



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

UNITED STATES: PHASE 2

**FOLLOW-UP REPORT ON THE IMPLEMENTATION
OF THE PHASE 2 RECOMMENDATIONS ON THE APPLICATION OF THE
CONVENTION AND THE 1997 RECOMMENDATION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS**

This follow-up report was approved and adopted by the Working Group on Bribery in International Business Transactions on 1 June 2005.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of findings

1. Since the evaluation of the US under Phase 2, the Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have demonstrated their continuous commitment to enforcing the Foreign Corrupt Practices Act (FCPA): a total of 12 cases involving violations of the FCPA criminal and record-keeping and accounting provisions have been prosecuted since June 2002. In addition, two criminal cases have been brought for money-laundering and violations of the FCPA. Overall, the different agencies (notably the Department of Justice and the Securities and Exchange Commission) involved in FCPA enforcement are moving forward in the pursuit of common goals. The DOJ and the SEC, in deciding to charge a company or individuals, weigh first and foremost the sufficiency of evidence. Yet, a clear public statement, in light of the OECD Convention, identifying the criteria applied in determining the priorities of both the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases, remains to be made (Recommendation 10).

2. The dynamism of enforcement, coupled with US expanded efforts to raise the level of awareness of the FCPA and the OECD Antibribery Convention among SMEs and other exporting companies, are useful means of deterrence. Training of those who provide counselling to US businesses on foreign markets, such as Foreign Commercial Service officers, posted in foreign countries, and of employees of US diplomatic and consular posts is well-developed. There have been less awareness-raising efforts targeting the accounting and auditing profession. Given that the existing DOJ opinion procedure appears to be infrequently used by companies, the U.S. may want to reflect further on whether other forms of guidance need to be explored.

3. New reporting requirements have been imposed on auditors of publicly-listed companies (“issuers”) since the enactment of the Sarbanes-Oxley Act of 2002: pursuant to section 404 of the Act, the company’s auditor is required to attest to, and report on management’s assessment of internal controls and procedures for financial reporting. The Public Company Accounting Oversight Board’s (PCAOB) auditing standard, which guides auditor review and reporting on management’s assessment of internal controls and was approved by the SEC in June 2004, requires auditors to consider “fraud” when auditing the management’s assessment of internal control over financial reporting. Yet, questions arise as to the degree of focus those provisions give to the FCPA. The Working Group takes note that the PCAOB is considering whether to propose amendments to the current auditing standard on consideration of fraud in financial statement audit (Statement on Auditing Standards No. 99) so that auditors of publicly-listed companies would be required to more diligently consider fraud, including the potential for bribery of foreign public officials. Also, as the new rules and standards do not apply to non-issuers, a wide range of companies active on foreign markets continues to fall outside the ambit of those and other requirements (Recommendations 7 & 8).

4. The FCPA appears to be working well, as testified by the number of cases prosecuted since the evaluation of the US under Phase 2. In 2004, the US Court of Appeals confirmed the DoJ’s broad interpretation of the FCPA by holding that the FCPA applies to payments to obtain an undue advantage in obtaining or retaining business, including favourable tax or customs treatment. The Court’s decision is binding on courts within the Fifth Circuit and may be persuasive authority in other circuits. To date, no federal courts outside the Fifth Circuit have adopted a contrary view. Certain other elements of the offence

however still remain untested, and these should be kept under review as case law develops. Furthermore, although the Working Group recognizes that a recent settled administrative case (SEC Release No. 34-47286 of 30 January 2003) may assist companies in delineating the boundary between routine business expenditures and bribes and takes note of the fact that the facilitation payments exception has never been used as a defence in proceedings, it still holds the view that, in the continuous absence of authoritative guidance, the existing exception for facilitation payments and the affirmative defence for reasonable and bona fide expenditure may lead to uncertainty into the interpretation of the FCPA (Recommendations 4 & 5).

5. Enforcement of the FCPA still appears to be based mainly on informal arrangements, without any formal mechanism to review and evaluate the overall FCPA enforcement effort, or cross-institutional statistics as to the number, sources and subsequent processing of allegations of FCPA violations (Recommendations 9 & 11). As noted by the Working Group at the time of the Phase 2 Evaluation, this may in the long term undermine the efficiency of the working relationship between the agencies. Recognising the value of maintaining a database of allegations of bribery of foreign public officials, the United States indicated that the Department of Justice is currently designing a pilot non-public, internal base to track such allegations. The Working Group still holds the opinion that the establishment of an inter-agency mechanism to review the overall process of FCPA enforcement and the compilation of statistics would be beneficial to enhance the enforcement capabilities of the United States.

b) Conclusions

6. Based on the findings of the Working Group with respect to the United States' implementation of the Phase 2 Recommendations, the Working Group reached the overall conclusion that Recommendations 1, 2, 3, 6, 12, 13 and 14 have been implemented satisfactorily or dealt with in a satisfactory manner. Recommendations 8 and 9 have been partially implemented. Recommendations 10 and 11 have not been implemented. Recommendations 4, 5 and 7 require further consideration from the United States.

7. The US authorities agreed to report orally on the implementation of Recommendations 8, 9, 10, and 11, and on further consideration of Recommendation 4, 5 and 7, within one year, i.e. by 31 March 2006.

United States: Written Follow-up to Phase 2 Report

Part I: Working Group Recommendations

Name of country: United States

Date of approval of Phase 2 Report: October 2002

Date of information: February 20, 2005

Text of recommendation 1:

With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:

Enhance existing efforts to reach small and medium-sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources. (Revised Recommendation, Article 1)

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States is committed to continue to enhance efforts to raise awareness of the Foreign Corrupt Practices Act (FCPA) among firms of all sizes that do business internationally.

The U.S. Department of Justice, the Securities and Exchange Commission, and the Department of Commerce participate in numerous seminars and conferences sponsored by professional associations and industry groups, many of which were attended by outside and in-house counsel representing small and medium-sized enterprises.

The U.S. Department of Commerce has expanded its efforts to raise the level of awareness of the FCPA and the OECD Antibribery Convention, in particular its efforts directed at small and medium-sized enterprises doing business internationally. While all of the same tools and programs identified in the U.S. government's Phase 2 review continue to be used, efforts to promote awareness and compliance with the FCPA and Antibribery Convention have been enhanced.

The International Trade Administration's (ITA) United States and Foreign Commercial Service (CS) has a network of export and industry specialists located in more than 100 U.S. cities and over 80 countries worldwide. These trade professionals provide counselling and a variety of products and services to assist small and medium-sized U.S. businesses in exporting their products and services. Since the U.S. government's Phase 2 review, detailed information on the FCPA and the Antibribery Convention has been included by CS in its Human Rights/Rule of Law training initiative directed at its Officers in foreign posts. In FY 2004 142 CS Officers received training under this initiative. The program has now reached over 70% of the CS Officer Corps, representing all regions of the world. In addition 40 CS local host country employees of U.S. diplomatic and consular posts have also received this training, 39 of whom are from the East Asia and Pacific region. Similar training is included as part of the Foreign Service Institute Training of U.S. diplomats going abroad to serve as economic and/or commercial officers, and is provided by staff from the Department of Commerce Office of General Counsel. This training has recently emphasized the importance of being sensitive to the needs of small and medium-sized enterprises operating abroad.

On the domestic front, ITA has requested that the CS staff at each of its U.S. Export Assistance Centers (USEACs) in the United States promote awareness of the FCPA and the OECD Antibribery Convention, and encourage client firms to consider adopting compliance programs that address transnational bribery.

The Departments of Commerce and State have used their respective annual reports to Congress on implementation of the OECD Antibribery Convention as awareness raising tools. For example, copies of the Department of Commerce report were provided to over 100 of its USEACs. The Department of Commerce report is available online at www.export.gov/tcc; while the Department of State report is available online at <http://www.state.gov/e/eb/rls/rpts/bib/>. Furthermore, the Department of Commerce report is also available to the general public through libraries that are part of the Federal Depository Library Program (FDLP). Each of the approximately 1,300 participating libraries in the FDLP has received a copy of the report. These libraries are located across the nation.

The Department of Commerce has developed other avenues to promote awareness of the FCPA and the Convention. For example, the Department of Commerce has sought to have the issue of the FCPA and the Antibribery Convention included in programs administered by private sector participants, and provides copies of its annual report to such organizations. For example, as part of a major U.S. international trade association's program on "Doing Business Overseas", conducted in conjunction with the U.S. Small Business Administration (SBA) and the Overseas Private Investment Corporation (OPIC), copies of the Department's annual report on implementation of the OECD Antibribery Convention were provided to all attendees. As noted above, the report is available online at: www.export.gov/tcc.

As one step to implement U.S. government anti-corruption commitments made at the G8 summit at Sea Island in June 2004, and to implement recommendations of the OECD Working Group on Bribery, in November 2004 Secretary of Commerce Donald L. Evans sent a letter to 160 leading U.S. exporters concerning the prohibitions of the FCPA, the OECD Antibribery Convention and of the importance of corporate awareness and compliance programs in combating bribery and corruption. This important message was also posted on the Department of Commerce's website in an effort to reach the broadest audience possible, including small and medium-sized enterprises: this site receives over five million "hits" per month.

The Department of Commerce has produced a practical guide for businesses involved in international trade, titled "Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies", available on-line at <http://www.ita.doc.gov/goodgovernance>. This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. This manual provides information on the subject of ethics and corporate compliance for all enterprises, and is particularly helpful to small and medium-sized enterprises and those new to international trade. The manual includes information on the FCPA and other international anticorruption instruments as well as the value of corporate compliance programs.

The United States will continue to look for opportunities to raise awareness of the FCPA and the Antibribery Convention in the coming years.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 2:

With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:

Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession. (Revised Recommendation, Article 1)

Actions taken as of the date of the follow-up report to implement this recommendation:

Staff from the Securities and Exchange Commission (SEC) participate in a large number of conferences each year, attended by auditors, internal company accountants and lawyers, in which the importance of FCPA compliance is stressed, primarily through discussion of the enforcement actions that are brought by the SEC for non-compliance with the anti-bribery, books and records and internal control provisions of the FCPA. In addition, the SEC and the Public Company Accounting Oversight Board ("PCAOB") have been involved in a number of rule-making and standard-setting activities that increase the accounting profession's awareness of the internal control provisions of the FCPA.

Section 404 of the Sarbanes-Oxley Act of 2002 requires management to assess and report on internal controls over the financial reporting of U.S. public companies. The SEC adopted rules in June 2003 to implement Section 404, and in February 2004 extended the compliance date to be effective for year-end 2004 filings. Companies are required to include in their annual reports a report of management on the company's internal control over financial reporting. The internal control report must include: a statement of management's responsibility for establishing and maintaining adequate internal control over financial reporting for the company; management's assessment of the effectiveness of the company's internal control over financial reporting as of the end of the company's most recent fiscal year; a statement identifying the framework used by management to evaluate the effectiveness of the company's internal control over financial reporting; and a statement that the registered public accounting firm that audited the company's financial statements included in the annual report has issued an attestation report on management's assessment of the company's internal control over financial reporting. Under the new rules, a company is required to file the registered public accounting firm's attestation report as part of the annual report. Additionally, management must evaluate any change in the company's internal control over financial reporting that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

In June 2004, the SEC approved the PCAOB's auditing standard that guides auditor review and reporting on management's assessment of internal controls. The auditor has to evaluate management's assessment process to be satisfied that management has an appropriate basis for its conclusion. Additionally, the auditor must test and evaluate both the design and the operating effectiveness of the company's internal controls to be satisfied that management's conclusion is correct and, therefore, fairly stated. The auditor's report on internal control over financial reporting will express two opinions -- an opinion on whether management's assessment of the effectiveness of internal control over financial reporting as of the end of the most recent fiscal year is fairly stated, and an opinion on whether the company has maintained effective internal control over financial reporting as of that date.

If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 3:

With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:

Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions. (Revised Recommendation, Article 1)

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States believes that the Opinion Procedure established by the U.S. Department of Justice, which permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA, at present provides an effective means of assisting business to comply with the FCPA. Summaries of these opinions are available on the Department's website, at: <http://www.usdoj.gov/criminal/fraud/fcpa/opiindx.htm>

The Department of Justice and the staff of the SEC do not believe that it would be appropriate to issue guidelines or guidance concerning compliance with the FCPA outside of the already-established FCPA Opinion Procedure. Under the United States system of criminal justice, the courts are charged with interpreting criminal law statutes, taking guidance from the will of Congress as expressed in the legislative history and prior interpretations by other courts. Without an express grant of authority by Congress, such as was done with respect to the Opinion Procedure, any interpretive statement by the Department of Justice or the SEC would have no binding effect upon the courts and could not be relied upon by the business community as an authoritative statement of the law [or future prosecution policy]. In contrast, the FCPA Opinion Procedure provides a safe harbour for the company requesting the opinion with respect to specific, non-hypothetical transactions. Although only the requesting company is protected by the Opinion, other companies can, and do, look to the Opinion Releases for assistance in interpreting the statute and in determining the Department's present enforcement policy.

More generally, the Departments of Justice and Commerce have jointly published a general guide to the FCPA that is available online at: <http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm>. Similarly, the Department of State, in cooperation with the Departments of Justice and Commerce, has published a brochure, also available online, that sets forth the United States' anti-corruption efforts throughout the world. The Department of State brochure contains the DOJ-DOC FCPA Guide in Appendix A.

If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 4:

With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:

Consider developing specific guidance in relation to the facilitation payments exception (Convention, Commentary 9; Phase 1 Evaluation, paragraph 1.3).

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States has carefully considered this recommendation. We presently believe that the language of the FCPA, including its definition of “facilitating or expediting payments,” is sufficient guidance. However, as noted in our response above to Recommendation 4, the Opinion Procedure established by the Department of Justice establishes an effective means that permits companies to request an opinion on whether specific, non-hypothetical, prospective conduct would violate the FCPA, including conduct related to “facilitating or expediting payments”. The Department of Justice does not presently intend to offer any additional specific guidance outside of the Opinion Procedure.

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 5:

With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:

With respect to the defence of reasonable and bona fide expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided. (Phase 1 Evaluation, paragraph 1.3).

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States has reviewed this recommendation and based on our enforcement experience, does not believe that specific guidance, beyond that afforded by the Opinion Procedure, is appropriate or necessary.

If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 6:

The Working Group further recommends that the United States:

Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally. (Revised Recommendation, Article V. C (i))

Actions taken as of the date of the follow-up report to implement this recommendation:

See response to Recommendation 1, above. United States government efforts to enhance awareness of the FCPA include encouraging the full range of companies doing business abroad, including small and medium-sized enterprises, to adopt compliance programs. In addition, firms can readily obtain advice and assistance in developing compliance programs from private legal counsel or consultants.

If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 7:

The Working Group further recommends that the United States:

Consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. (Convention, Article 8; Revised Recommendation, Article V)

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States has carefully considered this recommendation and presently believes that the level of deterrence provided by the FCPA is generally reasonable. We do not presently intend to expand the coverage of the books and records provisions of the FCPA to non-issuers. As was discussed in Phase 1 and Phase 2, we believe that other laws and regulations, including those governing bank fraud and tax fraud, cover non-issuers and may provide a basis for prosecutions based on false books and records.

If no action has been taken to implement recommendation 7, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 8:

With respect to detection, the Working Group recommends that the United States:

Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery. (Convention, Article 8; Revised Recommendation, Article V)

Actions taken as of the date of the follow-up report to implement this recommendation:

In Staff Accounting Bulletin No. 99, Securities and Exchange Commission (SEC) staff addressed the application of the concept of materiality in the context of preparing and auditing the financial statements of public companies. The positions expressed in the Bulletin have been referred to favourably by various federal courts of the United States, *see, e.g., Ganino v. Citizens Utilities Co.*, 228 F.3d 154 (2nd Cir. 2000).

The Sarbanes-Oxley Act of 2002 established the Public Company Accounting Oversight Board (“PCAOB”) and gave it strong powers over the auditing profession, under the direct oversight of the SEC. The Act and the PCAOB require that all firms that want to file audit reports with the SEC be registered, follow auditing standards established by the PCAOB, undergo an annual or triennial inspection (depending on the number of SEC clients), and be subject to the possibility of PCAOB sanctions for audit or quality control failures.

The PCAOB is considering whether to propose amendments to the current auditing standard (Statement on Auditing Standards No. 99) that requires the auditor, when conducting an audit, to consider the risk of fraud and its potential impact on the company's financial statements. The new standard will likely require auditors to be even more diligent in identifying the warning signs of possible fraud, including the potential for bribery of foreign public officials, as they conduct their audit procedures.

If no action has been taken to implement recommendation 8, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 9:

With respect to detection, the Working Group recommends that the United States:

Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery. (Revised Recommendation, Article 1; Annex to the Revised Recommendation, paragraph 6)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Department of Justice maintains a non-public, computerized case tracking system that monitors the status of all cases that have been opened as formal investigations. The Securities and Exchange Commission also maintains a computerized database of all FCPA investigations which includes the origin of such investigations. The United States recognizes the potential value of maintaining a database of allegations of bribery of foreign public officials and the Department of Justice is currently designing a pilot non-public, internal database to track such allegations.

If no action has been taken to implement recommendation 9, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 10:

1. The Working Group recommends that the United States:

Make a clear public statement, in light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)

Actions taken as of the date of the follow-up report to implement this recommendation:

As explained at the Phase 2 on-site examination, the Department of Justice and the SEC do not have priorities amongst FCPA cases. Any FCPA allegation that comes to the attention of either agency and that, upon investigation, satisfies generally applicable criteria for prosecution (sufficiency of the evidence, likelihood of success at trial, etc.) will be prosecuted.

If no action has been taken to implement recommendation 10, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 11:

The Working Group recommends that the United States:

Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).

Actions taken as of the date of the follow-up report to implement this recommendation:

The United States believes that existing internal controls, legislative requirements, Congressional oversight, and scrutiny by civil society presently provide adequate mechanisms to review and evaluate FCPA enforcement. Coordination between the Department of Justice and the Securities and Exchange Commission is close and effective, and includes periodic reviews of FCPA cases. As noted above, the Department of Justice maintains a case tracking system that monitors the status of all cases that have been opened as formal investigations.

If no action has been taken to implement recommendation 11, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 12:

The Working Group recommends that the United States:

Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA. (Convention, Article 7)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Department of Justice prosecutes violations of the money-laundering and suspicious transactions reporting laws, without regard to whether they are related to FCPA violations. It is worth noting, however, that in two recent FCPA cases, *United States v. Bodmer* and *United States v. Giffen*, the defendants were charged with money laundering as well as violations of the FCPA.

If no action has been taken to implement recommendation 12, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 13:

The Working Group recommends that the United States:

Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period. (Convention, Article 6)

Actions taken as of the date of the follow-up report to implement this recommendation:

The Department of Justice believes that the current period of five years, which may be extended to eight years when it is necessary to obtain foreign evidence, is sufficient. The Department of Justice therefore does not presently intend to request any change from Congress in the statute of limitations. We would note that the statute of limitations for FCPA offenses is the general five-year period applicable to all non-capital Federal offenses. See 18 U.S.C. § 3282. However, when the government needs to obtain evidence from a foreign country, the statute may be suspended for up to three years. See 18 U.S.C. § 3292.

If no action has been taken to implement recommendation 13, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Text of recommendation 14:

The Working Group recommends that the United States:

Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”. (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4)

Actions taken as of the date of the follow-up report to implement this recommendation:

The legislative history of the 1998 amendments to the FCPA, as well as the recent court decision in *United States v. Kay*, 359 F.3d. 738 (5th Cir. 2004), confirms that the existing language of the statute encompasses obtaining an “improper advantage.” The Department of Justice does not presently intend to seek any amendment to the FCPA. Of course, should the development of case-law call into question the current interpretation of the statute, the Department will request that Congress take appropriate action.

If no action has been taken to implement recommendation 14, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures:

Part II: Issues for Follow-up by the Working Group

The Working Group will follow up the issues below (number 15), as the case-law continues to develop, to examine:

Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to (i) cases where a benefit is directed to a third party by a foreign official; and (ii) the scope of the definition of a “foreign public official”, in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2).

With regard to each issue identified above, describe new case law, legislative, administrative, doctrinal or other relevant developments since the date of the Working Group meeting at which the Phase 2 report was considered. Provide relevant statistics as appropriate.

There have been no developments in case-law that relate to these issues. The Department of Justice has successfully brought criminal prosecutions in circumstances in which the bribes were to employees of state-controlled enterprises, such as state-run hospitals (see *United States v. Syncor Taiwan, Inc.*).

The Working Group will follow up the issues below (number 16), as the case-law continues to develop, to examine:

Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4)

With regard to each issue identified above, describe new case law, legislative, administrative, doctrinal or other relevant developments since the date of the Working Group meeting at which the Phase 2 report was considered. Provide relevant statistics as appropriate.

The Department of Justice has thus far brought only one case that charges an offence utilizing the nationality jurisdiction. In *United States v. Giffen*, the indictment charges three counts (Counts 11-13) of violations of the FCPA involving wholly extraterritorial conduct, *i.e.*, transfers between foreign bank accounts in furtherance of unlawful payments to foreign officials. The defence in that case has not thus far raised any challenge to the validity and application of the FCPA’s nationality jurisdiction.

The Working Group will furthermore monitor developments in the following area (follow-up issue number 17):

Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1)

With regard to each issue identified above, describe new case law, legislative, administrative, doctrinal or other relevant developments since the date of the Working Group meeting at which the Phase 2 report was considered. Provide relevant statistics as appropriate.

As of November 1, 2002, the sentencing guideline applicable to the FCPA is U.S.S.G. § 2C1.1, which is the same sentencing guideline that governs domestic public corruption. Under U.S.S.G. § 2C1.1, foreign and domestic bribery are treated identically. *See U.S. Sentencing Guidelines Manual*, App. C, Amend. 639.

United States: Written Follow-up to Phase 2 Report

Part III: Commentaries by the Lead Examiners*

Name of country: United States

Date of approval of Phase 2 Report: October 2002

Date of information: February 20, 2005

Text of Commentary A:

In the view of the lead examiners, the time has come to explore the need for further forms of guidance, mainly to assist new players (SMEs) on the international scene, and to provide a valuable risk management tool to guide companies through some of the pitfalls which might arise in structuring international transactions involving potential FCPA exposures. Also, consideration should be given to issuing guidelines in areas where a clear policy or position has emerged so to ensure that the DOJ's existing expertise can thus be captured for the future. (P2 Rpt. following § 25)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see responses to Working Group Recommendations nos. 1, 3, 6.

Text of Commentary B:

It is difficult to assess how effective the existing mechanisms have been in uncovering foreign bribery. The lead examiners believe that the investigation of foreign bribery cases would be enhanced by developing and maintaining statistics as to the origins of information about allegations of FCPA violations and what is done with it. In addition the lead examiners recognise that the issue of whistleblower protection is inextricably connected to the broader issue of witness protection and is not specific to the FCPA. (P2 Rpt. following § 30)

Actions taken as of the date of the follow-up report to implement this commentary:

As noted in the United States response to Working Group Recommendation 9, the Department of Justice maintains a non-public, computerized case tracking system that monitors the status of all cases that have been opened as formal investigations. The Securities and Exchange Commission also maintains a computerized database of all FCPA investigations which includes the origin of such investigations. The United States recognizes the potential value of maintaining a database of allegations of bribery of foreign public officials and is currently designing a pilot non-public, internal database to track such allegations.

* This information has been provided on a voluntary basis by the United States. Provision of such information is not required under the Phase 2 follow-up procedures.

Whistleblower protection was expanded by the Sarbanes-Oxley Act of 2001, which added and clarified obstruction of justice offenses and provided other protections to whistleblowers. For example, section 1107 of the Act, codified as 18 U.S.C. § 1513(e), provides:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

Further, section 806 of the Act, codified as 18 U.S.C. § 1514A, provides for a civil remedy protecting employees of issuers. This section provides, *inter alia*, that no issuer, or any officer, employee, contractor, subcontractor, or agent of an issuer,

may discharge, demote, suspend, threaten, harass, or in any other way discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information cause information be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [the federal fraud statutes], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, . . .

This section provides that the claimant may file a complaint with the Secretary of Labor (who has delegated responsibility for such complaints to the Occupational Safety and Health Administration) and, if the Secretary takes not action, to file a civil lawsuit. The statute authorizes the court to grant relief in the form of reinstatement, back pay (with interest), and compensation for any special damages.

Text of Commentary C:

The lead examiners are mindful of the vital role played by the accounting and auditing requirements in deterring and detecting violations of the FCPA among issuers, as well as in providing alternative legal remedies. This could be enhanced by taking steps to increase the focus on the FCPA among the accounting profession, and by the introduction of clearer auditing standards and more stringent controls over auditors. The lead examiners also invite the United States to consider placing independent auditors under a clear obligation, irrespective of materiality or actions taken by the board of directors, to report to the SEC any finding during an audit which indicates a possible illegal act of bribery, in line with Part V of the 1997 Revised Recommendation on Combating Bribery in International Business Transactions. Most importantly, and despite concerns being raised about which would be the appropriate body to undertake enforcement, due consideration should be given to extending the FCPA books and records provisions, at least to those categories of non-issuers whose international business exceeds a certain level. (P2 Rpt. following § 45)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see responses to Working Group Recommendations 7, 8.

Text of Commentary D:

The lead examiners are mindful of the deterrent effect of the collateral consequences of an FCPA investigation or conviction. They take the view that it would be misleading to look only at the levels of fines and other sanctions available on the statute book. (P2 Rpt. following § 52)

Actions taken as of the date of the follow-up report to implement this commentary:

No response required.

Text of Commentary E:

The challenge of widening the use of compliance programs in those areas where they are most needed is only one aspect of the issues relating to SMEs and start-ups which will be addressed below. The lead examiners would welcome the commitment of the United States to developing and promoting compliance programs, or guidelines for their design and implementation, specifically tailored to a wider, international, corporate population. Also, in cases where compliance programs are prescribed as a condition of a court-ordered settlement, the inclusion of formal procedures for periodic follow-up or monitoring, such as those recently put in place, is to be welcomed. (P2 Rpt. following § 57)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see response to Working Group Recommendation 1.

The Department of Justice and the staff of the Securities and Exchange Commission (SEC) agree with the importance of periodic follow-up or monitoring of court-imposed compliance programs and have begun including them in plea agreements. See, e.g., SEC v. ABB Ltd.

Text of Commentary F:

The lead examiners invite the United States to consider ways in which the FCPA books and records provisions, currently binding only on issuers, could be extended to apply to those nonissuers whose international business activities exceeds a certain level. Further, the lead examiners would encourage the United States to pursue and reinforce the valuable “outreach” efforts undertaken by the Department of State and Department of Commerce to promote better levels of awareness of the FCPA and the Convention, targeting in particular smaller US enterprises doing business abroad. The Department of Justice has a major role to play here, by exploring what additional forms of guidance it could make available in order to ensure that SMEs and start-ups have access to its wealth of expertise. Those law firms with a significant FCPA practice in the US should ensure that lawyers in their foreign offices are thoroughly versed in the FCPA and able to give direct and relevant advice at local level. Those firms with an existing client base of SMEs are encouraged to extend their ongoing efforts to devise and publicise compliance programs suitably tailored to the needs of smaller companies. (P2 Rpt. following § 61)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see response to Working Group Recommendations 7, 8.

Text of Commentary G:

The examiners encourage the U.S. authorities, in appropriate cases, to consider bringing more criminal prosecutions for failure to report suspicious activity, in order to underline the importance of complying with the reporting regime. Further consideration might also be given to criminalising negligent failure to report, given that the present “willful” “mens rea” standard places a high evidentiary burden on the prosecutor. The lead examiners further encourage the US authorities to compile the relevant statistical information for the purpose of a future assessment. (P2 Rpt. following § 71)

Actions taken as of the date of the follow-up report to implement this commentary:

The Department of Justice prosecutes willful violations of such offenses when appropriate. It is not appropriate to establish a negligence mens rea in criminal cases, but U.S. banking law provides for civil and administrative sanctions for failure to establish a system to detect suspicious transactions.

Text of Commentary H:

The lead examiners were encouraged by the stronger degree of focus now placed by the SEC on prosecuting substantive violations of the FCPA. However, in the absence of any recent definitive statements, there is a certain lack of transparency surrounding the prosecution policy and priorities applied within the organisation. This, coupled with the recent high levels of staff turnover at the SEC, might in time undermine the consistency and effectiveness of its vital role in the enforcement of the FCPA. (P2 Rpt. following §75)

Actions taken as of the date of the follow-up report to implement this commentary:

The United States believes that the high degree of professionalism and competence at both the Department of Justice and the Securities and Exchange Commission ensure a rigorous enforcement of the FCPA, regardless of any changes in personnel.

Text of Commentary I:

The lead examiners invite the United States to state publicly its current enforcement priorities with regard to the FCPA in the light of the OECD Convention. The examiners also invite the United States to consider what techniques, whether in the form of policy statements, internal practice guidelines, statistics or otherwise, might be used in order to capture, secure and maintain, in a suitably objective and visible form, the wealth of institutional memory and expertise with regard to FCPA prosecution that is currently available in the team of Fraud Section prosecutors, in order to reinforce the organizational infrastructure necessary to carry on the fight against corruption, and to ensure continuity. (P2 Rpt. following § 84)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see response to Working Group Recommendation 3.

Text of Commentary J:

The lead examiners noted that there are no clear, documented, formal processes between agencies to underpin the vital exchange of information and reporting of suspected violations, and a corresponding absence of statistics. This results in a lack of transparency and of data, which, if captured, could serve useful analytical purposes in reviewing the workings of the FCPA. It is suggested that the efficiency of inter-agency co-operation might be enhanced by the introduction of clearer processes, while acknowledging that the US does not favour the use of formal guidelines for this purpose. Further, the overall system might benefit from the creation of a mechanism to periodically review the process of FCPA enforcement from prevention to prosecution. Such mechanism, without forming part of the decision-making function, could provide the means to identify criteria for demonstrating objectively that the system is working, and to identify where in the enforcement system there is a need for meaningful statistics to be kept. (P2 Rpt. following § 89)

Actions taken as of the date of the follow-up report to implement this commentary:

It is the view of the United States that a formalization of the current cooperative relationship amongst the U.S. government enforcement agencies is not necessary. As noted in the response to Working Group Recommendation, existing internal controls, legislative requirements, Congressional oversight, and scrutiny by civil society presently provide adequate mechanisms to review and evaluate FCPA enforcement. As also noted, the Department of Justice and the Securities and Exchange Commission each maintain a case tracking system that monitors the status of all cases that have been opened as formal investigations.

Text of Commentary K:

The length and modalities of statutes of limitations have been identified in Phase 1 as a generic problem for many signatories of the Convention. The lead examiners noted the DOJ assurances that the relatively short limitation period for the filing of an indictment has not, to date, presented problems in practice in the U.S. However, there is no basis on which this situation can be monitored or verified in the absence of any statistical data about how prosecution cases under the FCPA are prepared, and of what types of evidentiary difficulty most commonly arise. With the increased sophistication of the techniques deployed in paying and concealing bribes, the possibility that evidence might remain concealed for several years is obvious, and this could impact the effectiveness of enforcement of the legislation. (P2 Rpt. following § 96)

Actions taken as of the date of the follow-up report to implement this commentary:

As indicated in the response to Working Group Recommendation 13, the Department of Justice believes that the current period of five years, which may be extended to eight years when it is necessary to obtain foreign evidence, is sufficient. The United States notes that the statute of limitations for FCPA offenses is the general five-year period applicable to all non-capital Federal offenses. See 18 U.S.C. § 3282. However, when the government needs to obtain evidence from a foreign country, the statute may be suspended for up to three years. See 18 U.S.C. § 3292.

Text of Commentary L:

The present definition of the offence of bribery under the FCPA has been recently interpreted by a court as requiring that the acts be done for the purpose of “obtaining or retaining business”, and that seeking to obtain an improper advantage is not of itself an alternative ground for indictment. That decision is under appeal. If it were upheld, the result would be to exclude from the scope of the offence any illicit payment which is directed to securing some advantage – such as favourable tax or customs treatment – to which a company is not clearly entitled. Such an interpretation would be narrower than that prescribed by the Convention. The DOJ has confirmed that the United States will consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”. (P2 Rpt. following § 112)

Actions taken as of the date of the follow-up report to implement this commentary:

In February 2004, the Court of Appeals reversed the lower court’s decision and held that the FCPA applies to payments to obtain an undue advantage in obtaining or retaining business, including favourable tax or customs treatment. See *United States v. Kay*, 359 F.3d. 738 (5th Cir. 2004).

Text of Commentary M:

As regards the other areas of potential uncertainty identified above in the offences under the FCPA, the lead examiners recommend that these be kept under review as the case law develops. In particular, the need to prove an “interstate nexus” in respect of US nationals and companies is of some concern given that nationality jurisdiction (which does not require this element) has as yet not been tested. Also, for the reasons given above, reliance on other statutes may not always be sufficient to complement the FCPA in these areas. (P2 Rpt. following § 112)

Actions taken as of the date of the follow-up report to implement this commentary:

The United States has never encountered any difficulty in establishing this element.

Text of Commentary N:

The lead examiners suggest that there may be a case for guidance to be issued by the DOJ to explain the tests it applies in practice to assist in the interpretation of this [facilitation payments] exception. Alternatively, consideration should be given to amending the wording of the statute to clarify, for the benefit of all, that only minor payments are allowable. (P2 Rpt. following § 116)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see response to Working Group Recommendation 4.

Text of Commentary O:

The lead examiners are of the view that the defence is not legally necessary and that the scope it allows for interpretation introduces some uncertainty. If it is maintained, the lead examiners suggest that there is a case for guidelines or guidance to be issued by the DOJ to explain in more detail the tests it applies in practice and to assist in the interpretation of the defence. (P2 Rpt. following § 121)

Actions taken as of the date of the follow-up report to implement this commentary:

Please see response to Working Group Recommendation 5.

United States: Written Follow-up to Phase 2 Report

ANNEX 1

Additional Enforcement Actions since Phase 2 Report*

Name of country: United States

Date of approval of Phase 2 Report: October 2002

Date of information: February 20, 2005

A. CRIMINAL ENFORCEMENT ACTIONS:

1. *United States v. Halford; United States v. Reitz; United States v. King and Barquero* (W.D. Mo.). The defendants in these cases were indicted or otherwise charged prior to the Phase 2 examination. Since then, the following events have occurred:

- a. In June 2002, Robert Richard King, the majority shareholder of Owl Securities Inc., a now-defunct corporation based in Kansas City, Missouri, was convicted of conspiring to violate the Foreign Corrupt Practices Act by agreeing to offer bribes to officials and political parties in Costa Rica to obtain a valuable land concession. King was subsequently sentenced to 30 months imprisonment and \$60,000, and his conviction and sentence were affirmed by the Court of Appeals in December 2003. *See United States v. King*, 351 F.3d 859 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 2852 (2004).
- b. In related cases, Richard Halford and Albert Reitz, two officers of Owl Securities, pleaded guilty, cooperated with the government's investigation, and testified at King's trial. As a result, the government made a motion for lenient sentence, and the two defendants were sentenced to probation, with a requirement of community service.
- c. Pablo Barquero, a Costa Rican national who acted as the local agent for the Owl Securities, remains a fugitive, as Costa Rica does not extradite its own nationals.

2. *United States v. Kay and Murphy* (S.D. Texas). The defendants in this case were indicted prior to the Phase 2 Examination. In addition, the SEC sued American Rice, Inc. and certain individuals. *See SEC v. Douglas A. Murphy, David G. Kay, and Lawrence Theriot* (Litigation Release No. 17651), and *In the Matter of American Rice, Inc., Joseph A. Schwartz, Jr., Joel R. Malebranche and Allen W. Sturdivant* (Release No. 34-47286; File No. 3-11024) below. Since then, the following developments have occurred:

* This information has been provided on a voluntary basis by the United States. Provision of such information is not required under the Phase 2 follow-up procedures.

- a. In April 2002, the district court dismissed the indictment, finding that bribes to customs officials to reduce duties and taxes did not fall within the FCPA's element of "obtaining or retaining business." See *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Texas 2002). On February 4, 2004, the Court of Appeals reversed the district court's dismissal of the indictment and reinstated the charges, finding that the element of the FCPA requiring the bribe to be "for the purpose of assisting . . . in obtaining or retaining business" encompassed more than just obtaining government contracts. The court held that whether the conduct charged in the Indictment – paying bribes to customs officials to reduce duties – fell within the scope of the statute depended on the intent of the defendants, i.e., whether they paid the bribes to obtain or retain business, including obtaining an advantage over competitors, or merely to improve the profits of an already profitable business. See *United States v. Kay*, 359 F.3d. 738 (5th Cir. 2004).
- b. On July 14, 2004, in response to a Supreme Court case involving sentencing, the grand jury returned a superseding indictment that charged the defendants with conspiracy to violate the FCPA and charged one defendant with obstruction of justice for allegedly lying to the SEC in sworn testimony.
- c. On October 6, 2004, following a two-week jury trial, the jury returned a verdict finding Murphy and Kay guilty of all counts. Sentencing is scheduled for January 6, 2005.

3. *United States v. Gautam Sengupta* (D.D.C.); *United States v. Ramendra Basu* (D.D.C.). In January 2002, Sengupta, an employee of the World Bank, pleaded guilty to conspiracy to commit wire fraud and a substantive violation of the FCPA in connection with kickbacks to World Bank consultants and payments to a foreign official of the government of Kenya. Subsequently, in December 2002, Basu, another employee of the World Bank, pleaded guilty to the same charges. Their sentencing has been delayed pending resolution of related Swedish enforcement proceedings.

4. *United States v. Richard G. Pitchford* (D.D.C.). In September 2002, Pitchford, a country manager for a U.S. government-funded development organization, was charged with violating the FCPA and engaging in government program fraud by artificially inflating development grants to generate funds for kickbacks to himself and others and to pay bribes to a British official. He pleaded guilty and was sentenced to 12 months and 1 day incarceration; 3 years supervised release, and payment of \$400,000 in restitution.

5. *United States v. Syncor Taiwan, Inc.* (C.D. Cal.). In November 2002, Syncor Taiwan, a foreign subsidiary of a U.S. company, was charged and pleaded guilty to a violation of 15 U.S.C. § 78dd-3, the section added to the FCPA in 1998 to implement the OECD Convention with respect to "all persons." The company was sentenced to pay a \$2,000,000 fine. See *SEC v. Syncor International Corporation* (Litigation Release No. 17887/Release No. 34-46979; File No. 3-10969) below for the civil enforcement action against the parent company.

6. *United States v. Giffen* (S.D.N.Y.). In April 2003, the grand jury returned an indictment charging Giffen, a U.S. national who acted as an advisor to the government of Kazakhstan in connection with a number of oil and gas transactions, with conspiracy, violations of the Foreign Corrupt Practices Act, mail and wire fraud, money laundering, and subscribing to false tax returns. Since then, the following significant events have taken place:

- a. In March and August 2004, the grand jury returned superseding indictments adding certain tax offenses and sentencing factors.

- b. On July 2, 2004, the district court entered an order dismissing certain allegations in the mail and wire fraud counts that charged Giffen with defrauding the people of Kazakhstan by depriving them of the honest services of their officials. The court held that the statute defining such “honest services fraud,” 18 U.S.C. § 1346, while it applied to foreign and domestic private corruption, was limited to domestic corruption in the public sector. See *United States v. Giffen*, 2004 WL 1475498 (S.D.N.Y.). Although the government did not agree with this conclusion, it chose not to appeal to avoid delaying the trial in this matter.
- c. Also on July 2, 2004, the district court held that certain classified documents of the State Department and the Central Intelligence Agency were potentially discoverable by the defendant, which decision automatically triggered procedures under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III. See *United States v. Giffen*, 2004 WL 1475499 (S.D.N.Y.). These procedures, which involve in camera review of the documents by the court, have begun. However, as a result of the CIPA procedures, the trial, which had been scheduled to begin on October 4, 2004, has been postponed to April 4, 2005.

7. *United States v. Hans Bodmer* (S.D.N.Y.). The defendant in this case, a Swiss lawyer, was indicted on August 5, 2003, for violating the FCPA and engaging in money laundering in connection with bribes allegedly paid to obtain an advantage in the privatization of a state-owned oil company in Azerbaijan. The following significant events have taken place:

- a. On August 19, 2003, Bodmer was arrested in Korea in response to a request by the United States for his extradition. After five months in Korean custody, Bodmer agreed to extradition.
- b. On July 9, 2004, the district court granted a defense motion to dismiss the FCPA counts but denied it with respect to the money laundering counts. Interpreting language in the pre-1998 version of the FCPA, the Court held that a foreign national who is an agent or employee (as distinguished from an officer or director) could only be held criminally liable under the FCPA if he was properly “within the jurisdiction” of the court. The court held that Bodmer was not so “within the jurisdiction” of the court for FCPA purposes because he was not afforded access to American counsel before agreeing to extradition. See *United States v. Bodmer*, 2004 WL 1555151 (S.D.N.Y.). Although the government disagreed with the court’s rationale, it chose not to appeal this decision as (i) the FCPA was amended in 1998 to apply directly to foreign nationals who take an action within the United States and to impose criminal liability on foreign nationals who act as agents and employees of American companies, and (ii) the court did not dismiss the money laundering charge.
- c. On October 8, 2004, Bodmer pleaded guilty to money laundering.

8. *United States v. ABB Vetco Gray Inc. and ABB Vetco Gray (UK) Ltd.* (S.D. Texas). On July 6, 2004, two subsidiaries of ABB Ltd., a Swiss company, pleaded guilty to violations of the FCPA in connection with obtaining a number of oil and gas construction contracts in Nigeria. According to the Information and Stipulated Statement of Facts, the companies paid approximately \$1.1 million in an effort to obtain contracts in Nigeria. Pursuant to the plea agreements, the companies agreed to pay a combined fine of \$10.5 million.

9. *InVision Technologies Inc.* On December 6, 2004, Invision Technologies, Inc., a U.S. company, entered into a two-year deferred prosecution agreement with the Justice Department in which it admitted to violations of the FCPA in Thailand, China, and the Philippines, agreed to pay \$800,000 in penalties, agreed to implement a rigorous compliance program with a monitor, and agreed to cooperate fully in the ongoing

parallel investigations by the Justice Department and the SEC. General Electric Company, which acquired InVision after the criminal conduct, agreed to ensure compliance by InVision of InVision's obligations under its agreement and to effect FCPA compliance programs within GE's new InVision business. GE and InVision conducted an internal investigation of potential FCPA violations discovered in the course of acquisition due diligence and voluntarily disclosed their findings to the Justice Department and the SEC. Related complaints and orders were filed by the SEC.

10. *United States v. Monsanto Co.* (D.D.C., 2005) On January 6, 2005, Monsanto Company entered into a deferred prosecution agreement with the Justice Department in which it agreed to pay a \$1,000,000 penalty and admit to violations of the FCPA involving a payment to an Indonesian official to induce him (unsuccessfully) to repeal an environmental regulation, and a related false books and records entry. Pursuant to the agreement, the Government will seek the dismissal of the charges in three years provided the company implements a strict compliance program and continues to cooperate with the Government's investigation. Monsanto also agreed to hire an independent compliance monitor to meet its obligations. Related complaints and orders were filed by the SEC.

B. CIVIL AND ADMINISTRATIVE ENFORCEMENT ACTIONS

1. *SEC v. Douglas A. Murphy, David G. Kay, and Lawrence Theriot* (Litigation Release No. 17651). On July 30, 2002, the SEC filed a civil injunctive action against two former officers of American Rice, Inc., Douglas A. Murphy and David G. Kay, alleging that they authorized over \$500,000 in bribery payments to Haitian customs officials during 1998 and 1999, in violation of the FCPA. The complaint, filed in the United States District Court for the Southern District of Texas, alleges that Kay, with Murphy's knowledge, authorized the bribes to illegally reduce American Rice's import taxes by approximately \$1.5 million. The case is currently stayed pending the outcome of the related criminal action. *See I.A.2 supra*.

2. *SEC v. Syncor International Corporation* (Litigation Release No. 17887/Release No. 34-46979; File No. 3-10969). On December 10, 2002, the SEC filed two settled enforcement proceedings charging Syncor International Corporation, a radiopharmaceutical company based in Woodland Hills, California, with violating the FCPA. First, the Commission filed a lawsuit in the United States District Court for the District of Columbia charging Syncor with violating the FCPA and seeking a civil penalty. Second, the SEC issued an administrative order finding that Syncor violated the anti-bribery, books-and-records, and internal controls provisions of the FCPA, ordering Syncor to cease and desist from such violations, and requiring Syncor to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures. Without admitting or denying the SEC's charges, Syncor consented to the entry of a final judgment in the federal lawsuit requiring it to pay a \$500,000 civil penalty and consented to the SEC's issuance of its administrative order. In a related proceeding, the United States Department of Justice filed criminal FCPA charges against Syncor Taiwan, Inc., a subsidiary of Syncor. (U.S. v. Syncor Taiwan, Inc. No. 02-CR-1244-ALL (C.D. Cal.)). In that proceeding, Syncor Taiwan has agreed to plead guilty to one count of violating the anti-bribery provisions of the FCPA and to pay a \$2 million fine.

3. *In the Matter of American Rice, Inc., Joseph A. Schwartz, Jr., Joel R. Malebranche and Allen W. Sturdivant* (Release No. 34-47286; File No. 3-11024). On January 30, 2003, the Commission instituted settled administrative proceedings against American Rice, Inc. and three individuals. The administrative order found that from at least January 1998 to August 1999, American Rice employees, at the direction of an American Rice vice president, made numerous bribery payments to Haitian customs officials to illegally reduce American Rice's import taxes. The payments assisted American Rice to obtain or retain its business of selling rice in Haiti at a favorable price in violation of the FCPA. Other employees helped carry out the bribery scheme by preparing fake shipping documents. American Rice inaccurately recorded the bribery payments in its consolidated books and records as routine business expenditures. American Rice also

failed to devise and maintain an adequate system of internal accounting controls to detect and prevent improper payments to foreign government officials and to provide reasonable assurance that transactions were recorded as necessary to permit the preparation of financial statements in conformity with Generally Accepted Accounting Principles. Without admitting or denying the SEC's findings, the respondents consented to the SEC's issuance of its administrative order.

4. *In re BJ Services Company*, (Release No. 34-49390; File No. 3-11427). On March 10, 2004, the SEC filed a settled administrative proceeding against BJ Services Company. The administrative order found that during 2001, BJ Services Company, through its wholly-owned Argentinean subsidiary B.J. Services, S.A. ("BJSA"), made illegal or questionable payments, totaling approximately 72,000 pesos to Argentinean customs officials. Further, from 1998 through April 2002, certain undocumented or improperly characterized payments were made totaling approximately 151,000 pesos. In certain instances, entries were made in BJSA's books and records to conceal the payments. During the same period, BJ Services Company experienced certain breaches in the existing accounting policies, controls and procedures in certain areas of its Latin American Region. Without admitting or denying the SEC's charges, BJ Services Company consented to the SEC's issuance of its administrative order.

5. *SEC v. Schering-Plough Corporation* (Litigation Release No. 18740/Release. No. 34-49838; File No. 3-11517). On June 9, 2004, the SEC filed a settled lawsuit in the United States District Court for the District of Columbia seeking a civil penalty against Schering-Plough Corporation for violating the books and records and internal controls provisions of the FCPA. The SEC's complaint alleges that between February 1999 and March 2002, one of Schering-Plough's foreign subsidiaries, Schering-Plough Poland, made improper payments to a charitable organization called the Chudow Castle Foundation. The Foundation was headed by an individual who was the Director of the Silesian Health Fund during the relevant time. The health fund was a Polish governmental body that, among other things, provided money for the purchase of pharmaceutical products and influenced the purchase of those products by other entities, such as hospitals, through the allocation of health fund resources. According to the complaint, Schering-Plough Poland paid 315,800 zlotys (approximately \$76,000) to the Chudow Castle Foundation to induce the Director to influence the health fund's purchase of Schering-Plough's pharmaceutical products.

The complaint alleges that none of the payments made by Schering-Plough Poland to the Foundation were accurately reflected on the subsidiary's books and records. The complaint also alleges that the company's system of internal accounting controls was inadequate to prevent or detect the improper payments. Without admitting or denying the allegations in the complaint, Schering-Plough consented to pay a \$500,000 civil penalty. In a related enforcement action, Schering-Plough consented, without admitting or denying the SEC's findings, to the issuance of an SEC order requiring Schering-Plough to cease and desist from committing or causing violations of the books and records and internal controls provisions of the FCPA. Schering-Plough also was ordered to comply with its undertakings to retain an independent consultant to review the company's policies and procedures regarding compliance with the FCPA and to implement any changes recommended by the consultant.

6. *SEC v. ABB Ltd* (Litigation Release No. 18775). On July 6, 2004, the SEC filed a settled enforcement action in the United States District Court for the District of Columbia charging ABB Ltd, a global provider of power and automation technologies headquartered in Zurich, Switzerland, with violating the anti-bribery, books-and-records, and internal controls provisions of the FCPA. Simultaneously with the filing of the complaint, and without admitting or denying its allegations, ABB consented to the entry of a final judgment enjoining it from future FCPA violations, and requiring it: (i) to pay \$5.9 million in disgorgement and prejudgment interest; (ii) to pay a \$10.5 million penalty, which would be deemed satisfied by two of its affiliates' payments of criminal fines totaling the same amount in parallel criminal proceedings brought by the Department of Justice; and (iii) to retain an independent consultant to review the company's FCPA compliance policies and procedures.

7. *SEC v. GE InVision Inc. (formerly known as InVision Technologies, Inc.* (United States District Court for the Northern District of California, Civil Action No. C-05-0660 MEJ; Litigation Release No. 19078 / February 14, 2005; Admin. Proc. File No. 3-11827.) On January 14, 2005, the Securities and Exchange Commission charged InVision Technologies, Inc. (InVision), a Newark, California-based manufacturer of explosive detection machines used in airports, with authorizing improper payments to foreign government officials in violation of the Foreign Corrupt Practices Act (FCPA). Simultaneous with the filing of the Commission's charges InVision agreed, without admitting or denying the charges, to disgorge \$589,000 in profits from its FCPA violations plus prejudgment interest of approximately \$28,700, and pay a \$500,000 civil penalty. InVision was acquired in December 2004 by the General Electric Company, and now operates under the name GE InVision, Inc.; the conduct charged by the Commission occurred prior to the acquisition.

In both a federal court complaint and an administrative order, the Commission charged that from at least June 2002 through June 2004, InVision employees, sales agents and distributors pursued transactions to sell explosive detection machines to airports in China, the Philippines and Thailand. According to the Commission, in each of these transactions, InVision was aware of a high probability that its foreign sales agents or distributors made or offered to make improper payments to foreign government officials in order to obtain or retain business for InVision. Despite this, InVision allowed the agents or distributors to proceed on its behalf, in violation of the FCPA. The Commission also charged that InVision improperly accounted for certain payments to agents or distributors and failed to have an adequate system of internal controls to detect and prevent violations of the FCPA.

The Commission's administrative order finds that InVision violated the anti-bribery, books and records and internal controls provisions of the FCPA (respectively, Sections 30A, 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934). Without admitting or denying liability or the Commission's findings, InVision agreed to pay disgorgement and prejudgment interest, cease and desist from violations of the FCPA, and comply with its undertakings to retain an independent consultant to ensure that InVision adheres to a corporate compliance program designed to detect and prevent violations of the FCPA. In the district court action, which alleges the same violations, InVision agreed to settle the charges, without admitting or denying liability, and pay a civil penalty.

8. *SEC v. Monsanto Co.* (Case No. 1:05CV00014 (U.S.D.C., D.D.C.), filed January 6, 2005; Litigation Release No. 19023 / January 6, 2005; Admin. Proc. File No. 3-11789.) On January 6, 2005, the Commission filed two settled enforcement proceedings charging Monsanto Company, a global producer of technology-based solutions and agricultural products headquartered in St. Louis, Missouri, with making illicit payments in violation of the Foreign Corrupt Practices Act ("FCPA"). First, the Commission filed a lawsuit in the United States District Court for the District of Columbia charging Monsanto with violating the FCPA and seeking a civil penalty. Second, the Commission issued an administrative order finding that Monsanto violated the anti-bribery, books-and-records, and internal-controls provisions of the FCPA, ordering Monsanto to cease and desist from such violations, and requiring Monsanto to retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures. Without admitting or denying the Commission's charges, Monsanto consented to the entry of a final judgment in the federal lawsuit requiring it to pay a \$500,000 civil penalty and consented to the Commission's issuance of its administrative order.

In both its federal court complaint and its administrative order, the Commission charged that, in 2002, a senior Monsanto manager, based in the United States, authorized and directed an Indonesian consulting firm to make an illegal payment totaling \$50,000 to a senior Indonesian Ministry of Environment official ("the senior Environment Official"). The bribe was made to influence the senior Environment Official to repeal an unfavorable decree that was likely to have an adverse effect on Monsanto's business. Although the payment was made, the unfavorable decree was not repealed. The Commission further charged that the

senior Monsanto manager devised a scheme whereby false invoices were submitted to Monsanto and the senior Monsanto manager approved the invoices for payment.

In addition, the Commission charged that, from 1997 to 2002, Monsanto inaccurately recorded, or failed to record, in its books and records approximately \$700,000 of illegal or questionable payments made to at least 140 current and former Indonesian government officials and their family members. The approximate \$700,000 was derived from a bogus product registration scheme undertaken by two Indonesian entities owned or controlled by Monsanto. The largest single set of payments was for the purchase of land and the design and construction of a house in the name of the wife of a senior Ministry of Agriculture official. The Commission further charged that, in certain instances, entries were made in the books and records of the two Indonesian entities that concealed the source, use and true nature of these payments.

As a result of the conduct described above, the Commission charged that Monsanto violated the anti-bribery provisions of the FCPA (Section 30A of the Securities Exchange Act of 1934). The Commission further charged that Monsanto violated Section 13(b)(2)(A) of the Exchange Act, Section 13(b)(2)(B) of the Exchange Act, Section 13(b)(5) of the Exchange Act, and Rule 13b2-1 of the Exchange Act.