Foreign Corrupt Practices Act Compliance Issues for Import/Export Operations

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1. Introduction

In the 35 years since the enactment of the Foreign Corrupt Practices Act (the "FCPA"), there has been a great deal of commentary, both in the legal journals and in the popular press, about the application and interpretation of that statute. Moreover, in the past decade, FCPA enforcement has been a matter of high priority for the Department of Justice (the "DOJ") and the Securities and Exchange Commission (the "SEC"). Those enforcement efforts have resulted in judgments obtained and settlement agreements reached in which prominent companies have been subject to very large fines and penalties[1]. Generally, the most prominent (or notorious) FCPA enforcement actions have involved large payments to foreign officials in order to secure large contracts from foreign government agencies for the purchase of goods and services.

In response to the increased attention focused upon, and the increased law enforcement efforts devoted to, FCPA compliance, a great many business enterprises have dedicated very substantial resources to FCPA compliance policies, procedures and training. In very large part, those compliance efforts have been designed to prevent improper payments in connection with the solicitation, promotion, obtaining and maintaining contracts and other business opportunities with foreign government agencies. By contrast, it appears that relatively little attention on the part of corporate compliance officials has been devoted to FCPA compliance issues in connection with corporate import and export operations. The relative lack of attention to FCPA compliance is unfortunate, and fraught with peril, because, as discussed in this paper, import and export operations especially in emerging markets pose significant risks to United States companies under the FCPA.

The import of merchandise into, and the export of merchandise from, any particular country invariably involve substantial interactions with government officials of that country (*e.g.*, customs officials; import/export licensing officials; product safety certification and standards officials; etc.). In many emerging markets, imported merchandise is subject to relatively high import duties and taxes, which adversely affect the competitiveness of that merchandise in those countries. Correspondingly, many emerging markets have import and export licensing and other regulatory requirements that are lacking in transparency, and that may make the movement of merchandise into and out of those countries time-consuming, cumbersome and expensive. Under the circumstances, especially in "high risk" countries where local officials may be significantly underpaid and where official corruption is commonplace, the temptation to make payments or provide other benefits to those local officials in order to "facilitate" or "expedite" the import and export of merchandise may be very high. Such payments to foreign customs, tax and import/export regulatory officials are, however, likely to run afoul of the FCPA.

In view of the FCPA compliance risks posed by import and export operations, corporate trade compliance officials need to be aware of requirements and restrictions of the FCPA, and the application of that statute to the various circumstances in which compliance problems may arise. The objective of this paper is, therefore, to highlight those situations in which the import and/or export of merchandise in international trade and commerce may cause FCPA compliance problems or may expose corporate importers and exporters to potential liability for violations of the FCPA. Although this paper is directed primarily at corporate trade compliance professionals, it is extremely important that corporate counsel and corporate ethics and compliance officers understand this often overlooked area of FCPA compliance exposure. As trade compliance professionals are generally the corporate officials with the greatest visibility into import and export operations, including the activities of third parties acting on behalf of the company (*e.g.*, customs brokers, freight forwarders, logistics service providers, trade consultants), those trade compliance professionals can and should be key players in the company's overall efforts to assure compliance with its obligations under the FCPA[2].

2. The Foreign Corrupt Practices Act

The FCPA was enacted in 1977 to prevent bribery of foreign officials by United States companies. There are two separate and distinct provisions of the FCPA, as follows: (i) the anti-bribery provisions, which prohibit payments to foreign officials for certain specified improper purposes; and (ii) the accounting provisions, which require publicly-traded companies to keep accurate books and records of account, and to establish and maintain effective internal accounting controls. As discussed below, each of these separate provisions of the FCPA has significant implications for business practices in import/export operations.

a. <u>The Anti-Bribery Provisions of the FCPA</u>

The anti-bribery provisions of the FCPA are set forth in two separate sections of the statute, section 103[3], which applies to "issuers[4]", and section 104[5], which applies to "domestic concerns[6]". Those anti-bribery provisions[7] prohibit any issuer and domestic concern, and any officer, director, employee or agent, acting on behalf of an issuer or a domestic concern from paying or giving, or promising or offering to pay or give, or authorizing another person to pay or give, any money or any other thing of value to a "foreign official" ***for the purpose of*** (i) influencing any act or decision by that foreign official; (ii) inducing that foreign official to do or omit to do any act in violation of his/her lawful duty; (iii) securing any improper advantage; or (iv) inducing the foreign official to use his/her influence to assist the payor in obtaining or retaining business, or directing business to another person[8]. For purposes of this paper, there are five elements of the anti-bribery provisions of the FCPA that merit special consideration.

(1) **<u>Foreign Officials</u>:** The FCPA prohibits certain improper payments to "foreign officials". The term "foreign official" is defined in section 103(f)(1)(A) and 104(h)(2)(A)[9] as:

> … any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any 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.

Officials and employees of a country's customs service, import/export licensing agency or other regulatory agency clearly come within the scope of the statutory definition of a "foreign official"[10]. Importantly, officers and employees of private parties acting on behalf of a foreign government department or agency may also be "foreign officials" for purposes of the FCPA. This point may be of considerable importance for import/export operations because the various regulatory agencies and/or the customs service in a number of countries have engaged private companies (*e.g.*, SGS) to conduct tests or preshipment inspections of merchandise to be imported into those countries, in order to assure that the merchandise conforms to the country's product safety, environmental and certification standards. A payment made to an employee of such a private inspection company (*e.g.*, to issue a false inspection report or to certify non-conforming goods) could constitute a violation of the anti-bribery provisions of the FCPA, just as would a payment made to a foreign government customs inspector or regulatory enforcement officer, under the standards discussed below.

(2) **<u>Business Purpose</u>:** The anti-bribery provisions of the FCPA prohibit payments to any foreign official ***for the purpose of***: (i) causing that foreign official to fail to perform his/her lawful duty; (ii) securing an improper advantage; or (iii) inducing the foreign official to use his/her influence to obtain or retain business for the payor or to direct business to any other person. Based on the statutory language of this "business purpose" element of the FCPA, the principal focus of FCPA compliance and enforcement activities has been in preventing or punishing the payment by United States companies[11] of bribes to foreign officials made to obtain procurement contracts and other business opportunities from foreign governments.

Nonetheless, the 2004 decision of the Federal Court of Appeals for the Fifth Circuit in *United States v. Kay et al.*[12] makes it clear that the "business purpose" element of the anti-bribery provisions of the FCPA extends beyond payments made to foreign officials to obtain government contracts. In the *Kay* case, the defendants were indicted under the FCPA for paying bribes to Haitian customs officials in order to avoid paying lawful duties and import taxes on the importation of rice into Haiti. The defendants challenged their indictments on the ground that payments made to foreign officials to avoid (or evade) the payment of duties and taxes were not within the scope of the prohibitions of the FCPA, because they were not made "to obtain or retain business". The Court of Appeals, however, rejected that argument and held that[13]:

> Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage.

It is now well established (and should be assumed for purposes of designing and implementing compliance programs) that a payment made to a foreign customs officer or inspector for the purpose of avoiding the payment of lawful duties and taxes, or for the purpose of avoiding compliance with other regulatory requirements and formalities, in connection with the importation of merchandise into a particular country will constitute a payment made for an ***improper business purpose*** as contemplated by the FCPA's anti-bribery provisions[14].

(3) **<u>Payments to Third Parties</u>:** The anti-bribery provisions of the FCPA prohibit payments for improper purposes made both directly to foreign officials and through third party intermediaries. Thus, section 103(a)(3) and section 104(a)(3) prohibit issuers and domestic concerns, respectively, from paying, giving or offering or promising to pay or give any money or any other thing of value to any person with ***knowledge*** that all or a portion of that money or other thing of value will be offered, given or promised, directly or indirectly, to a foreign official for an improper purpose[15]. This element of the FCPA's anti-bribery provisions presents particular compliance challenges in the context of import/export operations, because companies typically rely upon third parties to perform essential services in connection with international trade transactions. Thus, export clearance and international shipment of merchandise is typically handled for exporters by independent freight forwarders or logistics service providers; under the customs laws and regulations of many countries import and customs clearance formalities must be handled by licensed customs brokers or authorized import/export corporations; and, in those countries with complex import regulations and non-tariff barriers lacking in transparency, as a practical matter it may be necessary to engage a local trade consultant to handle compliance with regulatory requirements and import restrictions. Under the foregoing sections of the anti-bribery provisions of the FCPA, a United States company may be subject to "imputed liability" under the FCPA in the event that a customs broker, freight forwarder or other third party service provider makes an improper payment to a foreign customs or import/export regulatory official on behalf of that United States company[16].

An issuer or a domestic concern may be subject to "imputed liability" under the FCPA, based on an improper payment made to a foreign official by a third party intermediary, if that issuer or domestic concern makes a payment or provides some other thing of value to the third party intermediary with "knowledge" that some or all of the payment or other thing of value will be offered, given or promised to that foreign official. For purposes of imposing such "imputed liability" on an issuer or a domestic concern, however, it is not necessary for the DOJ or SEC to prove that the issuer or domestic concern had ***actual knowledge*** that the third party intended to, and did, make the payment to a foreign official. Instead, under sections 103(f)(2) and 104(h)(3) of the statute, a person will be deemed to have "knowledge" of an improper payment by a third party intermediary if that person is aware of facts and circumstances indicating a high probability that the improper payment is likely to occur[17].

In effect, an issuer or domestic concern may be subject to penalties, including criminal penalties, under the FCPA if the evidence shows a "conscious disregard" or "willful blindness" on the part of the issuer or domestic concern to the activities of a third party intermediary acting on its behalf in deal with foreign officials[18]. Evidence of such a "conscious disregard" or "willful blindness" may take the form of various "red flags" suggesting a heightened possibility that a third party intermediary may intend, or may have an incentive, to make improper payments to foreign officials in furtherance of the issuer's or domestic concern's business. As discussed in detail in Sections 3(a) and 3(b) of this paper, *infra*, an effective FCPA compliance program should, therefore, include: (i) comprehensive due diligence in engaging third party intermediaries, including freight forwarders, customs brokers, logistics service providers and trade consultants, to determine if the intermediary or the proposed relationship presents any such "red flags"; and (ii) carefully monitoring the activities of the third party intermediaries to assure that the intermediaries'on-going performance does not indicate the presence of any such "red flags"[19]. Such monitoring of the activities of third party intermediaries may include annual compliance certifications, periodic compliance reviews, and in exceptional cases, comprehensive compliance audits.

(4) **<u>The Facilitating Payment Exception: Trap for the Unwary</u>:** Sections 103(b) and 104(b) of the FCPA include an exception to the anti-bribery prohibitions for facilitating or expediting payments made to foreign officials to expedite or secure the performance of a "routine governmental action[20]". For purposes of this "facilitating payment" exception, "routine governmental action" is defined to mean, and is limited to, actions ordinarily and commonly performed by foreign officials (ministerial or clerical officials) in connection with:

(i) Obtaining permits, license or other official documents to qualify to do business in a foreign country;
(ii) Processing governmental papers, such as visas or 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.

Especially in the context of import/export operations, this "facilitating payment" exception may be a trap for the unwary, and any issuer or domestic concern would be extremely ill-advised to rely upon the exception as a basis for ignoring or justifying payments made to foreign customs or other import/export regulatory officials in connection with the import or export of merchandise into or out of a foreign country. Thus, for example, payments made to foreign customs officers will almost invariably be characterized by the payor as made solely to "facilitate" or "expedite" the importation of merchandise into the foreign country in question[21].

The fact that a payment to a foreign official is characterized (or identified on a customs broker's or import/export agent's invoice) as made to facilitate or expedite the customs clearance and regulatory formalities for the importation of merchandise does ***not***, however, make that payment permissible under the "facilitating payment" exception to the FCPA. To the contrary, if the payment to a foreign official is intended to avoid: (i) the payment of lawful customs duties and import taxes; (ii) compliance with customs inspection or product certification requirements; or (iii) compliance with other import/export regulatory formalities, the payment will be an illegal bribe under the FCPA, even if the intent and effect of the payment is to "facilitate" or expedite" the importation of merchandise into the foreign official's country[22]. As discussed in detail in Section 3(a) of this paper, *infra*, the characterization of a payment on an employee's expense report or on an invoice submitted by a customs broker, freight forwarder or import/export agent as a payment to facilitate or expedite the import or export of merchandise should, in fact, be seen as a "red flag" suggesting the possibility that an improper payment has been made to a foreign official in connection with the movement of that merchandise.

(5) ***De Minimis* Payments to Foreign Officials:** It is important to emphasize that there is no exception to the anti-bribery prohibitions of the FCPA for "*de minimis*" payments to foreign officials. A payment made by or on behalf of an issuer or domestic concern to a foreign official , even if trivial in amount, may still constitute an illegal bribe under the FCPA if made for an improper purpose (*i.e.,* to obtain or retain business or to secure some other improper advantage). Thus, for example, in the SEC's administrative enforcement action against Helmerich & Payne, Inc.("H&P"), it was alleged that H&P made payments to Venezuelan customs officials in the total amount of only $7,000 ***over a five-year period***. Nonetheless, those payments were treated as unlawful bribes, as they were made to avoid customs inspections and compliance with Venezuelan import/export regulations[23].

b. The Accounting Provisions of the FCPA

Section 102 of the FCPA[24] imposes two separate obligations on issuers, which are intended to supplement the anti-bribery provisions of the statute, by preventing "off books" accounts and other accounting irregularities that may be intended to disguise improper payments to foreign officials[25]. Specifically, those "accounting provisions" of the FCPA require each issuer to:

(i) Make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of assets of the issuer (the "books and records" provision[26]); and

(ii) Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: (A) transactions are executed in accordance with management's authorization; (B) transactions are recorded as necessary to permit the preparation of financial statements in accordance with generally accepted accounting principles and to maintain accountability for assets; (C) access to assets is permitted only in accordance with management's authorization; and (D) periodic audits are performed and actions are taken to reconcile differences between recorded assets and actual assets (the "internal accounting controls" provision).

There are three key points regarding the accounting provisions of the FCPA that may be particularly relevant to understanding the application of those provisions to import/export operations of a multinational corporation. First, unlike the anti-bribery provisions of the statute, the accounting principles apply directly to those foreign subsidiaries of an issuer whose assets, operations and financial results are included in the consolidated financial statements of the issuer. Thus, an improper payment to a foreign official made by a foreign subsidiary of an issuer, and mischaracterized on the books and records of that foreign subsidiary, may constitute a violation by the issuer of both the books and records provision and the internal accounting controls provision of the FCPA, even if there is no other jurisdictional nexus between the improper payment and the United States (*i.e.*, the improper payment may not be within the jurisdictional scope of the anti-bribery provisions of the statute)[27]. This point may be especially important for issuers whose foreign subsidiaries act as importers and exporters of record in their respective countries.

Second, although the accounting provisions were enacted as part of the FCPA, and were intended primarily to prohibit the concealment of improper payments to foreign officials through "off books" accounts and falsified accounting records, the application of those accounting provisions ***is not so limited***. To the contrary, the making of a false accounting record or the mischaracterization of a particular payment on the books and records of an issuer may constitute a violation of the accounting provisions of the FCPA, even where: (i) the actual payment is lawful under the anti-bribery provisions of the FCPA; or (ii) there is no evidence whatsoever that the false accounting record involved a payment to a foreign official[28]. Accordingly, as discussed in more detail in Section 3(b) of this paper, *infra*, the issuance of a commercial invoice, to be used in connection with the import of merchandise into a foreign country, in which the value of the merchandise is misstated and/or other false or inaccurate information about the merchandise is presented, may constitute a violation of the books and records of the FCPA. A commercial invoice, reflecting the sale of merchandise by an issuer to a foreign buyer, is an "accounting record" for purposes of that books and records provision.

Third, there is no "materiality" element under the FCPA's accounting provisions. A violation of those accounting provisions may occur if an issuer (or a person acting on behalf of the issuer) knowingly makes a false accounting document (such as an invoice) or makes a false entry on the issuer's books and records of account, even if the inaccurate amount is relatively small[29]. In many instances, the values of individual import or export transactions, and individual customs entries, are likely to be well below the company's "materiality" threshold for SEC financial reporting purposes.

3. Import/Export Problem Areas for FCPA Compliance

The following are among the circumstances in which FCPA compliance risks and problems are most likely to be encountered in connection with import/export operations.

a. **<u>Avoidance of Customs Duties and Import Taxes</u>:** The import and customs laws and regulations in a number of emerging countries impose high customs duties and import taxes in imported merchandise, which have a severely negative impact on the competitiveness of imported merchandise as compared to similar goods produced locally (but which may be of lesser quality and/or technical sophistication)[30]. As a result, in a highly competitive environment, there may be a temptation to find ways to avoid or minimize those customs duties and import taxes. As the decision of the Court of Appeals in the *United States v. Kay* case shows, a payment made to a foreign customs officer for the purpose of avoiding (or evading) lawful customs duties and import taxes will constitute an unlawful bribe under the anti-bribery provisions of the FCPA[31]. In the *United States v. Kay* case, the defendants paid bribes to Haitian customs officials to cause those officials to accept false customs entry documents on which the quantity of imported merchandise and the value of that merchandise were understated so as to minimize Haitian customs duties and import taxes.

For companies that adhere to strict standards of business ethics, and have implemented robust internal FCPA compliance policies and programs, the greatest FCPA compliance risk in the importation of merchandise into such emerging markets may arise in connection with dealings with and through third party intermediaries, such as customs brokers, import/export agents and trade consultants. That risk may be highlighted by the facts and circumstances surrounding the *United States v. Panalpina* case. Panalpina is an international logistics services company that provides freight forwarding and customs clearance services on behalf of its clients. In the Plea Agreement resolving that case, *Panalpina* admitted paying bribes to Nigerian customs officials to secure preferential customs treatment, including the avoidance of taxes and duties, for merchandise imported into Nigeria on behalf of Panalpina's customers. Concurrently with the resolution of the Panalpina case, five of its Panalpina's customers also agreed to the payment of substantial fines and penalties to resolve FCPA violations. Those five customers acknowledged that Panalpina had made the improper payments to Nigerian customs officials, ***with knowledge*** on the part of the customers[32].

A customs broker or other intermediary may make payments to a foreign customs official to avoid or reduce customs duties and import taxes in order to "assist" its customer (*i.e.*, the United States issuer or domestic concern) in enhancing its competitive position in the country of importation[33]. In such circumstances, the improper payments may be made by the customs broker or other intermediary to those foreign officials without the direct authorization or actual knowledge of the issuer or domestic concern. Nonetheless, as explained in Section 2(a)(3) of this paper, *supra*, "knowledge" of such improper payments may be inferred (for purposes of imposing "imputed liability" under the FCPA on the issuer or domestic concern) from the presence of "red flags" suggesting willful blindness or conscious disregard of FCPA compliance risks. Accordingly, in dealing with customs brokers and other third party intermediaries assisting with import/export operations, especially in "high risk" countries[34], international trade professionals working for United States companies should be on the lookout for: (i) arrangements that may suggest that merchandise is not being imported into those countries in strict compliance with local customs and import laws and regulations; or (ii) unusual costs and expense charges that may be disguised requests for reimbursement for improper payments made to foreign customs officials. Examples of such "red flags" suggesting the possibility of improper payments to foreign customs officials include:

- Customs entry documents classifying the goods in question under an unusual or demonstrably incorrect tariff classification number.

- Customs entry documents declaring the customs value of the goods at a substantially lower amount than the sales price stated on the United States supplier's commercial invoice for those goods.

- Requests for payment or reimbursement of "customs processing fees", "customs expediting fees", "administrative fees", and "special handling charges"[35].

- Unusual shipping and routing arrangements.

To that end, any agreement with a third party intermediary that will handle any import/export operations on behalf of a United States company should include audit rights, which authorize the United States company to conduct an audit of the third party intermediary's books and records to confirm the third party intermediary's compliance with its obligations under that agreement, especially FCPA compliance provisions. The United States company should then invoke those audit provisions in the event that any such "red flags" suggesting the possibility of an improper payment by the third party intermediary to a foreign customs (or other) official come to the attention of the United States company's international trade professionals[36].

b. **<u>Under Invoicing Schemes</u>:** In circumstances in which a customer, rather than the United States company or its foreign subsidiary, is the importer of record for merchandise to be imported into a country with high customs duties and import taxes, the United States supplier may receive a request from the foreign customer to state on the commercial invoice accompanying the merchandise a declared value for that merchandise substantially lower than the actual price of sale of the merchandise. Invariably, the objective of such an "under invoicing" request is to understate the declared value of the merchandise for local customs purposes, thereby avoiding lawful customs duties and import taxes on the importation of that merchandise[37].

The issuance of a knowingly false commercial invoice, in response to a customer request, may constitute a violation of the books and records section of the FCPA's accounting provisions. Importantly, as explained in Section 2(b) of this paper, *supra*, in the issuance of such a false commercial invoice may violate those FCPA accounting provisions even though: (i) there is no evidence whatsoever that any improper payment was made by the issuer or the foreign customer to a foreign customs official in connection with the importation of the merchandise in question; (ii) the amount of the understatement of the value of the merchandise on the issuer's commercial invoice in immaterial; and (iii) the issuer declares the correct value of the merchandise in the "electronic export information" filed with the United States Census Bureau at the time of exportation of the merchandise from the United States[38].

International trade professionals should be aware of the fact that acceding to customer under invoicing requests in connection with the importation of merchandise into a foreign country may also expose the United States supplier to potential criminal liability under other federal criminal statutes, most notably the federal mail fraud and wire fraud statutes[39]. Thus, in *Pasquantino v. United States*[40], the United States Supreme Court upheld the convictions of two defendants for violation of the federal wire fraud statute in connection with a scheme to smuggle alcoholic beverages into Canada, so as to avoid Canadian customs duties and alcohol import taxes. The federal wire fraud statute prohibits the use of the instrumentalities of interstate or international telecommunications in furtherance of any scheme or artifice to defraud. The Supreme Court held that a scheme to deprive a foreign government of lawful duties and taxes comes within the scope of a "scheme or artifice to defraud" within the intent of that federal wire fraud statute. Thus, based on the precedent of the Supreme Court's decision in the *Pasquantino v. United States case*, a United States supplier that issues a false commercial invoice, with knowledge that the customer intends to use that false commercial invoice to avoid (evade) customs duties and import taxes, may be subject to liability under the mail and/or wire fraud statutes, if there has been any use of the mails or the instrumentalities of interstate or international telecommunications (telephone calls, e-mails, etc.) in connection with the under invoicing request.

Alternatively, the United States supplier may be asked by its foreign customer to ***over state*** the value of the merchandise on the supplier's commercial invoice, especially where the merchandise in question is duty-free upon importation into the customer's country. Such over invoicing arrangements are typically proposed in furtherance of tax evasion schemes (*e.g.*, by overstating the cost of goods sold, thereby allowing the customer to declare lower taxable income for local income tax purposes). Although such over invoicing schemes typically do not involve avoidance of customs duties and import taxes, those over invoicing schemes are subject to the same legal considerations as are under invoicing schemes, from the United States supplier's perspective. Thus, by issuing an over stated commercial invoice, the United States issuer is making a false accounting record, in violation of the FCPA's books and records requirements. If the United States supplier knows that the customer has requested the over stated invoice in furtherance of a tax evasion scheme, that United States supplier may also face potential criminal liability under the mail and wire fraud statutes.

c. **<u>Avoidance of Import Regulatory Requirements and Restrictions</u>:** In an effort to restrict imports, a number of countries have adopted complex import regulatory programs. Such import regulatory programs may include: (i) import licensing requirements; (ii) product certification and detailed technical data filing requirements; and (iii) product testing and inspection requirements. In many instances, the import regulatory regimes are less than transparent, such that understanding the compliance obligations is problematic. In other instances, especially those circumstances in which products are subject to testing, inspection and/or detailed technical data filing requirements, compliance may pose a practical risk of loss or theft of trade secrets and confidential technical information related to the products. In all such cases, the process of obtaining required import licenses and product certifications, and in complying with other non-tariff regulatory requirements, is likely to be time-consuming and costly. Under the circumstances, there may be a significant temptation to avoid or otherwise overcome such import regulatory requirements and restrictions. A payment made to foreign customs or other import regulatory officials for the purpose of avoiding compliance with import regulatory requirements or restrictions will, however, constitute an unlawful bribe under the anti-bribery provisions of the FCPA. Correspondingly, characterization of such a payment as a "facilitating payment" or otherwise mischaracterizing that payment on the accounting books and records of an issuer will constitute a violation of the accounting provisions of the FCPA[41].

The FCPA compliance issues presented by payments made to foreign customs and import officials in order to overcome import regulatory requirements and restrictions are highlighted by the facts of certain conduct described in the Plea Agreement in the *United States v. Panalpina*. In that case, certain of Panalpina's customers had imported offshore drilling rigs into Nigeria on a duty-free basis under a temporary import permit procedure. Under that procedure, upon expiration of the temporary import permit, the offshore drilling rig had to be exported from Nigeria, and, if use of the drilling rig in Nigerian waters was still required, that equipment would then have to be reimported under a new temporary import permit. The failure to export the drilling rig upon expiration of its temporary import permit was subject to a fine of up to six times the value of that drilling rig.

In order to assist its customers in avoiding the costs and business disruption associated with the exportation and reimportation of those offshore drilling rigs, Panalpina made payments to Nigerian customs officials to adopt a "paper process" for the issuance of new temporary import permits, falsely reflecting the export and reimportation of the drilling rigs, when no such activities with respect to the drilling rigs had occurred. Those payments to the Nigerian customs officials were treated as unlawful bribes under the anti-bribery provisions of the FCPA in the Panalpina plea agreement[42].

The FCPA anti-bribery compliance issue applicable to payments made to foreign customs officials in connection with the temporary import permit procedure in the *Panalpina* case is similarly applicable to payments made to foreign customs officials in order to avoid other forms of import regulatory requirements or restrictions. For example, in the *Helmerich & Payne* case, certain of the payments made to Argentine and Venezuelan customs officials that were held to be unlawful bribes under the FCPA were made in order to import merchandise that: (i) was not in compliance with local product certification requirements; (ii) had not undergone required product inspections; or (iii) could not be lawfully imported into the country[43].

That last set of circumstances (*i.e.*, payments made to customs officials to overcome statutory or regulatory prohibitions on the importation of certain merchandise) may pose a special FCPA compliance challenge for international trade professionals working for United States companies in the electronics industry. Many of those electronics companies "recycle" parts and components from defective equipment, for use as spare and warranty replacement parts and components for products sold their customers. Such recycling of "good" parts and components taken from defective products offers substantial cost savings in providing customers with warranty service and support, and serves important environmental objectives in reducing the amount of electronic waste in the waste stream. Nonetheless, the import laws and regulations of a number of major countries prohibit or restrict the importation of "used" or "refurbished" electronic equipment[44]. If the importation of recycled parts and components into one of those countries is challenged by a local customs official, there may be a temptation to find ways to overcome that import prohibition, particularly if the parts and components are required to meet a local customer's urgent need for product service (*e.g.*, a "machine down" situation). A payment made to a customs officer to waive or overlook a regulatory restriction on the import of such "used" electronic equipment will constitute an unlawful bribe under the FCPA[45].

d. **Offshore Payments to Third Party Intermediaries:** In dealings with third party intermediaries, including customs brokers, import/export agents and trade consultants, United States companies frequently encounter requests that fees payable for *bona fide* services performed by those third party intermediaries in connection with import/export operations be paid to an offshore bank account or to an affiliated company (frequently located in a tax haven country). Such an offshore payment, by itself, would not constitute a violation of either the FCPA's anti-bribery provisions or the FCPA's accounting provisions. Nonetheless, a request by a third party intermediary that a United States company make payments to an offshore account raises a number of very serious FCPA compliance challenges.

Proposals for payments for services performed in one country be made to an account or an entity in another country are typically made in furtherance of schemes to avoid local currency control requirements and/or local income tax obligations. Thus, receipts that never appear on the third party intermediaries' books may not be converted into local currency under applicable currency control regulations, and may not be reported as taxable income on the third party intermediary's local income tax returns. The fact that the third party intermediary is apparently willing to engage in actions contrary to local currency control and tax laws may suggest that the person or entity has a cavalier attitude toward compliance with other legal obligations (including anti-corruption laws such as the FCPA). Moreover, a request for payments to an offshore account may be made in furtherance of scheme to establish an "off books" account from which improper payments to foreign officials may be made with minimal risk of detection[46]. Under the circumstances, any such request for offshore payments of service fees payable for customs brokerage services or other import/export services performed by third party intermediaries should be seen as a "red flag" suggesting a heightened risk that the third party intermediary may make improper payments to local customs or import officials in furtherance of import/export operations on behalf of the United States company for which it is performing services[47]. If a United States company were to make a payment, even a *bona fide* service fee payment, to a third party intermediary with reason to believe that that third party intermediary is trying to evade income taxes on that service fee, and thereafter the DOJ or SEC were to learn that the third party also made improper payments to foreign officials, it would be extremely difficult for the United States company to maintain successfully that it had no reason to suspect that such improper payments might be made by that third party intermediary.

Requests for offshore payments of service fees to third party intermediaries may also present significant compliance issues under the books and records section of the FCPA's accounting provisions. If those payments are mischaracterized on the books and records of account of a United States issuer, a violation of the FCPA books and records section will have occurred. Moreover, even if the nature of the service fees payments are properly described on the issuer's books of account, potential violations of both the books and records section and the internal accounting controls section of the FCPA's accounting provisions may have occurred if the service fees, while owed to the third party intermediary in one country, are actually paid to another (affiliated) company in another country.

Finally, consistent with the discussion set forth in Section 3(b) of this paper, *supra*, if the United States company knows that the request for payments to an offshore account is made in furtherance of a scheme by the third party intermediary to avoid or evade income taxes lawfully payable by that third party intermediary in its home country, the United States company may be exposed to criminal liability under the federal mail and wire fraud statutes on the basis of the legal principles enunciated by the Supreme Court in its decision in the *Pasquantino v. United States* case[48].

Under the circumstances, it is recommended that any request by a customs broker, import/export agent, trade consultant or other third party intermediary for payment of service fees to an offshore account should be summarily rejected. Instead, international trade professionals for United States issuers and domestic concerns should insist that all payments of service fees to third party intermediaries that perform services in connection with import/export operations must be made through normal banking channels (*e.g.*, wire transfers, etc.) to the third party intermediary's bank account in the country in which that third party intermediary performs the services for that United States company[49].

e. **<u>Hospitality and Gifts for Foreign Customs Officials</u>:** Significant and difficult FCPA compliance issues may arise with respect to the furnishing of hospitality or gifts to foreign officials, including customs and import regulatory officials[50]. On the one hand, a small gift may simply be a token of respect or friendship, as a normal professional courtesy consistent with local customs and practices. There is, however, no "*de minimis*" exception to the anti-bribery provisions of the FCPA, and in 1988 Congress considered but rejected creating an affirmative defense to those anti-bribery provisions for nominal payments and gifts to foreign officials, given as a courtesy or token of respect[51]. Accordingly, the furnishing of hospitality or gifts to foreign officials, including customs officials, may constitute a violation of the anti-bribery provisions of the FCPA if given for an improper purpose (*i.e.*, to obtain or retain business or to secure some other improper purpose)[52].

A gift given to a foreign customs official, even if relatively modest in value, may, therefore, constitute a bribe under the FCPA if the United States company's intent in providing that gift is to secure some improper advantage, such as preferential customs treatment, avoidance of customs duties, import taxes or import regulatory restrictions, or resolution of prior non-compliance with customs and import requirements. Intent to secure an improper advantage may be evidenced by (i) the actual results (*e.g.*, was merchandise imported into a particular country in a manner contrary to applicable customs laws and regulations); (ii) the value of the gift given; (iii) the circumstances in which the gift is given (in the open or "behind closed doors"); and (iv) how the gift is recorded on the books and records of the United States company. FCPA compliance risks associated with the giving of gifts to foreign officials may, therefore, be mitigated by:

- strict corporate guidelines for such gift giving, with dollar limits on the value of any gift and clear approval procedures for any such gift;
- documented justification for any proposed gift as a condition of approval;
- transparency in the giving and receiving of such gifts;
- confirmation that the giving and receiving of the gift is lawful under the laws of the foreign official's home country; and
- proper recording of the gift on the books and record of the United States company, in conformance with the FCPA's accounting provisions.

Questions frequently arise regarding the FCPA compliance implications of furnishing gifts to a foreign government agency. As the anti-bribery provisions of the FCPA prohibit improper payments and gifts to ***foreign officials***, a *bona fide* gift to a foreign government agency or department should not, in most instances, constitute an improper payment under those anti-bribery provisions[53].

Nonetheless, FCPA compliance issues can arise in the context of the furnishing of a gift to a local customs office. For example, it may be proposed (typically by local managers) that a Chinese subsidiary of a United States corporation give boxes of "moon cakes" to the local customs office, where the subsidiary's imports are processed, on the occasion of the celebration of Chinese New Year. Although the "moon cakes" would be delivered to the local customs office, rather than given to a particular customs official, if the intent of the gift is to furnish an incentive to local customs officials to provide, or to furnish a reward to those local customs officials for providing, preferential customs treatment contrary to applicable Chinese customs and import laws and regulations, the gift of those "moon cakes" ostensibly to the local customs office, may in fact, be characterized as an improper payment under the anti-bribery provisions of the FCPA.

f. **<u>FCPA Compliance with respect to the Export of Defense Articles</u>:** The Plea Agreement in the *United States v. BAE Systems*[54] case illustrates the intersection between the FCPA and export compliance requirements with respect to the export of defense articles under the International Traffic in Arms Regulations (the "ITAR"). Under the Arms Export Control Act and the ITAR, an export license from the State Department's Directorate of Defense Trade Controls ("DDTC") is required for the export of "defense articles" or "defense services" to any foreign country[55]. Under section 130.9 of the

ITAR, in any application for such an export license, the applicant must disclose to the DDTC whether it has paid (i) any political contributions of $5,000 or more; or (ii) any fees or commissions of $100,000 or more, in connection with the proposed sale of defense articles or defense services for which the export license is sought.

Among the charges against BAE Systems that resulted in the March 1, 2010 plea agreement were violations of that section 130.9 of the ITAR. According to the plea agreement, BAE Systems failed to disclose to DDTC on its export license applications the commissions paid to so-called "market advisors" who had been retained by BAE Systems to assist in securing sales of defense articles. The rationale for failing to disclose the commissions paid to those "market advisors", as stated in the plea agreement, was to conceal the relationships between BAE Systems and the "market advisors", especially because BAE Systems was aware that there was a high probability that the "market advisors" would pay a portion of their commissions to foreign officials to secure favorable decisions in the purchase of defense services[56].

For those international trade professionals working for United States companies that are engaged in the export of defense articles and defense services, it is, therefore, imperative that they have a very clear understanding of their companies' relationships with all third party intermediaries, including sales representative, commission agents, sales consultants and "market advisors". It is only with that clear understanding that the international trade professionals can assure compliance with the commission reporting requirements of section 130.9 of the ITAR. In addition, through that understanding, the international trade professionals can perform an important role in FCPA compliance (*i.e.*, in preventing market advisor" arrangements of the kind at issue in the *United States v. BAE Systems* case)[57].

g. **<u>Merger and Acquisition Transactions</u>:** Corporate merger and acquisition transactions raise special FCPA compliance challenges for acquirers that are issuers or domestic concerns. If, at the time of the acquisition, the acquirer fails to identify, and take remedial action with respect to, prior non-compliance by the target company, there is a substantial risk of successor liability on the part of the acquirer under the FCPA. In addition, if on-going compliance problems on the part of the target company under either the anti-bribery provisions or the accounting provisions (or both) of the FCPA remain undetected and persist following the completion of the acquisition transaction, the acquirer is exposed to the risk of direct liability under the FCPA for post-acquisition non-compliance. For that reason, FCPA practitioners recommend, and the DOJ and SEC encourage, United States companies to include a robust FCPA compliance element in their pre-acquisition due diligence review of prospective acquisition targets[58].

Based on the foregoing, many United States companies and their outside legal and accounting advisors have incorporated FCPA compliance into their pre-acquisition due diligence reviews. Similarly, many of those United States companies, particularly those companies that are major importers of merchandise into the United States and/or deal regularly in commodities and technologies that are restricted for export control purposes, have an international trade compliance element in their pre-acquisition due diligence protocols[59]. In most cases, however, those two elements of the due diligence review are conducted separately, and corporate international trade compliance professionals are seldom involved in the analysis and assessment of the FCPA compliance risks presented by a potential acquisition target.

The failure to engage international trade professionals in the FCPA compliance pre-acquisition due diligence process is unfortunate, and poses a significant risk that improper payments to foreign officials in connection with the target company's import/export operations will be missed in that due diligence process. Through the trade compliance due diligence process, corporate international trade professionals may be best positioned to identify "red flags" suggesting the possibility of such improper payments and/or accounting irregularities, of the kind discussed in the paper, in connection with the target's import/export operations. To that end, however, those corporate international trade professionals must: (i) have a clear understanding of the application and scope of the FCPA; (ii) be integral members of the FCPA compliance pre-acquisition due diligence team; and (iii) remain directly involved in the post-acquisition integration process (*i.e.*, bringing the target's import and export operations under the acquiring company's trade compliance policies and procedures).

4. Conclusion

As discussed in this paper, import/export operations, especially in high risk corruption countries, pose significant FCPA compliance risks. Those FCPA compliance risks are inherent in such import/export operations especially because: (i) of their very nature, they involve direct and substantial interactions with foreign officials in transactions in which substantial sums of money may be involved (both in terms of the value of the merchandise and the amounts of customs duties and taxes potentially payable); and (ii) of the need to rely upon third party intermediaries, such as customs brokers and import/export agents, for the performance of key elements of such import/export operations. An effective FCPA compliance program for any issuer or domestic concern that is involved in import/export operations (including merely supplying products to customers located abroad) should include the full engagement of the company's international trade professionals. To that end, corporate international trade professionals require a clear understanding of the requirements, restrictions and scope of application of the FCPA (both the anti-bribery provisions and the accounting provisions), and corporate ethics and compliance officers must have an appreciation of the nature and scope of FCPA compliance risks arising out of import/export operations. It is hoped that this paper will make a contribution to those processes.

January, 2013

[1] The largest penalties to date were imposed upon Siemens AG and its affiliates. In December, 2008, Siemens paid fines in the total amount of $1.6 billion to the DOJ, the SEC and German authorities in connection with guilty pleas to multiple violations of the FCPA. *See* www.usdoj.gov/opa/pr/2008/December/08-crim-1105.html.

[2] Two absolutely essential resources for any FCPA compliance program are: (i) U.S. Department of Justice and U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) (the "*DOJ/SEC FCPA Resource Guide*"); and Robert W. Tarun, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (2d Ed. 2011).

[3] Section 30A of the Securities Exchange Act of 1934, *codified as* 15 U.S.C. § 78dd-1.

[4] An "issuer" is a company whose shares are registered with the SEC under section 12 of the Security Exchange Act of 1934, as amended, 15 U.S.C. § 78l, or a company that is required to file reports with the SEC under section 15(d) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78o(d).

[5] 15 U.S.C. § 78dd-2.

[6] The term "domestic concern" is defined in section 104(h) of the FCPA to include: (i) any individual who is a citizen, national or resident of the United States; (ii) 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 any State or territory of the United States. The intent of that broad definition of the term "domestic concern" is to assure that all corporations and other business enterprises that are not "issuers" under the Securities Exchange Act are nonetheless covered by the anti-bribery provisions of the FCPA.

[7] 15 U.S.C. § 78dd-1 and 15 U.S.C. § 78dd-2, respectively.

[8] Violators of the anti-bribery provisions of the FCPA are, in the case of corporations, subject to criminal fines of up to $2 million per violation, and in the case of individuals, are subject to fines of up to $100,000 and up to five years imprisonment. See 15 U.S.C. § 78dd-2(g)(1)(A), 78dd-2(g)(2)(A); 15 U.S.C. § 78ff(c)(1)(A); 78ff(c)(2)(A).

[9] 15 U.S.C. § 78dd-1(f)(1)(A); 78dd-2(h)(2)(A).

[10] *See, e.g.*, *United States v. Vetco Gray Controls, Inc., et al.*, No. H-07-CR-004 (S.D. Tex), Information ¶ 19 (Jan 5, 2007), *available at* www.justice.gov/criminal/fraud/fcpa/cases/abb/06-22-04abbvetco-info.pdf (Identifying employees of the Nigerian Customs Service as "foreign officials" under the FCPA).

[11] As stated above, the anti-bribery provisions of the FCPA apply to issuers (some of which may be foreign corporations whose securities are traded on United States stock exchanges) and domestic concerns. The entities to which these anti-bribery provisions are referred to in this paper collectively as "United States companies."

[12] *United States v. Kay et al.*, 359 F.3d 738 (5th Cir. 2004), *convictions affirmed* 513 F.3d 432 (5th Cir. 2007), *rehearing denied* 513 F.3d 461 (5th Cir. 2008).

[13] 359 F.3d at 755. *See also* H.R. Conference Rep. No. 100-576, 100th Cong. 2d. Sess. 918-919, *reprinted in* 1988 U.S. Code, Cong. & Admin News 1547, 1951, discussing the "business purpose" element of the FCPA in connection with the 1988 amendments to the statute. The Conference Report states in relevant party that the

"business purpose" element of the statute is "… not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment*." [emphasis in the original]

[14] *See, e.g., United States v. Panalpina*, No. 10-CR-765 (S.D. Tex), Plea Agreement (Nov. 4, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/panalpina.html (payments made to Nigerian Customs Service employees to avoid Nigerian customs duties and taxes); *United States v. Vetco Gray Controls Inc*., No. H-07-CR-004 (S.D. Tex) Information (Jan. 5, 2007) (payments made to Nigerian Customs Service employees to secure preferential treatment in connection with customs clearance process and the avoidance of Nigerian customs duties and tariffs); *In the Matter of Helmerich & Payne, Inc*., SEC Administrative Proceeding File No. 3012565, Order Instituting Cease and Desist Proceedings (July 30, 2009), available at www.sec.gov/litigation/admin/2009/34-60400.pdf (payments made to Argentine and Venezuelan customs officials to: (i) import merchandise without proper certifications; (ii) to secure a lower duty rate that lawfully applicable; and (iii) to import and export merchandise contrary to import/export regulations).

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

[16] *See, e.g.*, United States Department of Justice Press Release, November 4, 2010, announcing that five oil service companies had agreed to pay substantial fines in settlement of FCPA charges arising out of payments made on their behalf by a third party freight forwarder and customs broker (Panalpina) to Nigerian Customs Service employees to circumvent Nigerian customs and import regulations in connection with the importation of merchandise into Nigeria, *available at* www.justice.gov/opa/pr/2010/November/10-crm-1251.html. *See United States v. Pride International, Inc.*, 10-CR-766 (S.D. Tex) (Nov. 4, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/pride-intl.htlm; *United States v. Shell Nigeria Exploration and Production Company Ltd.*, 10-CR-767 (S.D. Tex) (Nov. 4, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/snepco.htlm; *United States v. Tidewater Marine International Inc*., 10-CR-770 (S.D. Tex) (Nov. 4, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/tidewater-intl.htlm; *United States v. Transocean, Inc.*, No. 10-CR-765 (S.D. Tex) (Nov. 4, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/cases/transocean-inc.htlm; *SEC v. Noble Corp*., No. 10-cv-4336 (S.D. Tex) (Nov. 4, 2010), *available at* www.sec.gov/litigation/complaints/2010/comp21728.pdf.

[17] *See DOJ/SEC FCPA Resource Guide, supra,* Note 2 at 22.

[18] *See* H.R. Conference Rep. 100-576, 100th Cong. 2d. Sess. 919-921, *reprinted* in 1988 U.S. Code, Cong. & Admin. News 1952=54 (legislative history of the 1988 amendments to the FCPA, Pub. L 105-366, 112 Stat. 3302). One of the key objectives of the 1988 amendments to the statute was to clarify the "knowledge" standard for imputed liability based on improper payments by third parties.

[19] For a comprehensive list of "red flags" that may arise with respect to relationships with third party intermediaries, including agents and consultants, *see* Tarun, *supra* Note 2 at 91-92.

[20] 15 U.S.C. § 78dd-1(b), 78dd-2(b). This "facilitating payment" represents a codification, as part of the 1988 amendments to the FCPA, of Congress' intent when the FCPA was first enacted in 1977. Thus, the legislative history of the 1977 version of the FCPA reflects Congress' intent to exclude "facilitating payments" from the anti-bribery prohibitions of the statute, as follows: "The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called "grease payments". In using the word "corruptly", the committee intends to distinguish between payments which cause an official to exercise other

than his free will in acting or deciding or influencing an act or decision and those payments which merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action. … For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event." H.R. 95-640, 95th Cong. 1st Sess. 8, *available at* http://www.justice.gov/criminal/fraud/fcpa/history/1977/houseprt-95-640.pdf.

21 For example, in the matter of *Helmerich & Payne, Inc., supra* Note 10,, the SEC charged that made improper payments to Argentine and Venezuelan customs officials to: (i) avoid customs duties; (ii) import merchandise without required customs inspections; and (iii) import merchandise that was not authorized for importation under local law. The payments were, however characterized as "customs processing" or "customs facilitation" payments. Correspondingly, the Plea Agreement in *United States v. Panalpina, supra*, indicates that improper payments made by Panalpina, a freight forwarder and customs broker, on behalf of its customers to Nigerian Customs Service employees were invoiced to the customers as "local processing fees" or "administration/transport charges".

22 A further problem with the "facilitating payment" exception to the FCPA's anti-bribery provisions is that, even if a payment to a foreign official does, in fact, come within the scope of that exception, and therefore does not constitute a violation of the FCPA, it is likely to be an unlawful payment under the laws of the foreign official's home country. Anti-corruption and public service laws of most countries generally prohibit government officials from receiving, and private parties from offering, consideration of any kind for the performance by those government officials of their official duties.

23 *In the matter of Helmerich & Payne, Inc., supra* Note. 10, Statement of Facts, ¶ 11. In connection with the 1988 amendments to the FCPA Congress considered adding an affirmative defense for nominal payments and gifts to foreign officials, given as a courtesy or token of respect, of reasonable value consistent with local customs and business practices. That proposed amendment was, however, deleted from the final version of the 1988 amendments. *See* H.R. Conference Report 100-576, 100th Cong., 2d Sess. 922, *reprinted in* 1988 U.S. Code, Cong. & Admin. News 1952.

24 Section 13 of the Securities Exchange Act of 1934, codified as 15 U.S.C. sec. 78m(b). The legislative history of the accounting provisions of the FCPA explains the importance of those provisions in preventing the payment of bribes to foreign officials as follows: "… corporate bribery has been concealed by the falsification of corporate books and records .. . [so] that the accounting provisions remove this avenue of coverup, and that taken together the accounting provisions and the criminal anti-bribery provisions should effectively deter corporate bribery of foreign government officials." See. S. Rep. 95-114, 95th Cong. 1st. Sess. 3, *reprinted in* 1977 U.S. Code, Cong. & Admin. News 4100.

25 Violations of the accounting provisions of the FCPA are punishable, in the case of issuers, by criminal fines of up to $25 million, and in the case of individuals, by criminal fines of up to $5 million and imprisonment for up to 20 years.

26 The mandate of the "books and records" provision of the FCPA is implemented by SEC Rule 13b2-1, 17 C.F.R. sec. 240.13b2-1, which provides that: "No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to section 13(b)(2)(A) of the Securities Exchange Act."

27 *See, e.g., SEC v. International Business Machines Corporation*, Litigation Release No. 16839 (December 21, 2000), *available at* www.sec.gov/litigation/litreleases/lr16839.htm (announcing the settlement of a civil action

against IBM under the books and records provision of the FCPA based on payments made by IBM's Argentine subsidiary to officials of an Argentine state-owned commercial bank which were improperly recorded on the IBM Argentina books and records of account. IBM Argentina's management overrode IBM's procurement and contracting procedures, and sought to disguise those actions by mischaracterizing the payments in question as subcontracting fees).

[28] *See DOJ/SEC FCPA Resource Guide supra* Note 2 at 38 ("Although the accounting provisions were originally enacted as part of the FCPA, they do not apply only to bribery-related violations"). *See also SEC v. Helmerich & Payne, Inc.*, supra Note 10, Statement of Facts, ¶¶ 15-16 (alleging that H&P made payments to Argentine and Venezuelan customs officials "to facilitate the performance of routine governmental actions", but improperly recorded those payments on the company's books and records, in order to conceal the true nature and purpose of the payments).

[29] See, e.g., *SEC v. World-Wide Coin Investments, Ltd*., 567 F.Supp. 724, 749 (N.D. Ga. 1983).

[30] For example, the effect of the imposition of customs duties, federal excise taxes, state value added taxes and various municipal taxes and fees on merchandise imported into Brazil may be that the "landed" cost of that merchandise is approximately twice the FOB, port of shipment, sales price of that merchandise.

[31] *See United States v. Kay, supra* Note 10 at 755. *See also* H.R. Conference Rep. No. 100-576, *supra* Note 11 at 918-919 (the FCPA's prohibition against corrupt payments includes payments to foreign officials for the purpose of obtaining more favorable tax treatment).

[32] *See* Note 14, *supra*. *See also United States v. Vetco Gray Controls, Inc., supra* Note 9, Information ¶¶ 30-31 (a customs broker made improper payments to Nigerian Customs Service officials in order to secure preferential treatment for merchandise imported into Nigeria for and on behalf of Vetco Gray, with knowledge and authorization of Vetco Gray of those improper payments).

[33] In one instance with which the author is familiar, the effort by a foreign contract manufacturer located in a Southeast Asian country to reduce the cost of products that the contractor manufactured for a United States company exposed that United States company to a serious FCPA compliance risk. The parts and components used in the manufacturing process were subject to very high customs duties upon importation into the Southeast Asian country in question, and the contractor was not able to recover those customs duties upon exportation of the finished goods to the United States company (*i.e.*, no duty drawback or inward processing duty refund was available). The contractor, therefore, made payments, without the actual knowledge of the United States company, to local customs officers, to cause those customs officers to "reclassify" the parts and components under a different tariff classification number which was subject to a much lower rate of customs duty. The United States company only learned of the improper payments by the contractor when that contractor sought reimbursement for "tea money" that it had paid to the local customs officers to secure that favorable customs treatment for the imported parts and components.

[34] Transparency International, a non-governmental organization based in Berlin, Germany, publishes an annual corruption perception index ("CPI"), ranking 176 countries in terms of the perception of the level of official corruption. Any country with a CPI score of 5.0 or less is considered a "high risk" country from an FCPA compliance perspective. The Transparency International CPI may be found at http://www.transparency.org/cpi2012. For a discussion of how the DOJ and the SEC refer to the Transparency International CPI in evaluating corporate compliance efforts under the FCPA, *see* Tarun, Note 2 at 92-93.

[35] The improper payments by Panalpina on behalf of its customers were so characterized when charged back to those customers. *See United States v. Panalpina*, supra Note 12, Plea Agreement, ¶ 68. Recording payments to the a customs broker as "customs processing fees", special handling fees" or "facilitating or expediting fees", where an issuer knows that the payments are, in fact, reimbursements for improper payments to foreign customs officials, will also constitute a violation of the FCPA's books and records and internal accounting controls requirements. *See, e.g., SEC v. Noble Corporation, supra* Note 14, Complaint, ¶¶ 18, 23, 27.

[36] Any request from a customs broker or other third party intermediary for reimbursement of a "facilitating payment" to a foreign customs official should be subject to special scrutiny. As explained in Section 2(a)(4) of this paper, *supra*, the fact that a payment to a foreign official is described by the customs broker or other third party intermediary as a "facilitating payment" does not necessarily make it a lawful payment under the facilitating payment exception to the anti-bribery provisions of the FCPA. There may be a temptation to characterize any payment to a foreign customs official as a "facilitating payment" because it is intended to "facilitate" the importation of merchandise into the foreign country in question and/or to disguise the actual purpose for the payment.

[37] In most countries of the world, customs duties and various other import taxes (*e.g.* import value added taxes, goods and services taxes, or their equivalent) are assessed on an *ad valorem* basis (i.e., the duties and taxes payable are a percentage of the "customs value" of the imported merchandise). The "customs value" of imported merchandise in virtually all countries that are members of the World Trade Organization ("WTO") is determined in accordance with the valuation principles set forth in the WTO Valuation Code (the Agreement Implementing Article VII of the General Agreement and Tariffs and Trade 1994). Under Article 1(1) of the WTO Valuation Code, the customs value of imported merchandise is, in almost all instances, the total price actually paid or payable by or on behalf of the buyer for the merchandise when sold for exportation to the country of importation.

[38] The United States Foreign Trade Regulations, 15 C.F.R. Part 30, require that "electronic export information" must be filed by or on behalf of the exporter with the Census Bureau through the Automated Export System (or "AES") for most exports of goods from the United States. Among the data elements to be included among that "electronic export information" is the value of the exported merchandise, which is defined in section 30.6(a)(17)(1) of the Foreign Trade Regulations as the selling price at the United States port of exportation.

[39] 18 U.S.C. § 1341 (mail fraud) and § 1343 (wire fraud).

[40] 544 U.S. 349, 125 S.Ct. 1766 (2005), *rehearing denied* 545 U.S. 1135, 125 S.Ct. 2931 (2005).

[41] *See, e.g., SEC v, Noble Corporation, supra* Note 14, Complaint ¶ 23; In the matter of *Helmerich & Payne, Inc.*, supra Note 12, Cease & Desist Order, Statement of Facts, ¶ 15.

[42] *United States v. Panalpina, supra* Note 12, Plea Agreement, Statement of Facts ¶¶ 36-42.

[43] *See In the Matter of Helmerich & Payne, Inc., supra* Note 12, Cease & Desist Order, Statement of Facts ¶¶ 6, 11.

[44] For example, the importation of "used" equipment into Brazil is restricted pursuant to Ordinance DECEX NO. 08/91, as amended by Ordinance MDIC No. 235/06 and Ordinance MDIC No. 25/08. The importation of "used" items into China is restricted under (i) the *Order of the General Administration of Quality Supervision, Inspection and Quarantine Concerning the Issuing of the Administrative Measures for Inspection and Supervision of the Old Imported Mechanical and Electrical Products*, issued by the State Administration of Quality Supervision, Inspection and Quarantine ("AQSIQ") (May 1, 2003); (ii) the *Provisions on Inspection and Supervision Procedures for Import of Old Mechanical and Electrical Products* (October 1, 2008); and (iii) the *Measures for Administration of Import of*

Specified Old Mechanical and Electronic Products, jointly issued by the AQSIQ and the Ministry of Commerce ("MOFCOM") (May 1, 2008).

[45] One of the ways in which FCPA compliance issues can arise, effectively inadvertently, from the import or attempted import of used equipment into one of the countries that restricts or prohibits such imports may be illustrated by a situation with which the author is familiar. In that situation, a United States company shipped surplus office equipment to its Brazilian subsidiary, for the purpose of outfitting a newly established sales office in that country. The equipment was not described as "used" on the United States company's commercial invoice or shipping documentation. The equipment was, however, identified as used by a Brazilian customs official, who threatened the Brazilian subsidiary and its management with criminal prosecution for (i) attempting to import prohibited products into Brazil; and (ii) making a false customs declaration (failing to describe the equipment as used). The customs officer subsequently indicated to the Brazilian subsidiary's local attorney that the "problem could go away" if he was paid a substantial sum of money. The Brazilian attorney suggested to the United States company that he would pay the requested amount to the customs officer, and then would invoice that amount to the United States company or the Brazilian subsidiary as "legal fees". In view of the problems presented under both the anti-bribery provisions and the accounting provisions of the FCPA, the United States company refused to make or authorize the payment to the Brazilian customs official, and immediately terminated its relationship with the Brazilian attorney. The Brazilian subsidiary incurred a very substantial fine for the attempt to import prohibited products, and those products were seized and forfeited by Brazilian customs.

[46] *See, e.g.*, *United States v. BAE Systems, Inc.*, 10-CR-035-JDB (D.DC. 2010), Plea Agreement, Appendix B, Statement of Offense, ¶¶ 23-31.

[47] See Tarun, *supra* Note 2, at pp 91-92, identifying requests by third party intermediaries for payments to offshore accounts and payments to entities located in tax haven countries as "red flags" under the FCPA.

[48] *Pasquantino v. United States, supra* Note 36.

[49] Although not directly related to FCPA compliance issues, such offshore payments, especially where implemented to avoid local currency controls, may be pose a risk of significant disruption of important business operations. The author is familiar with one instance in which a number of leading United States companies relied upon a particular Chinese logistics service provider to handle the importation, warehousing and supply of warranty and replacement parts for Chinese customers. The logistics service provider had requested that all fees payable by the United States companies for those services be made to an account maintained by an affiliate of the logistics service provider in Hong Kong. When the Chinese authorities learned that the logistics service provider was receiving fees in Hong Kong for services performed in China, in violation of Chinese currency control regulations, those authorities shut down the operations of the logistics service provider in a "dawn raid". One of the effects of that shut down was that the United States companies were unable to fulfill their warranty and service obligations to their Chinese customers for several months, until alternate logistics service providers could be identified and supported.

[50] For a general discussion of the FCPA compliance issues arising in connection with the furnishing of hospitality and gifts to foreign officials, *see DOJ/SEC FCPA Resource Guide*, *supra* Note 2, at 15-19.

[51] *See* H.R. Conference Rep. 100-576, *supra* Note 21, p. 922.

[52] See, e.g., *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).

[53] See, e.g., United States Department of Justice, Opinion Release Procedure, 06-01 (October 16, 2006), *available at* www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf. In that opinion, the Department of Justice approved a proposal by a United States company to contribute $25,000 to the Customs department in an African country as part of a pilot project to enhance anti-counterfeiting enforcement by local customs officers.

[54] *United States v. BAE Systems*, *supra* Note 42. As part of that plea agreement, BAE Systems paid criminal fines of $400 million for a series of violations of the anti-bribery and books and record provisions of the FCPA, as well as violations of the Arms Export Control Act, 22 U.S.C. § 2778 *et seq*., and the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130.

[55] *See* 22 C.F.R. § 123.1.

[56] *See United States v. BAE Systems*, *supra* Note 42. Plea Agreement, Statement of Offense, ¶¶ 21-29. The steps taken by BAE Systems to conceal its commission payments to those "market advisors" were also deemed to be a violation of the FCPA's accounting provisions.

[57] United States companies engaged in the export of defense articles and defense services should be aware that a criminal conviction for violation of the FCPA is grounds for statutory (i.e., mandatory) debarment under the ITAR. Thus, section 127.7(c) of the ITAR prohibits the DDTC from issuing any export license or other authorization for the export of defense articles or defense service for a period of three years to any person or entity that has been convicted of violating any one of the United States criminal statutes enumerated in section 120.27 of the ITAR. Section 120.27(a)(6) of the ITAR lists among those criminal statutes the anti-bribery provisions of the FCPA.

[58] *See DOJ/SEC FCPA Resource Guide*, *supra* Note 2 at 28-33. For a template of an FCPA compliance pre-acquisition due diligence checklist, see Tarun, *supra* Note 2 at 110-111.

[59] *See generally, United States v. Shields Rubber Corp.*, 732 F.Supp. 569 (IW.D. Pa. 1989) (successor liability for customs violations); *In the Matter of Sigma-Aldrich Corporation, et. al*,, Case No. 01-BXA-06, ALJ Decision (August 29, 2002) (successor liability for export control violations), *available at* www.bis.doc.gov/enforcement/casesummaries/sigma_aldrich_alj_decision_02.htm.