expose employee wrongdoing.

While the phrase "anything of value" is not defined in the FCPA or its legislative history, the DOJ, SEC, and several courts have interpreted the phrase expansively. Any item of potential present or future benefit may be "of value" if either the payer or recipient subjectively values it. Thus, items "of value" include money, gifts, discounts, charitable donations, use of resources (e.g., materials, facilities, and equipment), entertainment luxuries (e.g., food, travel, meals, lodging), and promises of future employment or internships. This broad interpretation of the phrase "anything of value" is in accordance with the definition of bribery contained in the domestic anti-bribery statute.

To violate the FCPA, all defendants, individual or corporate, must "knowing[ly]" and "corruptly" commit the alleged act. Individual defendants must also act "willfully." A person acts "knowingly" when he is either aware that he is engaging in such conduct, that such circumstance exists, or that such result is "substantially certain" to occur. Thus, the knowledge requirement may be satisfied through willful blindness or conscious avoidance, i.e., when the defendant "intentionally avoid [s] confirming the fact" of culpable conduct. For example, corporate officials may be found liable where they have a reasonable indication that a FCPA violation has occurred, but fail to act. Therefore, both those with actual knowledge and those who purposefully avoid actual knowledge are liable.

Although the FCPA does not define the term "corruptly," the Senate Report for the statute states that "[t]he word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." Specifically, "the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation." That is, there must be a *quid pro quo* whereby the illegal payment is intentionally given in exchange for some unlawful act, though completion of the exchange is not required.

Similarly, the FCPA does not define "willfully," but courts interpret it to include acts "committed voluntarily and purposefully, and with a bad purpose." In proving that a defendant acted "willfully," the government need only prove that an act was undertaken with knowledge of its general unlawfulness, rather than with a specific intent to violate the FCPA.

The anti-bribery provisions define "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."

Entities need not be state-owned or state-controlled to qualify as an "instrumentality" of a foreign government. Rather, in *United States v. Esquenazi*, the Eleventh Circuit set forth a two-part test for determining which entities constitute "instrumentalities" of foreign governments under the FCPA. The *Esquenazi* court interpreted a government "instrumentality" as an organization that both: (i) is "controlled by the government of a foreign country" and (ii) "performs a function the controlling government treats as its own.”. . .

Once a foreign entity is considered a government instrumentality, all of the entity’s employees are considered foreign officials regardless of their status or responsibilities within the organization. Therefore, U.S. businesses that regularly engage in commercial relationships with state-controlled companies, such as those traditionally common in China, must diligently observe compliance with the FCPA due to the increased risk of violation.

The FCPA prohibits payments to foreign officials for wide variety of purposes related to the obtainment or retainment of business. Thus, in addition to payments made for the clear purpose of obtaining or retaining government contracts, the FCPA prohibits payments made to increase sales, secure special tax or customs treatment, as well as payments “to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, and to circumvent a licensing or permit requirement.”

As discussed, determination of prohibited payments under the FCPA rests on whether the payment would *assist in* obtaining or retaining business. But because the Act and courts alike have failed to specify just how direct the nexus between payments and business sought must be, businesses and individuals continue to grapple with the legality of payments that simply permit the company to operate more efficiently or effectively, otherwise known as “facilitating” or “grease” payments.

The FCPA creates an exception and two affirmative defenses to potential anti-bribery violations.

The FCPA expressly permits “facilitating” payments (also known as “grease payments”) to foreign officials to “expedite or to secure the performance of routine governmental action.” Grease payments constitute an exception, rather than an affirmative defense, because such payments are, by definition, not made with the corrupt intent of prompting the foreign official to *misuse* their official position.

“Routine governmental actions” are non-discretionary actions that a foreign official ordinarily performs in the course of daily business. Examples include obtaining permits and licenses, processing governmental paperwork, scheduling inspections, and providing utilities or governmental services such as police protection. Permissible payments usually are of low value, but the purpose is more important than the value.

Three caveats accompany the facilitation payments exception. First, courts agree with regulators that the exception is “very limited.” For example, the SEC has fined companies for payments arguably within the exception. And while there is no official maximum amount for grease payments, $1000 appears to have emerged as the acceptable limit. Second, issuers must identify and record grease payments as such, since there is no parallel exception under the accounting provisions. Third, grease payments allowed under the FCPA may still violate foreign anti-bribery laws, such as the UK

Bribery Act. Accordingly, most U.S. companies ban or severely limit facilitation payments to avoid liability under foreign laws.

The FCPA provides two affirmative defenses to the anti-bribery provisions: the "local law" defense and the "reasonable and bona fide business expenditure" defense.

The local law defense shields conduct that ordinarily falls under the FCPA anti-bribery provision, but that is legal under written local law. The absence of written laws prohibiting bribery in a foreign official's country would not by itself satisfy this defense; rather, the payment must be expressly and affirmatively lawful under the relevant country.

The reasonable bona fide business expenditure defense applies when expenses incurred by or on behalf of a foreign official, or other covered persons and/or entity, such as the cost of travel and lodging, are "directly related to the promotion, demonstration, or explanation of a company's products or services," or are related to a company's "execution or performance of a contract with a foreign government or agency thereof." However, these reasonable bona fide expenditures may signal a corrupt intent and violate the FCPA's accounting provisions when they are mischaracterized in a company's books and records or occur due to a failure to implement adequate controls. Although no court has interpreted this affirmative defense, the DOJ has issued guidance discerning between allowable and prohibited expenses under this provision. Nominal payments for items such as cab fares, refreshments, company promotional items, small tokens of courtesy, and reasonable meals and entertainment expenses are highly unlikely to trigger enforcement action unless part of a pattern of behavior evincing corrupt intent. . . .

The FCPA is part of the securities laws (the '34 Act). It includes a violation for simply failing to record payments (see how the first statute below does that), known as the "books and records" provision. The main statutory scheme, however, prohibits certain forms of corrupt payments.

The anti-bribery part of the legislation has three statutory provisions that run parallel to each other. Much of the key language is the same in all three provisions—in terms of the bribery-related conduct necessary to violate the FCPA. The three statutes differ primarily in terms of *who* they cover rather than *what conduct* they prohibit. Set out below are: (1) the bookkeeping provision, (2) the bulk of the first of the three anti-bribery provisions, and (3) only the differing jurisdictional language in the other two anti-bribery provisions.

Do the usual drill here of figuring out the elements of the crime, but you should spend even more time than usual on the statutory language because it is detailed and there is not abundant case law interpreting it. To whom do the statutes apply? What acts are prohibited? What are the required mental states for a criminal violation? What is the jurisdictional scope or requirements of each provision?

Foreign Corrupt Practices Act (FCPA) (Selected Provisions)

15 U.S.C. § 78m - Periodical and other reports . . . ("books and records")

(b)(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(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 in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and

(II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences. . . .

(b)(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(b)(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2). . . .

(b)(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

15 U.S.C. § 78dd–1 - Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)

(i) influencing any act or decision of such foreign official in his official capacity,

(ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or

(iii) securing any improper advantage; or

(B) 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;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A)

(i) influencing any act or decision of such party, official, or candidate in its or his official capacity,

(ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or

(iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or 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; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A)

(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity,

(ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or

(iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its 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.

(b) Exception for routine governmental action

Subsections (a) and (g) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

It shall be an affirmative defense to actions under subsection (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof. . . .

(f) Definitions

For purposes of this section:

(1)

(A) The term "foreign official" means 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.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2)

(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3)

(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780 (d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

15 U.S.C. § 78ff - Penalties

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)

(A) Any issuer that violates subsection (a) or (g) of section 78dd–1 of this title shall be fined not more than $2,000,000.

(B) Any issuer that violates subsection (a) or (g) of section 78dd–1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)

(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd–1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd–1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

15 U.S.C. § 78dd–2 - Prohibited foreign trade practices by domestic concerns [this is the second of the three anti-bribery provisions; it prohibits essentially the same substantive conduct but differs jurisdictionally, applying to "domestic concerns" instead of "issuers"]

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd–1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . [defining essentially the same acts as 15 U.S.C. § 78dd–1] . . .

(g) Penalties

(1)

(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)

(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States. . . .

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section, for the

purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term “United States person” means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

15 U.S.C. § 78dd–3 - Prohibited foreign trade practices by persons other than issuers or domestic concerns [this is the third of the three anti-bribery provisions; it prohibits essentially the same substantive conduct but differs jurisdictionally, applying to anyone who acts “while in the territory of the United States” instead of to “issuers” or “domestic concerns”]

(a) Prohibition

It shall be unlawful for any person other than an issuer that is subject to section 78dd–1 of this title or a domestic concern (as defined in section 78dd–2 of this title), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to— . . . [defining essentially the same acts as 15 U.S.C. §§ 78dd–1 and 78dd-2] . . .

(e) Penalties

(1)

(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)

(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

Alternative Fines Act. Note that the "alternative fines act," 18 U.S.C. § 3571, applies to the issue of corporate penalties for FCPA violations. The statute provides that, for *all* federal criminal cases, a court may impose a fine on an organization that is "not more than the greater of *twice the gross gain* or *twice the gross loss*" resulting from the offense (emphasis added). This provision, of course, has far more impact than most of the penalty provisions in specific offense definitions on the size of a potential corporate fine in a federal criminal case involving major conduct in a large business. To use a quick example, a company convicted of violating the FCPA in order to secure a contract with a foreign government earning the company $500 million could be fined $1 billion.

A VERY ROUGH STATUTORY SUMMARY

Statute (15 U.S.C.)	Who covered?	How violate?	With what mens rea?	Jurisdictional reach?
§ 78m ("books and records")	All "issuers" of registered securities (as defined by '34 Act) and any "person" of an issuer	Fail to keep accurate accounting records; or Fail to maintain adequate accounting controls	"Knowingly" circumvent or fail to implement controls (criminal)	All "issuers" of registered securities (as defined by '34 Act)
§ 78dd-1 (FCPA anti-bribery #1)	All "issuers" of registered securities (as defined by '34 Act) and their agents	Through mail or interstate commerce; Offer (etc.) anything of value; To "foreign official" or "foreign political party or official" (defined terms), or same through intermediary	"Corruptly" in furtherance of offer; and Purpose to influence; and Business purpose Willfully (criminal)	Use of mail or interstate commerce, or "Issuer" doing act outside U.S., in furtherance of offer
§ 78dd-2 (FCPA anti-bribery #2)	All "domestic concerns" (that are not "issuers") and their agents	Through mail or interstate commerce; Offer (etc.) anything of value; To "foreign official" or "foreign political party or official," or same through intermediary	"Corruptly" in furtherance of offer; and Purpose to influence; and Business purpose Willfully (criminal)	Use of mail or interstate commerce, or Any "United States person" doing act outside U.S., in furtherance of offer
§ 78dd-3 (FCPA anti-bribery #3)	Any person (that is not an "issuer") while in U.S. territory	Through mail or interstate commerce; Offer (etc.) anything of value; To "foreign official" or "foreign political party or official," or same through intermediary	"Corruptly" in furtherance of offer; and Purpose to influence; and Business purpose Willfully (criminal)	Use of mail or interstate commerce, in furtherance of offer

With the following recently enacted statute, the UK is an important player in the field of international anti-corruption enforcement. Many cases of bribery involving large corporations will be covered by both U.S. and UK jurisdiction. Again, look at the covered persons and entities, covered acts, the required mental states, and the jurisdictional reach. Is the UK Act broader or narrower than the FCPA, or both broader and narrower? In which ways?

United Kingdom, Bribery Act of 2010

Section 6. Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

(a) business, or

(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

(a) directly or through a third party, P offers, promises or gives any financial or other advantage—

(i) to F, or

(ii) to another person at F's request or with F's assent or acquiescence, and

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(5) "Foreign public official" means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function—

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

(6) "Public international organisation" means an organisation whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organisations,

(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—

(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

Section 7. Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted. . . .

Section 8. Meaning of associated person

(1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

(3) Accordingly A may (for example) be C's employee, agent or subsidiary.

(4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C. . . .

Section 11. Penalties

(1) An individual guilty of an offence under section . . . 6 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

(2) Any other person guilty of an offence under section . . . 6 is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine. . . .

Section 12. Offences under this Act: territorial application

(1) An offence is committed under section … 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section . . . 6 takes place in the United Kingdom,

(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere. . . .

Section 14. Offences under sections 1, 2 and 6 by bodies corporate etc.

(1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.

(2) If the offence is proved to have been committed with the consent or connivance of—

(a) a senior officer of the body corporate or Scottish partnership, or

(b) a person purporting to act in such a capacity,

the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly. . . .

C. Recent Foreign Bribery Examples

Problem 5-2	
(a)	Suppose you are an in-house lawyer at a global pharmaceutical company. You learn that the company's deputy chief of sales in India arranged prostitutes for doctors who heavily prescribed one of the company's leading drugs. What is the company's potential exposure under U.S. and UK law, what more would you most need to know, and what arguments if any might be available to the company if confronted about these incidents by prosecutors and regulators?
(b)	Recall your thoughts under Problem 5-1 of factors that should or should not counsel in favor of FCPA prosecutions (or the equivalent for UK prosecutors). Do such factors exist in the matters described in the following two settlement documents, concerning JP Morgan's hiring practices related to China and Goldman Sachs' dealings with a Malaysian sovereign wealth fund?

ATTACHMENT A

STATEMENT OF FACTS

1. The following Statement of Facts is incorporated by reference as part of the Non-Prosecution Agreement (the "Agreement") between the United States Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of New York (collectively, the "Offices"), and the defendant JPMorgan Securities (Asia Pacific) Limited ("JPMorgan-APAC" or the "Company"). Certain of the facts herein are based on information obtained from third parties by the Offices through their investigation and provided to the Company. JPMorgan-APAC hereby agrees and stipulates that the following facts and conclusions of law are true and accurate. JPMorgan-APAC admits, accepts, and acknowledges that it is responsible for the acts of its officers, directors, employees, and agents as set forth below.

Relevant Entities and Individuals

2. JPMorgan Chase & Co., a Delaware incorporated and New York headquartered financial services firm, and its subsidiaries and affiliated companies (collectively, "JPMorgan") provided numerous types of financial services, including investment banking, globally. JPMorgan Chase & Co.'s shares were publicly traded on the New York Stock Exchange and it was an "issuer" within the meaning of the Foreign Corrupt Practices Act ("FCPA"), Title 15, United States Code, Section 78dd-1(a).

3. JPMorgan-APAC was a Hong Kong registered company and wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan-APAC, which was headquartered in Hong Kong, principally carried out investment banking under the "JPMorgan" brand for the Asia- Pacific region. JPMorgan-APAC was an "agent" of an issuer within the meaning of the FCPA, Title 15, United States Code, Section 78dd-1(a), and a number

of its employees and agents were each a "person" within the meaning of the FCPA, Title 15, United States Code, Section 78dd- 3(a) and (f)(1). Many of JPMorgan-APAC's clients in China were state-owned enterprises ("SOEs"), which were owned and controlled by the government of China and performed a function that the government treated as its own, and thus were each an "instrumentality" within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1) and 78dd-3(f)(2). Employees of these customers and clients were therefore "foreign officials" within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1) and 78dd-3(f)(2).

Relevant JPMorgan-APAC Clients and Government Officials

4. "Client 1," an entity whose identity is known to the United States and the Company, was a state-owned and controlled Chinese financial services firm and an instrumentality within the meaning of the FCPA, Title 15, United States Code, Sections 78dd- 1(f)(1) and 78dd-3(f)(2) ("instrumentality").

5. "Client 2," an entity whose identity is known to the United States and the Company, was a private Chinese manufacturing company.

6. "Client 3," an entity whose identity is known to the United States and the Company, was a Taiwanese private financial holding company.

7. "Client 4," an entity whose identity is known to the United States and the Company, was a state-owned and controlled Chinese bank and financial services firm and an instrumentality.

8. "Chinese Official 1," an individual whose identity is known to the United States and the Company, was the Deputy Minister of a Chinese government agency and a foreign official within the meaning of the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1) and 78dd-3(f)(2) ("foreign official").

9. "Chinese Official 2," an individual whose identity is known to the United States and the Company, was an Executive Vice President of Client 4 and a foreign official.

Overview of the Scheme

10. In or about and between 2006 and 2013, JPMorgan-APAC had a compliance review process to screen candidates for employment who had been referred to the Company by its clients, potential clients, and government officials. This process was supposed to ensure compliance with JPMorgan's anti-corruption policies including that referred candidates were not hired as part of *quid pro quo* arrangements, whereby the Company would win business from the referral source in exchange for hiring the applicant.

11. Beginning in or about 2006 and continuing until at least in or about 2012, however, JPMorgan-APAC bankers set up and used a program (the "Client Referral Program") to hire referred candidates specifically for the purpose of influencing senior

officials at clients to award business to the Company and, in certain instances, to achieve the very *quid pro quo* arrangements the compliance review process and JPMorgan's policies sought to prevent. Company employees sometimes referred to the Client Referral Program as the "Sons and Daughters Program."

12. Although such *quid pro quo* hiring arrangements initially occurred in certain instances, in or about November 2009, JPMorgan-APAC executives and senior bankers institutionalized the practice of making hires for the purpose of winning specific business mandates, and revamped the Client Referral Program to improve its efficacy by prioritizing those hires linked to upcoming client transactions. The changes to the Client Referral Program were made by senior JPMorgan-APAC investment bankers. Under the revamped Client Referral Program, referred candidates for employment needed, to quote a presentation prepared by JPMorgan-APAC employees responsible for implementing the program, a "[d]irectly attributable linkage to business opportunity" to be considered for a job.

13. As a result of the scheme to corruptly influence senior officials at clients and potential clients through the Client Referral Program, the Company received investment banking mandates from Chinese SOEs whose executives referred candidates to the Company. The Company earned at least $35 million in profits from those mandates.

Relevant JPMorgan-APAC Policies and Hiring Procedures

14. In or about 2001, JPMorgan established a policy that applied to, among other entities, JPMorgan-APAC and which prohibited the hiring of children or relatives of clients and potential clients in order to obtain business. On or about March 31, 2006, a JPMorgan-APAC managing director sent an e-mail to all JPMorgan-APAC investment bankers reiterating that policy and stating, in part:

> As you know, the firm does not condone the hiring of the children or other relatives of clients or potential clients of the Firm . . . for the purpose of securing or potentially securing business for the Firm. In fact, the firm's policies expressly forbid this. There are no exceptions. . . . [T]he Firm recognizes that from time to time we want to make offers to people who may raise the appearance of a conflict of interest or even a regulatory issue, with respect to their parents or relatives holding senior ownership or management positions in companies that the Firm may have or wish to have as its clients, or other regulatory or governmental or quasi- governmental positions. In light of that, the firm has developed a "Sons & Daughters" program that sets out clear parameters within which we are prepared to analyze and potentially make such offers.

15. Thereafter, JPMorgan-APAC's Legal and Compliance Department circulated a "Questionnaire for Potential Hire Under the 'Sons & Daughters Program'" (the "Compliance Questionnaire") to be used as part of the compliance screening process.

The Compliance Questionnaire focused on FCPA and other risks and required the bankers who wanted to hire applicants who had been referred by both private and SOE clients and potential clients and government officials, to disclose, among other things: (1) whether the applicant was qualified for the position; (2) whether the applicant had gone through the normal interviewing process; (3) whether the referring client/potential client was government-related; (4) whether the firm was actively pitching for any business from the client/potential client; and (5) whether there was an "expected benefit to JPMorgan" for hiring the referred candidate.

16. In or about September 2007, JPMorgan broadened its FCPA policy into a global anti-corruption policy, which applied to JPMorgan-APAC and provided that "the offer of internships or training for relatives of a public official" required legal and compliance pre-clearance and that hiring to win business was prohibited. At or around the same time, in connection with the new policy, JPMorgan-APAC compliance employees trained bankers that pre-clearance was required from the legal and compliance department because "[a]n offer of internship to a relative of a non-U.S. public official suggests an advantage by causing the official to misuse his or her position."

17. In or about June 2011, JPMorgan implemented an updated global Anti-Corruption Policy, which applied to JPMorgan-APAC. A training presentation on this policy advised that "almost anything can meet the definition of a 'bribe,' including internships [and] employment." The updated policy further advised that "[n]o employee may directly or indirectly offer, promise, grant or authorize the giving of money or anything else of value to a government official to influence official action or obtain an improper advantage."

The Corrupt Use of the Client Referral Program

18. Beginning no later than in or about late 2007, JPMorgan-APAC investment bankers used the hiring of client-referred candidates in certain instances as a tool to influence senior officials at clients and prospective clients to obtain banking business. During this period, the Compliance Questionnaire was routinely used by both JPMorgan-APAC investment bankers and personnel responsible for compliance matters. To obtain approval to make these hires, JPMorgan-APAC bankers and supporting personnel provided incorrect, misleading, and untruthful responses to the Compliance Questionnaire. Rather than using the Compliance Questionnaire to determine if a referral hire was done for the purpose of obtaining or retaining business, JPMorgan-APAC employees, including support personnel, falsely used the forms to justify and paper over corrupt business arrangements. In addition, JPMorgan-APAC compliance personnel drafted and modified Compliance Questionnaires that failed to state the true purpose for hiring some referred candidates. For instance, in or about January 2007, JPMorgan-APAC employees, including compliance employees, began using a template for the Compliance Questionnaire with certain answers pre-filled in, including the answer "No expected benefit" in response to a question requiring an explanation for what was the intended benefit to the firm from the referral hire.

JPMorgan-APAC Management Refocused the Client Referral Program to Corruptly Obtain Business Mandates

19. In or about September 2009, JPMorgan-APAC bankers sought to expand and further capitalize on the use of improper referral hiring. On or about September 5, 2009, a JPMorgan-APAC managing director ("JPMorgan-APAC Employee 1") wrote an e-mail to his JPMorgan supervisor that stated:

> One specific item that we may need your help is how to run a better sons and daughters program, which has an almost linear relationship with mandates in China. People believe [other investment banks] are doing a much better job. On the other hand, we J.P.Morgan have had a few disas[t]rous cases which I can share with you later. We have more LoBs [lines of business] in China therefore in theory we can accommodate more 'powerful' sons and daughters that could benefit the entire platform.

20. Following this e-mail, various senior members of JPMorgan-APAC management met on repeated occasions to discuss revamping the Client Referral Program to improve JPMorgan-APAC's ability to obtain specific client business mandates. Among other matters, it was agreed that the Client Referral Program would be used to prioritize referral requests that JPMorgan-APAC received from "decision-makers" or those who had the ability to influence an upcoming banking mandate, preferably in the near term. Thus, for example, on or about September 22, 2009, a JPMorgan-APAC executive who was responsible for supervising Client Referral Program hires ("JPMorgan-APAC Employee 2") wrote in an e-mail that he wanted to revisit the Client Referral Program "to plan [for] better . . . deal conversion or revenue attribution and relationship."

21. Referred candidates hired under the revamped Client Referral Program typically were less qualified for the position of associate, analyst, or summer intern when compared with the regular pool of such candidates hired through JPMorgan-APAC's standard hiring programs. Referred candidates who met JPMorgan-APAC's hiring standards typically were directed to apply for jobs through the normal hiring channels. Referred candidates who did not meet JPMorgan-APAC's hiring criteria for its standard hiring programs were hired through the Client Referral Program. Despite the fact that the Client Referral Program hires typically lacked the record of academic achievement and finance background that JPMorgan required under its standard hiring programs, Compliance Questionnaires submitted for Client Referral Program hires routinely stated that the Client Referral Program candidates were as qualified as other applicants for positions as associates, analysts, and summer interns.

22. In or about November 2009, a JPMorgan-APAC employee whose responsibilities included supervising employees hired under the Client Referral Program prepared a presentation, at the direction of JPMorgan-APAC Employee 2, that described how Client Referral Program hiring was "designed to hire employees referred by [ ] key

clients who may not meet [ ] regular hiring standard[s]," and that the program "could be further improved to optimize control/management and enhance contribution to business generation."

23. Under the revamped Client Referral Program, the "selection criteria" included a "[d]irectly attributable linkage to business opportunity." The authority to sponsor referral hires was further restricted to senior managing directors. The November 2009 presentation also stated that the cost of the program would be "[f]ully allocated to the sponsor's team as a marketing expense." In or about December 2010 and March 2011, to keep the Client Referral Program focused on generating near term revenue, a JPMorgan-APAC employee, whose responsibilities included supervising employees hired under the Client Referral Program, created and then updated a spreadsheet that tracked hires to specific clients, while also tracking revenue attributable to those hires. The spreadsheet included columns for each hire, the referring client, the relationship of the candidate, and the amount of revenue generated attributable to the hire in U.S. dollars. One of the purposes of the spreadsheet was to track deals that resulted from the hires and measure revenue associated with Client Referral Program hires.

24. As with the earlier *ad hoc quid pro quo* hires made prior to 2009, JPMorgan-APAC continued to use the existing Compliance Questionnaire to obtain pre-clearance to hire candidates selected under the revamped Client Referral Program. Both investment bankers and support personnel routinely provided inaccurate, misleading, and untruthful answers to the Compliance Questionnaire.

25. Referred candidates hired under the Client Referral Program were typically given the same titles and paid the same amount as entry-level investment bankers, despite the fact that many Client Referral Program hires performed ancillary work such as proof reading and provided little real value to any deliverable product. On or about July 13, 2011, JPMorgan- APAC Employee 2 sent an e-mail that asked the JPMorgan-APAC employee then overseeing the management of junior-level employees whether "we get real IB [investment banking] productivity from [the referral hire] or is she a photocopier[?]" The employee responded: "Photocopier" and noted that full-time, regular hires referred to these special hires as "'contractors' - peripheral."

26. Client Referral Program hires were also given special treatment in certain instances. For example, on or about April 28, 2011, JPMorgan-APAC Employee 2 requested that a Client Referral Program hire be shifted into a permanent position but noted an issue given the referral's "undeniable underperformance." Nevertheless, the hiring was permitted on the grounds that the "deal is large enough [and] we are pregnant enough with this person, that we'd be crazy not to accommodate her father's wants."

27. JPMorgan-APAC, through its employees or agents, took acts in furtherance of the corrupt scheme while in the territory of the United States, including sending e-mails while in the United States in furtherance of hiring the referred candidates in order to assist in obtaining and retaining business, and placing certain of the referred candidates in New York in order to assist in obtaining and retaining business. A banker who was

based in New York and who reported into JPMorgan-APAC (the "New York Banker") was directly responsible together with JPMorgan-APAC bankers for placing at least two of the referred candidates in New York, and JPMorgan ultimately profited from the illegal scheme.

Examples of JPMorgan-APAC Quid Pro Quo Hiring

JPMorgan-APAC's Use of the Referral Program to Secure Business from Client 1

28. In or around 2007, a senior official from Client 1 referred another senior official's son to a JPMorgan-APAC investment banker in Hong Kong. On or about November 15, 2007, a JPMorgan executive sent an e-mail to an employee in the JPMorgan Human Resources Department for the APAC region, copying a JPMorgan-APAC executive, asking if prior to hiring this candidate they had "validate[d] this kid's parental status." On or about the same date, the JPMorgan-APAC executive responded in an e-mail that the referral was "[c]onfirmed as son of [] mayor" and "[c]lose to [Client 1] ceo."

29. In or about December 2007, JPMorgan-APAC Human Resources and Legal and Compliance employees received responses to the Compliance Questionnaire for this referral. The JPMorgan-APAC banker who completed the form initially disclosed that there was an "expected benefit" to JPMorgan by hiring the job applicant, writing, among other things, "[t]he hiring of this candidate will place JPMorgan in a more favorable position for securing future business from the client." Shortly thereafter, a JPMorgan-APAC employee changed the response to this question to read: "The candidate will be trained by JPMorgan for couple of years and then go to local bank. Thus, will bring more business[]." Rather than rejecting the hire, Human Resources and Compliance instead instructed the JPMorgan-APAC employee to remove the offending language, writing, "[h]iring of the candidate should not be for the purposes of securing future business of the firm. Please remove."

30. The following week, a JPMorgan-APAC employee changed the Compliance Questionnaire answer to read: "1. Maintain long term good relationship with the client. 2. If the candidate can work out within the firm and demonstrates his capability that will be a win-win situation for JPMorgan, particularly from finding a capable employee point of view." On or about March 10, 2008, the candidate started work at JPMorgan-APAC.

31. Thereafter, in or about mid-2008, JPMorgan-APAC became the exclusive financial advisor to Client 1 on a transaction yielding profits to the Company of approximately $4.82 million.

JPMorgan-APAC's Use of Referral Hiring to Secure Business from Client 2

32. On or about May 29, 2008, a JPMorgan-APAC investment banker received a referral hiring request from a senior executive of Client 2. At the time of the referral, JPMorgan-APAC was actively pitching to be a "joint bookrunner" (*i.e.*, a lead underwriter in a securities issuance) in the initial public offering ("IPO") for Client 2.

33. On or about July 1, 2008, the sponsoring banker who received the hiring request wrote an e-mail to the JPMorgan-APAC banker responsible for overseeing hiring under the Client Referral Program to inquire whether the referral candidate had been hired. The banker sought guidance about whether it was worth hiring the person, since the IPO had been postponed. A JPMorgan-APAC executive responded: "I am supportive of bringing her on board given what's at stake. . . . A couple of points . . . to discuss and agree prior to any offer being made to her: how do you get the best quid pro quo from the relationship upon confirmation of the offer?"

34. On or about the same date, the sponsoring banker responded to the e-mail, copying three other JPMorgan-APAC executives, stating, "The client has communicated clearly the quid pro quo on this hire and the team should start working on the [upcoming] IPO asap." JPMorgan-APAC was selected along with another investment bank as a bookrunner on the IPO. The internal Compliance Questionnaire did not include the information concerning the *quid pro quo* arrangement with Client 2, and in response to the question "What is the expected benefit to JPMorgan in employing the candidate," the answer provided was "[n]o expected benefit" from the hire.

<u>JPMorgan-APAC's Use of Referral Hiring to Secure Business from Client 3</u>

35. In or about February 2009, JPMorgan-APAC received a request to hire the son of the Vice-Chairman of Client 3, who also held a senior position at another JPMorgan-APAC client. On or about February 16, 2009, the sponsoring JPMorgan-APAC banker sent an e-mail to a JPMorgan-APAC executive and other investment bankers noting that both entities "are very important JPM clients" and that "we are in active discussion with [Client 3] on a potential equity raising."

36. On or about February 17, 2009, the JPMorgan-APAC banker responsible for overseeing junior-level employee staffing sent an e-mail to JPMorgan-APAC Employee 2 seeking approval for the son's hire, noting that "[t]here seem to be strong business reasons for this referral hire and he is also a Wharton, but not very impressive, poor GPA." On the same day, JPMorgan-APAC Employee 2 responded, "I know how important this relationship is and yes I support its being processed now."

37. JPMorgan-APAC Employee 2 kept the Vice-Chairman of Client 3 informed of the son's status. On or about February 17, 2009, JPMorgan-APAC Employee 2 e-mailed a colleague: "I will be seeing the candidate's father next week . . . and I can relay the good news to him in person . . . lets get internal approvals underway." Within several weeks, the son was made an offer and then began working at JPMorgan-APAC in or about July 2009.

38. On or about July 23, 2009, a banker who supervised the work of the son described the son's performance as not satisfactory:

> Clearly, I think [the referral] has attitude issue. Every research analyst/assistant and intern . . . comes to office for morning meeting-

> morning meeting participation is compulsory for entire research department globally. We have told [the son] to attend but apparently he doesn't seem to care . . . . In this case, I think he can stay in other department and doesn't need to "sit" in research for the sake of it. If having [the son] sit in every department for 2 weeks is a business need to maintain relations with [Client 3], I can understand and am happy to accommodate. But next time, we really don't need to have an intern doing nothing and not following very basic rule.

39. In spite of the son's performance issues, JPMorgan-APAC continued to employ him and to accommodate additional demands concerning him described below. On or about August 27, 2010, JPMorgan-APAC Employee 2 wrote an e-mail to another JPMorgan-APAC banker, which read, in part: "So we picked up a new mandate in [our office] today - all we have to do is get [the son] a full time analyst job at JPM in NY. Mission impossible?" On or about the same date, the JPMorgan-APAC banker responded by referencing the difficulties given the son's performance: "Can try his napping habit will be an eye-opening experience for our NY colleagues if he gets a job. Does it have to be [investment banking]? He's not really built for it."

40. On or about September 3, 2010, JPMorgan-APAC Employee 2 sent an e-mail to several JPMorgan investment bankers stating:

> We have a very good client in Taiwan who has asked that we find an IB analyst role for his son in NY. We are being offered now a sellside on a 800mm [transaction] and the quid pro quo, is an analyst IB job for his son.

41. On or about October 29, 2010, the son of the Vice-Chairman of Client 3 was offered a full-time position as an analyst at JPMorgan in New York. A JPMorgan banker noted in an October 29, 2010 e-mail sent to a JPMorgan-APAC banker based in Asia and other JPMorgan bankers that because of the job offer the son was a "happy young man! And his dad will also be very pleased."

42. On or about January 27, 2011, JPMorgan received a mandate for an equity offering from Client 3. On or about the same date, a high-level JPMorgan executive sent an e- mail to another high-level executive, stating, "[Vice Chairman of Client 3] certainly followed through on his unspoken promises. We must make absolutely sure we keep a close eye on his son whom I continue to mentor on a regular basis." The JPMorgan executive then sent an e-mail to a JPMorgan-APAC banker stating, "This win is really down to you. We would never have got a chance without your help and guidance and your relationships."

<u>JPMorgan-APAC's Use of Referral Hiring to Secure Business</u>

<u>Generally by Hiring the Son of Chinese Official 1</u>

43. JPMorgan-APAC hired the son of Chinese Official 1, who was then a deputy

minister at a Chinese government agency. On or about July 21, 2006, a JPMorgan-APAC investment banker attempted to place a candidate referred by Chinese Official 1 in an investment banking position in JPMorgan's New York office. Several days later, in describing the importance of Chinese Official 1, the JPMorgan-APAC investment banker e-mailed a high-level executive at JPMorgan describing the influence of Chinese Official 1:

> Although he is now promoted to be a government official, his influence remains strong both personally as well as in an official capacity [at the Chinese Ministry] . . . [and] a good in[-]depth relationship with the Ministry will pave the ground for us in many large and important industries in China as well as large cap companies, despite the fact some of them are 'independent' commercial entities, a unique feature of the Chinese/government business alliance.

44. In or about December 2006, the son of Chinese Official 1 completed interviews for a position in New York. A New York employee e-mailed a JPMorgan-APAC banker that the referral "did very very poorly in interviews - some [managing directors] said he was the worst BA [business analyst] candidate they had ever see[n] - and we obviously had to extend him an offer . . . [o]bviously, we will need to accommodate due to client pressure, but we're going to have to handle this very carefully."

45. In or about mid-2007, JPMorgan-APAC created a position in New York to place the son into a one-year term position.

46. In May 2008, during the first year of the son's work at JPMorgan in New York, Chinese Official 1 requested that JPMorgan-APAC Employee 1 provide the son with another job after his one-year term position expired. On or about June 8, 2008, JPMorgan-APAC Employee 1 sent an e-mail discussing the business case for finding the referral candidate another position, which stated, in part:

> The father indicated to me repeatedly that he is willing to go extra miles to help JPM in whatever way we think he can. And I do have a few cases where I think we can leverage the father's connection. [G]iven the above, I'd like to discuss with you and seek your advice/support on how to handle the son in NY and leverage the father in China. Many thanks.

47. In or about July 2008, the New York Banker offered a position in his group to the referral candidate. On or about August 11, 2008, the New York Banker informed JPMorgan-APAC Employee 1: "I don't have the details of the incident but apparently last Friday when I was out of the office, [the referral] sent out an e-mail (which he inadvertently copied to an HR person), where he made some inappropriate sexual remarks."

48. After learning of the e-mail, various JPMorgan-APAC executives undertook to keep Chinese Official 1's son in the position. On or about August 12, 2008, the New

York Banker sent a follow up e-mail stating:

> [T]here is general consensus among the seniors in our group as well reports from people in his previous group that [the referral] is immature, irresponsible and unreliable. [A banker in the] European Clients Group with whom we share the analyst pool where [the referral] sits, is no longer willing to have [the referral] as part of the pool. That means that our Asia Group must take him on exclusively and in addition to all else, there is also concern about his reliability on confidentiality of client records/documents which means that we may not be able to let him have access to sensitive transactional records/documents.

49. The next day, the New York Banker e-mailed a colleague: "[A]s I suspected, we will need to manage this situation in our group for which I will need your input/support." Despite the referral's performance, he was kept on until his position was eliminated as part of a reduction in force exercise ten months later.

<u>JPMorgan-APAC's Use of Referral Hiring to Secure a Major Hong Kong IPO</u>

50. Beginning no later than in or about early 2009, Client 4 commenced the process for an IPO. JPMorgan-APAC was actively competing with other investment banks for a lead role on that IPO and had been informally pitching for such a role since 2007. When Client 4 went public in 2010, the IPO raised billions of dollars.

51. As part of pitching for a role in the Client 4 IPO, JPMorgan-APAC identified several key decision-makers at Client 4 who were understood to have significant influence over awarding roles in the IPO to the competing investment banks. One of these key decision-makers was Chinese Official 2.

52. On or about November 13, 2009, several months before JPMorgan-APAC submitted a formal proposal for the IPO, Chinese Official 2 e-mailed a letter to a JPMorgan- APAC Employee 1 and attached the resume of a referred candidate. This referred candidate wanted a position in JPMorgan's New York office. In e-mails, JPMorgan-APAC Employee 1 repeatedly described the referred candidate as Chinese Official 2's nephew, although in reality there was no blood relation between the referred candidate and Chinese Official 2. The referred candidate's father was an executive at a Chinese state-owned energy company, from which JPMorgan-APAC was also seeking business.

53. In or about late 2009, Chinese Official 2 communicated to JPMorgan-APAC Employee 1 that hiring the referred candidate would significantly influence the role JPMorgan-APAC would receive in Client 4's upcoming IPO. JPMorgan-APAC Employee 1 communicated this message to several senior colleagues, who understood that JPMorgan-APAC would receive a more significant and lucrative role in the IPO if JPMorgan-APAC hired the candidate referred by Chinese Official 2, and would risk losing the mandate if it did not make the hire.

54. On or about December 4, 2009, a JPMorgan-APAC executive e-mailed a colleague, who had received the November 12 letter from Chinese Official 2: "Spoke[n] with a few people who know [the referred candidate]. Unlikely to pass th[ro]ugh regular process." Indeed, in subsequent months, as the candidate referred by Chinese Official 2 pursued various jobs at JPMorgan, it became clear that he was not qualified for an investment banking job at JPMorgan. On or about December 9, 2009, one recruiter, for example, stated in an e-mail that "[relative] to other candidates, [the referral candidate's] technological and quantitative skills were light (this is an extremely quantitative position)."

55. On or about December 16, 2009, a JPMorgan-APAC banker e-mailed the New York Banker. The JPMorgan-APAC banker asked for assistance with hiring the referred candidate and stated that JPMorgan-APAC would "agree to fund [the referral] if necessary." Thereafter, the New York Banker arranged for multiple interviews for positions in New York for the candidate referred by Chinese Official 2.

56. In or about December 2009 and January 2010, JPMorgan-APAC executives received multiple inquiries and repeated pressure from Chinese Official 2 and another official to hire the candidate referred by Chinese Official 2. On or about December 22, 2009, JPMorgan-APAC Employee 1 e-mailed the New York Banker to offer his appreciation for the New York Banker's assistance and stated that the candidate's "father and his uncle have separately approached so many different people at J.P. Morgan."

57. On or about December 28, 2009, Chinese Official 2 sent a follow up e-mail to JPMorgan-APAC Employee 1 pushing for the hire of the referred candidate. On or about January 14, 2010, JPMorgan-APAC Employee 1 e-mailed his supervisor referring to a letter from "[Chinese Official 2] at [Client 4] pushing for a NY-based job position for his nephew." JPMorgan-APAC Employee 1 stated that:

> [T]o avoid any "complication", [Chinese Official 2] has asked to keep this confidential and particularly away from the '[Client 4] pitch team' But I have kept [a senior banker on the pitch team] in the loop . . . Would be great if you could give this a push in NY [Financial Institutions Group].

58. In a separate e-mail sent on or about January 14, 2010, JPMorgan-APAC Employee 1 forwarded the December 28th e-mail from Chinese Official 2 and stated: "Another letter from [Chinese Official 2] pushing for the same candidate. In between there have been several phone calls and sms from him." JPMorgan-APAC Employee 1 later e-mailed the New York Banker and told him, "I spoke with [the supervisor] last week about [the referred candidate] after his meeting with [Chinese Official 2]. He agreed to take this case to [another high-level banker] in NY himself. FYI only."

59. By the end of January 2010, JPMorgan-APAC employees attempting to find a job for the candidate referred by Chinese Official 2 had been unsuccessful. On or about January 21, 2010, a New York-based JPMorgan employee who had interviewed the

referred candidate reported that the candidate's "communication skills and his interest in Investment Banking lagged that of his peers. Based on the feedback, the FIG [Financial Institutions Group] New York team is not comfortable moving forward with an offer." After receiving pushback from the New York Banker to reconsider, the interviewer wrote:

> [T]he recruitment process for our analyst program in the Investment Bank is highly competitive. I have personally interviewed and interacted with dozens of highly talented analyst candidates that have had a more well-rounded skill-set than [the referred candidate] that we've also chosen not to pursue. In summary, [the referred candidate's] current skill-set falls short in some of the categories I mentioned above and I would recommend he pursue a different career track.

60. On or about January 22, 2010, the New York Banker received a follow up e-mail from a human-resources employee recommending that he "be honest with the individual (and the client) and let him know that we don't want to place him in a situation where it will be difficult to succeed and advise (and help) him pursue other opportunities that might be better 'fits' for his skill set and will provide a better opportunity to be successful."

61. The New York Banker did not deliver this message to the referred candidate or Chinese Official 2. Instead, JPMorgan-APAC bankers created a position for the referred candidate in the New York office funded out of JPMorgan-APAC's budget. On or about February 2, 2010, a JPMorgan-APAC banker leading the pitch for Client 4's IPO e-mailed three senior colleagues about the referral candidate:

> [W]e have now reached consensus among us to offer [the referred candidate] a one year fixed term position at [the New York Banker's] team in our new york office. We understand that you have been always supportive of this hire. it is time to ask your approval to proceed on that basis. [Chinese Official 2] called and sent sms to [JPMorgan-APAC Employee 1] and me several times to ask the status. If we can get this hire done soon, that will be very helpful.

62. On or about February 10, 2010, the firm hired the candidate referred by Chinese Official 2 and attributed the headcount to JPMorgan-APAC; no Compliance Questionnaire was submitted for this hire to Legal and Compliance.

63. Thereafter, in the second quarter of 2010, JPMorgan-APAC was selected as a joint bookrunner for Client 4's IPO. On or about June 7, 2010, JPMorgan-APAC Employee 1 sent an e-mail to the New York Banker: "I understand from his father that [the referred hire] will start today in office. His uncle [Chinese Official 2] did deliver [the Client 4] IPO and his father is helping us on a [different] ipo."

64. In or about mid-2010, a senior official at Client 4 informed a banker at one of

JPMorgan-APAC's competitors that the selection criteria for investment banks to underwrite the Client 4 IPO had included whether the investment bank had hired candidates referred by Client 4 officials.

65. On or about November 9, 2010, JPMorgan-APAC Employee 1 wrote in an e-mail to several JPMorgan-APAC executives that "[the referred hire] has been extremely helpful in our relationship with [Client 4]."

66. On or about January 26, 2011, JPMorgan-APAC Employee 1 wrote to a JPMorgan-APAC executive about the referred hire: "[t]his is the young analyst you met briefly. . . . He (and his family) has been instrumental in helping us on both the [Client 4] IPO and [an energy company] IPO. His father is also helping us on [other energy companies] at the moment as well."

67. JPMorgan-APAC received profits of at least $23.8 million as a result of the Client 4 IPO.

Corporate crime problems can tend towards contagion within industries. That seems to particularly be a tendency in the financial services industry. For example, in October of 2019, investigative journalists reported a scheme by Deutsche Bank to win business through mass bribery of Chinese political elites.[2] Beyond million-dollar payouts to Chinese consultants, Deutsche Bank also gave Chinese officials luxury goods such as a $15,000 crystal horse, a $4,000 bottle of French wine, and Louis Vuitton products totaling $22,000. The Deutsche Bank affair led to a civil enforcement settlement with the SEC somewhat similar to the DOJ settlement in the JP Morgan matter.[3]

The following is another high-profile recent FCPA matter involving perhaps the world's most familiar name in financial institutions, Goldman Sachs. The example provides perhaps a more paradigmatic picture of bribery in the conduct of business in a developing economy. The matter was resolved through settlements with various enforcers, including a settlement with DOJ that included a guilty plea by a regional subsidiary and a deferred prosecution agreement with the parent company, Goldman Sachs. To see the nature of the FCPA violations, here is a portion of the agreed statement of facts that was appended to the settlement agreements.

[2] For the details, see Michael Forsythe, David Enrich, & Alexandra Stevenson, *Inside a Brazen Scheme to Woo China: Gifts, Golf and a $4,254 Wine*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/business/deutsche-bank-china.html.

[3] For the details, see https://www.sec.gov/litigation/admin/2019/34-86740.pdf.

ATTACHMENT A

STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Deferred Prosecution Agreement (the "Agreement") between the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") and Money Laundering and Asset Recovery Section ("MLARS"), and the United States Attorney's Office for the Eastern District of New York (the "Office") (collectively, the "United States"), and the defendant, The Goldman Sachs Group, Inc. (together with its wholly-owned subsidiaries and affiliated entities, "Goldman" or the "Company"). Goldman hereby agrees and stipulates that the following facts and conclusions of law are true and accurate. Certain of the facts herein are based on information obtained from third parties by the United States through its investigation and described to Goldman. Goldman admits, accepts, and acknowledges that it is responsible for the acts of its officers, directors, employees and agents as set forth below. Should the United States pursue the prosecution that is deferred by this Agreement, Goldman agrees that it will neither contest the admissibility of, nor contradict, this Statement of Facts in any such proceeding. The following facts took place during the relevant time period, unless otherwise noted, and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to the Agreement.

1. From in or about and between 2009 and at least 2014 (the "relevant time period"), Goldman was a global investment banking, securities and investment management firm incorporated in Delaware and headquartered in New York, New York. Accordingly, during the relevant time period, Goldman was a "United States person" as that term is used in the Foreign Corrupt Practices Act ("FCPA"), Title 15, United States Code, Section 78dd-1(g). Goldman had a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 (Title 15, United States Code, Section 78l) and was required to file periodic reports with the U.S. Securities and Exchange Commission ("SEC"). Accordingly, during the relevant time period, Goldman was an "issuer" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-1. Goldman operated worldwide primarily through wholly-owned subsidiaries and affiliated entities. Goldman and its subsidiaries and affiliated entities, combined, had approximately 38,000 employees.

2. Goldman Sachs (Malaysia) Sdn. Bhd. ("Goldman Malaysia") was a wholly-owned subsidiary and agent of Goldman. Goldman Malaysia was incorporated in Malaysia and had offices in Kuala Lumpur. Goldman Malaysia's records and accounts were included in Goldman's consolidated financial statements to the SEC. Goldman Malaysia also received revenue related to the relevant transactions described more fully below. During the relevant time period, Goldman Malaysia and its employees and directors were agents of an "issuer" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-1.

3. Goldman Sachs (Singapore) Pte., Goldman Sachs International, Goldman Sachs

Bank USA, Goldman Sachs & Co. L.L.C. and Goldman Sachs (Asia) L.L.C. are each Goldman subsidiaries, and they and their employees were agents of Goldman that assisted in carrying out business around the world, including the relevant transactions and conduct set forth herein. During the relevant time period, Goldman Sachs (Asia) L.L.C. was incorporated in Delaware, had offices in Hong Kong and was a "domestic concern" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-2, and a "United States person" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-2(i).

4. Tim Leissner ("Leissner") was employed by various Goldman subsidiaries and acted as an agent and employee of Goldman with respect to the transactions and conduct set forth herein. Leissner was employed by Goldman from in or about and between 1998 and 2016, and was a Participating Managing Director ("PMD") from in or about and between November 2006 and February 2016. Additionally, he held various senior positions in Goldman's Investment Banking Division in Asia from in or about and between 2011 and 2016, including Chairman of Southeast Asia, a region that included Malaysia, from in or about and between July 2014 and February 2016, and he served on the Board of Directors for Goldman Malaysia. Leissner's job included obtaining and executing business for Goldman. During the relevant time period, with respect to the transactions and conduct set forth herein, Leissner was an employee and agent of an "issuer" and a "domestic concern" as those terms are used in the FCPA, Title 15, United States Code, Sections 78dd-1(a) and 78dd-2(a).

5. Ng Chong Hwa, also known as "Roger Ng" ("Ng"), was employed by various Goldman subsidiaries from in or about and between 2005 and 2014, including Goldman Malaysia, and acted as an agent and employee of Goldman with respect to the transactions and conduct set forth herein. In or about and between April 2010 and May 2014, Ng was a Managing Director ("MD") of Goldman. For part of that time, Ng served as Head of Investment Banking and on the Board of Directors for Goldman Malaysia, and was then employed by another Goldman subsidiary in Malaysia. Ng worked with Leissner on the relevant transactions, and his job included obtaining and executing business for Goldman. During the relevant time period, Ng was an employee and agent of an "issuer" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-1(a).

6. "Employee 1," an individual whose identity is known to the United States and the Company, was employed by at least one Goldman subsidiary, and acted as an agent and employee of Goldman. In or about and between October 2007 and November 2018, Employee 1 served as a PMD and, during the relevant time period, held various leadership positions in Goldman's Asia operations. Employee 1 worked with Leissner and Ng on the relevant transactions. During the relevant time period, Employee 1 was an employee and agent of an "issuer" as that term is used in the FCPA, Title 15, United States Code, Section 78dd-1(a).

7. 1Malaysia Development Berhad ("1MDB") was a strategic investment and

development company wholly owned by the Government of Malaysia through its Ministry of Finance (“MOF”). It was formed in or about 2009 to pursue investment and development projects for the economic benefit of Malaysia and its people, primarily relying on debt to fund these projects. 1MDB was overseen by senior Malaysian government officials, was controlled by the Government of Malaysia and performed a function on behalf of Malaysia. During the relevant time period, 1MDB was an “instrumentality” of a foreign government, as that term is used in the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1), 78dd-2(h)(2), 78dd- 3(f)(2).

8. International Petroleum Investment Company (“IPIC”) was an investment fund wholly owned by the Government of Abu Dhabi. It was established by the Government of Abu Dhabi and was overseen by senior Abu Dhabi government officials, was controlled by the Government of Abu Dhabi and performed a government function on behalf of Abu Dhabi. During the relevant time period, IPIC was an “instrumentality” of a foreign government, as that term is used in the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

9. Aabar Investments PJS (“Aabar”) was a private joint stock company incorporated under the laws of Abu Dhabi, and a subsidiary of IPIC. During the relevant time period, Aabar was an “instrumentality” of a foreign government, as that term is used in the FCPA, Title 15, United States Code, Sections 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2). . .

10. During the relevant time period, Low Taek Jho, also known as “Jho Low” (“Low”), was a Malaysian national who worked as an intermediary in relation to 1MDB and other foreign government officials on numerous financial transactions and projects involving Goldman and others. . . .

11. In or about and between 2009 and 2014, Goldman, through certain of its agents and employees, together with others, knowingly and willfully conspired and agreed with others to corruptly provide payments and things of value to, or for the benefit of, foreign officials and their relatives to induce those foreign officials to influence the decisions of 1MDB, IPIC and Aabar to obtain and retain business for Goldman, including positions as an advisor to 1MDB on the acquisitions of Malaysian energy assets, underwriter of the 1MDB bonds, and underwriter of certain other 1MDB business, including the contemplated initial public offering (“IPO”) of 1MDB’s Malaysian energy assets. Leissner, Ng and Employee 1 used Low’s connections within the Governments of Malaysia and Abu Dhabi to obtain and retain this and other business for Goldman and, in turn, concealed Low’s involvement in the deals from certain employees and agents of Goldman. In total, Goldman conspired to provide approximately $1.6077 billion to, or for the benefit of, foreign officials and their relatives, of which approximately $18.1 million was paid from accounts controlled by Leissner.

12. The bribes resulted in Goldman being engaged on, among other projects, three bond offerings that were related to 1MDB’s energy acquisitions and that raised a total of approximately $6.5 billion for 1MDB in 2012 and 2013. The bribes were also intended

to help Goldman secure a role on the anticipated IPO of those energy assets. These three bond offerings and a related acquisition, along with a transaction involving Low and IPIC, ultimately earned Goldman in excess of $600 million in fees and revenue across its divisions, and increased Goldman's stature in Southeast Asia. In the course of this scheme, payments and communications made in furtherance of the scheme were made via wires that passed through the Eastern District of New York.

13. Pursuant to Goldman's internal accounting controls, each 1MDB bond transaction required Goldman management's general and specific authorization. Moreover, because Goldman initially purchased the full value of each bond from 1MDB using Goldman's assets, the transactions needed to be appropriately authorized and properly recorded. Among other things, Goldman's internal accounting controls included the Firmwide Capital Committee ("FWCC"), which was authorized by Goldman's Chief Executive Officer to provide global oversight and approval of bond transactions, including those transactions in which Goldman used its own assets to purchase the financial instruments, like the 1MDB bonds. Goldman's internal accounting controls also included approval of the bonds by Goldman's Business Intelligence Group ("BIG") and compliance, both of which were represented on the FWCC. While certain of Goldman's employees and agents, including Leissner, Ng and Employee 1, circumvented these and other controls, other Goldman employees and agents who were responsible for implementing its internal accounting controls failed to do so in connection with the 1MDB bond deals. Specifically, although employees serving as part of Goldman's control functions knew that any transaction involving Low posed a significant risk, and although they were on notice that he was involved in the transactions, they did not take reasonable steps to ensure that Low was not involved. Additionally, there were significant red flags raised during the due diligence process and afterward, including, but not limited to, Low's involvement in the deals, that were either ignored or only nominally addressed so that the transactions would be approved and Goldman could continue to do business with 1MDB.

14. In or about 2009, Leissner and Ng were introduced to Low, who was known to be close to various high-ranking officials in Malaysia and Abu Dhabi, and through Low began cultivating relationships with Malaysian Official 1 and others to secure business for Goldman.

15. In or about January 2009, Leissner and Ng discussed with Low and others a role for Goldman in the creation of and potential fundraising for Terengganu Investment Authority ("TIA"), 1MDB's predecessor entity.

16. Leissner and Ng also attempted to onboard Low as a Goldman client, or otherwise work with Low, on numerous occasions in or about and between 2009 and 2013. For example, in or about September 2009, Ng referred Low for a private wealth management account ("PWM") through a Goldman European subsidiary. Ng described Low as "our partner in a lot of transactions in [M]alaysia. Largely the mid-east and [M]alaysia rationship [sic]." As part of the onboarding process, Goldman's control

functions, including BIG, vetted Low's finances and raised questions about his source of wealth. As control functions personnel worked to diligence those questions about Low, the business side continued to pressure them to approve Low as a client. In a March 13, 2010 email, a Goldman regional head of compliance wrote to a high-level BIG executive and others, expressing frustration with the pressure to approve Low and underscoring the red flags Low raised as a client:

> This has been an exceptionally trying experience I have to admit, and I believe that no matter what we do [Goldman PWM representative] is not willing to accept that we are not in a position to onboard this prospect . . . I do not believe we will ever be able to get comfortable with this matter. I'd like to shut this down once and for all . . . It is seldom that one sees a vendor report, which has been backed up verbally by them, that so clearly states that we should exercise extreme caution.

17. Ultimately, BIG personnel rejected Low as a Goldman client because of his inability to satisfactorily answer questions raised by Goldman's control functions, as well as negative news coverage about Low's lavish spending. Notwithstanding this rejection, there were additional attempts to onboard Low and his companies as a Goldman client.

18. For example, in early 2011, Leissner tried to onboard two of Low's companies as clients of Goldman but was unable to do so due to compliance's continued objections to Low.

19. Around the same time, Leissner made an additional attempt to bring Low on as a PWM client through Goldman's Singapore office, without referencing the prior attempt. Low was again denied due to, among other things, his questionable source of wealth. In a March 11, 2011 email chain discussing the attempt, a high-ranking employee in compliance and MD noted, "To be clear, we have pretty much zero appetite for a relationship with this individual," and a high-ranking employee in BIG and MD expressed, "this is a name to be avoided."

20. Even after the control functions had rejected Low as a client, Leissner, Ng and others at Goldman continued their relationship with Low and used him to obtain and retain business for Goldman from 1MDB and others. In or about and between 2012 and 2013, Leissner, Ng, Employee 1 and other Goldman employees worked with Low to help 1MDB raise more than $6.5 billion via three separate bond offering transactions, referred to internally at Goldman as "Project Magnolia," "Project Maximus" and "Project Catalyze," respectively.

21. In or about February 2012, 1MDB engaged Goldman as its financial advisor for its anticipated purchase of a Malaysian energy company ("Malaysian Energy Company A"). Low helped secure Goldman's role in that transaction.

22. On or about January 23, 2012, Low arranged a meeting between Leissner, Ng

and a high-ranking 1MDB official. In making the arrangements, Low emailed all three at their personal email addresses, and stated "Making an introduction to [Leissner] and [Ng]'s private e-mail accounts [….] Please exclude me from the e-mail list going forward." Thereafter, Leissner and Ng worked with the high-ranking 1MDB official on the potential purchase of Malaysian Energy Company A.

23. 1MDB was also interested in raising funds to acquire Malaysian Energy Company A, including through a bond transaction. In or about early 2012, Leissner, Ng, 1MDB Official 1, 1MDB Official 3, Low and others met in Malaysia to discuss the necessity of a guarantee from IPIC to make the bond transaction feasible for Goldman, which would purchase all of the bonds initially, and then sell the bonds to other investors.

24. In or about February 2012, Leissner and Ng traveled to London to meet with Low and others to discuss the proposed bond transaction. Leissner and Ng utilized Goldman resources to fund their travel to London.

25. At that meeting, Low explained that government officials from Abu Dhabi and Malaysia needed to be bribed to both obtain the guarantee from IPIC and get the necessary approvals from Malaysia and 1MDB. Low advised that a high-ranking official of IPIC ("IPIC Official 1") and Malaysian Official 1 needed to be paid the largest bribes out of all the government officials to approve the transaction, and that other lower-level officials would need to be bribed as well.

26. Subsequently, Leissner and Ng each separately informed Employee 1 about the information they had learned at the London meeting regarding the need to bribe foreign officials.

27. Low also promised remuneration to various 1MDB officials to facilitate the deals and to ensure Goldman's role in those deals. For example, on or about March 8, 2012, 1MDB Official 1 emailed himself a copy of an online chat he had with Low on or about March 8, 2012, in which they discussed, among other things, Malaysian Energy Company A. In that chat, Low told 1MDB Official 1 that he would give 1MDB Official 1 a "big present" when the Malaysian Energy Company A transaction was completed and then directed 1MDB Official 1 to "delete from email and destroy once done."

28. On or about March 5, 2012, Leissner, Ng, Employee 1, Low and others traveled to Abu Dhabi to meet with IPIC and Aabar representatives regarding the potential debt financing that would assist 1MDB in raising funds for the acquisition of Malaysian Energy Company A. During the same trip, Low arranged a meeting between Leissner and IPIC Official 1, during which Leissner delivered a letter from Malaysian Official 1 addressed to IPIC Official 1.

29. On or about March 19, 2012, 1MDB formally chose Goldman as the "sole bookrunner and arranger" for the $1.75 billion debt financing transaction designed, in part, to pay $822 million towards Malaysian Energy Company A's acquisition. IPIC was chosen to serve as guarantor on the bond and Aabar was granted certain options by the

1MDB issuer for assistance in securing the guarantee.

30. One of Goldman's goals in pursuing this transaction was to secure more business for itself, including a role in the potential IPO of 1MDB's energy assets, as explicitly stated in Goldman's FWCC memorandum circulated during the approval process for Project Magnolia: "Post closing, we expect significant follow on business from 1MDB and 1MDB Energy[,] including the IPO of 1MDB Energy."

31. As work progressed on Project Magnolia, between on or about March 25, 2012 and on or about March 29, 2012, Leissner and Ng traveled to Los Angeles, California and New York, New York to discuss matters related to Project Magnolia with Low and others. Leissner and Ng traveled using Goldman resources.

32. Meanwhile, although employees within Goldman's control functions suspected that Low may be involved in the deal, the only step taken by the control functions to investigate that suspicion was to ask members of the deal team whether Low was involved and to accept their denials without reasonable confirmation.

33. For example, during a telephone call in or about March 2012, a high-ranking employee in BIG and MD voiced suspicions that Low was involved in Project Magnolia. Leissner denied that Low was involved. Similarly, on or about April 3, 2012, the day before a FWCC meeting to discuss Project Magnolia, a high-ranking executive in BIG, who was also an advisor to the FWCC ("Employee 2"), emailed other members of BIG that "Leissner said Jho Low not involved at all in deal as far as he [is] aware but that Low was present when Leissner met [IPIC Official 1] in Abu Dhabi."

34. On or about April 4, 2012, the FWCC meeting was held, which was attended telephonically by Goldman executives in New York, New York. During this meeting, Leissner was asked whether Low was involved in Project Magnolia and Leissner said that, other than arranging a meeting between Leissner and IPIC Official 1, Low was not involved. Ng was also present during this meeting and did not correct Leissner's false statement about Low's involvement. Later that same day, after the FWCC meeting, Employee 2 emailed Leissner, stating "I was told Jho Low attended the meeting you had with [IPIC Official 1] . . . that was wrong." Leissner responded that he "hand delivered a letter by the Prime Minister of Malaysia to [IPIC Official 1] and the Crown Prince." Employee 2 replied, "I guess Low will have had a hand in fixing that you were able to carry the letter from the Malaysian PM . . . Important we have no role on our side for Low and we should ask that any payments from any of [the] participants to any intermediaries are declared and transparent." Leissner agreed with Employee 2's admonishment.

35. Goldman's control functions accepted the statements of the deal team members about Low's involvement at face value, rather than taking additional steps that Goldman's control functions took in other deals, such as reviewing the electronic communications of members of the deal team to look for evidence of Low's involvement (e.g., searching for references to Low). For example, had Goldman conducted a review

of Leissner's electronic communications at this time, it would have discovered multiple messages linking Low to, among others, the bond deal, 1MDB officials, Malaysian Official 1 and Abu Dhabi Official 1, as well as the use of personal email addresses by Leissner and Ng to discuss Goldman business.

36. During this time period, Low, Leissner and Ng continued to structure the bribery scheme. Leissner and Ng ultimately understood that Low intended to use the funds raised through Project Magnolia to pay bribes, and cause bribes to be paid, to foreign officials in Malaysia and Abu Dhabi to influence those officials to obtain the necessary approvals and assistance for Goldman to execute Project Magnolia.

37. On or about May 16, 2012, Goldman's committees approved Project Magnolia, and on or about May 21, 2012, the $1.75 billion bond issuance closed. Goldman purchased the entire bond issuance from 1MDB.

38. On or about May 22, 2012, Goldman caused approximately $907,500,000 in proceeds from Project Magnolia to be wired to a 1MDB subsidiary ("1MDB Subsidiary 1"), through a correspondent bank account in New York, New York. Goldman booked approximately $192,500,000 in fees for this bond transaction and an additional approximately $16,800,000 in fees for advising on the acquisition of Malaysian Energy Company A. . . .

39. Within weeks of closing Project Magnolia, in or about May 2012, 1MDB sought assistance from Goldman to purchase a second Malaysian energy company ("Malaysian Energy Company B") and to issue a bond to raise funds for the acquisition. In or about August 2012, 1MDB agreed to purchase Malaysian Energy Company B for approximately $814 million and planned to finance the purchase with another $1.75 billion bond guaranteed indirectly by IPIC.

40. Once again, Goldman's control functions simply accepted at face value the representations of the deal team members and failed to further investigate Low's suspected involvement in this bond deal. For example, on or about June 20, 2012, a member of Goldman's control functions asked members of the deal team, "Is Jho Low involve[d] in this transaction? Please also keep us posted if there are any other politically exposed person involve[d] in this transaction in a non-official capacity." A deal team member responded "no."

41. Additionally, on or about October 10, 2012, in response to committee questions, Leissner told a firmwide committee that neither Low nor any intermediary was involved in Project Maximus. Despite their continued concern, as evidenced by their repeated questions, Goldman's control functions did not engage in electronic surveillance of Leissner's correspondence or activities to determine whether Low was involved in the deal.

42. Goldman's continued control failures were further compounded when Goldman ignored additional red flags raised by Project Maximus, including that 1MDB was

seeking to raise additional funds within a few months of raising $1.75 billion via Project Magnolia without having utilized the full amount from that deal, and was also seeking to raise far more than was needed to acquire Malaysian Energy Company B. Goldman's control functions also failed to verify how Project Magnolia's proceeds were used.

43. On or about October 19, 2012, Project Maximus closed. Goldman purchased the entire bond issuance from 1MDB. On or about October 19, 2012, Goldman caused approximately $1.64 billion to be transferred via wire through correspondent accounts in the United States to another 1MDB subsidiary ("1MDB Subsidiary 2"). Goldman booked approximately $110,000,000 in fees for Project Maximus. . . .

44. Leissner then directed follow-on transfers from Holding Company 2 Account to government officials and others. For example, on or about December 4, 2012, Leissner emailed his close relative from his personal account with bank account details and amounts to be wired from Holding Company 2 Account to Malaysian Official 2, 1MDB Official 4 and 1MDB Official 5. On or about January 15, 2013, Leissner again emailed his close relative from his personal account, correcting some banking information and adding a transfer to 1MDB Official 2. . . .

45. In or about November 2012, almost immediately after Project Maximus closed, Leissner and Low began working on another bond issuance. Ultimately, Goldman underwrote a third bond issuance that raised an additional $3 billion for 1MDB with Goldman acting as arranger and underwriter. This bond issuance was purportedly intended to fund 1MDB's portion of a joint venture with Aabar.

46. Goldman's control functions had continued suspicions that Low was working on the third bond deal. Once again, however, the control functions relied solely on the deal team members' denials of Low's involvement without any further scrutiny.

47. On or about April 24, 2013, a senior Goldman executive who was a member of Goldman's approval committee located in New York, New York, emailed Leissner about "1MDB," asking: "Is there a story circulating about an intermediary on the Magnolia trades??" Leissner responded, "Not that I am aware of . . . There definitely was no intermediary on any of the trades. The blogs in Malaysia always try to link a young Chinese business man [sic], Jho Low, to 1MDB. That is not the case other than he was an advisor alongside other prominent figures to the King of Malaysia at the time of the creation of 1MDB." There was no follow-up by Goldman's control functions about Low.

48. Goldman also failed to address the other red flags that were raised by the proposed $3 billion transaction, including, once again, 1MDB raising large sums of money with no identified use of proceeds within months of Project Magnolia and Project Maximus, and Goldman's failure to verify use of past bond proceeds. Adding to the transaction's risks was the upcoming Malaysian general election, which directly affected the political future of Malaysian Official 1.

49. Goldman's committees nevertheless approved Project Catalyze on or about

March 13, 2013, and the proceeds from Project Catalyze were issued on or about March 19, 2013. Goldman purchased the entire bond issuance from 1MDB and booked approximately $279,000,000 in fees on Project Catalyze.

50. Low and Leissner continued to pay bribes to government officials from the bond proceeds. On or about March 19, 2013, Goldman transferred via wire from and through the United States approximately $2.7 billion from Project Catalyze to an account for another 1MDB subsidiary ("1MDB Subsidiary 3") at Foreign Financial Institution A. Subsequently, Low caused approximately $1,440,188,045 to be transferred through a series of pass-through accounts to accounts beneficially owned or controlled by Low and Individual 1. Low then directed multiple transfers to various government officials. . . .

51. After the bond deals were complete, Goldman continued to pursue 1MDB business, including a role in the anticipated 1MDB Energy IPO. In the pursuit of that additional business, in or about September 2013, Goldman hosted a roundtable in New York for Malaysian Official 1. Several senior Goldman executives, Leissner, Low, 1MDB Official 3 and others were scheduled to attend this meeting, though Low did not ultimately attend. However, during that trip, a New York jeweler ("Jeweler 1") met with Low and the wife of Malaysian Official 1 in a hotel suite at the Mandarin Oriental Hotel in New York, New York, to show the wife of Malaysian Official 1 a piece of expensive jewelry that Jeweler 1 had designed for her at Low's request.

52. On or about January 13, 2014, 1MDB invited Goldman to submit a proposal to provide services to 1MDB in connection with the IPO. Goldman worked on the proposed IPO through 2014, during which time Low and Leissner continued to make or promise corrupt payments to government officials, including from Project Catalyze's misappropriated proceeds.

53. On or about June 2, 2014, Leissner sent an email to himself at his personal email account containing a chat between himself and Low in which the two discussed 1MDB business opportunities that Goldman was trying to win at the time, including the IPO. Specifically, they discussed how to manage officials at 1MDB to steer additional business to Goldman, including getting Goldman to serve as a Joint Global Coordinator for the IPO.

a. For example, Low stated that 1MDB Official 2 and another high- ranking 1MDB official were unhappy with Goldman for not "deliver[ing]" a loan to 1MDB in 2013, which was ultimately provided by Foreign Financial Institution F. As a result, according to Low, 1MDB would only give Goldman a more limited role in the IPO. Leissner responded that he "would have delivered" the loan, and expressed frustration that Goldman was concerned about issues related to 1MDB's delayed financial reporting at the time, declaring "Committee is stupid!!!"

b. Low and Leissner then agreed that Leissner would "babysit" 1MDB Official 2 and the high-ranking 1MDB official, and Low would "manage via [1MDB Board of Directors]." Leissner also noted that neither named official provided "much of value" but that they "need[ed] to suck up to them."

c. Low and Leissner also discussed sending "cakes" to "madam boss" and Low asked if he could transfer money to Management Company 1 Account so that Leissner could "settle madam cakes 2." Low asked Leissner, "Do u mind if funds go [from] [Shell Company 1] to u [sic] direct at [Management Company 1]? Or u [sic] think too sensitive?" Leissner responded, "[Shell Company 1] is ok too. But need to get it out asap. Best today. Because I am seriously in trouble."

d. Low and Leissner further discussed Leissner's continued efforts to onboard Low as a formal Goldman client. Leissner explained he would "push harder" for Low once Leissner was confirmed as Goldman's Southeast Asia Chairman of the Investment Banking Division.

54. On or about June 2, 2014, approximately $1.215 million was transferred from Shell Company Account 8 to Management Company 1 Account.

55. On or about October 10, 2014, Leissner caused approximately $4.1 million to be transferred from Management Company 1 Account to Jeweler 1 in New York, New York, in part to pay for approximately $1.3 million in jewelry that had been purchased on or about January 3, 2014 by the wife of Malaysian Official 1 while she, Malaysian Official 1 and Low were in the United States.

56. On or about October 14, 2014, Leissner transferred approximately $600,000 from Holding Company 2 Account to an account beneficially owned and controlled by Abu Dhabi Official 2 and his close relative.

57. Also on or about October 14, 2014, Leissner transferred approximately $3.5 million from Holding Company 2 Account to the business account of an associate of Malaysian Official 1's relative.

58. After the bond deals were completed, in or about and between March 2013 and February 2016, additional red flags were raised in the press and on internal phone calls among Goldman's employees and executives about Low's involvement in the deals and the possible payment of bribes in connection with the deals. Goldman failed to investigate these red flags or to perform an internal review of its role in the bond deals despite the clear implication that the deals had involved criminal wrongdoing. Further, high ranking employees of Goldman failed to escalate concerns about bribery and other criminal conduct related to the bond deals pursuant to Goldman's escalation policy, which required that any Goldman employee who became aware of any conduct that could raise, among others, "a legal, compliance, reputational, ethical, accounting, [or] internal accounting control" issue to report such conduct immediately to a supervisor and Goldman's control functions.

59. Specifically, in or about May 2013, a Goldman PMD ("Employee 3") who had been involved in the 1MDB deals, discussed the deals in a series of phone calls with Goldman senior executives that were recorded on Goldman phone lines. For example,

on or about May 8, 2013, Employee 3 called a senior Goldman executive about, among other things, Project Catalyze. Employee 3 stated, "the main reason for the delay for [IPIC] not having funded their three billion into the JV with 1MDB is [Abu Dhabi Official 1] is trying to get something on the side in his pocket." He continued later, "I think it's quite disturbing to have come across this piece of information . . . ." The senior Goldman executive replied, "What's disturbing about that? It's nothing new, is it?" In response, Employee 3 agreed that the situation was nothing new. Employee 3 had at least one substantially similar phone conversation with at least one other senior Goldman executive.

60. Subsequently, in May 2015 and again in October 2015, amid negative media reporting linking Low with the 1MDB bond deals and Malaysian Official 1, Goldman executives and employees discussed Low's involvement in the 1MDB deals. For example, on a recorded call on or about October 13, 2015, Employee 3 told the senior Goldman executive that a senior IPIC officer had informed his subordinate that "there are a number of key people who are involved in, let's call it the situation. [Abu Dhabi Official 1] is one. Jho Low for sure. He thinks Jho Low is the leader of the pack. And he has a very strong view that [Leissner] is involved." The control functions never took steps to address these red flags.

61. There were also subsequent emails and recorded phone calls between Employee 3 and senior Goldman executives in the control functions about the disparity between how due diligence and risk issues were handled on various deals. In particular, they discussed the unusual latitude granted to certain employees, such as Leissner and Employee 1.

62. For example, in or about January 2016, on a recorded call between Employee 2, who had been involved in BIG's review of each of the relevant transactions, and Employee 3, they discussed, among other things, Leissner's conduct, including Leissner's false statements that Low was not involved in the 1MDB deals. Employee 2 then noted that there were several similarly "problematic" people from a compliance perspective at Goldman, and Employee 3 agreed, immediately mentioning Employee 1 as an example of a "problematic" person. Employee 3 also noted the "double standard" between the minor repercussions meted out to favored employees like Leissner and Employee 1 when they got caught trying to circumvent the control functions, and the more serious repercussions to other, less favored employees who engaged in similar behavior. Employee 2 agreed, stating, "Yes, double standard, and it looks stupid." In the course of the call, Employee 2 also noted that Leissner's email communications had been searched as part of an internal investigation into a separate incident involving the use of an intermediary that occurred subsequent to the 1MDB deals, which Employee 2 stated "seems to me should have been done ages ago." Employee 3 similarly discussed on a recorded call in or about February 2016 with a high-ranking employee in compliance and MD how repercussions for control functions violations varied radically between deals. . . .

In the Goldman 1MDB affair, Timothy Leissner pled guilty and agreed to testify for the government. In the spring of 2022, the government proceeded to trial against former Goldman employee Roger Ng. Leissner's days of testimony at Ng's trial were jaw-dropping in their details—recounting one of the most dishonest and craven courses of conduct ever disclosed from within the walls of a large financial institution. Leissner even lied to women to get them to marry him while he was already married, supporting his story with photoshopped divorce papers! For some reading for the curious, start with these: https://www.ft.com/content/829f619d-7a9c-4c4b-9e1d-82ee8706e085 (Financial Times); https://www.nytimes.com/2022/03/01/business/goldman-sachs-1mdb-leissner.html (New York Times). The jury appeared not to hesitate in convicting Ng.

D. DOJ Enforcement Policy

The volume of FCPA enforcement actions increased so substantially in the 2010s that the Justice Department developed the following supplemental corporate prosecution guidelines for FCPA cases, which (1) more clearly centralize FCPA enforcement within "Main Justice" and (2) specify in more detail what corporations must do to earn sanction reductions or qualify for a potential declination of prosecution. In 2019, the Department stated that it intended to follow this approach as "nonbinding" in all corporate criminal cases.[4] So this is, at least until DOJ next issues new policy guidance, an important document.

U.S. DEPARTMENT OF JUSTICE, JUSTICE MANUAL [Updated FCPA Policy 2019]

9-47.100. Introduction

This chapter contains the Department's policy regarding investigations and prosecutions of violations of the Foreign Corrupt Practices Act (FCPA). The FCPA prohibits both United States and foreign corporations and nationals from offering or paying, or authorizing the offer or payment, of anything of value to a foreign government official, foreign political party, party official, or candidate for foreign public office, or to an official of a public international organization in order to obtain or retain business. In addition, the FCPA requires publicly-held United States companies to make and keep books and records which, in reasonable detail, accurately reflect the disposition of company assets and to devise and maintain a system of internal accounting controls sufficient to reasonably assure that transactions are authorized, recorded accurately, and periodically reviewed.

Further guidance on the FCPA is available in *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012), published by the Criminal Division of the U.S.

[4] *See* Alan Friedman, Darren LaVerne & Gary Naftalis, *DOJ Criminal Division Announces FCPA Corporate Enforcement Policy Provides Nonbinding Guidance for All Criminal Cases*, JDSUPRA (Mar. 9, 2018), https://www.jdsupra.com/legalnews/doj-criminal-division-announces-fcpa-43249.

Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, available at:

https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

9-47.110. Policy Concerning Criminal Investigations and Prosecutions of the Foreign Corrupt Practices Act

No investigation or prosecution of cases involving alleged violations of the antibribery provisions of the Foreign Corrupt Practices Act (FCPA) of 1977 (15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3) or of related violations of the FCPA's record keeping provisions (15 U.S.C. § 78m(b)) shall be instituted without the express authorization of the Criminal Division.

Any information relating to a possible violation of the FCPA should be brought immediately to the attention of the Fraud Section of the Criminal Division. Even when such information is developed during the course of an apparently unrelated investigation, the Fraud Section should be notified immediately. Close coordination of such investigations and prosecutions with the United States Securities and Exchange Commission (SEC) and other interested agencies is essential. Additionally, the Department has established a FCPA Opinion Procedure concerning proposed business conduct. *See* A Resource Guide to the U.S. Foreign Corrupt Practices Act at 86.

Unless otherwise agreed upon by the AAG, Criminal Division, investigations and prosecutions of alleged violations of the antibribery provisions of the FCPA will be conducted by Trial Attorneys of the Fraud Section. Prosecutions of alleged violations of the record keeping provisions, when such violations are related to an antibribery violation, will also be conducted by Fraud Section Trial Attorneys, unless otherwise directed by the AAG, Criminal Division.

The investigation and prosecution of particular allegations of violations of the FCPA will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. In addition, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. For these reasons, the need for centralized supervision of investigations and prosecutions under the FCPA is compelling.

9-47.120. FCPA Corporate Enforcement Policy

1. Credit for Voluntary Self-Disclosure, Full Cooperation, and Timely and Appropriate Remediation in FCPA Matters

Due to the unique issues presented in FCPA matters, including their inherently international character and other factors, the FCPA Corporate Enforcement Policy is aimed at providing additional benefits to companies based on their corporate behavior once they learn of misconduct. When a company has voluntarily self-disclosed misconduct in an FCPA matter, fully cooperated, and timely and appropriately remediated, all in accordance with the standards set forth below, there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. Aggravating circumstances that may warrant a criminal resolution include, but are not limited to, involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism.

If a criminal resolution is warranted for a company that has voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated, the Fraud Section:

- will accord, or recommend to a sentencing court, a 50% reduction off of the low end of the U.S. Sentencing Guidelines (U.S.S.G.) fine range, except in the case of a criminal recidivist; and
- generally will not require appointment of a monitor if a company has, at the time of resolution, implemented an effective compliance program.

To qualify for the FCPA Corporate Enforcement Policy, the company is required to pay all disgorgement, forfeiture, and/or restitution resulting from the misconduct at issue.

2. <u>Limited Credit for Full Cooperation and Timely and Appropriate Remediation in FCPA Matters Without Voluntary Self-Disclosure</u>

If a company did not voluntarily disclose its misconduct to the Department of Justice (the Department) in accordance with the standards set forth above, but later fully cooperated and timely and appropriately remediated in accordance with the standards set forth above, the company will receive, or the Department will recommend to a sentencing court, up to a 25% reduction off of the low end of the U.S.S.G. fine range.

3. <u>Definitions</u>

a. *Voluntary Self-Disclosure in FCPA Matters*

In evaluating self-disclosure, the Department will make a careful assessment of the circumstances of the disclosure. The Department will require the following items for a company to receive credit for voluntary self-disclosure of wrongdoing:

- The voluntary disclosure qualifies under U.S.S.G. § 8C2.5(g)(1) as occurring "prior to an imminent threat of disclosure or government investigation";
- The company discloses the conduct to the Department "within a reasonably prompt time after becoming aware of the offense," with the burden being on the company to demonstrate timeliness; and

- The company discloses all relevant facts known to it, including all relevant facts about all individuals substantially involved in or responsible for the violation of law.

b. *Full Cooperation in FCPA Matters*

In addition to the provisions contained in the Principles of Federal Prosecution of Business Organizations to satisfy the threshold for any cooperation credit, see JM 9-28.000, the following items will be required for a company to receive maximum credit for full cooperation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including: all relevant facts gathered during a company's independent investigation; attribution of facts to specific sources where such attribution does not violate the attorney-client privilege, rather than a general narrative of the facts; timely updates on a company's internal investigation, including but not limited to rolling disclosures of information; all facts related to involvement in the criminal activity by the company's officers, employees, or agents; and all facts known or that become known to the company regarding potential criminal conduct by all third-party companies (including their officers, employees, or agents);
- Proactive cooperation, rather than reactive; that is, the company must timely disclose all facts that are relevant to the investigation, even when not specifically asked to do so, and, where the company is or should be aware of opportunities for the Department to obtain relevant evidence not in the company's possession and not otherwise known to the Department, it must identify those opportunities to the Department;
- Timely preservation, collection, and disclosure of relevant documents and information relating to their provenance, including (a) disclosure of overseas documents, the locations in which such documents were found, and who found the documents, (b) facilitation of third-party production of documents, and (c) where requested and appropriate, provision of translations of relevant documents in foreign languages;
  - Note: Where a company claims that disclosure of overseas documents is prohibited due to data privacy, blocking statutes, or other reasons related to foreign law, the company bears the burden of establishing the prohibition. Moreover, a company should work diligently to identify all available legal bases to provide such documents;
- Where requested and appropriate, de-confliction of witness interviews and other investigative steps that a company intends to take as part of its internal investigation with steps that the Department intends to take as part of its investigation[1]; and

- Where requested, making available for interviews by the Department those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers, employees, and agents located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights), and, where possible, the facilitation of third-party production of witnesses.

c. *Timely and Appropriate Remediation in FCPA Matters*

The following items will be required for a company to receive full credit for timely and appropriate remediation for purposes of JM 9-47.120(1) (beyond the credit available under the U.S.S.G.):

- Demonstration of thorough analysis of causes of underlying conduct (i.e., a root cause analysis) and, where appropriate, remediation to address the root causes;
- Implementation of an effective compliance and ethics program, the criteria for which will be periodically updated and which may vary based on the size and resources of the organization, but may include:
  - The company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated;
  - The resources the company has dedicated to compliance;
  - The quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk;
  - The authority and independence of the compliance function and the availability of compliance expertise to the board;
  - The effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment;
  - The compensation and promotion of the personnel involved in compliance, in view of their role, responsibilities, performance, and other appropriate factors;
  - The auditing of the compliance program to assure its effectiveness; and
  - The reporting structure of any compliance personnel employed or contracted by the company.
- Appropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred;
- Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including implementing appropriate guidance and controls on the use of personal communications and ephemeral messaging platforms that undermine the company's ability to appropriately

retain business records or communications or otherwise comply with the company's document retention policies or legal obligations; and

- Any additional steps that demonstrate recognition of the seriousness of the company's misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.

4. Comment

. . . "De-confliction" is one factor that the Department may consider in appropriate cases in evaluating whether and how much credit that a company will receive for cooperation. When the Department does make a request to a company to defer investigative steps, such as the interview of company employees or third parties, such a request will be made for a limited period of time and be narrowly tailored to a legitimate investigative purpose (e.g., to prevent the impeding of a specified aspect of the Department's investigation). Once the justification dissipates, the Department will notify the company that the Department is lifting its request. . . .

M&A Due Diligence and Remediation: The Department recognizes the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity. Accordingly, where a company undertakes a merger or acquisition, uncovers misconduct through thorough and timely due diligence or, in appropriate instances, through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with this Policy (including, among other requirements, the timely implementation of an effective compliance program at the merged or acquired entity), there will be a presumption of a declination in accordance with and subject to the other requirements of this Policy.

Public Release: A declination pursuant to the FCPA Corporate Enforcement Policy is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy. Declinations awarded under the FCPA Corporate Enforcement Policy will be made public. . . .

E. FCPA Jurisdiction

Although case law on the FCPA is scant, the following decision from the Second Circuit provides some clarity on who falls under the jurisdiction of the FCPA. As you read, ask yourself what are the key doctrinal takeaways regarding extraterritoriality and conspiracy liability? What kinds of actors are beyond the FCPA's reach?

UNITED STATES v. HOSKINS, 902 F.3d 69 (2d Cir. 2018)

POOLER, Circuit Judge:

In this case, we are asked to decide whether the government may employ theories of conspiracy or complicity to charge a defendant with violating the Foreign Corrupt Practices Act ("FCPA"), even if he is not in the category of persons directly covered by the statute. We determine that the FCPA defined precisely the categories of persons who may be charged for violating its provisions. The statute also stated clearly the extent of its extraterritorial application.

The FCPA establishes three clear categories of persons who are covered by its provisions: (1) Issuers of securities registered pursuant to 15 U.S.C. § 78l or required to file reports under Section 78o(d), or any officer, director, employee, or agent of such issuer, or any stockholder acting on behalf of the issuer, using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-1; (2) American companies and American persons using interstate commerce in connection with the payment of bribes, 15 U.S.C. § 78dd-2; and (3) foreign persons or businesses taking acts to further certain corrupt schemes, including ones causing the payment of bribes, while present in the United States, 15 U.S.C. § 78dd–3. . . .

The government alleges that several defendants, including Hoskins, were part of a scheme to bribe officials in Indonesia so that their company could secure a $118 million contract from the Indonesian government. Hoskins worked for Alstom S.A. ("Alstom"), a global company headquartered in France that provides power and transportation services. During the relevant time, which was from 2002 to 2009, Hoskins was employed by Alstom's UK subsidiary, but was assigned to work with another subsidiary called Alstom Resources Management, which is in France.

The alleged bribery scheme centers on Alstom's American subsidiary, Alstom Power, Inc. ("Alstom U.S."), headquartered in Connecticut. The allegations are that Alstom U.S. and various individuals associated with Alstom S.A. retained two consultants to bribe Indonesian officials who could help secure the $118 million power contract for the company and its associates. Hoskins never worked for Alstom U.S. in a direct capacity. But the government alleges that Hoskins, while working from France for Alstom Resources Management, was "one of the people responsible for approving the selection of, and authorizing payments to, [the consultants], knowing that a portion of the payments to [the consultants] was intended for Indonesian officials in exchange for their influence and assistance in awarding the [contract.]"

The government alleges that several parts of the scheme occurred within the United States. The indictment alleges that one of the consultants kept a bank account in Maryland. In some cases, funds for bribes allegedly were paid from bank accounts held by Alstom and its business partners in the United States, and deposited in the consultant's account in Maryland, for the purpose of bribing Indonesian officials. The indictment also states that several executives of Alstom U.S. held meetings within the

United States regarding the bribery scheme and discussed the project by phone and email while present on American soil.

The government concedes that, although Hoskins "repeatedly e-mailed and called . . . U.S.-based coconspirators" regarding the scheme "while they were in the United States," Hoskins "did not travel here" while the bribery scheme was ongoing. . . .

The central question of the appeal is whether Hoskins, a foreign national who never set foot in the United States or worked for an American company during the alleged scheme, may be held liable, under a conspiracy or complicity theory, for violating FCPA provisions targeting American persons and companies and their agents, officers, directors, employees, and shareholders, and persons physically present within the United States. In other words, can a person be guilty as an accomplice or a co-conspirator for an FCPA crime that he or she is incapable of committing as a principal?

For purposes of this appeal, we assume that Hoskins was neither an employee nor an agent of a domestic concern and therefore does not fall within the terms of the statute. But accomplice and conspiracy liability are generally not so limited. A get-away driver for a bank robbery team can still be prosecuted even though he has not "by force and violence . . . take[n] . . . from the person or presence of another . . . any property . . . belonging to . . . any bank." 18 U.S.C. § 2113(a). As the common law has long recognized, persons who intentionally direct or facilitate the crimes physically executed by others must be held accountable for their actions. This recognition was effectuated by developing the doctrines of conspiracy and complicity, principles that are now codified in statutes. Under 18 U.S.C. § 2(a), a person who does not personally commit the acts constituting an offense is liable as a principal if he or she "aids, abets, counsels, commands, induces or produces" the commission of those acts by another. In addition, 18 U.S.C. § 371 punishes anyone who "conspire[s]" with another to commit the offense. Thus, by the plain language of the general statutes regarding conspiracy and accessorial liability—which nothing in the language of the FCPA purports to overrule or limit—if Hoskins did what the indictment charges, he would appear to be guilty of conspiracy to violate the FCPA and (as an accomplice) of substantive violations of that statute.

Conspiracy and complicity statutes do not cease to apply simply because a statute specifies particular classes of people who can violate the law. It is well established in federal criminal law that "[a] person . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas v. United States*, 522 U.S. 52, 64, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997). That principle was already deeply ingrained when the Supreme Court unanimously ruled in 1915 that persons not themselves bankrupt could be guilty of conspiring with someone who had declared bankruptcy to hide assets of the bankrupt's estate from the bankruptcy trustee, even if a non-bankrupt party could not be convicted of the principal offense. *United States v. Rabinowich*, 238 U.S. 78, 86, 35 S. Ct. 682, 59 L. Ed. 1211 (1915). With respect to complicity, the same principal was so clearly entrenched as a matter of the common law of crimes that the Supreme Court saw no need to cite a particular precedent when it unanimously recognized in 1833 that someone who "procure[d], advise[d] and assist[ed]" a postmaster to remove from the mail and destroy a letter was guilty of violating, as an accomplice, a statute prohibiting postal employees from taking mail entrusted to them for delivery. *United States v. Mills*, 32 U.S. (7 Pet.) 138, 141, 8 L. Ed. 636 (1833). . . .

There is a narrowly circumscribed exception to this common-law principle. In certain cases it is clear from the structure of a legislative scheme that the lawmaker must have intended that accomplice liability not extend to certain persons whose conduct might otherwise fall within the general common-law or statutory definition of complicity. A classic illustration is statutory rape, which makes it a crime to have sexual relations with a person who is under a statutorily defined age of consent. Applying the literal definitions of accomplice liability, a youthful participant who voluntarily consents to the act would be guilty of rape as well, because he or she intentionally aided or solicited the commission of the criminal act. But the legislature, in criminalizing the conduct of the adult participant and not that of the juvenile, obviously conceptualized the under-age party as the victim of the crime, and not a co-participant. Despite the common-law recognition of conspiracy and accomplice liability, and of the general principle that one could be guilty as a conspirator or accomplice even if the statute were defined in such a way that one was not capable of committing it as a principal, the common-law courts had no difficulty in recognizing an exception in those circumstances. *See, e.g.*, *Regina v. Tyrell*, [1894] 1 Q.B. 710. . . .

Applying the teachings of *Gebardi* and *Amen* [ed: detailed discussion of these cases has been omitted] to the FCPA, we find the "something more" that evinces an affirmative legislative policy to leave the category of defendants omitted from the statutory framework unpunished. In particular, the carefully tailored text of the statute, read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute, persuades us that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability. Our conclusion is consistent with the reasoning of other courts that have addressed this question.

We begin with the text of the statute. Like the Mann Act, which "[did] not specifically impose any penalty upon" a woman for assisting in her own transportation across state lines, "although it deal[t] in detail with" other persons, *Gebardi*, 287 U.S. at 119, 53 S. Ct. 35, the FCPA contains no provision assigning liability to persons in the defendant's position—nonresident foreign nationals, acting outside American territory, who lack an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies. *See* 15 U.S.C. §§ 78dd-1; 78dd-2; 78dd-3.

Moreover, in *Gebardi*, the statute under consideration was less clear as to Congress's intent to exclude the defendant from liability, compared to the FCPA's utter silence regarding the class of defendants involved in this case. As noted, the Mann Act placed a penalty upon "any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for . . . any woman or girl for . . . any . . . immoral purpose." *Id.* at 118, 53 S. Ct. 35. The Supreme Court explained that, for a woman to be liable under the Mann Act, her role must "be more active than mere agreement on her part to the transportation and its immoral purpose." *Id.* at 119, 53 S. Ct. 35. But the Court stated in *Gebardi*, much as it did in *Holte*, that the Mann Act would cover the woman to the extent she were to "'aid or assist' someone else in transporting or in procuring transportation" for her. *Id.* Thus, the statute created at least some potential for liability where a woman did more than exhibiting "mere agreement . . . to the transportation." *Id.* In the present case, by contrast, there is no text that creates any liability whatsoever for the class of persons in question.

A second piece of evidence—the structure of the FCPA—confirms that Congress's omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach. The statute includes specific provisions covering every other possible combination of nationality, location, and agency relation, leaving excluded only nonresident foreign nationals outside American territory without an agency relationship with a U.S. person, and who are not officers, directors, employees, or stockholders of American companies.

The FCPA explicitly lays out several different categories of persons over whom the government may exercise jurisdiction. First, the statute prohibits a company issuing securities regulated by federal law (an "issuer") from using interstate commerce in connection with certain types of corrupt payments to foreign officials. 15 U.S.C. § 78dd–1(a). The same prohibitions apply to any "domestic concern." 15 U.S.C. § 78dd–2(a). "Domestic concern" is a broad term that covers "any individual who is a citizen, national, or resident of the United States," 15 U.S.C. § 78dd–2(h)(1)(A), wherever such a person happens to be in the world. It also covers most businesses—including partnerships, sole proprietorships, and unincorporated organizations—that are organized under state or federal law or have principal places of business in the United States. 15 U.S.C. § 78dd–2(h)(1)(B).

Importantly, the prohibitions on issuers and domestic concerns also apply to "any officer, director, employee, or agent of" the entity, "or any stockholder thereof acting on behalf of" the entity. 15 U.S.C. §§ 78dd–1(a), 78dd–2(a). The statute's prohibitions thus apply not only (for example) to partnerships organized under state law, but also to their executives, janitors, and travel agents. And, although a person must be a citizen, national, or resident of the United States to be charged as a domestic concern, no similar requirement limits the liability of officers, employees, or agents of domestic concerns and issuers.

Second, the statute prohibits "any person other than an issuer . . . or a domestic concern" from using interstate commerce in furtherance of corrupt payments to foreign officials, but only while the person is "in the territory of the United States." 15 U.S.C. § 78dd-

3(a). A “person” is “any natural person other than a national of the United States,” as well as any business organized under foreign law. 15 U.S.C. § 78dd-3(f)(1).

In sum, these provisions provide jurisdiction over the following persons, in the following scenarios:

(1) American citizens, nationals, and residents, regardless of whether they violate the FCPA domestically or abroad;

(2) most American companies, regardless of whether they violate the FCPA domestically or abroad;

(3) agents, employees, officers, directors, and shareholders of most American companies, when they act on the company’s behalf, regardless of whether they violate the FCPA domestically or abroad;

(4) foreign persons (including foreign nationals and most foreign companies) not within any of the aforementioned categories who violate the FCPA while present in the United States.

The single, obvious omission is jurisdiction over a foreign national who acts outside the United States, but not on behalf of an American person or company as an officer, director, employee, agent, or stockholder. . . .

[Ed: the court’s lengthy discussion of how the FCPA’s legislative history supports the point has been omitted.]

The government’s argument—that Congress must have intended to cover foreign nationals acting abroad who are not employees or agents of an American company—focuses heavily on the OECD Convention with which Congress intended to make American law comply. The government first contends that the OECD Convention shows that the United States agreed to “take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to” engage in bribery of foreign officials. Convention on Combating Bribery and Foreign Public Officials in International Business Transactions art. 1.1, Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (1998) (hereinafter “OECD Convention”) (emphasis added). The government reads the words “any person” to apply expansively, including to nonresident foreign nationals who do not have direct connections to American businesses.

The government’s argument falters for two reasons. First, the requirement that intentional bribery by “any person” is illegal is a highly general one; it does not require approval of the precise type of complicity or conspiracy theory involved in this case. Second, [when amending the FCPA in 1998 following U.S. entry into the OECD Convention], Congress carefully considered the “any person” language, and interpreted it in a way that does not involve the government’s theory of liability here. The Senate’s Committee Report first noted that the “any person” text was effectuated by expanding the FCPA to include conduct by foreign nationals within the United States:

> [T]he OECD Convention calls on parties to cover "any person"; the current FCPA covers only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The Act, therefore, expands the FCPA's coverage to include all foreign persons who commit an act in furtherance of a foreign bribe while in the United States.

1998 Senate Report, at 2–3. Congress also associated the "any person" language with applying criminal, rather than civil, penalties to foreign nationals who violated the statute as employees or agents of issuers or domestic concerns. *Id.* at 4, 5. In short, Congress focused specifically on the text the government discusses, and employed it in a reasonable way that is not connected to complicity or conspiracy liability for foreign nationals.

The government next notes that the OECD Convention specifically mentions ancillary theories of liability such as conspiracy and complicity:

> Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

OECD Convention art. 1.2. The government contends that the text of this provision, requiring that conspiracy to bribe a foreign official "shall be [a] criminal offence[ ] to the same extent as . . . conspiracy to bribe a public official of" the United States, demands that a conspiring foreign national operating abroad be covered by the FCPA. The government's argument is that federal bribery statutes would indeed cover situations where overseas defendants conspire to bribe an American official.

The difficulty with the government's position, however, is that this provision covers the content of substantive law—the particular acts prohibited by it—not the law's jurisdictional aspects. A separate part of the Convention addresses jurisdictional questions. See OECD Convention art. 4. Moreover, adopting the government's view that the jurisdictional reach of the FCPA must be coterminous with that of bribery of American officials would transform the FCPA into a law that purports to rule the world. The defendant notes, for example, that bribery statutes covering American officials prohibit not only crimes with foreign national conspirators acting overseas, therefore, under the government's theory, these statutes likely cover situations in which the entire offense occurred overseas—that is, where there is no U.S. nexus at all except that the official to be bribed is stateside. The government does not dispute this point. Consequently, if read as the government proposes, the above-quoted provision of the Convention would cover conspiracies to bribe foreign officials consisting entirely of actions taken abroad. That is obviously not consistent with the legislation Congress wrote, and it cannot be what the OECD Convention requires.

The government also points to provisions about the territorial reach of the OECD Convention. In particular, the government emphasizes the following passage:

> Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

OECD Convention art. 4.1. The government essentially believes this passage to establish that, where "any part" of the offense occurs within the United States, the country is required to exercise jurisdiction over someone whose conduct is related to the offense, no matter how attenuated the person's connection to the acts taken on American soil.

The government's reading is undercut by the commentaries to the OECD Convention, and by Congress's careful consideration of the provision's meaning. The accompanying commentary to the Convention states, regarding Article 4.1, that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." OECD Convention cmt. 4.1. This language suggests that the Convention contemplated jurisdiction over persons with some "physical connection to the bribery act," even if not an "extensive" one, rather than persons with no physical connection to the actions at all. Congress plainly shared this view of the provision. As the Committee Report noted:

> The OECD Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory." OECD Convention, Art. 4, ¶ 1. The new offense complies with this section by providing for criminal jurisdiction in this country over bribery by foreign nationals of foreign officials when the foreign national takes some act in furtherance of the bribery within the territory of the United States.

1998 Senate Report, at 5. Congress's reading, and the view described in the commentaries both comport with the Convention provision's text. A requirement that a nation "establish its jurisdiction over the bribery of a foreign public official" does not say that it must create jurisdiction over persons in foreign lands with only distant connections to the offense. It is fairly read to mean that a nation that has agreed to the Convention must enact a law covering persons who commit acts within the nation's own borders. . . .

Even if we were not persuaded that Congress had demonstrated an affirmative legislative policy in the FCPA to limit criminal liability to the enumerated categories of defendants, we would still rule for Hoskins because the government has not established a "clearly expressed congressional intent to" allow conspiracy and complicity liability to broaden the extraterritorial reach of the statute. *RJR Nabisco*, 136 S. Ct. at 2100.

The Supreme Court's recent opinion in *RJR Nabisco* explained a "two-step framework for analyzing extraterritoriality issues":

> At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. ... If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.
>
> What if we find at step one that a statute clearly does have extraterritorial effect? . . . [W]e addressed this issue in *Morrison [v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)] explaining that it was necessary to consider § 10(b)'s "focus" only because we found that the statute does not apply extraterritorially: "If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's "focus."

Id. at 2101 (internal citation omitted). . . .

Because some provisions of the FCPA have extraterritorial application, "'the presumption against extraterritoriality operates to limit th[ose] provision[s] to [their] terms,'" *RJR Nabisco*, 136 S. Ct. at 2102 (quoting *Morrison*, 561 U.S. at 265, 130 S. Ct. 2869). And, as detailed at length above, the FCPA does not impose liability on a foreign national who is not an agent, employee, officer, director, or shareholder of an American issuer or domestic concern—unless that person commits a crime within the territory of the United States, *see* 15 U.S.C. § 78dd-3 (providing liability for persons "other than an issuer . . . or a domestic concern . . . or . . . any officer, director, employee, or agent of such person or any stockholder thereof" only if the person's conduct is undertaken "while in the territory of the United States"). In other words, the territorial limitations of the FCPA preclude liability for such a person. The government may not expand the extraterritorial reach of the FCPA by recourse to the conspiracy and complicity statutes. . . .

Consequently, the presumption against extraterritoriality bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA itself because of the statute's territorial limitations. That includes both charges that are the subject of this motion—conspiracy to violate Sections 78dd-2 and 78dd-3 of the FCPA, and liability as an accomplice for doing so—because the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern. To hold Hoskins liable, the government must demonstrate that he falls within one of those categories or acted illegally on American soil.

Notwithstanding this Court's conclusion that Hoskins cannot be held liable under the FCPA if he is not in the categories of persons directly covered by the statute, the government argues that it was error for the district court to dismiss the second object of the conspiracy. We agree.

The second object alleges that Hoskins willfully conspired with various co-defendants to, "while in the territory of the United States," commit acts in furtherance of bribing foreign officials in violation of Section 78dd-3. Indictment ¶ 26(b). The district court held that, because "it is undisputed that Mr. Hoskins never entered the territory of the United States and thus could not be prosecuted under this section," *Gebardi* barred the government from charging Hoskins with the second object of the conspiracy. *Hoskins*, 123 F.Supp.3d at 327 n.14. This Court agrees that Hoskins cannot be directly liable under Section 78dd-3. However, the government "maintains that it still intends to prove that [Hoskins] acted as an agent of a domestic concern liable as a principal for the substantive FCPA counts charged in the indictment" in violation of Section 78dd-2. Id. at 318-19 n.1. Provided that the government makes this showing, there is no affirmative legislative policy to leave his conduct unpunished, nor is there an extraterritorial application of the FCPA. Accordingly, the government should be allowed to argue that, as an agent, Hoskins committed the first object by conspiring with employees and other agents of Alstom U.S. and committed the second object by conspiring with foreign nationals who conducted relevant acts while in the United States. . . .

GERARD E. LYNCH, Circuit Judge, concurring:

. . . Congress might want to revisit the statute with this case in mind, as the result we reach today seems to me questionable as a matter of policy. The FCPA represents an effort by the United States to keep its own nationals free of corruption when dealing in foreign countries where corruption is endemic. Such corruption undermines the ethical foundations of American businesses, and risks accustoming American businesspeople and corporations to corrupt practices that they encounter abroad, with the attendant possibility of importing back to the United States practices they become familiar with in countries with less developed principles of the rule of law and the transparency and impartiality of government regulation. Moreover, by embroiling American companies in the corrupt activities of foreign officials, such bribery tends to perpetuate the corruption of developing nations, to the long-run disadvantage of the United States both in foreign policy (by associating the United States and its citizens and businesses with unpopular corrupt regimes) and in commerce (by perpetuating the corruption "tax" levied on all those who do business with such regimes). *See* Court Op. 48-50 & n.7 (discussing purposes of the FCPA).

As noted above, these important purposes must be balanced against a concern about intruding into foreign sovereignty. It is thus not surprising that Congress chose to stop American businesses from engaging in the corrupt cultures of countries where they may do business, but did not attempt to reform those countries themselves by punishing their public officers.

If the charges in the indictment are proved true, however, the prosecution of Hoskins does not implicate that concern. Hoskins was not an official of a corrupt foreign government, operating in a legal and business culture distinct from that of the United States and other Western democracies. He was, rather, a citizen of the United Kingdom, employed by a British subsidiary of the French parent company of the American entity that allegedly paid bribes to Indonesian legislators to secure business for the American company, working in France from the offices of a French subsidiary of the same French parent. Both his country of citizenship (the United Kingdom) and the country where he worked and where the company whose interests he was ultimately advancing was incorporated (France) are signatories of the Organisation for Economic Co-operation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and are thus committed, as is the United States, to enacting legislation along the lines of the FCPA. Although any prosecution of a foreign national for actions taken on foreign soil raises some concern about possible friction with other countries, the prosecution of someone in Hoskins's position does not threaten a foreign country's sovereign power to select, retain, and police the officials of its own government, nor does it conflict with the policies of the countries involved.

Nor were the effects of Hoskins's alleged actions felt only in his own countries of citizenship and employment. Hoskins is alleged to have been part of the team that reached into the United States to counsel and procure the commission of an American crime by an American company, and to assist that company in executing bribes in violation of American law. A prosecution on these facts does not evince an effort by the United States to "rule the world," *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 136 S. Ct. 2090, 2100, 195 L. Ed. 2d 476 (2016), but rather an effort to enforce American law against those who deliberately seek to undermine it.

Moreover, the FCPA explicitly contemplates the prosecution of at least some foreign nationals who operate entirely abroad, in that it penalizes foreign nationals who act as the agents of American companies in paying bribes abroad. Thus, for example, if Alstom U.S. had channeled its bribes to Indonesian officials through Indonesian citizens who were low-level Alstom employees in Indonesia, the FCPA would appear to penalize those employees. Indeed, our decision today leaves intact the possibility that Hoskins himself may be convicted under this indictment for violating the FCPA, if the government establishes that he functioned as the agent of the American company, rather than as one who directed the actions of the American company in the interests of its French parent company. That seems to me a perverse result, and one that is unlikely to have been specifically anticipated or intended by Congress. It makes little sense to permit the prosecution of foreign affiliates of United States entities who are minor cogs in the crime, while immunizing foreign affiliates who control or induce such violations from a high perch in a foreign parent company. That is the equivalent of punishing the get-away driver who is paid a small sum to facilitate the bank robber's escape, but exempting the mastermind who plans the heist. . . .

On retrial, a jury convicted Hoskins on the government's alternative theory that he acted as an agent of a "domestic concern" under the FCPA. The jury also convicted Hoskins of money laundering. After trial, the district court granted Hoskins's Rule 29 motion for acquittal notwithstanding the verdict on the FCPA charges, finding that the government's evidence was legally insufficient to prove that Hoskins acted as an agent. *United States v. Hoskins*, 2019 WL 3890831 (D. Conn. Aug. 19, 2019). The case is again on appeal to the Second Circuit, with Hoskins contesting his convictions for money laundering and the government cross-appealing the district court's ruling dismissing the FCPA charges. A further opinion from the Second Circuit regarding the scope of the FCPA is anticipated, although it has been slow to arrive.

F. FCPA Mens Rea

The following case is a legal malpractice claim that turns on the proper construction of the FCPA's mens rea requirement. Notice the interesting procedural history here that requires the court, in the context of a civil legal malpractice claim, to determine what proof is required to satisfy the FCPA's mens rea requirements for purposes of criminal liability. How does the court define "corruptly" within the meaning of the FCPA?

STICHTING v. SCHREIBER, 327 F.3d 173 (2d Cir. 2003)

SACK, Circuit Judge:

The plaintiff, Stichting ter behartiging van de belangen van oudaandeelhouders in het kapitaal van Saybolt International B.V. (Foundation of the Shareholders' Committee Representing the Former Shareholders of Saybolt International B.V.),[5] appeals from a decision of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*) granting the defendants' motion for summary judgment. *See Stichting Ter behartiging Van de Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt International B.V. v. Schreiber,* 145 F.Supp.2d 356 (S.D.N.Y.2001) ("*Stichting* "). The plaintiff claims that the erroneous legal advice given by defendant Philippe E. Schreiber caused a United States-based corporation that was a subsidiary of a Dutch company to violate the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1, *et seq.* ("FCPA"). The

[5] [Ed: the case caption has been edited to "Stichting" to make this party name easier to read and recall].

corporation pleaded guilty in a Massachusetts federal district court to violating the FCPA, and its former chief executive officer (“CEO”) was convicted of violating the FCPA by a New Jersey federal district court jury.

In the case at bar, the district court concluded that the guilty plea and the conviction collaterally estop the plaintiff, as the corporation's assignee, from claiming that Schreiber caused the corporation to think that its acts would not violate the FCPA. We disagree with the district court's conclusion that the corporation's guilty plea is inconsistent with the plaintiff's theory of how Schreiber misled the corporation. We also disagree with the district court's conclusion that the corporation was in privity with its former CEO at the time of his trial and therefore is bound by the trial's outcome. We vacate the judgment and remand for further proceedings consistent with this opinion. In so doing, we do not question the validity of either the plea or the conviction.

This appeal is from the district court's grant of the defendants' motion for summary judgment. The facts we adduce here are undisputed except as otherwise noted.

In 1995, Saybolt International was a private Dutch limited-liability company whose various worldwide subsidiaries were engaged in “the business of performing quantitative and qualitative testing of bulk commodities such as oil, gasoline, and other petrochemicals, as well as grains [and] vegetable oils.” Saybolt International owned Saybolt North America, Inc., a Delaware corporation with principal offices in Parsippany, New Jersey. All directors and officers of Saybolt North America were also directors or officers of Saybolt International. One such person was David H. Mead, who served as chief executive officer of Saybolt North America and as an officer and director of Saybolt International. Mead also served as the *de facto* head of all operations under the control of Saybolt International in the Western Hemisphere.

Beginning in late 1994 or early 1995, Saybolt de Panama S.A. (“Saybolt de Panama”), a subsidiary of Saybolt International under Mead's supervision, sought to acquire property in Panama for the construction of a laboratory and office complex. Sometime in 1995, Mead was told that Saybolt de Panama had identified suitable property in the Panama Canal Zone but that the lease could be acquired only if the company would first pay a $50,000 bribe to a Panamanian government official.

Mead raised the issue of the bribe in a Saybolt North America board meeting held in New Jersey on November 9, 1995. Schreiber, a lawyer admitted to practice in New York State, was present at the meeting. In addition to serving as a director of Saybolt North America, Schreiber occasionally provided legal services to the corporation. At the meeting, Schreiber advised those present that Saybolt North America could not pay the proposed bribe to the Panamanian official without subjecting the corporation and its officers and directors to potential liability. Then and in the weeks that followed, however, Schreiber allegedly led Mead and others to believe that “the bribe payment could legally be made under U.S. law by [their] Dutch affiliate.”

Allegedly on this basis, on December 17, 1995, an employee of Saybolt North America traveled by commercial airline from New Jersey to Panama for purposes of arranging the bribe. On December 21, 1995, Saybolt International wired $50,000 from the Netherlands to a bank account controlled by Saybolt de Panama. The Saybolt North America employee then directed an employee of Saybolt de Panama to deliver the $50,000 to an individual acting as an intermediary for the Panamanian official.

On November 20, 1996, United States officials investigating possible environmental crimes by Saybolt North America executed a search warrant at its offices in New Jersey. The search uncovered evidence of the Panama bribe.

Shortly thereafter, on May 12, 1997, Core Laboratories, N.V. ("Core") purchased Saybolt International and its controlling interest in Saybolt North America. Pursuant to the purchase agreement, Saybolt International's former shareholders placed $6 million in escrow to cover any criminal liability that might arise from the company's activities in Panama. In exchange, Core assigned the former shareholders all causes of action for any legal malpractice related to the Panama incident.

United States prosecutors decided to bring separate criminal proceedings against Saybolt North America and its officers. Mead was arrested in January 1998, at which point he stopped actively working for the various Saybolt entities, which were by then part of Core. On April 20, 1998, a federal grand jury in the District of New Jersey returned an indictment charging Mead with, *inter alia*, violating the FCPA, 15 U.S.C. § 78dd–2(a)(3), and conspiring to violate the FCPA, 18 U.S.C. § 371.

At about that time, the United States Attorney for the District of Massachusetts and the United States Attorney for the District of New Jersey jointly issued an information charging Saybolt North America with substantially the same offenses charged in Mead's indictment: violating, and conspiring to violate, the FCPA. On August 18, 1998, officers of Core caused Saybolt North America to enter into a plea agreement in which Saybolt North America promised to "cooperate truthfully and completely with the United States . . . in any trial or other proceedings arising out of this investigation of [Saybolt North America] and any of [its] present and former officers and employees." On December 3, 1998, Saybolt North America pleaded guilty to the charges in the information before the United States District Court for the District of Massachusetts (William G. Young, *Judge*). In the plea colloquy, the court instructed John D. Denson, the Core officer representing Saybolt North America, as follows:

> You understand that before the corporation or corporations can be found guilty of [violating the FCPA], the government would have to prove beyond a reasonable doubt that an agent of the corporation, acting for the corporation and so situated with respect to the management of the corporation[ ] that the act or acts can properly be considered the acts of the corporation itself, has to have entered into a corrupt, that is, a bribe-like transaction in the international commerce of the United States. It

> has to be not just that there was a mistake, that this agent or agents of the corporations knew what they were doing. Do you understand that?

Denson answered "Yes, sir." The court then entered judgment against the corporation.

Unlike his former employer, Mead decided to fight the charges against him. His case went to trial before the United States District Court for the District of New Jersey (Anne E. Thompson, *Judge*) in early October 1998. At trial, Mead presented evidence that, Mead contended, suggested that Schreiber led Mead to believe that "the bribe payment could legally be made" if the bribe of the Panamanian official were paid by a non-United States entity. The court instructed the jury that "[i]f the evidence shows you that the defendant actually believed that the transaction was legal, he cannot be convicted." The jury convicted Mead on both charges, and the district court sentenced him to four months' imprisonment and a $20,000 fine.

Saybolt International's former shareholders assigned their legal malpractice causes of action to the plaintiff, which brought this diversity action in the United States District Court for the Southern District of New York on November 18, 1999. In its amended complaint, the plaintiff alleged that Schreiber, and through him Walter, Conston, Alexander & Green, P.C., defendant-third-party-plaintiff, a law firm with which Schreiber was affiliated, committed legal malpractice by failing to advise Saybolt North America that "the bribe payment as proposed to be paid by a Dutch company to Panamanian officials would violate the FCPA." Without Schreiber's malpractice, the amended complaint alleged, "the bribe payment would not have been made, even at the cost of the entire Panama deal." The plaintiff further alleged that by committing such malpractice, Schreiber also breached his lawyer's fiduciary duty to Saybolt North America and breached his contract to provide competent professional services. Finally, the plaintiff alleged that Schreiber's malpractice cost the former Saybolt International shareholders $4.2 million, mostly in criminal fines.

In a June 12, 2001, Memorandum Order, the district court granted the defendants' motion for summary judgment on all claims. The court noted that the plaintiff alleged that Schreiber's erroneous advice led Saybolt North America to act without the knowledge that its conduct violated United States law. The court then held that this allegation necessarily contradicts Saybolt North America's guilty plea to the charges that it violated the FCPA:

> To enter such a plea Saybolt [North America] had to affirm, as it did, that it undertook the misconduct in question with knowledge of the corruptness of its acts. Since, if it had in fact relied on Schreiber's allegedly erroneous and misleading advice, Saybolt [North America] would not have believed at the time that its misconduct was unlawful or corrupt, it could never have made this admission at its allocution or, indeed, entered its guilty plea at all.

On this basis, the district court concluded that under the doctrine of collateral estoppel, Saybolt North America's guilty plea forecloses the plaintiff's theory of causation. "[S]ince Saybolt did . . . plead guilty and admit its criminal intent, it is bound by those admissions, and therefore cannot now contend either that it relied on Schreiber's alleged advice or that that advice, even if erroneous, . . . proximately caused whatever damages . . . were incurred by Saybolt.". . .

As the district court described it, the plaintiff's claim in its civil suit is that its lawyer, Schreiber, "advised Saybolt [North America] that a bribe payment by a foreign affiliate might be legal but also failed to advise Saybolt [North America] that any involvement by Saybolt [North America] or its officers in arranging the affiliate's payment could result in criminal liability." "[I]f Saybolt [North America] had in good faith relied on Schreiber's advice, Saybolt [North America] would have believed that its arranging the bribe through a foreign affiliate was permissible."

By pleading guilty, Saybolt North America admitted the six elements of the FCPA crime: that (1) it was a domestic concern, (2) that it made use of a means or instrumentality of interstate commerce, (3) corruptly, (4) in furtherance of an offer or payment of something of value to a person, (5) while knowing that the money would be offered or given directly or indirectly to a foreign official, (6) for purposes of influencing an act or decision of that foreign official in his official capacity. But by pleading guilty, Saybolt North America did not admit that at the time of the criminal act it knew that the act of arranging, rather than paying, such a bribe was criminal. Knowledge by a defendant that it is violating the FCPA—that it is committing all the elements of an FCPA violation—is not itself an element of the FCPA crime. Federal statutes in which the defendant's knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly not such a statute. Saybolt North America did not, therefore, by pleading guilty, preclude an assertion in a subsequent civil action—the case at bar—that it did not know it was violating the FCPA at the time of the violation.

The plaintiff is thus not collaterally estopped by Saybolt North America's criminal plea from arguing in this civil suit that, even though Saybolt North America admittedly did *commit* a violation of the FCPA, it did not *know* that it was committing a violation of the FCPA at the time; that it did not know it was committing such a violation because Schreiber negligently told it that it was not committing a violation by causing a foreign entity to pay the bribe; and that it suffered damages as a result of the negligent advice. . . .

To be sure, by pleading guilty, Saybolt North America admitted that it acted "corruptly"—the element of the crime that we numbered "3" in the discussion above—in its actions related to the Panamanian bribe. The defendants see in this admission a collateral bar to the plaintiff's assertion that Saybolt North America did not know that it was violating the FCPA at the relevant time and, indeed, was misled into believing that it was acting legally. The district court apparently agreed. We do not. We conclude that an admission that an act was done "corruptly" in this context is not equivalent to an admission that the person committing it knew that it violated the particular law at the time the act was performed.

It is difficult to determine the meaning of the word "corruptly" simply by reading it in context. We therefore look outside the text of the statute to determine its intended meaning. *See In re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 188 (2d Cir.2002) ("Legislative history and other tools of interpretation may be relied upon only if the terms of the statute are ambiguous." (citation and internal quotation marks omitted)).

The Senate Report for the FCPA explains the statute's use of the term "corruptly" as follows:

> The word "corruptly" is used [in the FCPA] in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient.

S. Rep. No. 95–114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108. The 1977 House Report uses a similar description, adding that the word "corruptly" in the FCPA is intended to have the same meaning as in 18 U.S.C. § 201, the federal statute criminalizing the bribing of a federal official. *See* H.R. Rep. No. 95–640, at 7–8 (1977).

The Senate's explanation of the term "corruptly" tracks closely our interpretation of that term in 18 U.S.C. § 201(b). We have repeatedly held in that context that "a fundamental component of a 'corrupt' act is a breach of some official duty owed to the government or the public at large." *United States v. Rooney,* 37 F.3d 847, 852 (2d Cir. 1994); *accord United States v. Zacher,* 586 F.2d 912, 915 (2d Cir. 1978) ("The common thread that runs through common law and statutory formulations of the crime of bribery is the element of corruption, breach of trust, or violation of duty."). We have also, in the context of the federal statute criminalizing the bribing of agents of financial institutions, approved jury instructions providing that a person acts "corruptly" if he or she acts with a "bad purpose." *United States v. McElroy,* 910 F.2d 1016, 1026 (2d Cir. 1990). Our case law defining the term "corruptly" in federal bribery statutes thus parallels the Senate Report's explanation of the term as denoting an evil motive or purpose and an intent to induce an official to misuse his position. . . .

We thus conclude that the word "corruptly" in the FCPA signifies, in addition to the element of "general intent" present in most criminal statutes, a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position. But there is nothing in that word or anything else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty of such a violation.

Finally in this connection, we note that had Saybolt North America gone to trial, it would have been allowed to present evidence that it relied on Schreiber's advice that the benefit sought from the Panamanian official would not require the official to misuse his position or breach his duties—i.e., that it did not act corruptly—precisely because "corruptly" is an element of the offense. Saybolt North America also would have been allowed a jury instruction on this allegation. *See United States v. Carr,* 740 F.2d 339, 346 n.11 (5th Cir. 1984) ("[R]eliance on advice of counsel . . . is the basis for a jury instruction on whether or not the defendant possessed the requisite specific intent."), *cert. denied,* 471 U.S. 1004, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985). By pleading guilty, Saybolt North America effectively admitted that it could not factually support such a theory of reliance.

But Saybolt North America would not properly have been entitled to a jury instruction on an allegation that Schreiber led it to believe that its acts did not violate the FCPA. A defense of reliance on advice of counsel is available only to the extent that it might show that a defendant lacked the requisite specific intent, *id.,* and specific intent to violate the FCPA is not an element of an FCPA violation. Thus, Saybolt North America's guilty plea does not constitute an admission that it could not factually support the theory of reliance on counsel that is the basis of the plaintiff's malpractice action.

We conclude that the question whether Saybolt North America acted with knowledge that its conduct violated the FCPA was not answered by its guilty plea, and thus that the plea does not collaterally estop the plaintiff from litigating the issue in its claim against Schreiber and the law firm with which he was affiliated. . . .

G. Foreign Officials and Instrumentalities

The following case addresses the question of what an "instrumentality" is in the context of the FCPA's definition of "foreign official." The answer to this question is key for understanding the extent to which the FCPA can be used to deal with bribery in connection with state-owned enterprises, which are of course major corporate entities in many developed and developing economies.

UNITED STATES v. ESQUENAZI, 752 F.3d 912 (11th Cir. 2014)

MARTIN, Circuit Judge:

Joel Esquenazi and Carlos Rodriguez appeal their convictions and sentences imposed after a jury convicted them of conspiracy, violating the Foreign Corrupt Practices Act, and money-laundering. After careful review, and with the benefit of oral argument, we affirm. . . .

Messrs. Esquenazi and Rodriguez co-owned Terra Telecommunications Corp. (Terra), a Florida company that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Mr. Esquenazi, Terra's majority owner, served as President and Chief Executive Officer. Mr. Rodriguez, the company's minority owner, served as Executive Vice President of Operations. James Dickey served as

Terra's general counsel and Antonio Perez as the company's comptroller.

One of Terra's main vendors was Telecommunications D'Haiti, S.A.M. (Teleco). Because the relationship of Teleco to the Haitian government was, and remains, at issue in this case, the government presented evidence of Teleco's ties to Haiti. Former Teleco Director of International Relations Robert Antoine testified that Teleco was owned by Haiti. An insurance broker, John Marsha, testified that, when Messrs. Rodriguez and Esquenazi were involved in previous contract negotiations with Teleco, they sought political-risk insurance, a type of coverage that applies only when a foreign government is party to an agreement. In emails with Mr. Marsha copied to Messrs. Esquenazi and Rodríguez, Mr. Dickey called Teleco an "instrumentality" of the Haitian government.

An expert witness, Luis Gary Lissade, testified regarding Teleco's history. At Teleco's formation in 1968, the Haitian government gave the company a monopoly on telecommunication services. Teleco had significant tax advantages and, at its inception, the government appointed two members of Teleco's board of directors. Haiti's President appointed Teleco's Director General, its top position, by an executive order that was also signed by the Haitian Prime Minister, the minister of public works, and the minister of economy and finance. In the early 1970s, the National Bank of Haiti gained 97 percent ownership of Teleco. From that time forward, the Haitian President appointed all of Teleco's board members. Sometime later, the National Bank of Haiti split into two separate entities, one of which was the Banque de la Republique d'Haiti (BRH). BRH, the central bank of Haiti, is roughly equivalent to the United States Federal Reserve. BRH retained ownership of Teleco. In Mr. Lissade's expert opinion, for the years relevant to this case, Teleco belonged "totally to the state" and "was considered . . . a public entity."

Mr. Lissade also testified that Teleco's business entity suffix, S.A.M., indicates "associate anonymous mixed," which means the "Government put money in the corporation." Teleco's suffix was attached not by statute, but "de facto" because "the government consider[ed] Teleco as its . . . entity." In 1996, Haiti passed a "modernization" law, seeking to privatize many public institutions. As a result, Haiti privatized Teleco sometime between 2009 and 2010. Ultimately, Mr. Lissade opined that, during the years relevant to this case, "Teleco was part of the public administration." He explained: "There was no specific law that . . . decided that at the beginning that Teleco is a public entity but government, officials, everyone consider[ed] Teleco as a public administration." And, he said, "if there was a doubt whatsoever, the [anti-corruption] law [that] came in 2008 vanish[ed] completely this doubt . . . by citing Teleco as a public administration" and by requiring its agents—whom Mr. Lissade said were public agents—to declare all assets to avoid secret bribes.

In 2001 Terra contracted to buy minutes from Teleco directly. At that time, Teleco's Director General was Patrick Joseph (appointed by then-President Jean–Bertrand Aristide), and the Director of International Relations was Robert Antoine. Mr. Antoine had two friends and business associates who played a role in this case: Jean Fourcand, a grocery-store owner, and Juan Diaz.

By October 2001, Terra owed Teleco over $400,000. So Mr. Perez testified, Mr. Esquenazi asked him to contact Mr. Antoine and negotiate an amortization deal or, alternatively, to offer a side payment. Mr. Perez met with Mr. Antoine, who rejected the idea of amortization but agreed to a side payment to ease Terra's debt. The deal, according to Mr. Perez, was that Mr. Antoine would shave minutes from Terra's bills to Teleco in exchange for receiving from Terra fifty percent of what the company saved. Mr. Antoine suggested that Terra disguise the payments by making them to sham companies, which Terra ultimately did. Mr. Perez returned to Mr. Esquenazi and told him the news and later shared details of the deal in a meeting with Messrs. Esquenazi, Rodriguez, and Dickey. The four discussed "the fact that Robert Antoine had accepted an arrangement to accept . . . payments to him in exchange for reducing [Terra's] bills." Mr. Perez testified: "[Mr. Esquenazi] was happy, and both James Dickey and Carlos Rodriguez also congratulated me on a job well done."

The following month, in November 2001, Terra began funneling personal payments to Mr. Antoine using the following subterfuge. Mr. Dickey, on Terra's behalf, drafted a "consulting agreement" between Terra and a company Mr. Antoine had suggested called J.D. Locator. J.D. Locator, an otherwise insolvent company, was owned by Mr. Antoine's friend Juan Diaz. During the course of the next several months, Messrs. Rodriguez and Esquenazi authorized payments to J.D. Locator via "check requests," forms Terra used to write checks without invoices. Mr. Diaz testified that he knew the payments Terra made were not for legitimate consulting services and that he never intended to provide such services. Instead, Mr. Diaz retained ten percent of the funds Terra paid J.D. Locator and disbursed the remainder, usually either to Mr. Antoine or his business associate Mr. Fourcand. Mr. Fourcand testified that he knew he was receiving money from Terra (through J.D. Locator) that would ultimately go to Mr. Antoine and that Mr. Antoine asked him to be part of that deal. All told, while Mr. Antoine remained at Teleco, Terra paid him and his associates approximately $822,000. And, during that time, Terra's bills were reduced by over $2 million.

In April 2003, President Aristide removed Mr. Antoine and named Alphonse Inevil as his replacement. Mr. Inevil soon replaced Mr. Joseph as Director General, and Jean Rene Duperval replaced Inevil. Later that year, with Terra still behind on its bills, Mr. Esquenazi helped Mr. Duperval form a shell company, Telecom Consulting Services Corporation (TCSC), through which Esquenazi ultimately would make side payments to Mr. Duperval. TCSC's president was Margurite Grandison, Mr. Duperval's sister; its incorporator and registered agent was Mr. Dickey; and the company's principal business address was a post office box that named Mr. Duperval as the person empowered to receive mail through it. Ms. Grandison executed a "commission agreement" with Terra, which Mr. Esquenazi signed. And on November 20, Mr. Rodriguez authorized the first transfer, $15,000, to TCSC. Over the next five months, although Terra received no invoices to reflect money owed TCSC, Terra made six additional transfers to TCSC totaling $60,000. Each of these seven transfers is the subject of the substantive FCPA counts. Ms. Grandison then disbursed money from TCSC's account to Mr. Duperval and his associates. She made a number of transfers, twelve of which constitute the substantive money-laundering counts.

During the Internal Revenue Service's investigation of the case, Mr. Esquenazi admitted he had bribed Mr. Duperval and other Teleco officials. He and Mr. Rodriguez nonetheless pleaded not guilty, proceeded to trial, and were found guilty on all counts.

Five days after the jury convicted Messrs. Esquenazi and Rodriguez, the government received from an attorney involved in Patrick Joseph's defense a declaration by the Haitian Prime Minister, Jean Max Bellerive. The declaration, marked with a date that fell in the middle of the jury trial, stated: "Teleco has never been and until now is not a State enterprise." In a second declaration, made later and provided by the government to defense counsel, Prime Minister Bellerive confirmed that "the facts mentioned in the [first] statement are truthful," but clarified: "The only legal point that should stand out in this statement is that there exists no law specifically designating Teleco as a public institution." In this second declaration, Prime Minister Bellerive also stated, "this does not mean that Haiti's public laws do not apply to Teleco even if no public law designates it as such." The second declaration detailed the public aspects of Teleco, many of which the government's expert had discussed at trial. Messrs. Esquenazi and Rodriguez moved for a judgment of acquittal and a new trial on the basis of the declarations, which the district court denied. . . .

The FCPA prohibits "any domestic concern" from "mak[ing] use of the mails or any means . . . of interstate commerce corruptly in furtherance of" a bribe to "any foreign official," or to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official," for the purpose of "influencing any act or decision of such foreign official ... in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. §§ 78dd–2(a)(1), (3). A "foreign official" is "any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof." *Id.* § 78dd–2(h)(2)(A) (emphasis added). The central question before us, and the principal source of disagreement between the parties, is what "instrumentality" means (and whether Teleco qualifies as one).

The FCPA does not define the term "instrumentality," and this Court has not either. For that matter, we know of no other court of appeals who has. The definition matters in this case, in light of the challenges to the district court's jury instructions on "instrumentality"; to the sufficiency of the evidence that Teleco qualified as an instrumentality of the Haitian government; and to Mr. Esquenazi's contention that the statute is unconstitutionally vague. Before we address these challenges, however, we must define "instrumentality" for purposes of the FCPA.

We begin, as we always do when construing statutory text, with the plain meaning of the word at issue. *See Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000). According to Black's Law Dictionary, an instrumentality is "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body." *Id.* at 870 (9th ed. 2009). Webster's Third New International Dictionary says the word means "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." *Id.* at 1172 (3d ed. 1993). These dictionary definitions foreclose Mr. Rodriguez's contention that only an actual *part* of the government would qualify as an instrumentality—that contention is too cramped and would impede the "wide net over foreign bribery" Congress sought to cast in enacting the FCPA. *United States v. Kay,* 359 F.3d 738, 749 (5th Cir. 2004). Beyond that argument, the parties do not quibble over the phrasing of these definitions, and they agree an instrumentality must perform a government function at the government's behest. The parties also agree, however, and we have noted in other cases interpreting similar provisions, that the dictionary definitions get us only part of the way there. *See Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir. 2010) (recognizing the Second Circuit's conclusion that "instrumentality" is "a word susceptible of more than one meaning" (citing *Green v. New York,* 465 F.3d 65, 79 (2d Cir. 2006))). Thus, we turn to other tools to decide what "instrumentality" means in the FCPA.

To interpret "instrumentality" as used in the Americans with Disabilities Act, we relied upon what the Supreme Court has called the "commonsense cannon of *noscitur a sociis," United States v. Williams,* 553 U.S. 285, 294, 128 S. Ct. 1830, 1839, 170 L. Ed. 2d 650 (2008)—that is, " 'a word is known by the company it keeps.'" *Edison,* 604 F.3d at 1309 (quoting *Green,* 465 F.3d at 79 (quoting, in turn, *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S. Ct. 1579, 1582, 6 L. Ed. 2d 859 (1961))). In the FCPA, the company "instrumentality" keeps is "agency" and "department," entities through which the government performs its functions and that are controlled by the government. We therefore glean from that context that an entity must be under the control or dominion of the government to qualify as an "instrumentality" within the FCPA's meaning. And we can also surmise from the other words in the series along with "instrumentality" that an instrumentality must be doing the business of the government. What the defendants and the government disagree about, however, is what functions count as the government's business.

To answer that question, we examine the broader statutory context in which the word is used. *See Edison,* 604 F.3d 1307 at 1310 ("We have affirmed many times that we do not look at one word or term in isolation but rather look to the entire statute and its context."). In this respect, we find one other provision of the FCPA and Congress's relatively recent amendment of the statute particularly illustrative. First, the so-called "grease payment" provision establishes an "exception" to FCPA liability for "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a *routine governmental action* by a foreign official." 15 U.S.C. § 78dd–2(b). "Routine governmental action" is defined as "an action . . . ordinarily and commonly performed by a foreign official in," among other things, "providing phone service." *Id.* § 78dd–2(h)(4)(A). If an entity involved in providing phone service could never be a foreign official so as to fall under the FCPA's substantive prohibition, there would be no need to provide an express exclusion for payments to such an entity. In other words, if we read "instrumentality," as the defendants urge, to categorically exclude government-controlled entities that provide telephone service, like Teleco, then we would render meaningless a portion of the definition of "routine governmental action" in section 78dd–2(b). "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Regions Hosp. v. Shalala*, 522 U.S. 448, 467, 118 S. Ct. 909, 920, 139 L. Ed. 2d 895 (1998) (citation omitted). Thus, that a government-controlled entity provides a commercial service does not automatically mean it is not an instrumentality. In fact, the statute expressly contemplates that in some instances it would.

Next, we turn to Congress's 1998 amendment of the FCPA, enacted to ensure the United States was in compliance with its treaty obligations. That year, the United States ratified the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), Dec. 17, 1997, S. Treaty Doc. No. 105–43, 37 I.L.M. 1 (ratified Dec. 8, 1998, entered into force Feb. 15, 1999). . . .

To implement the Convention's mandates, Congress amended the FCPA in 1998. *See* Pub. L. No. 105–366, 112 Stat. 3302. The only change to the definition of "foreign official" in the FCPA that Congress thought necessary was the addition of "public international organization." 15 U.S.C. 78dd–2(h)(2)(A). This seems to demonstrate that Congress considered its preexisting definition *already to cover* a "foreign public official" of an "enterprise . . . over which a government . . . exercise[s] a dominant influence" that performs a "public function" because it does not "operate[ ] on a normal commercial basis . . . substantially equivalent to that of . . . private enterprise[s]" in the relevant market "without preferential subsidies or other privileges." OECD Convention art. 1.4(a) & cmt. 14, 15. Although we generally are wary of relying too much on later legislative developments to decide a prior Congress' legislative intent, the circumstances in this case cause us less concern in that regard. This is not an instance in which Congress merely discussed previously enacted legislation and possible changes to it. Rather, Congress *did* make a change to the FCPA, and it did so specifically to ensure that the FCPA fulfilled the promise the United States made to other nations when it joined the Convention. The FCPA after those amendments is a different law, and we may consider Congress's intent in passing those amendments as strongly suggestive of the meaning of "instrumentality" as it exists today. . . .

Although we believe Teleco would qualify as a Haitian instrumentality under almost any definition we could craft, we are mindful of the needs of both corporations and the government for *ex ante* direction about what an instrumentality is. With this guidance, we define instrumentality as follows. An "instrumentality" under section 78dd–2(h)(2)(A) of the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own. Certainly, what constitutes control and what constitutes a function the government treats as its own are fact-bound questions. It would be unwise and likely impossible to exhaustively answer them in the abstract. Because we only have this case before us, we do not purport to list all of the factors that might prove relevant to deciding whether an entity is an instrumentality of a foreign government. For today, we provide a list of some factors that may be relevant to deciding the issue.

To decide if the government "controls" an entity, courts and juries should look to the foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed. We do not cut these factors from whole cloth. Rather, they are informed by the commentary to the OECD Convention the United States ratified. *See* OECD Convention, art. 1.4, cmt. 14 (stating that an entity is "deemed" to be under governmental control *"inter alia,* when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board"). They are also consistent with the approach the Supreme Court has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts. . . .

We then turn to the second element relevant to deciding if an entity is an instrumentality of a foreign government under the FCPA—deciding if the entity performs a function the government treats as its own. Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function. Just as with the factors indicating control, we draw these in part from the OECD Convention. . . .

In addition to challenging the "instrumentality" jury instruction, Messrs. Esquenazi and Rodriguez also argue the evidence was insufficient to demonstrate that Teleco was an instrumentality of the Haitian government. We review the sufficiency of the evidence *de novo,* "viewing the evidence and taking all reasonable inferences in favor of the jury's verdict." *United States v. Fries,* 725 F.3d 1286, 1291 (11th Cir. 2013). In light of our construction of the term, we have little difficulty concluding sufficient evidence supported the jury's necessary finding that Teleco was a Haitian instrumentality.

From Teleco's creation, Haiti granted the company a monopoly over telecommunications service and gave it various tax advantages. Beginning in early 1970s, and through the years Messrs. Esquenazi and Rodriguez were involved, Haiti's national bank owned 97 percent of Teleco. The company's Director General was chosen by the Haitian President with the consent of the Haitian Prime Minister and the ministers of public works and economic finance. And the Haitian President appointed all of

Teleco's board members. The government's expert testified that Teleco belonged "totally to the state" and "was considered . . . a public entity." Although the expert also testified that "[t]here was no specific law that ... decided that at the beginning that Teleco is a public entity," he maintained that "government, officials, everyone consider[ed] Teleco as a public administration." Construed in the light most favorable to the jury's verdict, that evidence was sufficient to show Teleco was controlled by the Haitian government and performed a function Haiti treated as its own, namely, nationalized telecommunication services.

H. Addressing International Corruption Beyond the FCPA

Can the United States prosecute corruption in international business transactions if such corruption *doesn't* involve foreign public officials? Yes. To see how, one must become familiar with a few more complicated but important statutes: the "Travel Act," federal money laundering prohibitions, and "RICO."

In addition, this part includes some materials for considering the role of U.S. law and American lawyers in the process by which the proceeds of corruption abroad are often patriated into the U.S. and other attractive jurisdictions for investment and wealth-building. Recall what the Biden Administration statement earlier in the chapter had to say about that subject.

<u>The "Travel Act"</u>

18 U.S.C. § 1952 - Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

> **(1)** distribute the proceeds of any unlawful activity; or
>
> **(2)** commit any crime of violence to further any unlawful activity; or
>
> **(3)** otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform—
>
>> **(A)** an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or
>>
>> **(B)** an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States, or (3) any act which is indictable under subchapter II of chapter 53 of title 31, United States Code, or under section 1956 or 1957 of this title and (ii) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. . . .

With organized crime in mind, Congress designed the Travel Act, somewhat like RICO (which the Travel Act predates), to allow federal prosecutors to "pull" some traditional state crimes into federal court when committed across state (and international) lines. In the context of bribery in business matters, the relevant state laws are so-called "commercial bribery" statutes, which are prevalent in American criminal codes. The following example is from New York:

> N.Y. Penal Law § 180.03. Commercial bribing in the first degree.
>
> A person is guilty of commercial bribing in the first degree when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars.

<u>"Promotion" and "concealment" money laundering</u>

18 U.S.C. § 1956 - Laundering of monetary instruments

(a)

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)

(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both….

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means—

[a long list of criminal offenses including] . . .

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving— . . .

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official; . . .

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States . . .

(D) . . . any felony violation of the Foreign Corrupt Practices Act . . .

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity….

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000. . . .

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy. . . .

<u>RICO</u>

18 U.S.C. § 1961 –Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year . . .

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; . . .

18 U.S.C. § 1962 – Prohibited activities

. . . **(c)** It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

[RICO's criminal penalties include fines, up to 20 years' imprisonment, and extensive forfeiture provisions.]

The next case, involving the bribery scandal relating to the Salt Lake City Olympics, was prosecuted as a Travel Act violation. As you read, consider the following questions: Why wasn't this an FCPA case? What is the underlying state statute with which the Travel Act was being used to bring this case in federal court? What issues with the state statute do the defendants raise and why does the court reject these arguments? Do you agree with the court's reasoning?

UNITED STATES v. WELCH, 327 F.3d 1081 (10th Cir. 2003)

BALDOCK, Circuit Judge:

Defendants Thomas K. Welch and David R. Johnson were the President and Senior Vice President, respectively, of the Salt Lake City Bid Committee for the 2002 Olympic Winter Games (SLBC). Community leaders organized the SLBC in the late 1980's as an I.R.C. § 501(c)(3) not-for-profit corporation under the direction of a board of trustees. The SLBC's primary purpose was to secure, in cooperation with the United States Olympic Committee (USOC), the right from the International Olympic Committee (IOC) to host the quadrennial Winter Games in Utah. The IOC is an "international non-governmental non-profit organization" based in Lausanne, Switzerland. One of the primary duties of individual IOC members from participating countries is to cast votes to elect the host city for the Olympic Games. In June 1995, the IOC awarded the 2002 Olympic Winter Games to Salt Lake City, Utah.

In July 2000, a federal grand jury indicted Defendants Welch and Johnson on fifteen bribery-related counts of criminal misconduct in connection with the SLBC's activities in procuring the 2002 Games. . . . Counts II through V charged Defendants with use of communications in interstate and foreign commerce to facilitate unlawful activity in violation of 18 U.S.C. § 1952(a)(3). . . .

According to the indictment, Salt Lake City began competing for the Olympic Winter Games around 1988. In 1994, the SLBC and USOC jointly executed and filed with the IOC an "Undertaking" in which they agreed to abide by the provisions of the International Olympic Charter and to act in accord with the IOC's instructions to candidate cities bidding on the 2002 Winter Games. As part of the 2002 bidding process, the IOC distributed a series of instructions to candidate cities and IOC members. IOC members similarly are bound by the Charter and take an oath to remain free from commercial influence. As stated in the indictment, the instructions "limited certain expenditures by candidate cities, created rules concerning visits by IOC members to candidate cities, and placed limitations on the value of gifts and other benefits which could be given to IOC members by and on behalf of candidate cities."

Meanwhile, between February 1988 and July 1999, Defendants purportedly utilized interstate facilities, contrary to federal law, to engage in a bribery scheme to "misappropriate and misapply the monies and funds of the SLBC[ ] by diverting SLBC income and by giving . . . money and other material benefits to influence IOC members to vote for Salt Lake City to host the Olympic Winter Games[.]" Among other things, the indictment alleges Defendants instructed an SLBC "sponsor" "to make a series of payments to the defendants in cash so that the payments would not appear on the SLBC's books and records and could be diverted by the defendants for their own personal purposes."

The indictment alleges Defendants (1) made direct and indirect payments of money and other things of substantial value to IOC members; (2) paid for tuition, living expenses, and spending money for the children and relatives of IOC members; (3) paid for medical expenses of IOC members and their relatives; and (4) paid for personal and vacation travel expenses of IOC members and their relatives. Defendants also purportedly obtained lawful permanent resident alien status for an IOC member's son through submission of false and misleading documents to immigration authorities. Defendants allegedly conferred valuable benefits upon amenable IOC members totaling approximately $1,000,000 in value.

According to the indictment, neither the SLBC, its board of trustees, nor its contributors were aware of Defendants' scheme. Similarly, neither the USOC, IOC, Salt Lake City, State of Utah, nor the United States had any knowledge of Defendants' activities. The indictment alleges Defendants secretly retained and paid Alfredo La Mont, the USOC's Director of International Relations, to assist them "in influencing the conduct of IOC members in connection with the IOC's election" of Salt Lake City to host the Winter Games. To further conceal their illicit activities, Defendants allegedly (1) made payments to IOC members in cash; (2) created and funded a sham program known as the National Olympic Committee Program ostensibly to provide athletes in underprivileged countries with training and equipment; (3) entered into sham contracts and consulting agreements on behalf of the SLBC; (4) recorded payments and benefits which the SLBC provided to IOC members inaccurately in corporate books and records; (5) placed false, fraudulent, and misleading information in SLBC financial records and statements, and (6) failed to disclose material information in public documents. . . .

Commonly referred to as the Travel Act, 18 U.S.C. § 1952 provides in relevant part:

> (a) Whoever . . . uses the mail or any facility in interstate or foreign commerce, with intent to- . . .
>
> > (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform-
>
> > > (A) an act described in paragraph . . . (3) shall be fined under this title, imprisoned not more than 5 years, or both[.]

Id. § 1952(a)(3)(A). Subsection (b) defines "unlawful activity" as, among other things, "bribery ... in violation of the laws of the State in which committed[.]" *Id.* § 1952(b)(i)(2). In this case, the "unlawful activity" on which the Travel Act counts rely is bribery as defined by Utah Code Ann. § 76-6-508(1)(a). Entitled "Bribery of or receiving bribe by person in the business of selection, appraisal, or criticism of goods or services," § 76-6-508(1)(a) provides in relevant part:

> (1) A person is guilty of a class A misdemeanor when, without the consent of the . . . principal, contrary to the interests of the . . . principal:
>
> > (a) he confers, offers, or agrees to confer upon the . . . agent, or fiduciary of . . . [the]

> principal any benefit with the purpose of influencing the conduct of the . . . agent, or fiduciary in relating to his . . . principal's affairs[.] . . .

Concerned with state and local governments' inability to cope with the interstate nature of complex criminal enterprises, Congress enacted the Travel Act as part of the Attorney General's 1961 legislative program directed against "organized crime." *See Perrin v. United States*, 444 U.S. 37, 41, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979). The Travel Act "impose[s] criminal sanctions upon the person whose work takes him across State or National boundaries in aid of certain 'unlawful activities.'" H.R. Rep. No. 966, at 4 (1961), reprinted in 1961 U.S.C.C.A.N. 2664, 2666 (letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives). The Travel Act is, "in short, an effort to deny individuals who act [with the requisite] criminal purpose access to the channels of commerce." *Erlenbaugh v. United States*, 409 U.S. 239, 246, 93 S. Ct. 477, 34 L. Ed. 2d 446 (1972).

As set forth by the Act's plain language, the elements necessary to sustain a Travel Act conviction are (1) travel in interstate or foreign commerce or use of the mail or any facility in interstate or foreign commerce, (2) with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and (3) performance of or an attempt to perform an act of promotion, management, establishment, or carrying on of the enumerated unlawful activity. 18 U.S.C. § 1952(a)(3). The district court never suggested the Travel Act counts fail to allege the foregoing elements, and neither have Defendants. Instead, the concern focuses largely on whether the Utah Commercial Bribery Statute legitimately defines the "unlawful activity" required for this Travel Act prosecution. . . .

Utah Code Ann. § 76-6-508(1)(a) is unconstitutionally vague as applied to Defendants only if its language "fails to provide people of ordinary intelligence a reasonable opportunity to understand" that Defendants' conduct, as alleged in the indictment, was proscribed. *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). In making that determination, we interpret the statute consistent with Utah state law. *See United States v. Gaudreau*, 860 F.2d 357, 361 (10th Cir. 1988). Unfortunately, the Utah Supreme Court has not addressed the constitutionality of § 76-6-508. The court has, however, provided useful principles to assist us in addressing that question:

> When interpreting statutes our primary goal is to evince the true intent and purpose of the legislature. We discern legislative intent and purpose by first looking to the "best evidence" of its meaning, which is the plain language of the statute itself. When examining the statutory language, we assume the legislature used each term advisedly and in accordance with its ordinary meaning.

State v. Martinez, 52 P.3d 1276, 1278 (Utah 2002) (internal quotations and citations omitted). Where the words of a statute are unambiguous, the Utah Supreme Court "has a long history of relying on dictionary definitions to determine plain meaning." *State v. Redd*, 992 P.2d 986, 990 (Utah 1999) (relying on dictionary definition of "remove" as used in a penal statute).

The district court concluded the words "any benefit" were "inherently ambiguous because the breadth of the language encompasses all gifts including expressions of courtesy such as good will gifts." We agree with the district court that "it . . . broaches absurdity to believe the [Utah] legislature intended to criminalize good will gifts and gestures, especially in the context of promoting Salt Lake City and the State of Utah on the world stage to host the Olympic Winter Games." Neither § 76-6-508(1)(a), nor the indictment, however, in any way seek to criminalize "good will gifts and gestures." Webster's Third New Int'l Dictionary 979 (1981) (hereinafter "Webster's") defines "good will" as "a will acting freely from pure disinterested motives." Utah Code Ann. § 76-6-508(1)(a), in clear contrast, requires a defendant confer or agree to confer a "benefit" upon the agent or fiduciary of a principal "with the purpose of influencing the conduct of the ... agent, or fiduciary in relating to his ... principal's affairs[.]" (emphasis added). The district court failed to appreciate the limiting effect of § 76-6-508(1)(a)'s mens rea requirement on the phrase "any benefit" and on the statute as a whole.

To establish Defendants' violation of the Travel Act, the Government must prove, among other things, that Defendants acted with a culpable state of mind. The Travel Act requires an act "with intent to . . . promote . . . or facilitate the promotion . . . of any unlawful activity[.]" The "unlawful activity" in this case, bribery under § 76-6-508(1)(a), requires an act "with the purpose of influencing . . . conduct[.]" Both statutes require the Government prove Defendants acted with a higher level of culpability than mere knowledge. The Travel Act requires a specific "intent to . . . promote[.]" *See United States v. James*, 210 F.3d 1342, 1345 (11th Cir. 2000) (Travel Act violation is a specific intent crime); *see also United States v. Hall*, 536 F.2d 313, 329–30 (10th Cir. 1976) (approving a specific intent instruction on a Travel Act charge). In other words, the Travel Act requires a defendant act not only with knowledge of what he is doing, but also with the objective of promoting some unlawful activity. *See United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995) ("A specific intent crime is one in which an act was committed voluntarily and purposely with the specific intent to do something the law forbids.") (internal quotations omitted). Meanwhile, § 76-6-508(1)(a) requires a purposeful act. A person acts purposely if he consciously desires his conduct bring about a particular result, whatever the actual likelihood of that result. *See United States v. Bailey*, 444 U.S. 394, 404, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980). As the Court explained in *Bailey*, acting with a purpose and with a specific intent are much the same. *Id.* at 403–07, 100 S. Ct. 624.

A vagueness challenge to a penal statute based on insufficient notice rarely succeeds where the requisite mental state is one of purpose or specific intent. The Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), limited on other grounds by *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989). The Court explained nearly sixty years ago that "where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." *Screws v. United States*, 325 U.S. 91, 102, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945) (plurality); *accord United States v. Stewart*, 872 F.2d 957, 959 (10th Cir. 1989). This is so because to meet the statute's mens rea requirement, a defendant must consciously behave in a way the law prohibits, "and such conduct is a fitting object of criminal punishment." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978).

Contrary to the district court's conclusion, no construction of § 76-6-508(1)(a) as applied to the allegations of the Travel Act counts could encompass those who confer or attempt to confer "benefits" upon an agent or fiduciary without unlawful purpose. The district court expressed concern that the words "any benefit" "leaves defendants to guess whether such gestures as transporting IOC members to and from the airport is sanctioned by § 76-6-508, but providing dinner for them is not; whether providing dinner is legal under the statute, but providing lodging is not; and so on and so forth." In doing so, the court went well beyond the four corners of the indictment to hypothetical "benefits" which § 76-6-508(1)(a) may or may not proscribe. *See Hill*, 530 U.S. at 733, 120 S. Ct. 2480 (rejecting "hypertechnical theories" as to what a penal statute covered).

Counts II, III, and IV of the indictment allege Defendants made or caused to be made international wire transfers in the amounts of $12,000, $1,000, and $15,000 respectively. Those counts further allege Defendants made those transfers to three IOC members with the "intent to . . . promote . . . or facilitate the promotion" of the crime of bribery as defined by § 76-6-508(a)(1). Count V alleges Defendants received an interstate fax from Alfredo La Mont, the USOC representative Defendants allegedly retained to assist them in their bribery scheme. That count further alleges Defendants received the fax with the "intent to . . . promote . . . or facilitate the promotion" of the crime of bribery as defined by § 76-6-508(1)(a).

At trial, Defendants will be free to argue before the jury that they facilitated these transfers and correspondence, if proven, absent the requisite intent to promote bribery. Absent proof of an intent to influence conduct, Defendants' use of interstate and international channels of commerce would not promote the designated "unlawful activity" as required by 18 U.S.C. § 1952(a). *See Jones*, 909 F.2d at 538–39 (proper Travel Act instruction "fully incorporates the elements of the relevant state law offense into the definition of the Travel Act violation"). That argument, however, is premature because at this stage we accept the indictment's allegations as true.

Employing much the same rationale as the district court, Defendants suggest "most gifts given to persons in a position to make decisions have, at some level, an intent to influence those persons, but not all of those gifts are unlawful." (emphasis added). Defendants add the Government does not "suggest that all benefits given with the intent to influence IOC members were bribes." (emphasis added). Neither § 76-6-508(1)(a) nor the indictment, however, concerns itself with "most gifts" and "all benefits." The indictment plainly states that certain expenditures, gifts, and other benefits tendered to IOC members were within IOC guidelines and permissible. The indictment does not oppose Defendants' undertaking on behalf of the SLBC to persuade IOC members, within the bounds of the law, as to the merits of their cause.

Instead, the indictment alleges Defendants clandestinely employed interstate and international channels of commerce to assist them in conferring direct and indirect cash payments and other benefits on IOC members "with the purpose of influencing" those members to cast their votes for Salt Lake City-not on the basis of the city's merits as mandated by the IOC, but on the basis of the members' personal gain. In other words, the indictment alleges Defendants used the channels of commerce to promote bribery, "a concept well-understood by the ordinary person." *Gaudreau*, 860 F.2d at 363 (rejecting a constitutional challenge to Colorado's commercial bribery statute when used as a predicate for a RICO prosecution). Defendants, like the district court, improperly wander beyond the four corners of the indictment to argue their case. Speculation about the vagueness of § 76-6-508(1)(a) in hypothetical situations is inadequate to sustain an attack on a Utah statute which surely applies to the conduct alleged in the indictment. *See Saffo*, 227 F.3d at 1270 ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). . . .

The district court next reasoned the phrase "in relating to his . . . principal's affairs" was unduly vague because it left one to guess whether the principal need suffer some detriment and was thus "susceptible to two distinct interpretations." . . .

Despite the district court's concern, § 76-6-508(1)(a)'s language does not require the principal actually "suffer some detriment." *Cf. Parise*, 159 F.3d at 798–801 (refusing to read into Pennsylvania's commercial bribery statute a requirement that the agent acted against the principal's interest). Such a reading of the statute might attribute to the Utah legislature the unexpressed intent to limit § 76-6-508(1)(a)'s reach to instances where the ultimate outcome harmed the principal. *See Bailey*, 444 U.S. at 406–07, 100 S. Ct. 624 (recognizing the criminal justice system "could easily fall of its own weight if courts . . . become obsessed with hair-splitting distinctions that [the legislature] neither stated nor implied when it made the conduct criminal"). Certainly the selection of Salt Lake City to host the 2002 Olympic Winter Games, in itself, was not detrimental to the IOC. The Games, by all accounts, were a success. Section 76-6-508(1)(a), however, proscribes conduct spawned by a corrupt intent to compromise an agent's duty of loyalty to the principal. Purposeful conduct designed to compromise this duty of loyalty is the harm at which the statute is aimed. We conclude that whatever the exact contours of § 76-6-508(1)(a)'s "in relating to" language, the conduct which Defendants allegedly sought to influence in this case, i.e., IOC members' votes, undoubtedly "relates to" the IOC's "affairs."

The court further reasoned the phrase "contrary to the interests of the . . . principal" was unduly vague because "[a] subjective evaluation by the defendants . . . is required to determine what is 'contrary to the interests' of the IOC and its members." Consistent with the statute's aim to protect the duty of loyalty, § 76-6-508(1)(a) does not require that the principal suffer some detriment. Rather, the statute requires only that the proscribed conduct be "contrary to the interests of" the principal, or in other words, opposed to the principal's concerns. *See* Webster's, *supra* at 495, 1178 (defining the terms "contrary" and "interest" respectively).

The IOC's interest is not limited to the desirability of the chosen site as the district court suggested. The IOC clearly has an interest in the fairness of the bidding process as evidenced by, among other things, the Olympic Charter. As stated in the indictment: "The Olympic Charter prohibited IOC members from accepting from governments, organizations, or other legal entities or natural persons, any mandate liable to bind them or interfere with their freedom of action and vote." Fairness in the site selection process depends on the undivided loyalty of IOC members to the IOC-a loyalty critical to the IOC's mission. See Report of the IOC ad hoc Commission to Investigate the Conduct of Certain IOC Members and to Consider Possible Changes in the Procedures for the Allocation of the Games of the Olympiad and Olympic Winter Games (1999). We believe a person of ordinary intelligence would understand that Defendants' alleged conduct was "contrary to the interest of" the IOC.

To the extent, if any, the phrase "contrary to the interest of" requires "subjective evaluation by the defendants," it is like the myriad of other phrases appearing in § 76-6-508(1)(a) with which the district court found fault. "'[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.'" *United States v. Villano*, 529 F.2d 1046, 1055 (10th Cir. 1976) (quoting *Nash v. United States*, 229 U.S. 373, 377, 33 S. Ct. 780, 57 L. Ed. 1232 (1913)). What the district court failed to recognize in analyzing the phrase "contrary to the interest of," as well as § 76-6-508(1)(a)'s other phrases, is that-

> [l]aws cannot define the boundaries of impermissible conduct with mathematical certainty. . . . "The precise course of the [boundary] may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

Gaudreau, 860 F.2d at 363 n. 17 (quoting *United States v. Wurzbach*, 280 U.S. 396, 399, 50 S. Ct. 167, 74 L. Ed. 508 (1930)). "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines*, 342 U.S. at 340, 72 S. Ct. 329.

We do not suggest Defendants have violated the Travel Act or even come "perilously close" to violating it, although the indictment plainly supports the former view. That ultimately is for a jury to decide. What we decide is that the statutory definition of "unlawful activity," i.e., Utah Code Ann. § 76-6-508(1)(a), on which the indictment's Travel Act counts rely, conveyed sufficiently clear warning to Defendants as to the criminal nature of their alleged conduct when measured by common understanding and practices. *See Villano*, 529 F.2d at 1055; *see also Gaudreau*, 860 F.2d at 359 n. 2 (noting that state "commercial bribery statutes have been uniformly upheld in the face of vagueness challenges"). The possibility Defendants, sophisticated businessmen, would misunderstand the unremarkable proposition that their use of the channels of commerce in the manner alleged might promote, in violation of the Travel Act, the "unlawful activity" of bribery as defined by § 76-6-508(1)(a) seems remote. *See Hill*, 530 U.S. at 732–33, 120 S. Ct. 2480. That possibility becomes still more remote when considering the indictment's allegations as to Defendants' concerted efforts to conceal their conduct. *See supra* at 1086; *see also United States v. Rybicki*, 287 F.3d 257, 264 (2d Cir. 2002) (noting that a mail fraud defendant's efforts to avoid detection by omitting information from financial records was "indicative of consciousness of guilt"). . . .

A jury in Salt Lake City acquitted all defendants of all charges in the *Welch* prosecution. How might you speculate on the basis for the jury's acquittals?

As a way of considering the huge money laundering and tax evasion problems involved in international corruption (consider the scandals revealed by the leaks knowns as *The Panama Papers*, *The Paradise Papers*, and *The FinCEN files*) and the role of the U.S. in those problems, it is highly recommended to watch a *60 Minutes* television news report, "Anonymous, Inc.," which includes secret video recordings of reputable New York lawyers discussing a potential money laundering scheme with a prospective foreign client. (At last check, a CBS News subscription was required but may be available for free on a trial basis, or through your institution's library; the author has typically used class time to show the report, which is stunning.) Consider the following ethics opinions in connection with the conduct of attorneys in that *60 Minutes* story.

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2018-4: Duties When an Attorney Is Asked to Assist in a Suspicious Transaction

TOPICS: Client Due Diligence, Confidentiality, Duty of Candor, Duty to Refrain from Counseling Fraudulent or Illegal Conduct.

DIGEST: The New York Rules of Professional Conduct (the "Rules") prohibit a lawyer from knowingly assisting a client's crime or fraud but do not explicitly address a lawyer's duty when the lawyer merely has doubts about the lawfulness of the client's conduct; nor do the Rules explicitly require a lawyer to investigate in such circumstances in order to ascertain whether the legal services would in fact assist a crime or fraud before assisting the client. Nevertheless, when a lawyer is asked to assist in a transaction that the lawyer suspects may involve a crime or fraud, a duty of inquiry in some circumstances is implicit in the Rules. First, in order to render competent representation as required by Rule 1.1, a lawyer has a duty to the client in some circumstances to undertake an inquiry into suspicious transactions to render reasonable and candid advice to the client about whether to undertake the proposed conduct and the consequences of doing so. Second, notwithstanding the absence of an explicit requirement, a duty to inquire into suspicious transactions under some circumstances is implicit in the duty to avoid knowingly assisting wrongful conduct. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client will engage or is engaging in a crime or fraud, the lawyer must not assist, or further assist, the wrongdoing. The lawyer may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

RULES: 1.1, 1.2, 1.6, 1.16, 2.1, 8.4

QUESTION: When an individual client asks a lawyer to provide legal assistance in a transaction, and the lawyer suspects that the legal services may assist the client's crime or fraud, to what extent must the lawyer investigate to allay or confirm the suspicions, and what other conduct must the lawyer undertake under the Rules?

OPINION:

I. Introduction

In the context of the following scenario, this opinion addresses lawyers' obligations under the Rules when the lawyer is retained to assist an individual client in a transaction that appears to the lawyer to be suspicious.

A lawyer represents a client in the sale of a business in New York. The client advises the lawyer that the proceeds of the transaction will be used to purchase a different business. The client directs that after the first transaction closes, all payments be sent to a bank in a well-known secrecy jurisdiction. The client then asks the lawyer to proceed with the purchase. In preparing the documents and doing general due diligence, the lawyer realizes that the proposed purchase price is much more than the business is worth. The lawyer also learns inadvertently that the client has two passports, each from a secrecy jurisdiction different than the one in which the bank is located. The lawyer suspects, but does not know, that the transaction will involve a fraud or crime, such as money laundering or tax evasion, on the part of the client.

As set forth below, a number of Rules and considerations bear on whether a transactional lawyer has a duty to investigate the client's conduct in this scenario and whether there are other steps that must be taken. These include the lawyer's duties of competence [Rule 1.1], of confidentiality [Rule 1.6], and to refrain from assisting a client in conduct that the lawyer knows is illegal or fraudulent [Rule 1.2(d)].

II. A Transactional Lawyer May Have a Duty to Inquire When Serious Questions are Raised Regarding Whether the Lawyer is Assisting the Client in a Crime or Fraud

a. The duty of competence may require the lawyer to conduct due diligence into the client's potentially fraudulent conduct

Rule 1.1(a) requires a lawyer to provide "competent representation to a client." In many contexts, the very purpose of the representation is to provide advice about the lawfulness of a client's proposed course of conduct or to assist the client in structuring a proposed transaction in a manner that conforms to the law. Rule 1.2(d) authorizes a lawyer to "discuss the legal consequences of any proposed course of conduct with a client," and in such cases, Rule 1.1 presupposes that the lawyer will provide competent advice about whether proposed conduct would be unlawful or about how to achieve the client's objectives within the law.

Regardless of the client's objectives, competent representation presupposes that the lawyer is rendering assistance in carrying out a client's lawful objectives. Committing a crime or engaging in other illegal or fraudulent conduct is not a lawful objective. Rule 1.2(d) forbids a lawyer from assisting the client in conduct that the lawyer knows to be illegal or fraudulent. But even if the lawyer does not have the requisite knowledge under Rule 1.2(d), furthering a client's illegal or fraudulent transaction – thereby subjecting a client to criminal or civil liability – may run afoul of the Rules if the lawyer did not act competently under Rule 1.1(a). In general, assisting in a suspicious transaction is not competent where a reasonable lawyer prompted by serious doubts would have refrained from providing assistance or would have investigated to allay suspicions before rendering or continuing to render legal assistance.

Further, Rules 1.4 and 2.1 require lawyers to render reasonable, candid advice. Unless the lawyer inquires in response to serious suspicions, the lawyer will not be in a position to advise the client about the attendant risks of civil or criminal liability. Thus, the duty of competence not only protects the client, but also in some situations requires the lawyer to take the steps necessary, including additional inquiry, to ensure that she is providing competent advice.

What constitutes a suspicion sufficient to trigger inquiry will depend on the circumstances. In many representations, there is no reason for the lawyer to doubt the lawfulness of the client's proposed actions. On the other hand, there may be representations where the circumstances raise suspicions or questions. For example, in the hypothetical above, the lawyer may have a duty to inquire of the client as to the reasons for a purchase of a business at a higher-than-market price and for running the funds through a bank in a secrecy jurisdiction to determine whether the transaction is being used to launder money, to avoid legitimate taxes, or for some other criminal or fraudulent purpose. Depending upon the answer, the lawyer may conclude that the transaction is legitimate, that she needs to make further inquiry, or that she must not provide further assistance in the transaction.

These conclusions are consistent with Comment [5] to Rule 1.1 which notes that "[c]ompetent handling of a particular matter includes inquiry into an analysis of the factual and legal elements of the problem," and with other authorities. *See, e.g.*, N.Y. City 2015-3 (2015) (a lawyer who believes he is the victim of a scam by a purported prospective client has a duty of competence to investigate further before proceeding with the matter); ABA Informal Op. 1470 (1981) ("Opinion 1470") ("[A] lawyer should not undertake representation in disregard of facts suggesting that the representation might aid the client in perpetrating a fraud or otherwise committing a crime."); cf. N.Y. City 2018-2 (2018) ("The duty of competence under Rule 1.1 establishes additional duties in the post-conviction context, including, in some cases, a duty to investigate new potentially exculpatory evidence regardless of whether Rule 3.8(c) is triggered.").

b. A lawyer who fails to investigate potentially fraudulent conduct may also violate Rule 1.2(d), depending on the circumstances

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows to be criminal or fraudulent. "Knowledge" under the Rules is defined as "actual knowledge of the fact in question . . . [which] may be inferred from the circumstances." Rule 1.0(k). However, consistent with the criminal law standard of "conscious avoidance," a lawyer may be deemed to have knowledge that the client is engaged in a criminal or fraudulent transaction if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. See N.Y. City 2018-2 (2018) ("Conscious avoidance of the fact in question may also constitute knowledge under the Rules, as under criminal law") (citing N.Y. City 99-02 (1999) ("Lawyers have an obligation not to shut their eyes to what was plainly to be seen . . . A lawyer cannot escape responsibility by avoiding inquiry.")).

Opinion 1470 similarly recognized that when lawyers are aware that the client's proposed course of conduct is likely to be illegal, they "cannot escape responsibility by avoiding inquiry" but "must be satisfied, on the facts before [them] and readily available to [them], that [they] can perform the requested services without abetting fraudulent or criminal conduct and without relying on past client crime or fraud to achieve results the client now wants"; if lawyers are not satisfied that the client's conduct is lawful, they have "a duty of further inquiry" before rendering assistance. Thus, while Rule 1.2(d) does not require lawyers to inquire when there is no ground for suspicion, they cannot ignore "red flags." *Cf.* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187 (2011), citing *In re Blatt*, 63 324 A.2d 15, 17–19 (N.J. 1974) (holding that "a lawyer committed misconduct by helping a client effect a purchase after failing to investigate its suspicious nature"); *In re Dobson,* 427 S.E.2d 166, 166–68 (S.C. 1993) (sanctioning "an attorney for helping his client while remaining deliberately ignorant of his client's criminal conduct" and holding that the court would " not countenance the conscious avoidance of one's ethical duties as an attorney").

III. Limits on the Lawyer's Duty to Inquire

Ordinarily, a lawyer will begin an inquiry by seeking information from the client before turning to other sources. After concluding a reasonable inquiry, the lawyer may ordinarily credit the client when there are doubts. Whether a particular inquiry is adequate will vary with the circumstances.

To the extent that the lawyer must seek information from others, the Rules may impose conditions or limits. In general, the duty under Rule 1.4 to keep the client reasonably informed will require the lawyer to explain why there are doubts about the legality of the transaction and what steps the lawyer proposes to take to allay or confirm suspicions. If suspicions are sufficiently serious to give rise to a duty of inquiry under Rule 1.2(d), then the lawyer would render further assistance at her peril. A lawyer's fear that a client may seek to cover up his actions does not eliminate the duty of communication. Rule 1.4(a)(5). If the lawyer does suspect a cover-up and cannot persuade the client to be forthcoming, she may choose to terminate the representation. Rule 1.16(c)(2). Similarly, if the client will not authorize such an inquiry, the lawyer may have no realistic choice other than to cease assisting in the particular transaction, because to continue the representation may put her in jeopardy of violating Rule 1.2(d). And, needless to say, a client's refusal to authorize and assist in an inquiry into the lawfulness of the client's proposed conduct will ordinarily constitute an additional, and very significant, "red flag."

If the client greenlights an inquiry but refuses to pay for the time required to conduct it, the lawyer must decide whether to conduct the inquiry at her own expense or terminate the representation. The lawyer may discontinue the representation based on concerns as to the legality of the transaction. See Rule 1.2(f) (permitting a lawyer to refuse to participate in conduct that the lawyer believes to be unlawful, even if there is support for an argument that the conduct is legal); Rule 1.2, Cmt. [15].

IV. Remedial Obligations

If a lawyer gains knowledge during the course of representation that a client is engaged in unlawful conduct (or plans to be), the lawyer has a range of options. The lawyer's remedial steps should be dictated by such factors as the lawyer's knowledge of the facts at hand, the seriousness of the client's misconduct, and the extent of the lawyer's involvement in the client's misconduct. When the lawyer has actual knowledge of prospective wrongdoing, the lawyer may not assist in the wrongdoing and, further, must counsel the client against the illegal course of conduct under Rule 1.4(a)(5). This counseling obligation derives from the duty of competence under Rule 1.1. Despite the challenges involved in "persuading a client to take necessary preventive or corrective action" under Rule 1.4, such communications are appropriate not only to assist the client but to mitigate any risks the attorney is assuming by continuing to represent the client. Rule 1.2(d), Cmt. [10].

In our hypothetical situation, if the lawyer determines that the client may be engaged in tax fraud or tax evasion, the lawyer may choose to counsel the client to pay the appropriate taxes or take other corrective action. There may also be circumstances in which corrective action is not possible and the lawyer may have no alternative but to resign. Rule 1.16(b)(1).

V. Conclusion

When asked to represent a client in a transaction that a lawyer believes to be suspicious, the lawyer has an implicit duty under some circumstances to inquire into the client's conduct. If the lawyer believes that her client is entering into a transaction that is illegal or fraudulent, the lawyer ordinarily must attempt to inquire in order to provide competent representation to the client under Rule 1.1. Further, under Rule 1.2(d), which forbids knowingly assisting a client's illegal or fraudulent conduct, a lawyer has the requisite knowledge if the lawyer is aware of serious questions about the legality of the transaction and renders assistance without considering readily available facts that would have confirmed the wrongfulness of the transaction. Implicit in the rule, therefore, is the obligation to take reasonably available measures to ascertain whether the client's transaction is illegal or fraudulent. The lawyer's inquiry must be consistent with the confidentiality duty of Rule 1.6, which governs disclosures the lawyer may make to third parties during the inquiry, as well as with the duty to keep the client informed during the representation. If the lawyer concludes that the client's conduct is illegal or fraudulent, the lawyer must not further assist the wrongdoing and may undertake remedial measures to the extent permitted by the exceptions to the confidentiality rule.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of John H. Jankoff (admitted as John Henry Jankoff), an attorney and counselor-at-law: Attorney Grievance Committee for the First Judicial Department, Petitioner, John H. Jankoff, Respondent.

September 20, 2018, Decided

PER CURIAM

Respondent, John H. Jankoff, was admitted to the practice of law in the State of New York by the First Judicial Department on December 23, 1968, under the name John Henry Jankoff. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

The Attorney Grievance Committee commenced this disciplinary proceeding by a petition of charges (Judiciary Law § 90[2] , Rules for Attorney Disciplinary Matters [22 NYCRR] § 1240.8), alleging that respondent was guilty of certain misconduct in violation of the Rules of Professional Conduct (22 NYCRR 1200.0) because he counseled a client to engage in conduct he knew was illegal or fraudulent and misrepresented his personal experience and knowledge during a meeting with the client. Specifically, respondent met with a potential client who represented himself as appearing on behalf of a West African minister. The individual stated that the minister desired to purchase real property in the form of a brownstone, an airplane, and a yacht in the United States and identified the money as "gray money" or "black money." Respondent did not personally inquire as to the provenance of the money. Although respondent knew that the money was questionable, he informed the individual that he would have to consult with an expert to determine whether the money could be moved anonymously and to make sure that the money was "clean" and not criminally derived. Nonetheless, respondent offered suggestions on how to transfer the money into the United States from other countries in ways that would mask the minister as the ultimate or beneficial owner. He also misrepresented his personal experience and knowledge of the subject matter to keep the potential client interested.

The parties agree on the stipulated facts, including the admission to the acts of professional misconduct and the violation of rules 1.2(d) , 8.4(c) and 8.4(h), the relevant factors in mitigation, and on the discipline. The parties now jointly move pursuant to 22 NYCRR 1240.8(a)(5) for discipline on consent and request the imposition of a public censure.

In support of the joint motion for discipline by consent, the parties rely on *Matter of Scher* (224 AD2d 132 , 647 N.Y.S.2d 857 [2d Dept 1996]), *Matter of Lesser* (217 AD2d 398 , 636 N.Y.S.2d 38 [1st Dept 1995]), *Matter of Rosales* (190 AD2d 214 , 598 N.Y.S.2d 302 [2d Dept 1993]), and *Matter of Kanarek* (33 AD2d 280 , 307 N.Y.S.2d 363 [2d Dept 1970]), and agree that the circumstances in those case are analogous here and should be followed. In light of the significant factors in mitigation, including respondent's cooperation, admitted conduct and acceptance of responsibility, and the fact that the misconduct was aberrational and occurred in the context of a single, open-ended conversation during a meeting with a potential clients after which respondent took no further steps, the parties agree that a public censure is appropriate.

Accordingly, the parties' motion for discipline by consent should be granted, and respondent is censured. The Committee's separately filed petition of charges should be denied as moot. . . .

Problem 5-3

As a final example of organized international corruption, consider the extensive prosecutions in the Eastern District of New York of individuals involved in the massive scandal in the operation of FIFA and other major organizations in the sport of soccer (football). The FIFA prosecutions have been largely predicated on RICO and the money laundering statutes. One of the main indictments is available at:

https://www.justice.gov/opa/file/796966/download.

There are also many summaries and reports readily available from online searches. Read a bit about the FIFA scandal if you haven't already, and consider these questions:

(a) Should the FIFA case have been a criminal prosecution?

(b) Should the FIFA case have been a *U.S.* criminal prosecution?

(c) Why might the FIFA case have been brought in the Eastern District of New York?

(d) Why hasn't the government used the FCPA in the FIFA prosecutions?