

**THE INTERNATIONAL IMPACT OF FRAUD
THE FOREIGN CORRUPT PRACTICES ACT: A MONITOR'S PERSPECTIVE**

This session will showcase how the Foreign Corrupt Practices Act (FCPA), a U.S. law, globally impacts how companies and individuals obtain and retain business. In recent years, the U.S. Department of Justice and the SEC have vigorously investigated FCPA violations throughout the world.

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Dan is a Director in the Litigation Services Group in Hemming Morse, Inc.'s San Francisco office. As a Certified Public Accountant, Certified Fraud Examiner, and former Special Agent for the Federal Bureau of Investigations (FBI), Dan has conducted financial investigations since 1982. During more than eight years as a Special Agent with the FBI, Dan conducted numerous investigations of white-collar crimes, including several of the largest savings and loan failures in California. Since leaving the FBI, Dan continues to conduct financial investigations as well as a variety of commercial litigation matters. These engagements include corporate investigations and litigation matters involving a variety of industries including securities, insurance, banking, health care, not for profit, and numerous others. In 2005, Dan was retained to serve as a Compliance Monitor for a publicly traded medical-device company that entered into a deferred prosecution agreement with the SEC and Department of Justice for violations of Foreign Corrupt Practices Act. The duties included monitoring the worldwide operations of the company. This was a three-year assignment.

Dan joined HMI in 1995. As a CPA, he has worked as a consultant and expert witness in civil and criminal cases. Dan has assisted both prosecution and defense, and has testified in federal, state, and local courts. Dan is the chair of the Litigation Steering Committee for the California Society of CPAs, and is the Chair of Litigation Services Special Interest Group for JHI—an international association of accounting firms. He has published several articles and lectures frequently on the topic of fraud and forensic accounting.

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Legislative History and Description of the Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA or the Act) was enacted in 1977 after SEC investigations revealed over 400 U.S. companies had made questionable payments totaling \$300 million to foreign officials to gain business. Although the law was enacted in 1977, there were only a handful of FCPA investigations and very few prosecutions. The U.S. Department of Justice website provides an overview of the FCPA (www.justice.gov/criminal/fraud/fcpa/). The overview states as follows:

The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. (FCPA), was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business. Specifically, the anti-bribery provisions of the FCPA prohibit the willful use of the mails or any means of instrumentality of interstate commerce corruptly in furtherance of any offer, payment, promise to pay, or authorization of the payment of money or anything of value to any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to a foreign official to influence the foreign official in his or her official capacity, induce the foreign official to do or omit to do an act in violation of his or her lawful duty, or to secure any improper advantage in order to assist in obtaining or retaining business for or with, or directing business to, any person.

Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. With the enactment of certain amendments in

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1998, the anti-bribery provisions of the FCPA now also apply to foreign firms and persons who cause, directly or through agents, act in furtherance of such a corrupt payment to take place within the territory of the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. See 15 U.S.C. § 78m. These accounting provisions, which were designed to operate in tandem with the anti-bribery provisions of the FCPA, require corporations covered by the provisions to:

- ❑ Make and keep books and records that accurately and fairly reflect the transactions of the corporation.
- ❑ Devise and maintain an adequate system of internal accounting controls.

As stated above, the FCPA has both an anti-bribery component as well as a “books and records” provision. The books and records provision, which is typically investigated and enforced by the Securities and Exchange Commission (SEC), requires companies to maintain accurate accounting records and the devise and maintain an adequate system of internal controls.

The FCPA of 1977 was amended in 1998 by the passage of the International Anti-Bribery and Fair Competition Act of 1998 (International Anti-Bribery Act). The passage of the International Anti-Bribery Act served to amend the Securities and Exchange Act of 1934, as well as the Foreign Corrupt Practices Act of 1977. Section 2 of the International Anti-Bribery Act amends the FCPA as it relates to issuers; Section 3 amends the FCPA as it relates to Domestic Concerns; and Section 4 amends the FCPA as it relates to Other Persons. Among other things, the International Anti-Bribery Act further defined or amended

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the definitions of Prohibited Conduct; the term Foreign Official; and the Jurisdiction Over Acts Outside of the United States. (A copy of the International Anti-Bribery Act can be found at www.gpo.gov/fdsys/pkg/PLAW-105publ366/html/PLAW-105publ366.htm.) Select portions of the International Anti-Bribery Act are as follows:

(a) Prohibited Conduct.—Section 104(a) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(a)) is amended—

(1) by amending subparagraph (A) of paragraph (1) to read as follows:

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage;

(2) by amending subparagraph (A) of paragraph (2) to read as follows:

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; ... and

(3) by amending subparagraph (A) of paragraph (3) to read as follows:

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; ...

(c) Officials of International Organizations.—Paragraph (2) of section 104(h) of the Foreign

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Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(h)) is amended to read as follows:

(2)(A) The term “foreign official” means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term “public international organization” means—
(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or
(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(d) Alternative Jurisdiction Over Acts Outside the United States.— Section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2) is further amended—

(1) by adding at the end the following:

(i) Alternative Jurisdiction.—

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term “United States person” means a national of the United States

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(as defined in section 101 of the Immigration and Nationality Act (8 U.S.C.1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

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Recent Department of Justice Enforcement Actions

The website for the Department of Justice (DOJ) has a section that identifies the enforcement actions taken by the DOJ for violations of the FCPA. The number of actions for the years 1998–2010 is as follows:

1998	4	2005	6
1999	2	2006	7
2000	0	2007	19
2001	6	2008	23
2002	4	2009	34
2003	5	2010	31
2004	5		

As can be seen from the above table, the number of FCPA enforcement actions has dramatically increased since 2007. In recent years there have been a number of high-profile convictions of both corporate entities and individuals. Some of the more recent enforcement actions taken by the DOJ and SEC include the following.

May 2005—The DOJ announced the filing of a Criminal Information against DPC (Tianjin) Co. Ltd., the Chinese subsidiary of Los Angeles–based Diagnostic Products Corporation (DPC). The company was charged with violations of the FCPA in connection with the payment of approximately \$1.6 million in bribes in the form of illegal “commissions” to physicians and laboratory personnel employed by government-owned hospitals in the People’s Republic of China.

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December 2008—The DOJ announced that Siemens AG and three of its subsidiaries reached a settlement agreement for violations of the FCPA. As part of the agreement, Siemens will pay \$450 million in fines and disgorge \$350 million in profits resulting in a total payment of \$800 million. The settlement relates to a worldwide investigation into the payments of approximately \$1.4 billion of bribes to foreign officials.

February 2009—The DOJ announced the guilty plea of Kellogg Brown & Root LLC (KBR) to violations of the FCPA for its participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement, and construction contracts. As part of the plea agreement, KBR has agreed to pay \$402 million in fines. The bribe payments, totaling tens of millions of dollars, were in the form of “consulting fees” paid to two agents who then funneled them to Nigerian officials. Under the plea agreement, KBR has agreed to retain a compliance monitor.

August 2009—The DOJ announced the guilty plea of Control Components, Inc. (CCI), a California-based company, for violations of the FCPA. The guilty plea follows an investigation into a decades-long scheme to secure contracts in approximately 36 countries by paying bribes to officials and employees of various state-owned companies. As part of the plea, CCI has agreed to pay a fine of \$18.2 million and to the retention of a compliance monitor. In addition, the DOJ also filed criminal charges against six executives of CCI.

March 2010—The DOJ announced the guilty plea of Nexus Technologies, Inc., and three of its employees in connection with violations of the FCPA. The guilty plea is in connection with a conspiracy to bribe officials of the

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Vietnamese government in exchange for lucrative contracts to supply equipment and technology to government agencies in Vietnam. In connection with the plea, company officials acknowledged they paid bribes in excess of \$250,000 to Vietnamese government officials. These bribe payments were falsely identified as “commissions” in the accounting records. The company faces a maximum fine of \$27 million, and the company executives face significant prison terms.

April 2010—The DOJ announced that Charles Paul Edward Jumet was sentenced to 87 months in prison for paying bribes to former Panamanian government officials to secure maritime contracts in violation of the FCPA. Jumet pleaded guilty in November 2009 to criminal charges of violations of the FCPA and to making false statements to federal agents. Jumet was an executive for Ports Engineering Consultants Corporation.

September 2010—The DOJ announced the guilty plea of ABB Ltd., a Swiss Corporation, and two of its subsidiaries to violations of the FCPA. As part of the guilty plea, company officials admitted that one of its business units based in Sugar Land, Texas, paid \$1.9 million in bribes from 1997 to 2004 to officials at Comision Federal de Electricidad (CFE), a Mexican state-owned utility company. The company has agreed to pay more than \$58 million in criminal and civil penalties, disgorgement, and interest.

Types of FCPA Matters and Critical Components of the Law

FCPA investigations can commence in a variety of manners. My personal experience with FCPA is twofold. The first was the filing of a Criminal Information, and subsequent guilty plea, involving Diagnostic Products Corporation. As part of the plea, DPC agreed to retain a

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compliance monitor for a three-year period. I was thereafter selected to serve as the monitor on behalf of the DOJ and SEC. The second FCPA-related matter pertained to the proposed acquisition by a large U.S.-based company of a company based in Asia. During the due diligence phase of this proposed merger transaction, allegations of bribe payments by the company in Asia began to surface. An internal investigation thereafter commenced.

The Anti-Bribery provisions of the FCPA have several key components, including the following.

Covered Person or Entity

Covered persons or entities under the FCPA include, but may not be limited to, employees, directors, officers, agents, distributors, freight forwarders, and stockholders.

Corrupt Intent

Although each situation is unique, the critical question to consider is whether there was a corrupt intent to the making or offer of payment, or whether there is a bona-fide business purpose and transparency to the transaction. One of the obvious tell-tale signs of a corrupt intent is the hiding, disguising, or misclassifying of the payments. Accuracy and transparency are critical factors. Other tell-tale signs include the use of agents, distributors, or other intermediaries to make payments that would not be permissible for the company to make in a direct manner. According to the DOJ website regarding corrupt intent:

The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business

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wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The offer or promise of a corrupt payment can constitute a violation of the statute. The FCPA prohibits any corrupt payment intended to influence any act or decision of a foreign official in his or her official capacity, to induce the official to do or omit to do any act in violation of his or her lawful duty, to obtain any improper advantage, or to induce a foreign official to use his or her influence improperly to affect or influence any act or decision.

Payment (Anything of Value) or Offer of Payment

A corrupt payment or bribe may be, in its simplest form, cash. However, many such corrupt payments are in the form of non-cash items. These may include the giving of expensive gifts. The corrupt payments of either cash or non-cash items may be either directly or indirectly provided to the recipients. Examples of indirect corrupt payments may include the satisfaction of a financial obligation (e.g. pay off someone’s credit card balance) or the giving of all expense paid trips.

Recipient

The FCPA makes it illegal to pay or make an offer to pay anything of value to a foreign government official. It is not always clear, however, whether the recipient of a corrupt payment fits this description. For purposes of the FCPA, covered recipients may include officials with foreign governments, international organizations, universities, hospitals, and other governmental agencies. With respect to covered recipients, the DOJ website states as follows:

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The prohibition extends only to corrupt payments to a foreign official, a foreign political party or party official, or any candidate for foreign political office. A “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a “foreign official,” such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a “foreign official.”

The FCPA applies to payments to any public official, regardless of rank or position. The FCPA focuses on the purpose of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the anti-bribery provision for “facilitating payments for routine governmental action.”

Knowledge

The consideration of a person or entity’s knowledge regarding the corrupt payments is similar to the discussion above about corrupt intent. Critical factors to consider are whether there is accuracy and transparency in the manner in which the payments are being made and subsequently recorded in the accounting records. The term *knowing* includes conscious disregard and deliberate ignorance.

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Business Purpose

The critical questions here include whether the payment was intended to influence an act or omission, or to secure an improper advantage. The corrupt payment may be intended to cause something to happen (e.g., contract award) or to prevent something from happening (e.g., switching to a competitor). The business purpose may include obtaining a new contract or performing on an existing contract.

The “books and records” provision of the FCPA has three components:

1. The company must maintain complete and accurate accounting records.
2. The company must maintain proper systems of internal controls (which includes specific training and consideration of FCPA rules).
3. A knowing falsification of records or circumvention of internal controls can result in criminal consequences for the employee or the company.

With respect to what is not a violation or affirmative defenses to allegations of the FCPA, the International Anti-Bribery Act and the DOJ website includes some information about permissible conduct or exceptions to the FCPA. The International Anti-Bribery Act states as follows:

(b) Exception for Routine Governmental Action.—

Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure

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the performance of a routine governmental action by a foreign official, political party, or party official.

The exception described above is generally referred to as *facilitating payments*. With respect to facilitating payments, the DOJ website states as follows:

Facilitating Payments for Routine Governmental Actions

There is an exception to the anti-bribery prohibition for payments to facilitate or expedite performance of a “routine governmental action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

It further states:

“Routine governmental action” does not include any decision by a foreign official to award new business or to continue business with a particular party.

(c) Affirmative Defenses.—It shall be an affirmative defense to actions under subsection (a) of this section that—

the payment, gift, offer, or promise of anything of value that was made, was lawful under the

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written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

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

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

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

With respect to Affirmative Defenses, the DOJ website states as follows:

A person charged with a violation of the FCPA's anti-bribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation. Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment. Moreover, because these defenses are “affirmative defenses,” the defendant is required to show in the first instance that the payment met these

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requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

What Does an FCPA Compliance Monitor Do?

The precise duties and obligations of the person designated to be the FCPA compliance monitor varies dramatically with each assignment. The nature of the industry, the facts surrounding the charged offense, the level of cooperation the company has with the DOJ and SEC, and the internal controls of the company are all factors that help shape the duties and responsibilities of the monitor.

In the DPC matter for which I was the designated monitor, the cease-and-desist order from the SEC defined my role as, “...review annually DPC’s compliance with its FCPA policies and procedures for a period of three years from the date of engagement.” The plea agreement that DPC entered into with the DOJ simply stated that the monitor was to “... monitor compliance with this agreement ...” and to “... monitor DPC’s implementation of and adherence to policies and procedures relating to FCPA compliance .”

My perspective on this assignment is that there is no way that I could guarantee that no bribe payments were being made anywhere in the world where DPC was doing business. The best that I could offer was “comfort” that the systems being put into place would help ensure compliance with FCPA, as opposed to “guarantees.” It should be noted that shortly after the monitoring assignment with DPC commenced, the company was acquired by a health care division of Siemens. Several additional acquisitions thereafter took place, and my monitoring assignment grew to a company with annual revenue of approximately \$10 billion.

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One of the key things that I looked for during my tenure was organizational change. Obviously some change was needed because the old system, controls, training, and leadership failed to prevent violations of the FCPA. There was an early understanding that the monitoring of this worldwide company could not be done by sitting in my office in San Francisco. I needed to meet the various country heads and senior leadership of the company to get an assessment of their personal commitment to not entering into business transactions in which bribes or corrupt payments were being sought. Essentially they had to be willing to possibly lose sales, and the personal benefits that might flow from sales generations, if they were obtained by corrupt payments. Other key components of what I did as a monitor include:

- Communicated with SEC and DOJ on a regular basis to advise them of findings and developments
- Continually assessed the tone at the top by senior management of the company
- Worked closely with the compliance officer and compliance committee
- Helped draft and implement new policies and procedures
- Identified and analyzed the various sales models utilized by the company (direct, distributor, and agent)
- Observed and ensured the proper training of employees on the FCPA rules
- Made sure that the proper mechanisms for reporting possible FCPA violations were in place
- Worked closely with the company to strengthen internal controls
- Worked with the compliance officer and internal audit staff to develop risk based audit programs
- Analyzed the compensation structure to ensure that employees wouldn't be penalized from doing the right

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thing (e.g., walking away from sales where bribe payments were being sought)

- ❑ Obtained an understanding of the local customs and practices in the high-risk areas where the company was making sales
- ❑ Conducted interviews with many employees at all levels within the organization throughout the world to understand the challenges that face on a daily basis
- ❑ Wrote reports of my findings to the SEC and DOJ

Transparency International

This organization produces and publishes annually a Corruption Perception Index, which ranks 178 different countries by how corrupt they are perceived to be. For 2010, the perceived least corrupt country was Denmark, with a score of 9.3 out of a possible 10. The perceived most corrupt country, with a score of 1.1 out of a possible 10, was Somalia. This index can be downloaded from www.transparency.org. The website has indexes available for 2001 through 2010.

Transparency International also prepares other indexes, including the Global Corruption Barometer and the Bribe Payers Index. These can also be downloaded from the organization’s website.

I used the Corruption Perception Index during my monitoring of DPC /Siemens Medical. The index of perceived corrupt countries was compared with the sales revenue generated in those high-risk locations. Those areas in which there were significant sales and a high-risk of corruption were identified and were subjected to more frequent internal audit reviews with expanded testing procedures.

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Conclusion

I have often heard the expression that the world is getting “flatter.” I definitely concur with this. My fraud investigation and forensic accounting practice is continually expanding in its international scope. More companies are conducting business on an internal level. Furthermore, the accounting profession is moving toward international accounting standards.

The use of the FCPA by the DOJ, SEC, and other law enforcement and regulatory bodies throughout the world will continue to increase. We have witnessed over the past several years increased cooperation among various countries and joint investigations by law enforcement agencies. These are resulting in an ever-increasing number of investigations, record fines, and significant jail terms for those persons making bribe payments. It is critical that employees and corporate officers have a clear understanding about the FCPA laws.

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