



**Preventing
Improper Practices
In Foreign Sales**



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INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) was enacted in 1977, but prosecutions were rare throughout the 1980s and 1990s. In the past several years, however, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have picked up the pace of enforcement. The average number of FCPA criminal prosecutions and civil enforcement actions increased fourfold over the last five years compared to the previous five years. Penalties have likewise steadily increased over the last several years. This trend in enforcement has escalated in the past three years, with 2006, 2007 and 2008 seeing the largest number of FCPA prosecutions in history. In 2008, the government reaffirmed its commitment to enforce the FCPA vigorously, with 33 enforcement actions being brought by the DOJ and the SEC and at least 80 companies reportedly under investigation.

By all accounts, 2008 was a watershed year for FCPA enforcement for several other reasons:

- The DOJ and SEC imposed the largest FCPA criminal and civil corporate penalty in history, \$800 million – almost twenty times the previous record – against Siemens.¹ When combined with penalties imposed by German authorities, Siemens paid more than \$1.6 billion in penalties and its multi-year investigation reportedly cost over \$1 billion.²
- The **Siemens** case raised the bar for corporate compliance programs and underscored the heightened degree of international cooperation in pursuing FCPA claims.
- The number of enforcement actions brought against individuals hit an all-time high.
- High level DOJ officials repeatedly identified FCPA enforcement as a priority.

The trend in enforcement efforts and increased penalties has continued in 2009. In February 2009, the SEC and the DOJ settled charges with **Halliburton** and its former subsidiary for a combined total of \$579 million – the largest amount ever paid by a U.S. company. And, according to Marc Mendelsohn, the Justice Department’s Chief Prosecutor of Foreign Bribery, at least 120 companies are currently under investigation – a 20% increase from 2008.³

Given the increasing emphasis on FCPA enforcement, any U.S. company (regardless of its size or whether it is publicly traded) that conducts business overseas and any foreign company that trades on a U.S. exchange or is operated by U.S. officers or directors should implement comprehensive FCPA internal controls, including FCPA compliance and training programs. An effective FCPA compliance program provides significant benefits. First, it may detect and prevent potential violations of the FCPA before they occur. Second, the DOJ and the SEC consider the existence of a robust FCPA compliance program an important factor in determining whether to prosecute. Finally, in the event of a prosecution and conviction, the existence of a strong FCPA compliance program can significantly reduce the punishment a company would otherwise receive under the U.S. Sentencing Guidelines.

¹ “Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 million in Combined Criminal Fines,” Release 08-1105, available at http://www.usdoj.gov/criminal/pr/press_releases/2008/12/12-15-08siemens-guilty.pdf.

² See *Id.*; Mike Esterel and David Crawford, “Siemens to Pay Huge Fine in Bribery Inquiry,” Wall Street Journal Law Online, Dec. 15, 2008, <http://online.wsj.com/article/SB122919269803304383.html>.

³ Dionne Searcey, “U.S. Cracks Down on Corporate Bribes,” Wall Street Journal Online, May 26, 2009, <http://online.wsj.com/article/SB124329477230952689.html>.

FCPA BASICS

The FCPA has three principal components:

- **Anti-bribery provisions**, which prohibit payments, offers of payments, or authorization of payments by U.S. persons (including individuals and organizations) to foreign officials for the purpose of obtaining or retaining business or any improper advantage.
- **Internal accounting controls provisions**, which require public companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that companies: (1) execute transactions in accordance with management's general and specific authorization; (2) record transactions as necessary to permit preparation of financial statements under GAAP and to maintain accountability for assets; (3) permit access to assets only in accordance with management's general or specific authorization; and (4) compare the recorded accountability for assets with the existing assets at reasonable intervals and take appropriate action with respect to any differences.
- **Books and records provisions**, which require public companies to maintain their books and records such that they accurately and fairly reflect the transactions and dispositions of their assets.

The DOJ and SEC have overlapping and concurrent jurisdiction to enforce the FCPA, but only the DOJ may bring criminal actions or pursue private companies or individuals who are not “issuers.” Until recently, the DOJ generally took the lead in pursuing violations of the anti-bribery provisions, while the SEC generally took the lead in pursuing violations of the accounting provisions. However, in the past two years, the SEC and DOJ have increasingly brought cases in which they alleged violations of both the anti-bribery and books and records provisions. The SEC and DOJ recently announced that they will continue coordinated investigations of FCPA violations.⁴ Equally significant, in 2008, the DOJ filed criminal FCPA internal controls charges for the first time as part of the **Siemens** prosecution.

⁴ See “Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine,” Release 09-112, available at: <http://www.usdoj.gov/opa/pr/2009/February/09-crm-112.html>.

ANTI-BRIBERY PROVISIONS

The scope of the FCPA's anti-bribery provisions is extraordinarily broad. Among other things, the FCPA makes it unlawful for:

Any U.S. individual or organization, including "issuers" and "domestic concerns," or any officer, director, employee or agent of any issuer or domestic concern, or any stockholder acting on behalf of any issuer or domestic concern, acting anywhere in the world, as well as any non-U.S. person who acts on U.S. soil

to "corruptly"

offer, pay, promise or authorize, the payment of money or the giving of anything of value

to any "foreign official," foreign political party, official of a political party, or foreign political candidate

for the purpose of influencing such official to do any official act or inducing such official to influence a foreign government or any entity thereof, in order to assist the "issuer" or "domestic concern" in retaining or obtaining business.

Each component is further discussed in the sections that follow.

Foreign Official

The FCPA defines “foreign official” to include any employee of a business enterprise that is owned or controlled by a foreign government. In many countries in Asia, Eastern Europe and South America, a large percentage of the businesses are owned or controlled by the government, especially in the telecommunications, banking, power, and medical industries. Foreign government officials include:

- Officials or employees at all levels of foreign government;
- Officials or employees of public international organizations;
- Officials or employees of any entity owned (in whole or in part) by a foreign government;
- Foreign political parties, officials, and candidates; and
- A person acting in an official capacity on behalf of the above.

TIP: The FCPA does not prohibit companies from doing business with government officials. However, companies should take extra precautions in such circumstances. The nature of the precautions will vary depending on the circumstances. At a minimum, companies should obtain a written agreement documenting that the foreign official has no influence over the business project, will not attend government meetings on behalf of the company, will recuse himself from any government decisions that may impact the company and will not violate the FCPA. Companies should also obtain a written legal opinion from local counsel that the relationship with the government official does not violate any local laws.⁵

CAUTION: Be sure you understand the ownership and business structure of third parties, including customers, agents, and representatives. The ownership structures of businesses in communist countries (such as China) and former Soviet-bloc countries can be complex and, in many instances, the government may have an ownership interest. You should also be cautious in dealing with not-for-profit entities such as hospitals or aid organizations because they are commonly government owned. When in doubt, assume you are dealing with a government official for FCPA purposes.

⁵ See FCPA Opinion Procedure Release 2001-02. Opinion Procedure Releases are not controlling, but they do provide useful guidance.

Prohibited Payments

The FCPA prohibits giving anything of value to a government official for the purpose of “influencing any act or decision,” “securing any improper advantage,” inducing the foreign official to act or refrain from acting in violation of the official’s duties, or inducing the foreign official to use his influence to assist “in obtaining or retaining business for or with, or directing business to, any person.”⁶ As with the other provisions of the FCPA, the concepts of “obtaining business” and “securing any improper advantage” have been broadly construed by the SEC and the DOJ. Companies have been prosecuted for making payments in order to obtain favorable tax treatment or to reduce tariffs or duties. Recently, the SEC prosecuted a company for (among other things) making payments to officials of state-owned airlines to induce them to reserve space on their airplanes or to falsely under weigh shipments, which resulted in lower shipping charges. The charges were settled for a \$300,000 civil fine.⁷

CAUTION: A violation can occur even if the company did not obtain the business or other benefit for which the bribe was offered or paid. Similarly, actual payment or receipt of benefit is not required for a violation to have occurred.

⁶ 15 U.S.C §§ 78dd-1(a), 78dd-2(a).

⁷ “SEC Files Settled Enforcement Action Charging Con-way Inc. with Violations of the Foreign Corrupt Practices Act,” Release 20690, available at <http://www.sec.gov/litigation/litreleases/2008/lr20690.htm>.

Anything of Value

The FCPA covers illicit transactions of any amount; it does not contain a *de minimus* exception. Payment of “anything of value” to a foreign official for an improper purpose is prohibited. The term “anything of value” is not defined in the FCPA. However, it has been broadly construed to include not only cash, but other tangible and intangible benefits such as the payment of travel and entertainment expenses. Even small amounts of cash can constitute a violation, especially when repeatedly given. For example, in 2007, the SEC and the DOJ prosecuted an individual and the company for violations arising out of payments to multiple doctors that averaged in some periods approximately \$30,000 a year.⁸

Moreover, the thing of value need not actually be given to the government official, nor is it required that the government official directly receive the benefit of the payment. Prohibited payments may include:

- Charitable donations;
- Donations of used computer equipment to a school;
- Scholarships;
- Employment of third parties; and
- Use of company facilities or services.

Further, the payment need not be related to a government contract to be improper. Payments made with the purpose of influencing a foreign official to take action or refrain from taking action that allows the company to conduct business in a general sense are also prohibited.

CAUTION: In late July 2009, Avery Dennison Corporation settled FCPA charges with the SEC for over \$500,000. Among other things, the SEC complaint alleged that purchasing shoes with a total value of approximately \$500 for four officials of a research institute and payments of \$100 each to three customs officials violated the FCPA.⁹

⁸ “SEC Files Settled Books and Records and Internal Accounting Controls Charges Against Former Chairman of Syncor International Corp.,” Release No. 20310, available at <http://www.sec.gov/litigation/litreleases/2007/lr20310.htm>.

⁹ SEC v. Avery Dennison Corp., No. CV09-5493 DSF (CWx), (C.D. Cal. 2009).

Corrupt Intent

Under the FCPA, a party acts with “corrupt intent” when it intends to wrongfully influence the recipient of the payment or to obtain an improper advantage. Corrupt intent can exist even if the payment is never actually made or does not produce the desired outcome.

The FCPA also provides that the level of knowledge required for a criminal violation can be established not just by actual, affirmative knowledge of improper payments, but also by merely being aware of a “high probability” that such conduct may have occurred, whether by an employee or by a third party. This means that companies may be liable if they ignore red flags or fail to conduct an adequate investigation when red flags occur. Knowledge thus “covers any instance where any reasonable person would have realized the existence of the circumstances or result and the defendant has consciously chosen not to ask about what he had reason to believe he would discover.”¹⁰ In 2006, for example, the SEC charged a senior executive with a violation of the FCPA where he allegedly received, but did not respond to or acknowledge, e-mail messages that supposedly suggested that “overseas sales agents and distributors intended to make improper payments or other gifts to foreign government officials.”¹¹

CAUTION: There is no “ostrich” defense – a person or company may be liable if it ignores red flags or other indicia of an improper payment. A person or company may also be liable if it “authorizes,” “directs” or “participates in” illegal activity by a third party – even if it has no actual knowledge that a violation has occurred. For example, the DOJ successfully prosecuted a company’s president for failing to investigate a marketing agreement with a government official’s relative, failing to inquire about the purpose of the payments made to the relative, and deliberately avoiding learning the true nature of the agreement.¹²

¹⁰ H.R. Conf. Rep. No. 100-576, at 921 (1988) (quotations omitted).

¹¹ SEC v. David M. Pillor, No. 06 CV-4906 (N.D. Cal. 2006); “SEC Settles Charges Against Former InVision Technologies Senior Vice President for Sales and Marketing,” Release 19803, available at <http://www.sec.gov/litigation/litreleases/2006/lr19803.htm>.

¹² “Former Pacific Consolidated Industries LP Executive Pleads Guilty in Connection with Bribes Paid to U.K. Ministry of Defence Official,” Release No. 08-394, available at <http://www.usdoj.gov/opa/pr/2008/May/08-crm-394.html>.

Use of Intermediaries

In addition to prohibiting direct payments to foreign officials, the FCPA prohibits payments to third parties (such as agents, consultants or distributors) while “knowing” that the third party will, directly or indirectly, make a payment or offer of payment to a foreign official. In practice, this means that a company may be held liable for the acts of its agents – even though the company did not directly make or offer to make any payments to foreign officials – if it knew about or authorized the payments. Individuals are similarly held accountable for the acts of intermediaries. For example, in 2008 the DOJ brought suit against an individual who was responsible for hiring two agents to pay bribes to Nigerian government officials. Under the plea agreement, the individual must pay \$10.8 million in restitution and faces seven years in prison.¹³

The FCPA also imposes obligations on companies with respect to the conduct of their subsidiaries, joint venture partners and other entities they own in whole or in part. A company can be liable for the acts of its foreign affiliates if the company knows of or authorizes the corrupt practices. The company may also be liable for failing to implement sufficient internal controls to detect the affiliate’s corrupt practices.

TREND: The large majority of recent investigations and prosecutions involve consultants, intermediaries, or other third parties. Because companies may have less control over these individuals, extra precautions should be taken whenever a third party is involved. For guidance on third parties, see pages 20-21.

¹³ “Former Officer and Director of Global Engineering and Construction Company Pleads Guilty to Foreign Bribery and Kickback Charges,” Release 08-772, available at <http://usdoj.gov/opa/pr/2008/September/08-crm-772.html>.

EXCEPTIONS AND AFFIRMATIVE DEFENSES

The FCPA contains an exception for “facilitating payments” and affirmative defenses for payments which are lawful under the local written laws or which are bona fide expenditures. The exception and the affirmative defenses are narrowly construed. Moreover, the company bears the burden of demonstrating that the exception or affirmative defense applies. In all instances, any payments or expenses must be accurately and transparently recorded in the company’s books and records.

Facilitating Payment Exception

The FCPA excludes “grease payments,” defined as “any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action.”¹⁴ The statute further defines “routine governmental action” to include “only an action which is ordinarily and commonly performed by a foreign official” in obtaining permits, processing governmental papers, or providing mail pick-up, for example.¹⁵ The statute expressly excludes from the definition of routine governmental action “any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decisionmaking process to encourage a decision to award new business to or continue business with a particular party.”¹⁶ In practice, the exception has been construed to apply to minor payments for the purpose of facilitating or expediting routine, lawful services or non-discretionary administrative actions to which a company is entitled under the laws of that country.

Despite this guidance, what differentiates a proper “facilitating” payment from an improper payment is often unclear. Accordingly, companies may not feel confident relying on this exception and should carefully evaluate any such payments. The DOJ has suggested that companies should consult counsel before relying on the exception.¹⁷ In all instances, facilitating payments must be accurately and transparently recorded in the company’s books and records.

CAUTION: Studies show that almost 80 percent of U.S. companies ban facilitating payments. Companies should use exceptional caution with respect to facilitating payments and, at a minimum, senior management approval and legal review should be required for any such payments.

¹⁴ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

¹⁵ Id. §§ 78dd-1(f)(3), 78dd-2(h)(4).

¹⁶ Id.

¹⁷ Department of Justice, “The Lay-Person’s Guide to FCPA,” www.usdoj.gov/criminal/fraud/docs/dojdocb.html (“Lay-Person’s Guide”).

Affirmative Defenses

The first affirmative defense applies where the payment is “lawful under the written laws and regulations” of the foreign official’s country.¹⁸ As the DOJ has noted, however, “[w]hether a payment was lawful under the written laws of the foreign country may be difficult to determine.”¹⁹ There is also some question as to whether the payments must be explicitly permitted under the written laws or whether it is sufficient that the written law does not prohibit the payment. Companies intending to use this affirmative defense should not rely on representations from agents, government officials or interested parties, but should obtain a written opinion of independent local counsel that the proposed conduct does not violate local laws. While such opinions will not prevent an inquiry by the government, they help demonstrate that the company acted in good faith and had adequate internal controls. For further assurance, companies should also consider “utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure when faced with an issue regarding the legality of such a payment.”²⁰

CAUTION: The conduct must be lawful under the *written* laws – it is not enough to establish that it conforms and complies with local custom or practice.

The second affirmative defense applies where the payment was for a “reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official” that are directly related to the “promotion, demonstration or explanation of products or services,” or “the execution or performance of a contract with a foreign government or agency thereof.”²¹

However, the DOJ has made clear that the fact that the FCPA contains this affirmative defense does not mean that the DOJ encourages such payments as a good business practice. To minimize risk, companies should ensure that such activities are incidental to the promotional purpose of the activity and the expenses are reasonable and not extravagant. Companies may also consider obtaining a written opinion from local counsel that the expenditures will not violate local law.

¹⁸ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1).

¹⁹ Lay-Person’s Guide.

²⁰ Id.

²¹ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

BOOKS AND RECORDS PROVISIONS

The FCPA requires every public company to maintain internal controls to ensure that financial records accurately and fairly reflect the issuer's transactions and dispositions of assets and that those internal accounting controls are aimed at preventing and detecting FCPA violations. Payments in connection with foreign sales transactions, including travel and expenses, as well as payroll and commissions, must be accurately recorded. There is no materiality requirement for establishing a violation of the books and records provision. Further, there is no requirement that a false record or deficient control be linked to an improper payment. Therefore, even a payment that does not constitute a violation of the anti-bribery provisions of the FCPA can lead to prosecution under the accounting provisions if inaccurately recorded or attributable to a deficiency in internal controls.

A books and records examination does not end at a company's financial statements, but extends to expenses at the local level. Companies may be liable for even relatively small, but improperly recorded receipts, invoices or payments. Accordingly, companies must ensure that all of their business units comply.

Both the SEC and DOJ actively enforce the accounting provisions of the FCPA, with the SEC taking a leading role in bringing this type of case. The SEC has cited the following factors as evidence of a company's failure to maintain adequate internal controls: (1) the extent and duration of the improper payments by a company; (2) the involvement of multiple subsidiaries, managers and/or employees; (3) inaccurate recording of payments in the books and records; (4) failure of management to detect irregularities; and (5) failure to take corrective action after an internal audit report and self-assessment on fraud risk highlighted deficiencies.²²

CAUTION: The books and records provisions require, for example, that a bribe be recorded as such. Similarly, where a payment in connection with a sale is recorded as a commission, but part of that commission is used for an improper purpose, the books and records provision may have been violated.

²² See SEC v. York Int'l Corp., No. 07-cv-01750 (D.D.C. 2007); "SEC Files Foreign Corrupt Practices Act Charges Against York International Corporation For Improper Payments to UAE Officials, to Iraq Under the U.N. Oil for Food Program, and to Others – Company Agrees to Pay Over \$12 Million and to Retain an Independent Compliance Monitor," Release 20319, available at <http://www.sec.gov/litigation/litreleases/2007/lr20319.htm>.

PENALTIES

Penalties for violations of the FCPA's anti-bribery provisions are severe. Companies may incur criminal fines of up to \$2 million per violation and may be subject to civil penalties of \$10,000 per violation.²³ Companies may also be barred from future U.S. government contracts and receipt of export licenses. Individuals can be imprisoned for up to five years and criminally fined up to \$100,000 per violation; they also may be subject to civil penalties of up to \$10,000 per violation.²⁴

In addition, the government has increasingly insisted that companies agree to a compliance monitor for periods generally ranging from three to four years. In 2008, the DOJ released guidance on the appointment and use of monitors, indicating that a monitor's "responsibilities should be no broader than necessary to address and reduce the risk of recurrence of the corporation's misconduct" and, generally, there should be provision for both the extension and early termination of the monitorship.²⁵ Nonetheless, monitorships remain burdensome and costly for companies.

Companies also face significant costs related to internal investigations, auditor fees, and remediation efforts. It was recently reported that Siemens spent more than \$1 billion in investigative and remediation costs in two years, including:

- Over \$850 million for the investigation;
- Over \$100 million in electronic database and document preservation costs;
- Over \$5 million in translation services; and
- Over \$150 million in remediation efforts.²⁵

While the cost of the Siemens investigation is exceptional, as the charts on the following page demonstrate, the costs of any investigation can be significant.²⁷

²³ 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c).

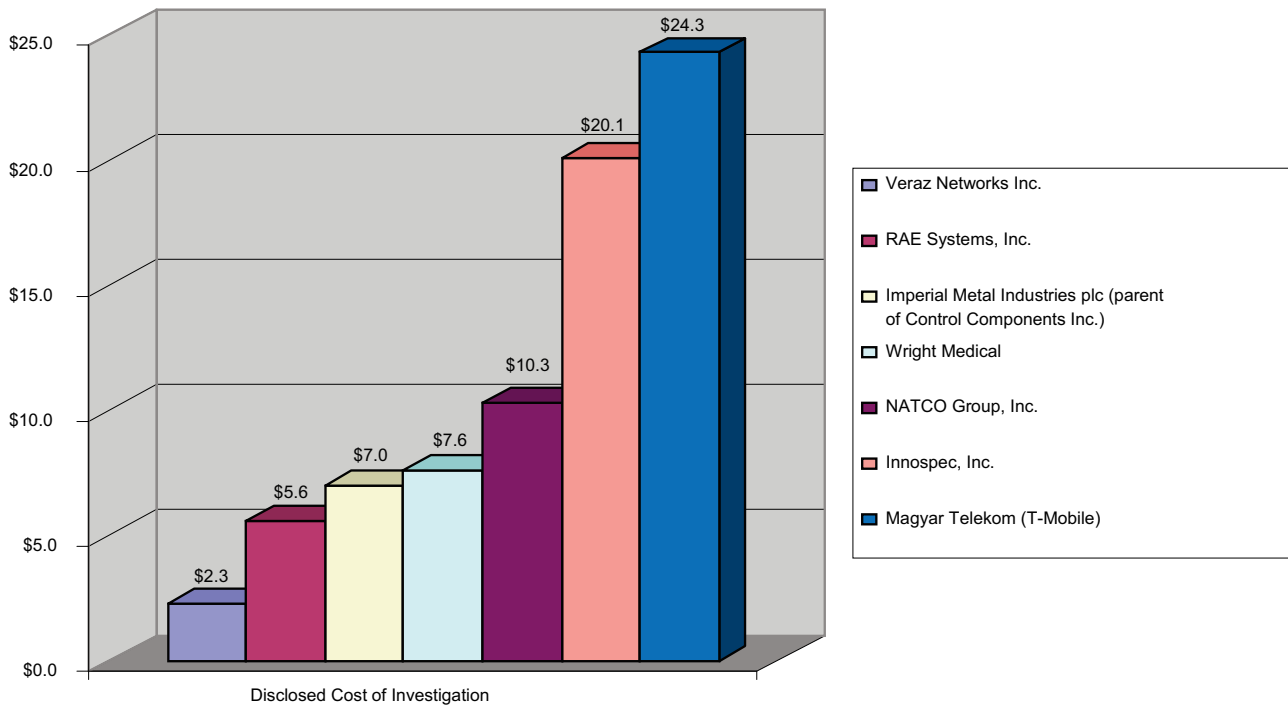
²⁴ Id.

²⁵ Memorandum from Craig S. Morford, Acting Deputy Attorney General, to Heads of Department Components and United States Attorneys (Mar. 7, 2008) available at United States Attorneys' Manual, Title 9 Criminal Resource Manual, Art. 163.

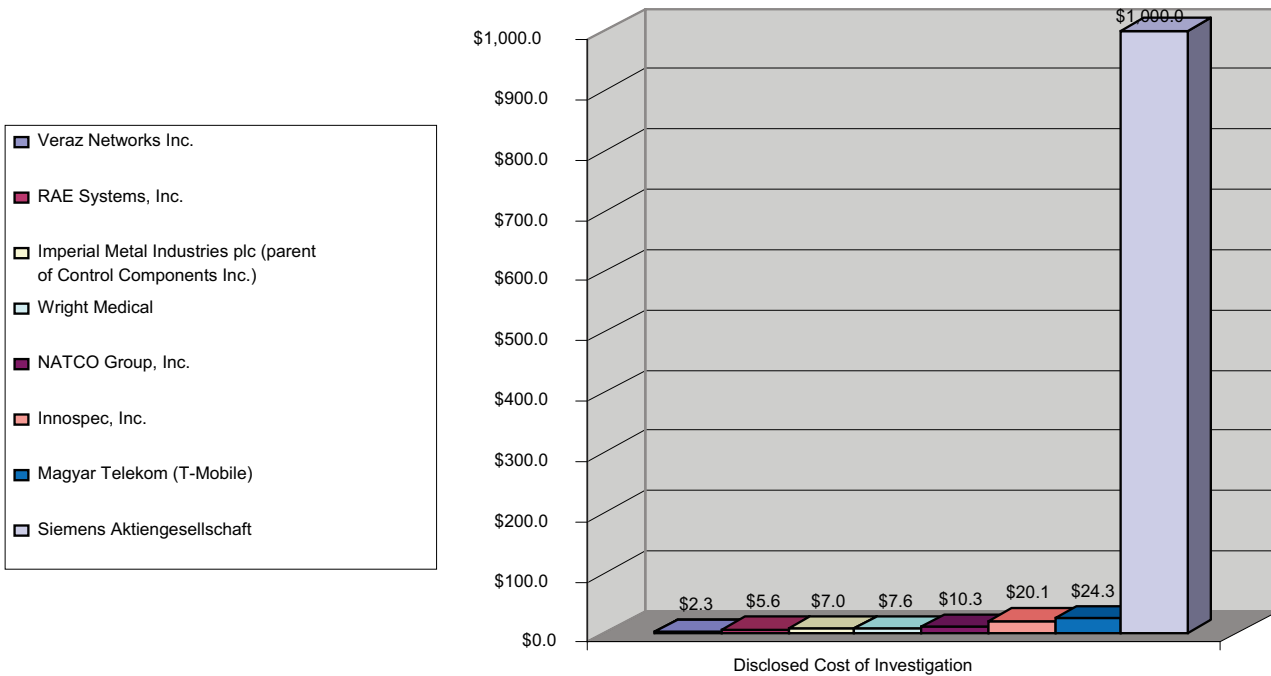
²⁶ See Sentencing Memorandum, U.S. v. Siemens, Ag, Case No. 08-00367 (D.D.C. 2008).

²⁷ These charts were created using publicly available data on the cost of investigations, as disclosed by the relevant companies.

Cost of Investigations Without Siemens (in \$ millions)



Cost of Investigations Including Siemens (in \$ millions)



INSURANCE

Companies should also be mindful of several directors and officers (D&O) liability insurance issues. First, under the so-called “commissions exclusion,” coverage for loss incurred in connection with any claim alleging or attributable to payments, commissions, gratuities or other benefits to, or for the benefit of, any foreign government official, may be excluded. This exclusion is relatively rare and companies can often negotiate to have the exclusion removed. Second, FCPA fines and penalties are usually outside of the covered definition of “loss” in most D&O policies. However, companies may be able to request policy forms that cover certain non-willful FCPA civil penalties awarded against officers or directors of a company. Third, depending largely on the definition of “claim” in the policy, defense costs of individual directors and officers for an FCPA enforcement proceeding may be covered. The corporate entity would typically only have coverage for an FCPA enforcement action against the company if (and to the extent) it falls within the definition of a securities claim.

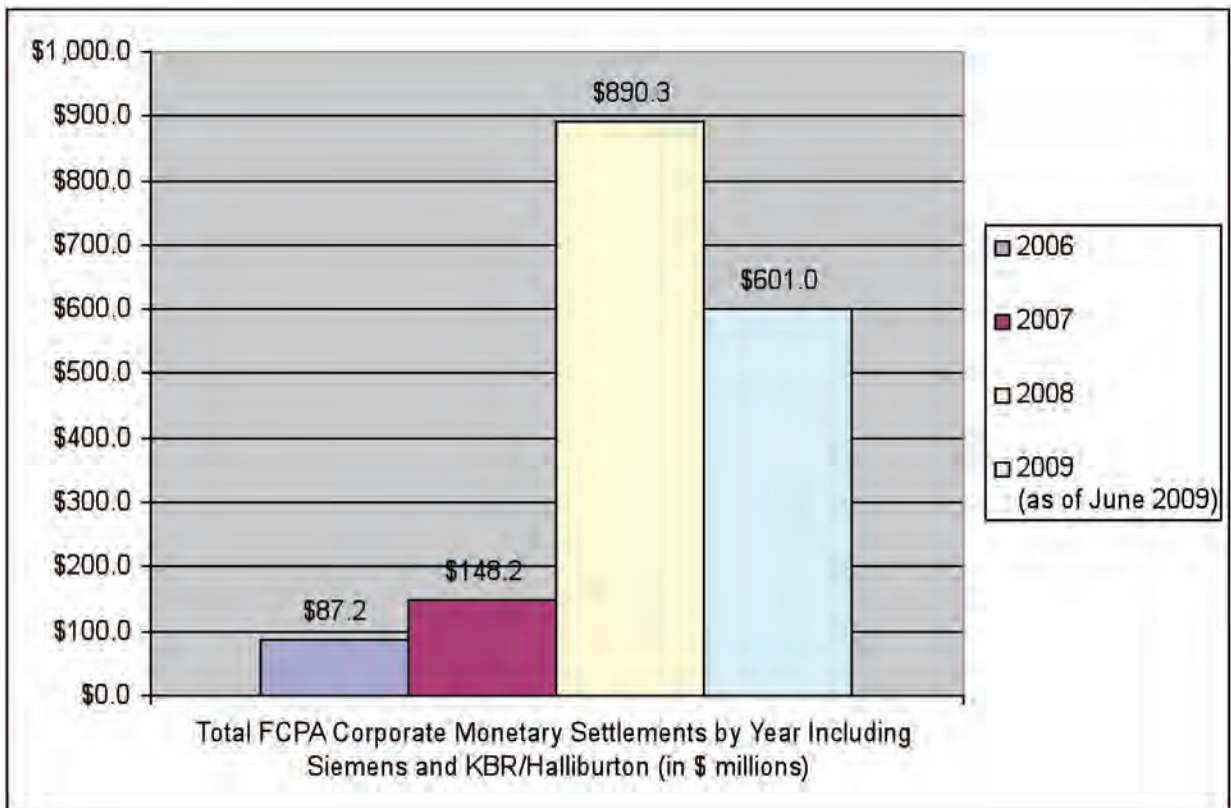
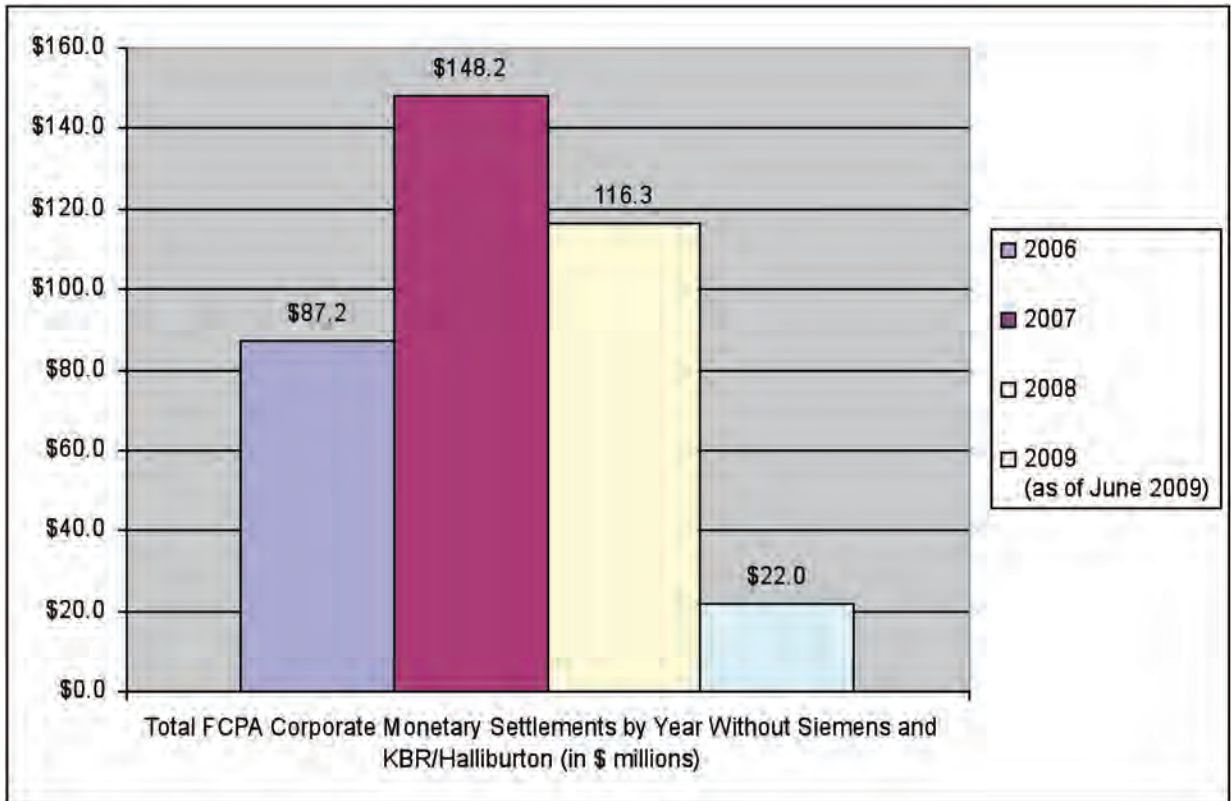
KEY DEVELOPMENTS IN FCPA ENFORCEMENT ACTIONS

In addition to the sheer number of enforcement actions, 2008 and the first half of 2009 were significant for FCPA enforcement for several other reasons:

- **Increased Corporate Financial Penalties.** The **Siemens** resolution was the largest settlement amount in the history of the FCPA, totaling \$450 million in criminal fines and \$350 million in disgorgement. The criminal fines alone were over 10 times larger than the previous record holder – Baker Hughes, Inc.’s \$44.1 million settlement in 2007. When combined with fines imposed by authorities and investigation and remediation costs, Siemens paid almost \$3 billion to resolve and remediate the FCPA issues.

In another record-breaking settlement, **KBR Inc.** (KBR) and **Halliburton**, KBR’s former parent, settled charges with the SEC for \$177 million in disgorgement. The KBR subsidiary, Kellogg Brown & Root LLC (KBR LLC) pled guilty to parallel criminal charges brought by the DOJ and agreed to pay a \$402 million fine. This \$579 million combined settlement represents the largest combined FCPA settlement ever paid by a U.S. company.

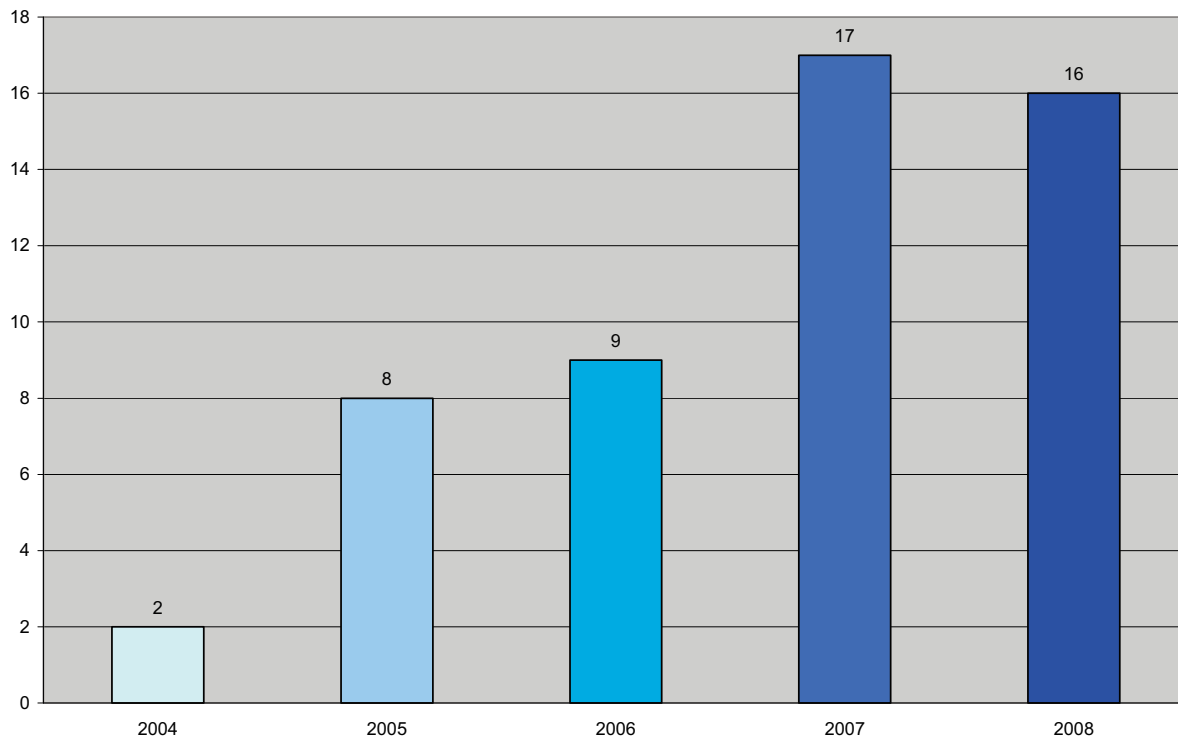
While we are unlikely to routinely see settlement amounts comparable to **Siemens** and **Halliburton/KBR**, there can be no doubt that the financial penalties for FCPA violations are on the rise. In 2008, in addition to Siemens, at least four other companies paid over \$10 million to resolve FCPA enforcement actions: **Fiat** (\$17.7 million), **Willbros Group** (\$32.3 million), **AB Volvo** (\$19.6 million) and **Flowserve Corp.** (\$10.5 million).



- Concentration on Prosecution of Individuals.** In 2008, approximately 60 percent of the FCPA defendants were individuals. In September 2008 Mendelsohn, confirmed the government’s commitment to prosecuting individuals, stating, “The number of individual prosecutions has risen – and that’s not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.”²⁸

TIP: The focus on holding individuals accountable has several important implications for companies and their compliance programs. First, it has led many boards and senior executives to prioritize FCPA compliance and training. Second, companies are critically examining their insurance and indemnification provisions to evaluate coverage for the FCPA. Third, as individuals become increasingly aware of their own exposure and the standards imposed by the FCPA, internal investigations and complaints regarding the FCPA have increased.

Number of Prosecutions of Individuals - SEC and DOJ Combined



²⁸ 22 Corporate Crime Reporter 36(1), September 16, 2008, “Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007.”

- **Globalization.** Globalization has brought about two significant developments with respect to the FCPA. First, it means that virtually every public company and many private companies are at risk, not just large multinational companies who are doing business abroad. Second, companies' activities abroad are becoming increasingly public. As Mendelsohn observed, "Problems in a faraway country are more likely to be learned by us – sitting here in Washington – than ever before. People in Bangladesh can e-mail me directly with an allegation that a company in Bangladesh [is] paying bribes to a government official there. Information about our work is now known around the world. The media is paying a great deal of attention to corruption issues. There is a lot more English language media reporting around the world. It's more difficult to hide."²⁹

Regulators have also increased their focus on cooperation by foreign governments as a means of enforcing the FCPA. At present, the DOJ is involved in over 20 multi-jurisdictional investigations. Foreign governments are also increasing their anti-corruption efforts. We expect multi-jurisdictional investigations and international cooperation to become an increasingly important factor in FCPA prosecutions going forward.

- **Civil Litigation.** Civil litigation – particularly in the area of securities litigation – has been on the upswing. For example, **Willbros Group, Inc.** recently settled a shareholder class action arising out of alleged violations of the FCPA for \$10.5 million.³⁰

With an uptick in government prosecutions and as the plaintiffs' bar becomes increasingly familiar with the FCPA, we can expect to see a continued increase in the number of civil suits based on the FCPA. However, the Ninth Circuit's 2008 decision in **InVision** should make it more difficult for plaintiffs to plead securities fraud lawsuits that piggyback on the disclosure of FCPA investigations or similar regulatory proceedings.³¹ In **InVision**, the Ninth Circuit rejected the application of collective scienter, which means the plaintiffs will have to plead specific facts demonstrating that the individuals responsible for the alleged misstatements knew about the FCPA violations. This will be difficult because "the surreptitious nature of the transactions creates an equally strong inference that the payments would have been deliberately kept secret – even within the company." Indeed, the alleged improper payments "were not, by their nature, the type of transaction of which it would be 'hard to believe' senior officials were unaware." The Court also noted that the DOJ and SEC settlements were insufficient to raise an inference of scienter, since the mere fact that someone at the company supposedly may have had actual knowledge of improper transactions was insufficient to raise a strong inference that the defendant officers had such knowledge.

²⁹ Id.

³⁰ In re Willbros Group, Inc. Sec. Litig., No. 4:05-CV-01778 (S.D. Tex. 2007).

³¹ In re InVision Technologies, Inc. Sec. Litig., No. 04-CV-3181 (9th Cir. 1008). Fenwick & West LLP represented InVision in the securities litigation and represented the Special Investigation Committee of InVision's Board of Directors, conducted the internal investigation that uncovered the FCPA violations, helped the company report the results of that investigation to the DOJ and SEC, and negotiated the non-prosecution agreement with the DOJ. In the agreement, the DOJ promised not to prosecute InVision. In return, InVision agreed to adopt an FCPA compliance program and internal controls designed to deter future violations.

HOT ISSUES IN FCPA COMPLIANCE

Third Parties and Business Partners

Regulators continue to stress that a company and its officers can be held liable for the misconduct of its agents and other third-party business partners. Demonstrating their resolve to pursue a corporation for FCPA violations based on the conduct of third parties, many of the new prosecutions brought in 2008 and 2009 involved a third-party agent or representative. Thus, while historically over 60 percent of the enforcement actions brought by the SEC and/or the DOJ have involved intermediaries, in 2008, 10 of the 11 companies who settled charges with the DOJ and/or the SEC utilized some sort of intermediary.³¹

In the past, FCPA compliance practices with respect to distributors have generally been less extensive than those involving sales representatives or consultants. That can no longer be the case. In the last year, the regulators stressed the importance of conducting due diligence before engaging a third-party business partner, obtaining written certification of FCPA compliance by the business partner, and investigating any signs that the business partner may be engaging in improper conduct. As Antonia Chion, Associate Director of the SEC's Division of Enforcement warned in commenting on the **Halliburton** settlement, “[m]ulti-national companies should take heed that attempting to conceal bribes by funneling them through intermediaries or offshore entities will not be successful.”³² Not surprisingly, several surveys indicate that companies view performing effective due diligence on third parties as challenging.

Due diligence procedures for third parties should be tailored to the specific circumstances, including whether any risk factors are present, the reputation of the country in which the business is to be conducted, and the nature of the business. Following are guidelines that highlight critical factors to consider in evaluating your due diligence program.

- **All third parties.** The DOJ has expressly “encouraged [companies] to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified partners and representatives.”³³ Accordingly, an appropriate level of due diligence should be conducted on all third parties, including any joint venture partners, representatives, distributors or agents.
- **Factors to consider.** In evaluating third parties, companies should consider: (1) whether the third parties are qualified for the position; (2) any personal or professional ties to the government; (3) the number and reputation of their clientele; (4) their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates; and (5) the existence and reputation of any partners or associates.³⁴
- **Watch for red flags.** Companies should also be mindful of so-called “red flags” or situations or circumstances that indicate extra scrutiny should be applied. Red flags do not necessarily mean that business cannot be conducted; however, extra precautions should be taken whenever they are present. As a general rule, the more red flags, the higher the degree of caution. Companies can be liable if they ignore red flags or information or circumstances that a prudent person would investigate.

³¹ Eight companies used agents or consultants, three used distributors, and three used a shell company. In several cases, the company used more than one type of intermediary. For example, Siemens AG used consultants, distributors and shell corporations.

³² See “SEC Charges KBR and Halliburton for FCPA Violations,” Release 2009-23, available at: www.sec.gov/news/press/2009/2009-23.htm.

³³ Lay-Person’s Guide.

³⁴ Id.

The DOJ has indicated that red flags include “unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.”³⁵

- **No informal arrangements.** Companies should ensure that all arrangements with third parties are in writing and that there are no improper side agreements. Companies should consider including FCPA provisions directly in the contracts. It is also prudent to require as a matter of policy that all commissions or fees are paid only pursuant to the written agreement. Requests for fees that are not included in the written agreement should be viewed as red flags and properly evaluated.
- **Compensation.** Compensation should not be in cash and should be reasonable, customary, and permitted under local laws. Companies should specifically review any commissions that are outside of the standard range. Requests for payments outside of the country in which the work is performed, prior to performance date or to third parties, should be viewed as red flags. Requests for reimbursement of expenses must comply with all relevant company policies and procedures, including the FCPA and ethics policies. All payments to third parties should be well documented and properly recorded in the company’s books and records.
- **Certifications.** Companies should ensure that the third party is familiar with the FCPA and the company’s policies and procedures. Companies should also consider obtaining certifications from third parties that they understand the FCPA and have not, and will not, violate or cause the company to violate the FCPA.
- **Ongoing.** Companies should conduct due diligence prior to engaging a third party and during the tenure of the relationship. In addition to monitoring for red flags, many companies conduct due diligence procedures focusing on the FCPA prior to the completion of significant deals.

CAUTION: The risk of ignoring red flags cannot be overstated. On July 10, 2009, an individual was convicted of conspiring to violate the FCPA even though he did not directly make any improper payments himself and did not benefit from the improper payments.³⁶ In trial, the government theorized that the individual had “consciously avoided” learning about the bribes. The jury apparently agreed; as the jury foreman stated in a post-trial interview: “it was Azerbaijan, it was a foreign country. We thought he knew and definitely could have known. He’s an investor. It’s his job to know.”³⁷

³⁵ Id.

³⁶ United States v. Kozeny, et al., Case No. 05 Crim 518 (SAS), (S.D.N.Y. July 10, 2009).

³⁷ <http://www.bloomberg.com/apps/news?pid=20601087&sid=aXO.vHLdvbcM>

China

Companies who do business in China must pay special attention to the FCPA for at least three important reasons.

First, the SEC and the DOJ are continuing to focus their enforcement efforts in China. In 2008, China was in the top-three geographic areas for FCPA enforcement actions (behind only Nigeria and Iraq, both of which were the focus of coordinated investigations).

Second, many industries and businesses in China are government owned or government controlled. Even when companies are doing business with non-government entities, the high level of government regulation, licensing requirements, and government supervision of foreign entities increases FCPA exposure.

Third, culturally, business in China is often done by building “relationships” and non-Chinese companies may feel that they are at a disadvantage. As Mendelsohn recently stated, “One of the major challenges that we face is ... that increasingly, U.S. companies and OECD nations, companies are competing with Russian companies, with Chinese companies, with the companies of other countries that are not signatories to the OECD Convention ... who may bribe for business.”³⁸ Accordingly, using local agents or partners is often critical to successfully obtaining business in China. However, so-called “relationship” companies pose significant FCPA risks because their role is often to influence the government entity from which business is being sought, and their fees may be based on a percentage of the contract price rather than the value of any services rendered. There is also some indication that the SEC and DOJ are beginning to focus on particular third parties in China and the companies who do business with them. Coupled with the lack of a bright line rule on which Chinese businesses are considered state owned, companies should be particularly sensitive about gifts and entertainment expenses, and pay particular attention to how any expenses are recorded.

China is also increasing enforcement of its own anti-bribery laws and, as such, we may see an increasing number of domestic parallel investigations. In many respects, the Chinese anti-bribery laws resemble the FCPA and outlaw payment or acceptance of kickbacks in commercial transactions. Under Chinese local law, the maximum a government official, which is defined as any employee of a state owned enterprise, can accept is 200 renminbi (approximately \$29). Companies doing business in China should familiarize themselves with local Chinese anti-bribery laws and ensure that proper controls are in place, especially in the procurement, business development, and sales departments.

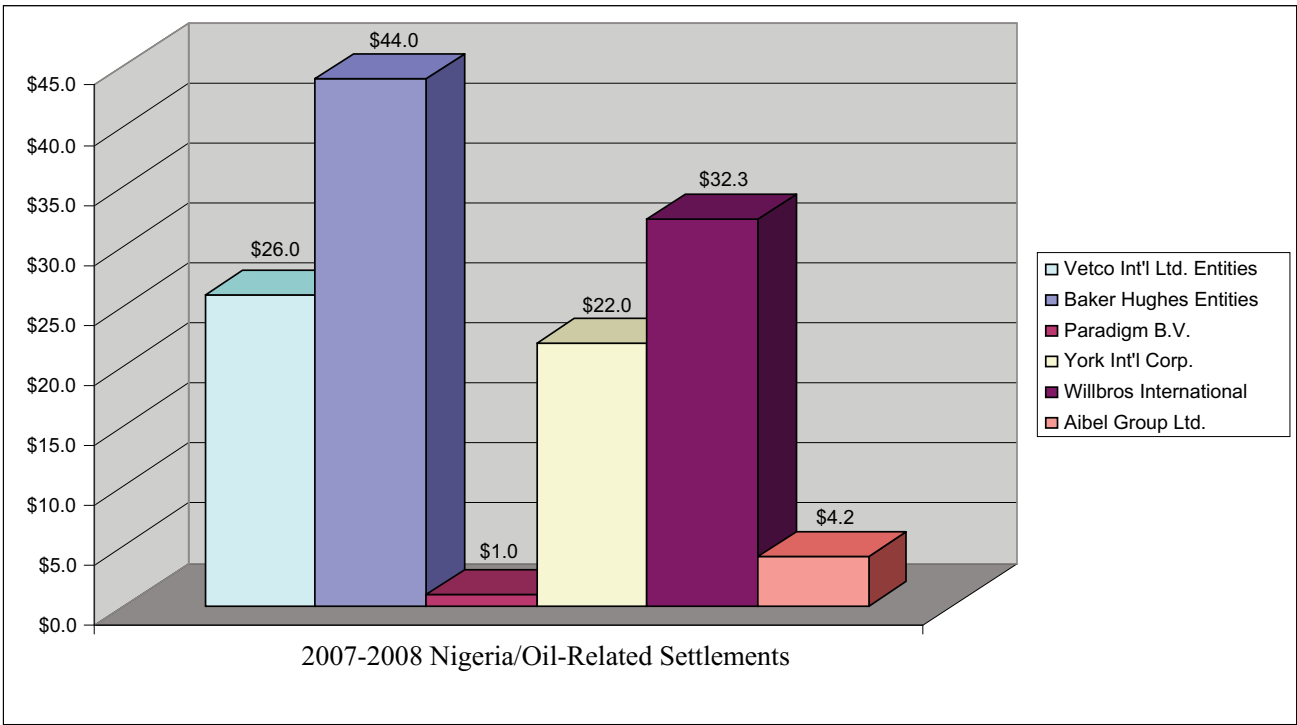
TIP: In addition to their regular compliance program, companies that do business in China or have Chinese partners should consider establishing a compliance program specifically tailored to China, training employees in China (especially sales personnel), distributing written employee handbooks and FCPA guidance in Chinese, and regularly testing for compliance with the FCPA.

³⁸ Frontline: Black Money (PBS television broadcast available at <http://www.pbs.org/wgbh/pages/frontline/blackmoney/interviews/mendelsohn.html>).

Coordinated Investigations

While the majority of FCPA prosecutions and investigations involve a single company, the DOJ and the SEC have recently begun targeting specific industries and launching coordinated investigations into multiple companies at the same time. The investigation of the Oil-for-Food Program in Iraq is the best example of such a coordinated effort. The investigation conducted by the United Nations together with U.S. governmental agencies revealed that the Iraqi government required companies “wishing to sell humanitarian goods to government ministries to pay a kickback, often mischaracterized as an ‘after sales services fee,’ to the government in order to be granted a contract. The amount of that fee was usually 10 percent of the contract price.”³⁹ To date, over two dozen companies have disclosed that they are under investigation for alleged FCPA violations related to the Oil-For-Food Program and 11 companies – including Siemens – have settled FCPA charges arising out of the Oil-for-Food Program.

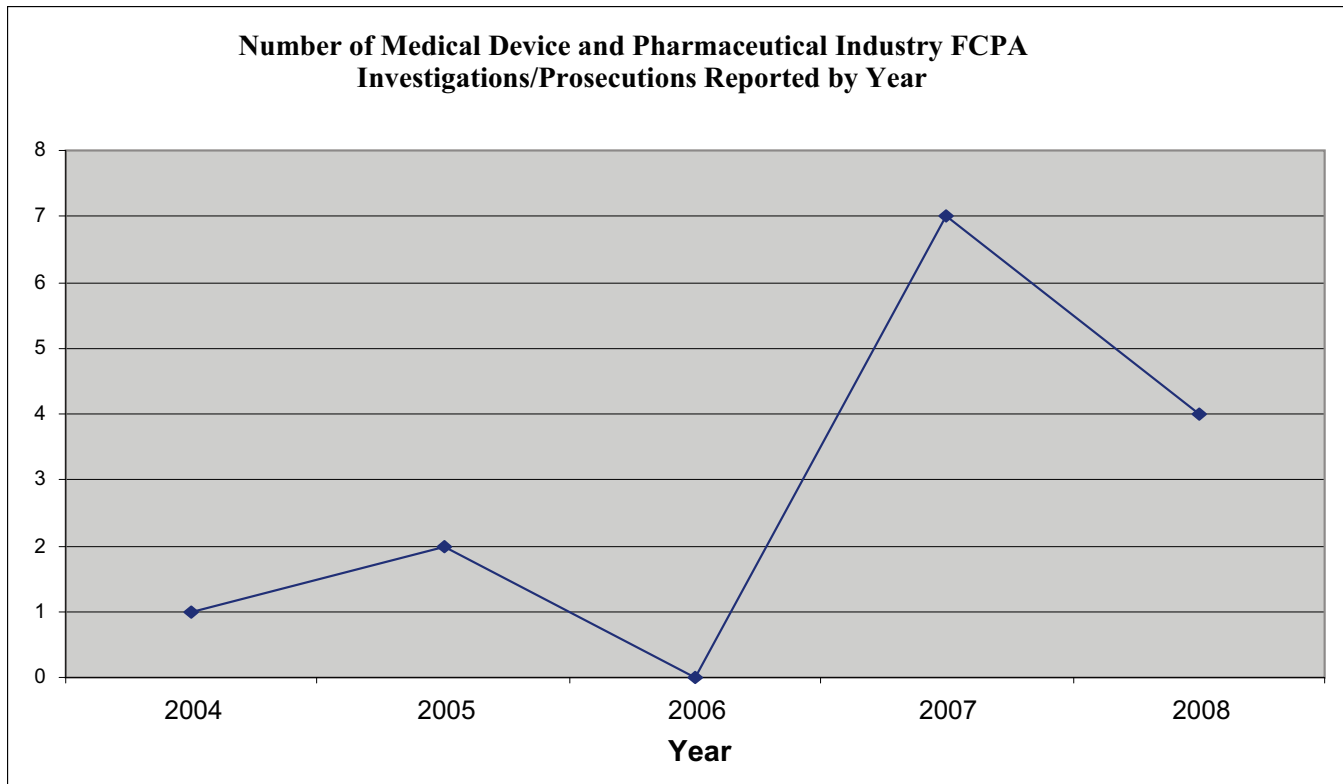
As Mendelsohn recently confirmed at an American Bar Association sponsored luncheon addressing emerging trends in FCPA enforcement, industry-wide practices and initiatives are a continuing enforcement priority. In 2007, the DOJ announced an investigation into 11 oil-related companies regarding their use of a specific intermediary and payments to Nigerian officials.⁴⁰ Following Vetco Gray’s settlement with the DOJ regarding payments to “a major international freight forwarding and customs clearing company,” the DOJ sent letters to numerous U.S. companies requesting information about their relationship and dealings with that customs clearing company. In 2007 and 2008, six companies settled charges with the DOJ related to activities in Nigeria:



³⁹ Press Release, Dep’t of Justice, Flowserve Corporation to Pay \$4 Million Penalty for Kickback Payments to the Iraqi Government Under the U.N. Oil for Food Program (February 21, 2008).

⁴⁰ Judith Burns, “US Justice Department Probing Oil Operations in Nigeria,” (July 24, 2007), http://www.marketwatch.com/news/story/us-justice-department-probing-oil/story.aspx?guid=%7B1B210CAC%2DBB35%2D4929%2D99D9%2D006720B92189%7D&dist=msr_1.

The government is also investigating the pharmaceutical and medical device industry and has issued a number of subpoenas to companies in that area requesting data on their foreign sales practices. The following chart demonstrates the recent spike in FCPA settlements by medical device and pharmaceutical companies:



We believe the government will continue focusing on specific industries or geographic areas that it believes may have FCPA issues. In particular, China, the tech industry and the financial services industry may be the focus of coordinated enforcement efforts. Companies should monitor developments in their industries and the countries in which they do business.

Mergers & Acquisitions

The FCPA has also become increasingly relevant in the context of mergers and acquisitions (M&A). As part of M&A due diligence, issues may arise regarding specific payments, intermediaries or the adequacy of internal controls. In some circumstances, allegations regarding FCPA violations come to light through anonymous whistleblower letters or complaints from competitors seeking to derail the transaction. When such issues arise, the M&A process can be delayed or stopped until an adequate internal investigation can be completed and the issues resolved. In addition, because the acquiring company may face significant potential inherited liability, it often requires the seller to disclose the FCPA issues to the DOJ and the SEC, potentially exposing the seller to prosecution. As a result of this dynamic, there is an increasing trend in companies self-reporting to the government based on FCPA issues identified during the M&A process.

Both the selling and the acquiring company face significant exposure when an FCPA issue arises. For the selling company, the risks include a government investigation and prosecution, lowering of the purchase price, rescinding certain transactions, delay or termination of the deal, or imposition of onerous deal terms. For the acquiring company, the risks include liability for pre- or post-acquisition violations, costs of the investigation, remediation expenses, and increased regulatory scrutiny. In some instances, the acquisition itself may be deemed to be a violation of the FCPA because the funds contributed to the merger may be considered a “payment” that is “in furtherance of” a bribe.⁴¹ From a valuation perspective, the acquirer should also consider whether the target company can achieve the same results without improper payments. The best way for a company wishing to be acquired to protect itself is to establish adequate internal controls and FCPA procedures to ensure that no violation has occurred. Acquiring companies can take the following steps to help reduce their exposure:

- **Conduct appropriate due diligence.** Due diligence should cover: (1) a review of internal controls for accounting, expenses, and other relevant areas; (2) a review of the target’s business practices; (3) an evaluation of key transactions for red flags; (4) a review of third-party business partners; and (5) an evaluation of subsidiaries, joint ventures and corporate structure. The acquirer should also consider whether the target operates in high-risk countries or industries. In every case, the due diligence program should be tailored to the specific concerns and issues that are present. While practical aspects, including a company’s relative bargaining power may limit due diligence, the less due diligence a company does, the greater potential risks it faces.
- **Focus on the merger agreement and representations and warranties.** Companies should closely consider the provisions of the merger agreement in light of the FCPA. Companies should request that the agreement contain a representation that the target is in compliance with the relevant laws and the FCPA. Companies should also consider indemnification provisions, closing conditions, materiality thresholds, and termination rights in the context of the FCPA.

⁴¹ See FCPA Opinion Procedure Release 2001-01.

- **Delay the acquisition until FCPA issues have been resolved.** The acquiring company may decide to delay the acquisition until any FCPA issues have been adequately resolved. In addition, the acquirer is generally an active observer in the internal investigation process. As such, the acquirer may be able to help the target reach a timely resolution. This is particularly true where the acquirer has a strong track record of compliance, significant internal controls and policies, and demonstrates a commitment to imposing a robust compliance regime on the new entity.

Where it is impractical or impossible to complete due diligence prior to the merger, companies should strongly consider submitting an Opinion Procedure request to the DOJ.⁴²

- **Closely monitor business activities until the merger takes place.** The acquirer should closely monitor all business activities until the merger takes place to ensure compliance with the FCPA. In addition, companies should evaluate employees to ensure that their conduct is ethical and that they set the appropriate tone. Once the merger takes place, the acquiring company should address compliance and corporate culture issues, and implement adequate controls and compliance procedures to ensure that past conduct is remediated and future violations are avoided.

⁴² See FCPA Opinion Procedure Release 2008-02.

COMPLIANCE

Any U.S. company that conducts business overseas (regardless of size or whether publicly traded) and any foreign company that trades on a U.S. exchange, or is operated by U.S. officers or directors should implement comprehensive FCPA internal controls, including FCPA compliance and training programs. With more and more companies doing business abroad, adopting an FCPA policy is quickly becoming a fundamental component of good corporate governance. Moreover, the DOJ and the SEC have consistently considered whether a company has an appropriate and enforced FCPA policy in place when determining whether to prosecute and the amount of any penalty. As Mendelsohn recently stated, “I think that companies need to be especially vigilant in this economic climate to not cut back. Our law enforcement efforts are not going to be scaled back, and so it would be, I think, a grave mistake for a company to take that path.”⁴³

Following are guidelines that should be considered in establishing an effective compliance program:

- **Assess your risk.** Each company’s compliance program should be tailored to its specific circumstances. Accordingly, before embarking on a compliance program, companies must understand their risk profile and tailor their FCPA policy to meet business risks and realities. Factors which may increase a company’s FCPA risk are:
 - Revenue is generated from a small number of large sales;
 - Reliance on intermediaries or third-parties;
 - Previous practices which implicated the FCPA;
 - Sales to government entities or in highly regulated industries;
 - Conducting business in countries with a perceived risk of corruption;
 - Conducting business in an industry with a history or reputation of corruption, such as the natural resources/oil, aeronautics and construction industries; and
 - A rapidly expanding international presence.

Companies should also consider how their FCPA policy fits in with their ethics and travel and expense policies, and general corporate governance to ensure an integrated approach.

- **Create a written FCPA policy.** It is critically important that documentation exist for each aspect of a company’s FCPA controls, including written policies and procedures and formalized reporting responsibilities within the organization. Written descriptions of specific compliance controls and procedures, as well as documentation relating to the testing of the adequacy of those controls and procedures, are also critical. Indeed, without such documentation or other evidentiary proof, a company is without the means to demonstrate to the DOJ or SEC the adequacy or existence of its compliance program.

⁴³ Frontline: Black Money (PBS television broadcast available at <http://www.pbs.org/wgbh/pages/frontline/blackmoney/interviews/mendelsohn.html>).

The written FCPA policy can be a stand-alone policy, intended to work in conjunction with the company's ethics policy, or it can be part of a broader ethics policy. Regardless of which option a company chooses, the FCPA policy or provisions should clearly explain the FCPA and the conduct it prohibits. The policy should avoid formalistic language and provide examples that are relevant to the company's circumstances.

At a minimum, an FCPA policy should address to whom the code applies, prohibited conduct, retention of and payments to third parties, travel, entertainment and gifts, books and records, disciplinary actions for failure to abide by the policy, anonymous reporting mechanisms, and non-retaliation.

Many policies also contain statements of the company's commitment to ethical standards and the expectations it places on employees, FCPA certifications, procedures for conducting due diligence, and examples of appropriate and inappropriate conduct.

CAUTION: Perhaps most important, the company must be able to meet the standards set by the policy. A policy that imposes unreachable standards practically ensures noncompliance. Noncompliance with an internal policy, in turn, serves as a red flag to investigators.

- **Communicate the policy.** Compliance does not end with a written policy. Companies must provide adequate resources for the implementation of the FCPA compliance program and demonstrate a commitment to abide by the terms of the written policy. While the FCPA applies to all employees and third parties, it may be impractical to translate the policy into the local language of every country in which a company does business and to train every person in the company on the FCPA. Companies should prioritize their training efforts on employees in higher-risk countries, the finance department, international sales teams, international distributors, and other individuals who are likely to face FCPA-related issues. It is also imperative that employees in senior management positions be trained in the FCPA.

Many companies conduct FCPA training on a periodic basis, usually once a year. In general, training should be in person or by some other interactive means, where attendance can be tracked. While company-wide email reminders may be useful, they are no substitute for training sessions. Companies should also carefully consider who will be required to execute FCPA certifications and how often.

- **Obtain oversight by board and management.** Establishing a proper "tone at the top" that emphasizes the importance of ethical conduct and legal compliance is critical to any compliance program. In addition to including a general policy statement by management at the beginning of the FCPA policy, many companies also have senior officers attend employee-training sessions to emphasize the importance of compliance. Designating a member of senior management to act as the company's Compliance Officer with overall responsibility for the FCPA compliance program also helps establish that the company takes its obligations seriously. Regulators critically evaluate whether an appropriate tone at the top has been set in determining whether to prosecute companies under the FCPA.

Companies should provide regular reports to the board of directors on FCPA compliance. Given the significant potential personal exposure of board members and the potential impact of FCPA issues on mergers and acquisitions, many boards are becoming increasingly active and sophisticated with respect to the FCPA.

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- **Obtain compliance by agents and other third parties.** In addition to the due diligence procedures on agents and other third parties set forth on pages 20-21 and 26-27 above, companies may consider performing diagnostics to test commissions, other contract terms, and expenses. Companies should also implement procedures to ensure that they adequately document their due diligence procedures with respect to third parties.
 - **Establish policies that help ensure financial controls and accurate books and records.** Companies must establish internal accounting controls governing access to cash, travel and entertainment expenses and other disbursements, as well as controls over any exceptions to established commission rates or price schedules. Companies should make sure that all employees understand and abide by the expense reimbursement, travel, entertainment and gift policies and procedures. Companies should also be sure to look for red flags such as numerous expense requests that fall just below the reporting and/or approval minimums, generic descriptions for the purpose of the expense, spikes in expenses prior to closing significant deals, inconsistent expense patterns (especially with respect to foreign subsidiaries), and any out of the ordinary advancements or requests for funds.
 - **Conduct ongoing monitoring, risk assessment and periodic audits.** It is not enough that a company implement a compliance program. Companies must perform ongoing monitoring and risk assessment to confirm the program is being followed and is effective.
 - **Establish and communicate internal reporting mechanisms.** Every compliance program must include provisions for anonymously reporting any suspected violations of company policy. Companies should also encourage employees to raise concerns directly and promptly to their supervisors and/or the legal or compliance departments. Companies must also be prepared to respond promptly and appropriately when a concern is brought to their attention.
 - **Punish and remedy any problems promptly.** Companies must implement procedures to ensure that, if unethical conduct is detected, reasonable steps will be taken to respond appropriately to prevent it from recurring, including modification of the program as appropriate. In addition to implementing disciplinary mechanisms for violations, companies must also discipline failure to detect violations of company policy or the law.

WHAT TO DO (AND WHAT NOT TO DO) WHEN AN ISSUE ARISES

When an issue arises, it is important that companies respond timely and appropriately. Because potential FCPA issues often arise in high-pressure situations (such as merger negotiations, just prior to quarter-end or in the final stages of a significant deal), it is prudent to have a procedure in place to respond to such issues before they arise. Following are guidelines for what to do (and what not to do) when an issue arises:

- **Do preserve documents and other materials.** When an FCPA issue arises, companies should promptly issue a “litigation hold” to ensure that all relevant materials are preserved. The litigation hold should be sent to those individuals who may have relevant materials and should be broad enough to encompass all shared files and all information regardless of how it is stored. It is also important to coordinate retention efforts with the company’s IT department to make sure that no relevant backup tapes or similar media are overwritten.
- **Do not allow employees to destroy documents.** Document spoliation raises significant risks, especially if a company faces regulatory scrutiny. Failure to preserve documents and other materials may trigger liability under the FCPA and other laws, including the Sarbanes-Oxley Act of 2002. Companies should revisit their document preservation and litigation hold policies regularly to ensure these policies account for the changing legal landscape.
- **Do promptly investigate.** Companies should contact their in-house or outside counsel to initiate an investigation. The first step is understanding the nature of the allegations or issues. Because the parameters of the issue are often not clearly defined, companies must carefully consider the scope of the investigation and follow-up on any additional issues that are identified. Companies should be prepared to document the steps taken in the investigation and justify any conclusions. It is prudent to assume that the adequacy of an investigation will be evaluated by the regulators and/or plaintiffs’ counsel.
- **Do not take an ostrich approach.** Ignoring a potential FCPA violation will compound the company’s risk and may in itself be a violation of the FCPA.
- **Do keep the board of directors informed.** The board of directors should be promptly informed of any FCPA issues that may arise. In some instances, it may be necessary to create a special committee and engage independent outside counsel to investigate the allegations. Regular reports to the board on the progress of the investigation, communications with the government, and any disclosure issues are also recommended.
- **Do not create collateral damage.** When a potential FCPA issue is identified, do not panic or react instinctively. Companies should not terminate implicated employees until they have secured all relevant documents and conducted interviews of the employees. Once an individual leaves the company, any cooperation is strictly voluntary. If an employee is implicated, he or she may be placed on administrative leave as an alternative to termination, if necessary. Companies should also keep the investigation confidential unless disclosure is required. In the event an investigation becomes public, companies should not discuss the matter with the media.

RESOURCES

Foreign Corrupt Practices Act (“FCPA”)

- Bribery – 15 U.S.C. §§ 78dd-1, et seq., enacted 1977, last amended 1998
- Books & Records – 15 U.S.C. § 78m(b)(2), (5)

Other U.S. Statutes

- Conspiracy – 18 U.S.C. § 371
- Wire & Mail Fraud – 18 U.S.C. §§ 1341, 1343
- Travel Act – Bribery – 18 U.S.C. § 1952
- Money Laundering – 18 U.S.C. §§ 1956, 1957

International Treaties and Conventions

- Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: 38 countries, including most Western European countries and Japan and Korea, have agreed to criminalize bribery of foreign officials by companies from the signatory countries
- Organization of American States Inter-American Convention Against Corruption
- Council of Europe Criminal Law Convention on Corruption
- United Nations Convention Against Corruption
- African Union Convention on Preventing and Combating Corruption

DOJ’s Lay-Person’s Guide to the FCPA

- <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html>

Transparency International Corruption Perceptions Index

- http://www.transparency.org/policy_research/surveys_indices

U.S. Commercial Service

- <http://www.buyusa.gov>

Government Lists

- <http://www.bis.doc.gov/complianceandenforcement/liststocheck.htm> (Denied Persons List, Unverified List, Entity List, Specially Designated Nationals List, Debarred List, and Nonproliferation Sanctions)

World Bank List of Ineligible Firms

- <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984> (World Bank’s publication of firms it has reprimanded or barred from participating in Bank programs because of corruption or fraud)

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Susan S. Muck is a partner in the Litigation Group of Fenwick & West LLP. Her practice focuses on internal corporate investigations, SEC regulatory proceedings, shareholder litigation and other complex commercial disputes. As a regular advisor to officers and directors on Foreign Corrupt Practice Act (FCPA), corporate governance and disclosure issues, she has extensive experience handling matters that require concurrent representation in civil, regulatory and white collar arenas. She has also investigated and resolved alleged FCPA and business practice violations in China, Taiwan and Singapore for three US banks and several private companies. In addition to her FCPA engagements, Susan Muck has led over a dozen stock option timing investigations and the subsequent defense of concurrent regulatory and shareholder litigation.

Ms. Muck was named by *The Best Lawyers in America*®2008 as one of the Best Lawyers in the specialty of Commercial Litigation, and was named by the *Daily Journal* for the past three years as one of the top 75 Women Litigators in California. Ms. Muck graduated from the University of Virginia School of Law and holds a Bachelor of Arts, with honors, from the University of Maryland at College Park.

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September 2009

Form 14-01-1009 (Ed. 9/09)