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FCPA Update

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Corrupt Intent, Relationship Building, and *Quid Pro Quo* Bribery: Recent Domestic Bribery Cases

The paucity of case law construing the FCPA is a frequent lament of FCPA practitioners, academics, and in-house counsel and compliance personnel. But given the similarities in wording between the FCPA's primary anti-bribery provisions and various elements of the principal U.S. federal domestic anti-bribery statutes, many issues are not as complex, doctrinally, as they might seem, although the practical consequences of how Congress has drawn lines can lead to a great deal of expense and prophylactic practice when it comes to compliance programs.

One of the most frequently recurring, if not vexing, legal problems under the FCPA is the line between what is commonly understood as "relationship building" activities such as the provision of gifts, meals, entertainment, and hospitality, on the one hand, and corrupt payments on the other. The statute nowhere contains the term "relationship building," and the concept plainly goes beyond the FCPA's affirmative defense for reasonable expenditures for the purpose of product promotion or education.[1]

The concept of "mere relationship building" derives not from any specific FCPA provision but rather from efforts by the federal courts to carve out, through the close parsing of federal criminal laws required by the rule of lenity and other principles of statutory interpretation, activities in which citizens and others affected by government action ought be entitled to engage absent a more specific prohibition—which, subject to constitutional limits, such as the free speech and petition clauses of the First Amendment, Congress is free to impose but has not.

The sections below first assess the case law related to "mere relationship building," and then consider how the specialized rules that have grown up to deal with the protected role of political contributions in the U.S. legal system affect whether domestic bribery case law can truly be of assistance to those subject to the FCPA.

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1 15 U.S.C. §§ 78dd-1(c)(2)(A), 78dd-2 (c)(2)(A), and 78dd-3 (c)(2)(A) (2006).

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The *Sun-Diamond* Decision and the Law of Relationship Building

The notion of "mere relationship building" was most clearly articulated over a decade ago by the Supreme Court in *United States v. Sun-Diamond Growers of California*.[2] In *Sun-Diamond Growers*, the Court held that, to prove a violation of the federal anti-gratuity statute, the government was required to prove more than that the defendant intended "to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future," and that, to prove an illegal gratuity, the gratuity had to be shown to have been linked to a *specific* official act.[3] Among other things, the Court held that Congress did not intend to criminalize "token gifts to the President based on his official position and not linked to any identifiable act—such as replica jerseys given by championship sports teams each year during ceremonial White House visits," or "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school."[4] The Court took umbrage that the Solicitor General argued in support of broader jury instructions that a "complimentary lunch" provided by a group of farmers to the Secretary of Agriculture "in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers" could violate the anti-gratuities law.[5]

In setting out these limits to the gratuities statute, 18 U.S.C. § 201(c)(1)(A), the Court observed that the general domestic anti-bribery prohibition contained in 18 U.S.C. § 201(b) requires "intent 'to influence' an official act or 'to be influenced' in an official act"—"[i]n other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."[6]

Lower courts addressing criminal domestic bribery issues since *Sun-Diamond* have focused on this *quid pro quo* language to distinguish between innocent relationship-building activities and *quid pro quo* transactions. In addressing the general anti-bribery statute, 18 U.S.C. § 201(c), discussed explicitly in *Sun-Diamond*, the courts of appeals have devised a number of rules or factors to help distinguish innocent relationship-building activities from corrupt criminal transactions or attempts.

Among the most recent of these cases was *United States v. Kohring*,[7] in which the Ninth Circuit earlier this year held that if monies and things provided to an Alaska state representative had in fact been given out of "friendship or pity" the jury would not have been permitted to convict, and that evidentiary decisions contrary to that

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2 *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

3 *Id.* at 405-07, 414.

4 *Id.* at 406-07.

5 *Id.* at 407.

6 *Id.* at 404-05. The FCPA contains similar language making corrupt provisions of things of value or offers of same to a foreign official or those acting on their behalf "for the purposes of (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such official to do or omit any act or do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage" or "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." 15 U.S.C. §§ 78dd-1(a)(1)(A) and (B), 78dd-2(a)(1)(A) and (B), and 78dd-3(a)(1)(A) and (B).

7 *United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (cash payments to state representative for daughter's Girl Scout uniform and to put money in Easter eggs for daughter's Easter egg hunt).

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rule of decision were prejudicial error.[8] In *United States v. McNair*,[9] a 2010 decision arising out of the notorious bribery cases dealing with waste treatment projects in Jefferson County, Alabama, the Eleventh Circuit held that "[a] finding that a gift was made or accepted with corrupt intent necessarily excludes friendship and good will gifts."[10] Among other factors that the Eleventh Circuit has directed fact finders to consider when evaluating the motivation of defendants are (1) whether the gifts were made close in time to official acts alleged to have been undertaken in a *quid pro quo* relationship; (2) the size of the gifts; and (3) whether there were efforts to conceal the gifts when they were made.[11]

There are some disagreements among the courts of appeals as to the scope of the *quid pro quo* requirement in the area of federal program bribery, prohibited by 18 U.S.C. § 666, with some circuits requiring the same kind of very specific *quid pro quo* relationship,[12] others holding that the necessary element is proved so long as money was given to an official with a specific intent to reward or influence him or her in his or her official capacity,[13] and still others finding the statute to be satisfied by proof of a payment in exchange for a commitment to perform official acts as opportunities arise.[14] There is no disputing, however, that some sort of *quid pro quo* arrangement, sometimes described as "*quid pro quo* light,"[15] must be proved before a defendant may be convicted of domestic bribery.

Do Domestic Bribery Cases Translate? The Role of Money in U.S. Politics

Long before the Supreme Court raised serious questions about the scope of many political spending limits in its landmark *Citizens United* decision last year,[16] courts have differentiated *quid pro quo* transactions from political activity, including legitimate campaign contributions. To understand whether these decisions render case law for domestic bribery inapplicable to the FCPA—that is, whether unique U.S. considerations create wider latitude for interactions with government officials in the United States than those overseas—it is first necessary to assess the breadth given to campaign activities in domestic bribery cases.

The courts grant political fundraising wide berth under domestic bribery laws. The Ninth Circuit's decision in *United States v. Kohring* distinguished the motive of making a campaign contribution with the hope of encouraging a candidate to take certain legislative acts on the one hand, from paying a politition with the intent to obtain specific legislative favors on the other. While the first is generally not criminalized under current election law, the later is, the court held.[17]

Similarly, the Fifth Circuit, in addressing the role of *quid pro quo* evidence in a theft of honest services case, *United States v. Whitfield*,[18] reaffirmed that payments made with "some vague expectation of some future benefit" do not suffice to generate criminal bribery liability.[19] The Fifth Circuit undertook a comprehensive review of the law dealing with the interaction of campaign contributions and bribery laws, concluding that a specific act need not be identified at the time of payment to satisfy the *quid pro quo* requirement, so long as the parties had agreed on a "specific type" of action (in *Whitfield* itself, judicial decisions of bribed judges).[20] The Second Circuit has also characterized the "vague expectation of some future benefit," or "generalized goodwill" or "favor," as legal lobbying, separate from illegal *quid pro quo* activity.[21] The court relied upon *McCormick v. United*

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8 *Id.* at 912.

9 *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010) (benefits to county officials consisting of *inter alia*, cash payments; purchases of materials and labor to expand and improve an official's photography studio; construction of an official's 3,000-sqaure foot retirement home; cruise vacation; landscaping and construction of patio at an official's home; vacation condominium; Disney World and casino vacations; goods, services, and materials to renovate official's home; and interest-free loans to purchase land).

10 *Id.* at 1195.

11 *Id.* at 1196-97.

12 *E.g., United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998).

13 *E.g., McNair*, 605 F.3d at 1188 (11th Cir. 2010); *United States v. Abbey*, 560 F.3d 513, 520 (6th Cir. 2009); *United States v. Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005).

14 *United States v. Ganim*, 510 F.3d 134, 142-43, 147 (2d Cir. 2007).

15 *McNair*, 605 F.3d at 1188 n.41.

16 *Citizens United v. Fed. Election Comm'n*, 558 U.S. __, 130 S. Ct. 876 (2010).

17 *United States v. Kohring*, 637 F.3d 895, 909 (9th Cir. 2011).

18 *United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (substantial unsecured loans to state judicial candidates).

19 *Id.* at 349, 354.

20 *Id.* at 350.

21 *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007) (mayor received kickbacks totaling over $500,000 in cash, meals, clothing, wine, and home renovations).

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States for the proposition that political contributions are treated differently from other types of payments due to their U.S. constitutional stature.[22]

Most recently, in *United States v. Siegelman*,[23] the Eleventh Circuit distinguished between a "generalized expectation of some future favorable action" and the giving of a campaign donation in return for a "specific official action."[24] This recent decision illustrates how courts draw the line between lawful contributions given in a one-sided hope that positive treatment of some kind will result, on the one hand, and illegal *quid pro quo* bribery, on the other. While holding that there must be proof beyond a reasonable doubt that there was an "explicit" *quid pro quo* arrangement,[25] the Eleventh Circuit noted, however, that the explicit agreement need not be "express," relying on language in Justice Kennedy's concurring opinion in *Evans v. United States*.[26] The agreement must relate to some specific official action, though it need not be "memorialized in a writing, or even . . . be overheard by a third party."[27]

These decisions, at bottom, recognize that relationship-building is not necessarily limited to providing small gifts or a simple free meal. It is the agreement—*the quid pro quo*—that is critical.

That campaign contributions have an important and well-recognized role in American politics, but might not elsewhere, does not detract from the central point that "relationship building" activities under both the FCPA and domestic bribery law can conceivably extend well beyond token gestures. The fact that a particular size or kind of campaign contribution that is lawful in the United States might not be lawful in another country, and *vice versa*, can certainly be relevant to how a transaction is scrutinized. In that sense, the precise results of cases under domestic bribery law might not always translate fully to those arising under the FCPA, in light of differing methods countries use to fund popular election campaigns or other campaigns for office. But this need to look at the context of payments is no more than another example of the rule that "no holding can be broader than the facts before the court," and that it is the "reasoning" of the Supreme Court's decisions that is ultimately controlling.[28]

That "reasoning" here is that the thrust of the relationship building cases under domestic bribery law—that genuine relationship building activities that do not encompass *quid pro quo* arrangements are lawful—should apply to cases under the FCPA. This is compelled by the substantial and relevant similarities of the language of the FCPA to that of domestic bribery laws, as well as the presumption that requires statutes with extraterritorial application to be narrowly construed.[29] Although Congress could have imposed a higher standard of conduct vis-à-vis foreign officials than vis-à-vis officials of its own government, there is no evidence Congress did so in the FCPA. The lack of an anti-gratuity provision in the FCPA that mirrors the domestic anti-gratuity law only confirms that non-*quid pro quo* relationship building is lawful under the FCPA.

Accordingly, under the FCPA, so long as there is no *quid pro quo* arrangement, the fact that a payment or benefit represents more than the cost of a baseball cap bearing a corporate logo should not be determinative. Just as in-kind and monetary political contributions given without a specific expectation that legislative favors will be given in return can represent many thousands of dollars in value—particularly given the practice in federal campaigns of lawful "bundling," wherein particular individuals organize and motivate large groups of donors independently to donate to a campaign—payments and benefits need not be minimal to qualify as relationship building activities.[30] To be sure, the closer a company can get to the baseball cap analogy, the lower the enforcement risk, which is why strong compliance programs emphasize that gifts to foreign officials should be modest in value and branded with a company logo if at all feasible. But

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22 *McCormick v. United States*, 500 U.S. 257, 273-74 (1991) (requiring proof in a Hobbs Act case of federal extortion under color of official right of an express promise when payments are made "in the form of campaign contributions," but explicitly refraining from deciding whether a showing of a quid pro quo must be made "in other contexts").

23 *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) ($500,000 in contributions to Alabama governor's campaign).

24 *Id.* at 1171.

25 *Id.* at 1179.

26 *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring) (noting that agreements based on "winks and nods" are subject to prosecution).

27 *Siegelman*, 640 F.3d at 1171.

28 *United States v. Stanley*, 483 U.S. 669, 680-81 (1987).

29 *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010).

30 For the distinctions between legitimate bundling and illegitimate straw donations under U.S. federal campaign law, see, *e.g.*, *United States v. Boender*, No. 10-2652, __ F.3d __, 2011 WL 3634163 (7th Cir. Aug. 19, 2011); *United States v. O'Donnell*, 608 F.3d 546 (9th Cir. 2010).

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the notion that the value of a baseball cap is a legal ceiling is incorrect.

The key lesson from domestic bribery cases is that it is a subjective fact—intent—that matters. Making a payment or providing a benefit to an official, foreign or domestic, with the intent that the official breach his or her duty to his or her employer, the "evil motive" identified in the leading appellate decision on the meaning of corrupt intent under the FCPA, *United States v. Kay*,[31] is the critical touchstone. The size, timing, and, most of all, specific context, of payments, benefits, and offers of same, can take those transfers out of the "relationship building" safe harbor, all depending on the circumstances.

While on the one hand this conclusion means that both domestic bribery and FCPA offenses that depend on the presence of corrupt intent can—and doctrinally should—be judged by a single standard, the fact that the standard can yield different outcomes for similar conduct depending on the precise context inevitably will result in continuing pressure on corporate compliance programs to adopt conservative and administrable limits on conduct that could be construed as "mere relationship building"—at least until Congress or the DOJ provide greater clarity to the scope of FCPA liability. ■

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31 *United States v. Kay*, 513 F.3d 432, 449-50 (5th Cir. 2007) (bribes to Haitian officials to reduce customs duties and sales taxes on rice imports).

The Wolfsberg Group's Latest Guidance for Avoiding Lender and Banker Liability for FCPA Violations

On August 18, 2011, the Wolfsberg Group—Banco Santander, Bank of Tokyo Mitsubishi, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan Chase, Societe General, and UBS—published a 20-page guide entitled "Wolfsberg Anti-Corruption Guidance" ("2011 Wolfsberg Guide") geared to identifying ways member financial institutions can better protect themselves not only against the risk of corruption undertaken for their own accounts, but also against the risk that "their institutions may be misused for the purpose of paying bribes or laundering their proceeds."[1]

The 2011 Wolfsberg Guide by financial institutions may be yet another arrow in the quiver of robust compliance programs. Perhaps more important, the 2011 Wolfsberg Guide's principles targeted against misuse of financial institutions will likely work as an additional deterrent to corrupt behavior by others as well as a source of evidence of misconduct when it occurs.

Despite a landmark decision by the U.S. Supreme Court reinforcing the Court's determination to draw bright-line rules to limit aiding and abetting liability for private securities law violations,[2] financial institutions rightly have perceived that the legal landscape continues to pose risks of being ensnared in anti-bribery investigations based on the conduct of others—if financial firms whose services are used to facilitate misconduct become sufficiently aware of the improper activity and yet fail to take steps to report it or take other action to remediate.

Indeed, because the very nature of banking laws, from the Bank Secrecy Act to the USA PATRIOT Act,[3] and their "know your customer" and suspicious activity report requirements, banks and other financial institutions are in possession of a significant amount of information and data related to financial transactions.

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1 The Wolfsberg Group, "Anti-Corruption Guidance" (Aug. 18, 2011), http://www.wolfsberg-principles.com/pdf/Wolfsberg%20Anti%20Corruption%20Guidance%20Paper%20August%2018-2011%20(Published).pdf.

2 *See Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (June 13, 2011).

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The resulting risks of being ensnared in misconduct if compliance resources are not properly applied are daunting.

Moreover, the U.S. government's broad use of the "agency" language of the FCPA's primary anti-bribery provisions, as well as its ability to pursue potential civil and criminal aiding-and-abetting charges, and to bring actions against unaffiliated companies alleged to have acted at the behest of or in support of others,[4] mean that financial services firms have much to gain by implementing robust programs for overseeing, escalating, and reporting customer misconduct or evidence that meets the test for the issuance of suspicious activity reports.

Although the 2011 Wolfsberg Guide contains many of the same provisions of the February 2007 Wolfsberg Statement Against Corruption ("2007 Statement"),[5] the 2011 Wolfsberg Guide contains significant new language consistent with other anti-corruption compliance guidance by the Organisation for Economic Co-operation and Development ("OECD"), Committee of Sponsoring Organizations of the Treadway Commission ("COSO"), and other non-governmental organizations urging member organizations to (1) ensure senior management commitment to the company's anti-corruption program; (2) utilize periodic risk assessments to assure that the compliance program is geared to address the risks and issues genuinely faced by the company; (3) establish a control environment to assure that compliance standards are followed; as well as (4) monitor and review compliance to address any deviations and needs for remediation.[6] This new language as well as additional commentary puts significant new compliance flesh on the bones of the 2007 Statement.

The 2011 Wolfsberg Guide also reiterates risk areas that were anticipated in the 2007 statement, including private banking, project finance and export credits, as well as retail banking, in each case identifying for the particular banking function risk factors, red flags, and risk mitigation strategies.[7] Among the various red flags, one stands out for every kind of transaction—the flow of substantial cash amounts through accounts that are not consistent with the types of transactions contemplated by the account opening due diligence or expectations of the market role played by a customer or its transferee.[8] The presence of politically-exposed-persons ("PEPs"), country risk, industry risk, and the presence of intermediaries in payment procedures are also highlighted in the 2011 Wolfsberg Guide.[9] Although many of these red flags were identified in the 2007 Statement, the 2011 Wolfsberg Guide's emphasis on the devotion of resources to the four pillars of strong compliance programs, noted above, is a change that member institutions as well as other firms seeking to implement best practices will need to consider as they formulate their budgets related to anti-corruption compliance tasks. ■

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3 For a comprehensive pre-Dodd-Frank Act review of "know your customer" and related compliance requirements imposed by federal banking laws, *see* Paul L. Lee, USA PATRIOT ACT Requirements for Foreign Banks (4th Ed. 2007) (Matthew Bender). Although the Dodd-Frank Act does not contain any express statutory provisions creating anti-money laundering ("AML") obligations for banks and their affiliates, it may still have some impact on AML reporting requirements. The Act dismantled the Office of Thrift Supervision ("OTS") and transferred its oversight responsibilities to the Federal Reserve Bank (the "Fed"). Dodd Frank Wall Street Reform and Consumer Protection Act of 2009, Pub. L. 111-203, 124 Stat. 1376, § 312(B) (2010). Under the supervision of OTS, certain entities were not required to file suspicious activity reports. The Fed has broader AML requirements than the OTS did, and so, under the supervision of the Fed—assuming it applies its policies consistently—such entities will likely now have to file suspicious activity reports. *See, e.g.*, 12 C.F.R. § 208.62 (Jan. 1, 2010); Federal Reserve Bank, Annual Report 2010 (July 2010), http://www.federalreserve.gov/publications/annual-report/2010-banking-supervision-regulation.htm#3.

4 78 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), and 78dd-3-(a)(1); *see SEC v. Panalpina, Inc.*, No. 4:10-CV-4334, Complaint at ¶¶ 12-53, (S.D. Tex. filed Nov. 4, 2010) ("agency" theory of FCPA liability); *id.* at ¶¶ 54-60 (aiding and abetting civil FCPA liability); *see also SEC v. Monty Fu*, No. 1:07 Civ. 01735, Complaint ¶¶ 25-29 (D.D.C. filed Sept. 28, 2007); 5 U.S.C. § 78t (civil aiding and abetting and control person liability). Although the D.C. Circuit has held, in a related context (under the International Traffic in Arms ("ITAR") regulations) that criminal aiding and abetting charges are not available for conduct that is extraterritorial in nature, *see United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005), that has not deterred the U.S. Department of Justice ("DOJ") from bringing criminal aiding and abetting charges in the FCPA context, *see United States v. JGC Corp., No. 11-00260* (S.D. Tex. 2011); *United States v. Snamprogetti Netherlands B.V.*, No. 10-cr-460 (S.D. Tex. 2010), as well as, of course many cases based on allegations of conspiracy. *See, e.g.*, DOJ Press Rel. No. 10-360, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Allegations and Agree to Pay $93.6 Million in Criminal Penalties; Combined Criminal and Civil Penalties of $185 Million to be Paid (Apr. 1, 2010), http://www.justice.gov/opa/pr/2010/April/10-crm-360.html.

5 The Wolfsberg Group, "Statement Against Corruption" (Feb. 2007), http://www.wolfsberg-principles.com/pdf/statement_against_corruption_02-2007.pdf.

6 Wolfsberg 2011 Statement at 2-3, note 1, *supra.*

7 *Id.* at 17-20.

8 *Id.*

9 *Id.*

The U.K. FSA Reminds Financial Services Firms of Anti-Corruption Compliance Obligations

In the wake of the substantial publicity over the past six months regarding the coming into force of the U.K. Bribery Act ("UKBA"), the U.K. Financial Services Authority ("FSA") in its September 2011 monthly Financial Crime Newsletter[1] reminded firms subject to its regulatory authority that adequate internal controls reasonably designed to prevent bribery of non-U.K. officials are not just an affirmative defense to the UKBA's so-called corporate offense,[2] but an affirmative requirement for all firms authorized by the FSA in accordance with the Financial Services and Markets Act of 2000 ("FSMA").[3] In a short note, the FSA reminded FSA-authorized firms that underlying acts of making corrupt payments or an offer to make corrupt payments need not exist for a company to be subject to regulatory action for lacking sufficient anti-bribery internal controls.[4] The entirety of the note is reprinted below:

> Corruption and bribery are criminal offences under the Bribery Act 2010, which came into force on 1 July 2011. The Act consolidated and replaced previous anti-corruption legislation and introduced a new offence of commercial organisations failing to prevent bribery. Firms have a full defence for this offence if they can show that they had adequate procedures designed to prevent bribery. The Government has published guidance on these procedures.
>
> The FSA does not enforce the Bribery Act. FSMA-authorised firms are under a separate, regulatory obligation to identify and assess corruption risk and to put in place and maintain policies and processes to mitigate corruption risk. We can take regulatory action against firms who fail adequately to address corruption risk; we do not need to find evidence of corruption to take action against a firm.
>
> We have consolidated our expectations of firms' anti-bribery and corruption systems and controls in Chapter 7 of our proposed *Financial Crime: a Guide for Firms.* Our Guide is consistent with, but separate from, the Government's Bribery Act guidance. This is because the scope of the Bribery Act is different from our rules and Principles; firms should bear this in mind when reviewing the adequacy of their anti-corruption policies and procedures.[5]

Like the statutorily-independent internal controls provisions of the FCPA,[6] the internal controls requirements administered by the FSA carry significant potential risks to firms that are insufficiently attentive to anti-corruption risks. The FSA has illustrated its intention to address cases in which anti-bribery controls were deficient or lacking, even though it acknowledged, at least implicitly, that evidence of otherwise actionable bribery was not present.[7]

The FSA's reminder of its role in anti-bribery compliance follows in the wake of its lengthy May 2010 report entitled "Anti-Bribery and Corruption in Commercial Insurance Broking," which identified a number of recurring practices and compliance sore spots in the insurance broking industry that gave rise to concern,[8] including failure to conduct sufficient risk assessments in connection with the overall management and resourcing of anti-corruption compliance programs, over-reliance on market perceptions of and lack of sufficient due diligence and oversight of third parties in

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1 U.K. FSA, "The FSA and the Bribery Act," *Financial Crime Newsletter*, No. 15 (Sept. 2011) (hereinafter "FSA Newsletter No. 15"), http://www.fsa.gov.uk/pubs/newsletters/fc_newsletter15.pdf; *see also* Donia O'Laughlin, "FSA Warns Firms Over Anti-Corruption Rules," *Financial Times – FT Adviser* (Sept. 12, 2011), http://www.ftadviser.com/FTAdviser/Regulation/Regulators/FSA/News/article/20110912/4172a736-dd13-11e0-bfed-00144f2af8e8/FSA-warns-firms-over-anticorruption-rules.jsp.

2 Bribery Act, 2010, c.23, § 7 (Eng.), http://www.legislation.gov.uk/ukpga/2010/23/section/7.

3 For background materials on the FSMA, *see generally* U.K. FSA, Legal Framework, http://www.fsa.gov.uk/pages/About/Who/Accountability/legal/index.shtml.

4 The FSA regulates all companies carrying on any of a number of specified financial activities in the U.K. Banks, insurance companies, asset managers and others all require authorization by the FSA. *See* Financial Services and Markets Act, 2000, c.8, Parts II-III; sch. 2 (Eng.), http://www.legislation.gov.uk/ukpga/2000/8/contents.

5 FSA Newsletter No. 15 at 3, note 1, *supra.*

6 15 U.S.C. §§ 78m(b)(2)(A)-(B) (2006).

7 U.K. FSA, "Anti-Bribery and Corruption in Commercial Insurance Broking" (May 2010), http://www.fsa.gov.uk/pubs/anti_bribery.pdf ("FSA Insurance Broking Report"). *See* FSA Final Notice re: Willis Ltd. (July 21, 2011) (imposing financial penalty of £6,895,000 upon Willis Ltd.), http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf; FSA Final Notice re: Aon Ltd. (Jan. 6, 2009) (imposing financial penalty of £5.25 million upon Aon Ltd.), http://www.fsa.gov.uk/pubs/final/aon.pdf.

8 FSA Insurance Broking Report, note 7, *supra*. For the FSA's September 2009 interim findings in the insurance broking inquiry, *see* FSA, "Interim Findings: Anti-Bribery and Corruption in Commercial Insurance Brokers," http://www.fsa.gov.uk/pages/about/what/financial_crime/library/interim.shtml.

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the sales chain, inadequate escalation of suspicious payments, compensation systems that tied broker compensation excessively to sales results, and weak training in anti-bribery compliance principles.[9]

These findings, along with the FSA's lengthy investigation that led to the 2010 report and as its more recent actions against FSA-regulated market participants, illustrate that the FSA is prepared to step up and bring cases even if the criminal law provisions of the UKBA do not apply for want of an underlying specific corrupt act. The FSA's short note gives those firms subject to the FSA's regulatory jurisdiction good cause to be sure their anti-corruption compliance programs are robust in word and deed. Firms will also want to be on the lookout for the FSA's forthcoming *Financial Crime: a Guide for Firms*, a publication we will review and summarize for *FCPA Update* upon its publication. ■

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9 *See* FSA Insurance Broking Report at 3-5, note 7, *supra*.

Upcoming Speaking Engagements

October 17-18, 2011
Karolos Seeger
"Responding to the New UK Bribery Act: How to Adjust Your Compliance Program to Meet New 'Adequate Procedures' in India"
Second India Summit on Anti-Corruption
American Conference Institute, Mumbai
Conference brochure: http://www.debevoise.com/publications/India_Summit_Anti-Corruption.pdf