

FCPA Update

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The SEC's Final Rules Requiring Payment Disclosures by Resource Extraction Issuers: Do These Rules Help Resolve the FCPA "Foreign Official" Debate?

On August 22, 2012, the U.S. Securities and Exchange Commission ("SEC") adopted final rules implementing Section 1504¹ of the Dodd-Frank Act (the "Final Rules"). The Final Rules require both U.S. and non-U.S. issuers engaged in the commercial development of oil, natural gas or minerals to disclose certain payments made to the U.S. federal government or foreign governments on an annual basis.²

The relevance of the Final Rules to the FCPA in a broad sense is clear. Although the Final Rules do not target bribery *per se*, their stated aim is to increase transparency in the resource extraction sector,³ and one of the goals of such efforts is to reduce the opportunities and incentives for corruption. One editorial lauding the adoption of the Final Rules noted that "[t]ransparency only removes the competitive advantage provided by the ability to bribe."⁴ Likewise, when the adoption of Section 1504 was discussed in the Senate, members repeatedly referred to the provision's relevance to preventing and exposing corruption.⁵ But whether the statute as now implemented through the SEC's regulations will have the intended impact is something that only time will tell.

In this article, however, we discuss a slightly more nuanced aspect of the relationship between Section 1504 and the Final Rules on the one hand and the FCPA on the other: the intersection of the definition of "foreign government" under the two statutory schemes. In contrast to the FCPA's provisions dealing with the entities whose employees shall be deemed "foreign officials," Section 1504 expressly includes within its definition of "foreign government" not only an "instrumentality" of a foreign government, but

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1. 15 U.S.C. § 78m(q).
2. SEC Press Rel. No. 2012-164, SEC Adopts Rules Requiring Payment Disclosures by Resource Extraction Issuers (Aug. 22, 2012), <http://www.sec.gov/news/press/2012/2012-164.htm>; SEC Press Rel. No. 34-67717, Disclosure of Payments by Resource Extraction Issuers, Final Rule (Aug. 22, 2012) ("Final Rule"), <http://www.sec.gov/news/press/2012/2012-164.htm>.
3. Final Rule at 5 ("Based on the legislative history, we understand that Congress enacted Section 1504 to increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals.").
4. Editorial, "Sunshine Rules," *The Financial Times* (Aug. 22, 2012), <http://www.ft.com/intl/cms/s/0/874db8fa-ec61-11e1-a91c-00144feab49a.html#axzz26OiUmjZ7>.
5. 111 Cong. Rec. S3815, S3816, S3817 (daily ed. May 17, 2010).

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also “companies owned by a foreign government.”⁶ Even though the SEC was given the opportunity to construe the term “companies owned by a foreign government” expansively, the agency has narrowed that definition in the Final Rules to cover only companies that are majority-owned by a foreign government, rejecting a “control-in-fact” test that would require scrutiny of indicia of day-to-day control even if a state owner lacked a majority equity stake in the entity under review.⁷

The point we consider here is how the comparative structure of the FCPA’s definition of “foreign official” and Section 1504’s definition of “foreign government” may prove helpful to both companies and natural persons seeking to resist the broad interpretations of the term “foreign official” applied by both the SEC and the U.S. Department of Justice (“DOJ”) in their respective roles in enforcing the FCPA.

Section 1504 and the Final Rules

Section 1504 of the Dodd-Frank Act tasked the SEC with issuing “final rules that require each resource extraction issuer [under the Securities Exchange Act of 1934] to include in an annual report ... information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.”⁸ The Final Rules that implement this section specify the scope of the requirement on affected issuers, the information required to be reported, and the form in which it must be presented to the SEC.⁹

The stated intention of the Final Rules is to “increase the transparency of payments made by oil, natural gas, and mining companies to governments for the purpose of the commercial development of their oil, natural gas, and minerals.”¹⁰ In this regard, Section 1504 makes reference to “international transparency promotion efforts,”¹¹ and the legislative history clearly states Congress’s intention that the Final Rules “complement” the efforts of the Extractive Industries Transparency Initiative (“EITI”).¹² In this respect, the Final Rules form part of a broad international movement. Recently, the European

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6. 15 U.S.C. § 78m(q)(1)(B).

7. Final Rule at 98, 101.

8. 15 U.S.C. § 78m(q)(2)(A).

9. Final Rule at 226-231.

10. Final Rule at 5-6.

11. 15 U.S.C. § 78m(q)(2)(E).

12. 111 Cong. Rec. S3816 (daily ed. May 17, 2010). EITI is a voluntary coalition of oil, natural gas, and mining companies, foreign governments, investor groups, and other international organizations dedicated to fostering and improving transparency and accountability in countries rich in oil, natural gas, and minerals through the publication and verification of company payments and government revenues from oil, natural gas, and mining. See Final Rule at 7, n. 14; EITI, “Fact Sheet” (last visited Oct. 5, 2012), http://eiti.org/files/2012-09-20_Fact_Sheet_0.pdf. The United States is a stakeholder in the Initiative, <http://eiti.org/supporters/countries>, and in September 2011, President Obama announced plans to implement the EITI. See EITI News Rel., “President Obama: The US will implement the EITI” (Sept. 20, 2011), <http://eiti.org/news-events/president-obama-us-will-implement-eiti>. The SEC notes that the Final Rules are intended to be consistent with the EITI, except in those instances in which Congress intended the Final Rules to “go beyond what is required by the EITI.” Final Rule at 7, 12.

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Parliament voted in favor of adopting similar regulations.¹³

The commercial burdens imposed by the Final Rules have been well-documented. It has been argued that the Rules put companies listed on U.S. exchanges at a

“The SEC proposed...that the term ‘a company owned by a foreign government’ should ... cover only those companies that are at least majority owned by a foreign government.”

competitive disadvantage to many large state-run energy companies, provide foreign oil and natural gas companies with access to trade secrets, and place issuers in the awkward position of trying to comply with the Final Rules while safeguarding, often for legitimate reasons, the confidentiality of the terms under which they run their projects.¹⁴ The cost of complying with the Final Rules is likely to be significant. The SEC itself has assessed that “the total initial cost of compliance for all issuers is

approximately \$1 billion and the ongoing cost of compliance is between \$200 million and \$400 million.”¹⁵ The burden is not limited to U.S. companies; Congress has estimated that the Final Rules will apply to “90 percent of the major internationally operating oil companies and 8 out of the 10 largest mining companies in the world.”¹⁶ On October 10, 2012, the American Petroleum Institute and U.S. Chamber of Commerce, among others, relied on a number of these arguments to file suit against the SEC. The claimants seek a declaration that both Section 1504 and the Final Rules are null and void on First Amendment and arbitrary and capricious agency action grounds.¹⁷

Section 1504 and the Final Rules: Defining “Foreign Government”

As noted above, Section 1504 and the Final Rules require disclosure of payments made to both the U.S. federal government and “foreign governments.” Rather than leave the latter term undefined, Section 1504 defines “foreign government” as “a foreign government, a department, agency or instrumentality of a foreign government, or a company owned by a foreign government.” Section 1504 also provides

that “determining” the precise scope of the term is a matter for the Commission’s rulemaking discretion.¹⁸

In its Proposed Rules issued on December 23, 2010, the SEC made clear its intention to define “the term ‘foreign government’ consistent with the statute.” In so doing, it maintained Section 1504’s distinction between an instrumentality of a foreign government and a company owned by a foreign government. The SEC proposed, however, that the term “a company owned by a foreign government” should be narrowed even further to cover only those companies that are at least majority-owned by a foreign government, although it asked stakeholders to comment on the level of ownership that would be “appropriate.” Notably, the Commission also proposed “to specifically include foreign subnational governments in the definition to provide additional clarity.” The term “subnational government” entities, such as state, provincial, county, municipal, or district governmental units, were not explicitly referenced in Section 1504.¹⁹

The Final Rules define “foreign government” as follows:

[A] foreign government, a department, agency, or instrumentality

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13. Barbara Lewis, “EU politicians vote for tough oil, gas anti-corruption law,” *Reuters Canada* (Sept. 18, 2012), <http://ca.reuters.com/article/topNews/idCABRE88H0LE20120918>.

14. See, e.g., C.M. Matthews, “SEC Narrowly Approves Reporting Rules on Resource Extraction, Conflict Minerals,” *WSJ Corruption Currents* (Aug. 22, 2012), [http://www.fcprofessor.com/an-update-on-section-1504?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+thefcpaprofessor+%28FCPA+Professor%29](http://blogs.wsj.com/corruption-currents/2012/08/22/sec-narrowly-approves-reporting-rules-for-energy-mining-firms/?KEYWORDS=resource+extraction+rule; see also Mike Koehler, “An Update On Section 1504,” <i>FCPA Professor Blog</i> (June 4, 2012), <a href=).

15. Final Rules at 140. See also *id.* at 148 (a commentator on the proposed rules estimated that “initial set up time and costs associated with the rules implementing Section 13(q) would require 500 hours to effect changes to its internal books and records, and \$100,000 in IT consulting, training, and travel costs”).

16. 111 Cong. Rec. S3815 (daily ed. May 17, 2010).

17. *American Petroleum Institute v. SEC*, No. 1:12-cv-01668-JDB, Complaint (D.D.C. Oct. 10, 2012). See also S.N. Lynch, “Business Groups Sue SEC Over Dodd-Frank Anti-Bribery Rule,” *Reuters* (Oct. 10, 2012), <http://www.reuters.com/article/2012/10/11/us-sec-lawsuit-idUSBRE8991NL20121011>.

18. 15 U.S.C. § 78m(q)(1)(B). The legislative history does not provide any insight on Congress’s decision to make separate reference to instrumentalities and state-owned companies; while other aspects of the definition were amended, this aspect of the legislation was not changed significantly throughout the legislative process and was not the subject of detailed explanatory comments in the published legislative history. See 111 Cong. Rec. S2765 (Apr. 28, 2010).

19. SEC Proposed Rule, Disclosure of Payments by Resource Extraction Issuers, Federal Register, Vol. 75 No. 246, 80988-80989 (Dec. 23, 2010). Interestingly, the SEC noted the following issue posed by Congress’s definition: “in the case of certain state owned companies, the government would be a shareholder. Thus, certain transactions may occur as transactions between the company and the government and as transactions between company and shareholder.” *Id.* Although the Commission queried whether it should adopt specific rules to cover this situation, the Final Rules do not appear to deal with the issue.

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of a foreign government, or a company owned by a foreign government. As used in [this Rule], foreign government includes a foreign national government as well as a foreign subnational government, such as the government of a state, province, county, district, municipality, or territory under a foreign national government.²⁰

Similarly, the instructions for completing the relevant disclosure form state that “a company owned by a foreign government is a company that is at least majority-owned by a foreign government.”²¹ In adopting this definition, the Commission explicitly rejected proposals from commentators that the key concept in determining whether a company falls within the definition of “foreign government” should be the government’s “control” of that company, or the “capacity” in which the entity was acting at the time the payment was made.²² In other words the SEC appears to have definitively rejected a control-in-fact approach (as well as a “public function” test) to determining which companies are and are not government-owned in favor of a bright-line rule based on ownership interest.

Three relevant conclusions can be drawn from the approach taken by Congress and the SEC to defining “foreign government”

in the context of Section 1504:

(1) Congress considered that the term “instrumentality” was not broad enough to cover “a company owned by a foreign government”; (2) the SEC determined that the appropriate scope of the term “a company owned by a foreign government” is limited to those companies that are majority-owned by a foreign government; and (3) the SEC determined that “a department, agency or instrumentality of a foreign government” did not clearly cover foreign subnational governments, and that an SEC rule was required to bring such entities within the scope of the definition of “foreign government.”

State-Owned Entities and “Foreign Government” Under the FCPA

The SEC has taken a very different approach to determining whether companies owned by foreign governments – that is, state-owned entities (“SOEs”) – fall within the definition of foreign government under the FCPA. The FCPA bribery prohibitions cover payments made to “foreign officials,” defined as:

[A]ny 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.²³

In light of the fact that the FCPA does not define “instrumentality,” one of the central questions that has arisen is whether foreign SOEs are covered by that term, and if so, in what circumstances. Complicating the issue is the fact that few courts have had the opportunity to review the SEC’s or DOJ’s approach to defining “instrumentality.” The DOJ and SEC both have long taken the view in specific cases that SOEs can constitute “instrumentalities” under the FCPA. Entities that the DOJ and SEC have asserted fall within the concept of “instrumentality” include hospitals, universities, joint ventures and consortia. District courts that have addressed the definitional issue recently have roundly rejected the argument that SOEs can never be instrumentalities, and have provided some case-specific guidance in the handful of prosecutions that have been actively litigated as to when entities may or may not be so classified.²⁴ In light of the fact that, according to one estimate, two-thirds of FCPA enforcement actions brought against corporations involve payments to employees of SOEs, it is hard to overestimate

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20. Final Rule at 227.

21. Final Rule at 101, n. 363.

22. Final Rule at 98-101. One commentator suggested that the Commission should look at “whether the government has provided working capital to the company, and whether the government has the ability to direct economic or policy decisions of the company, appoint or remove directors or management, restrict the composition of the board, or veto the decisions of the company” in determining whether a company falls within the definition of “foreign government.” *Id.*

23. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

24. See, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011) (“a state-owned corporation having the attributes of CFE [one of Mexico’s state-owned public utilities] may be an ‘instrumentality’ of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation ... may therefore be ‘foreign officials’ within the meaning of the FCPA”); *United States v. Carson*, 2011 WL 5101701, *5 (C.D. Cal. May 18, 2011) (“when a monetary investment [in a business entity by the government] is combined with additional factors that objectively indicate the entity is being used as an instrument to carry out governmental objectives, that business entity would qualify as a governmental instrumentality”); *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 2012 WL 2094029, *3 (W.D. Pa. June 11, 2012) (citing *Carson* and *Aguilar* with approval and holding “Alba is identified in the pleadings as owned by the Government of Bahrain ... [Q]uestions of fact exist as to whether employees, who are identified in the pleadings as agents and executives of that government-owned entity, constitute foreign officials within the meaning of the FCPA.”); *United States v. Esquenazi*, No. 1:09-cr-21010-JEM, Order at 3 (S.D. Fla. Nov. 19 2010), ECF No. 309 (“The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA’s definition of a foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government.”).

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the importance of the definition of “instrumentality” to the FCPA regime.²⁵

A key criterion for both the DOJ and SEC in determining whether an SOE is an “instrumentality” of a foreign government appears to be the extent of the government’s control over the entity. For example, the DOJ has cited with approval the following “relevant but nonexclusive” list of factors related to the “foreign official” issue that were provided in jury instructions in the Haiti Teleco criminal trials in the United States District Court for the Southern District of Florida: (i) whether the entity provides services to the citizens and inhabitants of the foreign country; (ii) the appointment of key officers and directors by government officials; (iii) the extent of the foreign government’s ownership of the entity (including whether the government provides financial support such as subsidies, special tax treatment, loans or revenue from government mandated fees); (iv) the entity’s obligations and privileges under the foreign legal regime; and (v) whether the entity is widely perceived and understood to be performing official or governmental functions.²⁶ Interestingly, the DOJ has clearly stated that state ownership of an entity is not, by itself, sufficient. Instead, the key to determining whether an SOE

falls within the definition of a foreign government is whether it exercises a “government function.”²⁷

The SEC has taken a similar control-in-fact approach in a number of enforcement actions. Moreover, a number of the enforcement actions pursued by the SEC have made clear that, for the purposes of the FCPA, majority ownership by the government is not necessary for an entity to qualify as an instrumentality employing foreign officials, if other factors point to the government’s control of the entity:

- Alcatel-Lucent. The SEC alleged that Alcatel paid bribes to employees of Telekom Malaysia (“TM”), which it described as “the Malaysian government-owned telecommunications company.” The Malaysian Ministry of Finance owned approximately 43% of TM’s shares, although it also had “veto power over all its major expenditures, and made its key operational decisions,” and was classified as a “special shareholder.” Further a number of TM officials were political appointees.²⁸ On the other hand, TM was “listed on Bursa Securities in 1990” and described itself as having “a large shareholder base.”²⁹
- Bonny Island. The SEC alleged that a number of companies paid bribes

to employees of Nigeria LNG, Ltd. (“Nigeria LNG”), an entity created by the government of Nigeria to capture and sell the natural gas associated with oil production in Nigeria. The SEC noted that “[a]t all relevant times, the Nigerian government owned 49% or more of Nigeria LNG,” that the government “exercised control over the company” through the directors that it appointed to the Board, and that “Nigerian employees of Nigeria LNG are detailed from the Nigerian Ministry of Petroleum Resources or the government-owned Nigerian National Petroleum Corp.”³⁰ The remaining 51% stake in Nigeria LNG was owned by a consortium of private multinational oil companies, including Shell, Total, and Eni.³¹

Reconciling the Definitions

FCPA reform proponents have long advocated a narrower definition of the term “instrumentality” that would exclude at least those SOEs in which the government owns no more than a minority interest.³² Congress’s use of the term “instrumentality” in Section 1504 in a manner that suggests that the term “instrumentality” is different from the term “company owned by a foreign government,”

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25. Andrew Weissman & Alixandra Smith, “Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act” at 26, U.S. Chamber Institute for Legal Reform (Oct. 2010), <http://www.instituteforlegalreform.com/doc/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act> (citing Mike Koehler, “The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence,” 43 IND. L. REV. 389, 412 (2010)) (evaluating prosecutions in 2009).

26. *United States v. Esquenazi*, No. 11-15331, Brief for the United States at 28, 47 (11th Cir. Aug. 21, 2012).

27. *Id.* at 47. See also OECD, “Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents” at 15 (2011), <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (“[A] ‘public enterprise’ is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.”). DOJ reiterated its “fact-intensive, case-by-case determination” approach to the foreign official issue in a recent Opinion Procedure Release. See DOJ Op. Rel. No 12-01, Foreign Corrupt Practices Act Review at 5 (Sept. 18, 2012).

28. *SEC v. Alcatel-Lucent, S.A.*, No. 1:10-cv-24620, Complaint at ¶¶ 55-56 (S.D. Fla. Dec. 27, 2010).

29. Mike Koehler, “Foreign Official Limbo ... How Low Can It Go?,” *FCPA Professor Blog* (Jan. 10, 2011), <http://www.fcprofessor.com/foreign-official-limbo-how-low-can-it-go> (quoting TM’s annual report).

30. See, e.g., *SEC v. Technip*, 10-cv-2289, Complaint at ¶ 9 (S. D. Tex. June 28, 2010).

31. Weissman and Smith, note 25, *supra* at 26.

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and the SEC's decision in the Final Rules to restrict "companies owned by a foreign government" to those companies in which the government holds a majority interest, will therefore both be of great interest to those seeking an administrative or judicial construction of the FCPA or, sparing that, legislative amendments, limiting the kinds of enforcement actions involving SOEs.

The challenge that those advocating a narrowing construction will face is to convince the enforcement agencies and, if necessary, the courts that separate references in Section 1504 to "instrumentalities" and "companies owned by foreign governments" demonstrate that SOEs are also excluded from the term "instrumentality" under the FCPA. Battle lines will be drawn around the applicability of the statutory canon of interpretation *expressio unius est exclusio alterius* and similar doctrines, and whether Section 1504 and the Final Rules can overturn decades of enforcement practice to require a new, stricter interpretation of the term "instrumentality" under the FCPA.

Expressio unius est exclusio alterius is a well-known canon of statutory interpretation that provides that "expressing one item of an associated group or series excludes another left unmentioned."³³ Relying on this principle, an argument can be made that SOEs are necessarily excluded from the definition of "instrumentality" under the FCPA: "department, agency, instrumentality, and company owned by a foreign government" are members of an "associated group," as demonstrated by

Section 1504. By leaving the last member of this group unmentioned in the FCPA, Congress meant to exclude "company owned by a foreign government" from the scope of that statute.

Under a similar iteration of this argument, Section 1504 demonstrates

“[T]he SEC’s decision in the Final Rules to restrict ‘companies owned by a foreign government’ to those companies in which the government holds a majority interest, will therefore be of great interest to those seeking an administrative or judicial construction of the FCPA.”

that Congress is conscious of the need to explicitly include SOEs within the definition of a foreign government when it wishes to do so, and it clearly did not do so in the FCPA. Indeed, in the appeal before the United States Court of Appeals for the Eleventh Circuit currently awaiting argument in *United States v. Esquenazi*, arising out the Haiti Teleco FCPA prosecution, one of the appellants points to the language of Section 1504 to argue:

The presence of such explicit definitions in ... Dodd-Frank regarding foreign-owned entities indicates that Congress knew how to include such language in the FCPA, but chose not to do so ... That absence of language in the FCPA's definition of "instrumentality" is significant and warrants construing "instrumentality" narrowly. Thus, state-owned or state-controlled entities that are not political subdivisions that perform governmental functions should not be grafted into the definition "instrumentality."³⁴

It remains to be seen whether the Eleventh Circuit will adopt this reasoning and exclude SOEs from the scope of the term "instrumentality" in light of Section 1504. District courts analyzing similar arguments under the FCPA generally have not been receptive. For example, in *United States v. Carson*, the defendants pointed to the Foreign Sovereign Immunities Act ("FSIA"), in which Congress defined "agency or instrumentality" to include state-owned enterprises, to argue that "Congress knows how to define the term 'instrumentality' as a function of government ownership of a business enterprise when it desires to do so" and "[b]ecause the FCPA does not expressly define 'instrumentality' to include state-owned companies ... the appropriate inference to be drawn is that Congress did not intend to capture state-owned companies."³⁵ The district court disagreed, finding *expressio unius* and similar principles

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32. For example, one of the proposals put forward by the U.S. Chamber of Commerce for modifying the FCPA is to include a clear definition "indicat[ing] the percentage ownership by a foreign government that will qualify a corporation as an 'instrumentality.'" *Id.* at 27.

33. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002).

34. *United States v. Esquenazi*, No. 11-15331-C, Corrected Brief of Appellant at 39-40 (11th Cir. May 31, 2012) (internal citations omitted).

35. *Carson*, 2011 WL 5101701 at *7.

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“apply only within the same statute. Such canons do not apply when comparing two different statutes, and Defendants do not cite any authority supporting their proposition.”³⁶

The DOJ and SEC will likely rely on the “strong presumption” that a statute adopted later in time does not impliedly repeal an earlier statute in defending their broad reading of the term “instrumentality” under the FCPA. The Supreme Court has “repeatedly stated . . . that absent a clearly established congressional intention, . . . repeals by implication are not favored.” Furthermore, “[a]n implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.” Otherwise, the presumption requires that effect is given to both the earlier and later statutes.³⁷ Defendants, on the other hand, can point to the fact that no *repeal* is necessary for SOE employees to be excluded from the definition of “foreign official” under the FCPA because there is no clear evidence that Congress intended SOEs to fall within the definition of “instrumentality” when the FCPA was enacted. Instead, Section 1504 and the Final Rules provide authoritative guidance as to the term “instrumentality,” requiring

the courts (and agencies) to read that term to exclude “companies owned by a foreign government.” Rather than seeking to repeal the FCPA itself, the goal is to repeal the enforcement agencies’ longstanding practice under the statute (which is not itself contained in any agency regulation or guidance).

Nevertheless, advocates for a narrower definition of “foreign official” must confront the cases that limit *expressio unius* to instances in which the relevant term appears within the same statute.³⁸ Indeed, the Supreme Court has noted that the presumption is at “its most vigorous when a term is repeated within a given sentence.”³⁹

A corollary, which government lawyers undoubtedly will appeal to, is that *expressio unius* is at its weakest when a party seeks to apply it across two different statutes enacted at two different points in time. Indeed, the Supreme Court has held that while Congress’s inclusion of language in one section of a statute and exclusion in another section of the same statute gives rise to a presumption “that Congress acts intentionally and purposely in the disparate inclusion or exclusion,” Congress’s use of “language in one statute usually sheds little light upon the meaning of different language in another statute, even when the two are enacted at or about the same

time.”⁴⁰ Further, “it is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”⁴¹ In this respect, the SEC and DOJ will surely point to the thirty-plus year gap between the adoption of the FCPA and Section 1504.

On the other hand, in other contexts courts have adopted a presumption that similar language in two separate statutes must have a similar meaning. The Supreme Court has held in the labor law context that there exists a “presumption that similar language in two labor law statutes has a similar meaning.”⁴² The D.C. Circuit, which supervises the district court in which many FCPA cases are filed, noted, in a situation in which Congress had used an “identical string” of words in two statutes, that it was “reasonable to assume that the legislature intended both strings to have the same operative meaning.”⁴³ The Supreme Court has also held in the securities law context that “Congress knew how to impose aiding and abetting liability when it chose to do so If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”⁴⁴ Proponents of the argument that the term “instrumentality” under Section 1504 and

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36. *Id.* (internal citations omitted). In fact, the court found that the FSIA’s definition of instrumentality supported the opposite inference: “The fact that Congress passed FSIA a year before the FCPA, and defined ‘instrumentality’ to include state-owned companies, ultimately supports the Court’s conclusion that an ‘instrumentality’ could include such entities under the FCPA.” The court also found “indisputably relevant” support in “[t]he fact that domestic, state-owned corporations have been considered ‘instrumentalities’ of the United States.” *Id.* at *6.

37. *Branch v. Smith*, 538 U.S. 254, 273 (2003) (internal citations and quotation marks omitted).

38. *Carson*, 2011 WL 5101701 at *7. See also *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (“there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”).

39. *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

40. *Russello v. United States*, 464 U.S. 16, 23-25 (1983).

41. *Id.* at 26 (internal quotations omitted).

42. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987). See also *Brown*, 513 U.S. at 118 (examining the use of the same term “in analogous statutes” to determine its meaning).

43. See *Miller v. Clinton*, No. 10-5405, Slip Op. at 28 (D.C. Cir. Aug. 7, 2012).

44. *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-177 (1994) (internal citations omitted). See also *Whitfield v. United States*, 543 U.S. 209, 216 (2005) (“Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.”).

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the Final Rules, on the one hand, and the FCPA, on the other, must have a similar meaning that excludes SOEs from the latter's scope, will look to these precedents as bases to defeat arguments that the *expressio unius* presumption is inapplicable in this setting.

Given the complexity of the statutory interpretation questions presented, the ultimate outcome could depend significantly on “tie-breaker” arguments that focus on the very specific contexts in which the two statutes – the FCPA on the one hand and Dodd-Frank on the other – were enacted. For example, Section 1504 and the FCPA have avowedly similar purposes, have similar key features (particularly with respect to disclosure), and can be forcefully argued to have been enacted in the same context, *i.e.* both constitute anti-corruption legislation.⁴⁵ As the Supreme Court held in *Barnhart v. Peabody Coal Co.*, “the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”⁴⁶ This “associated group or series” argument could well be deployed to contend that the similar subjects of Section 1504 and the FCPA warrant applying the *expressio unius* principle to limit a broad interpretation of “foreign government” and “foreign official” under the FCPA.

Seen in this light, the notion that the United States's relations with foreign government-owned entities should be governed by an interpretive principle that assigns Congress a clear responsibility for stating explicitly when it wishes to have a “company owned by a foreign government” included within a field of Executive Branch regulation (including one that has criminal law ramifications) has great intuitive appeal and compelling logic. This is particularly true given that each of the statutes historically at issue, *i.e.*, the FSIA, the FCPA, and, now, Dodd-Frank, have significant extraterritorial implications, thus triggering the overarching clear-statement requirements of the presumption against extraterritorial application.⁴⁷

Conclusion

The separate references to “instrumentality” and “company owned by a foreign government” in Section 1504, and the adoption of a “majority ownership” test in the Final Rules, have certainly provided ammunition in the fight against a broad definition of “instrumentality” in the context of FCPA enforcement. Not unexpectedly, attempts by defendants to rely on Section 1504 in the FCPA realm have met resistance from the government.⁴⁸ But Congress's definition in Section 1504 of “foreign government” and the SEC's reliance on the concept of “majority ownership” will make some of the agency's

broader assertions of jurisdiction under the FCPA more open to challenge.

Unfortunately, companies and individuals can ill-afford to be on the wrong side of this complex legal issue, wherever the right answer lies. This is particularly so given that, in the absence of Executive branch or congressional intervention, it may be years before definitive guidance is provided by the federal judiciary, including the United States Supreme Court. Barring unforeseen changes in the DOJ's forthcoming guidance related to FCPA enforcement (and the distinct possibility the SEC might depart in civil cases from what the DOJ does in the criminal law realm), companies and individuals subject to the FCPA will remain well-advised to take a conservative approach to this topic.

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45. See notes 4-5, *supra*.

46. 537 U.S. 149, 168 (2003). See also *Chevron U.S.A. Inc.*, 536 U.S. at 82-83 (“The rule [*expressio unius est exclusio alterius*] is fine when it applies, but this case joins some others in showing when it does not The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.”). In that case, the Court rejected the application of the canon where it “would be a stretch” to say that standard usage connected the terms in question. *Id.*

47. See *Morrison v. Australian National Bank*, 130 S.Ct. 2869 (2010). The Supreme Court will potentially be issuing significant guidance as to the scope, requirements and impact of the presumption against extraterritorial application in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (S. Ct. reargued Oct. 1, 2012).

48. *United States v. Esquenazi*, No. 11-15331, Brief for the United States at 34-35, n. 10 (11th Cir. Aug. 21, 2012) (“Section 78m(q)(1)(B)'s definition of ‘foreign government,’ enacted more than 30 years after the FCPA and in a very specific and unrelated context, has no bearing on the meaning of instrumentality in the FCPA.”).

Transparency International Progress Report Finds That Global Anti-Bribery Enforcement “Remains Inadequate”

Despite the tremendous publicity surrounding global anti-bribery enforcement efforts, including the advent of the U.K.’s Bribery Act and additional substantial fines in the United States and other countries, Transparency International’s (“TI’s”) latest Progress Report on global enforcement of the Organization for Economic Cooperation and Development’s (“OECD’s”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”) finds that enforcement “remains inadequate.”¹ According to the Progress Report, in most countries that subscribe to the Convention, enforcement is not even at a level that provides a “credible deterrent” to foreign bribery.²

Only seven of the 39 countries that subscribe to the Convention engage in active enforcement, according to TI,³ a number that has not changed in the past three years.⁴ Those seven countries account for only 28 percent of the world’s exports.⁵ Only when active enforcement is taking place in countries accounting for more than half of global exports will TI view the prospects for conquering global corruption as “favorable.”⁶ That, according to the Progress Report, would require an additional six to ten countries actively to enforce their legislation implementing the Convention.⁷

As of the end of 2011, TI says that a total of 708 anti-bribery cases⁸ have been brought in member countries since the inception of the Convention.⁹ This figure

represents an increase of 144 cases since year-end 2010.¹⁰ Of those 144 additional cases, the report indicated that 127 of them were brought in the seven active enforcement countries of the United States, Germany, the United Kingdom, Italy, Switzerland, Norway and Denmark.¹¹ The United States, Germany and United Kingdom alone accounted for 95 of those new cases, including 48 in the United States, 41 in Germany and 6 in the United Kingdom.¹²

The Report also indicated that 286 anti-bribery investigations were underway worldwide during 2011, with 203 of those in the seven active enforcement jurisdictions.¹³ Again, the United States, Germany and United Kingdom lead the way with 113, 43, and 29 active

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1. See Transparency International, “Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012” at 6, http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_conventio [hereinafter “TI 2012 Progress Report”].

2. *Id.*

3. The Progress Report defines “active enforcement” countries as those with a two percent or greater share of world exports that brought at least ten major cases, of which at least three must have been initiated in the last three years and at least three concluded with substantial sanctions, or those countries with a less than two percent share of world exports that brought at least three major cases, including at least one concluded with substantial sanctions and at least one pending case initiated in the previous three years. *Id.* at 5.

4. *Id.* at 6. See also Transparency International, “Enforcement of the OECD Anti-Bribery Convention Progress Report 2011” at 5, http://www.transparency.org/whatwedo/pub/progress_report_2011_enforcement_of_the_oecd_anti_bribery_convention [hereinafter “TI 2011 Progress Report”]; Transparency International, Enforcement of the OECD Anti-Bribery Convention Progress Report 2010 at 8, http://www.transparency.org/whatwedo/pub/progress_report_2010_enforcement_of_the_oecd_anti_bribery_convention.

5. TI 2012 Progress Report, note 1, *supra* at 7.

6. *Id.* at 6.

7. *Id.*

8. The Progress report defines a “case” to include criminal prosecutions, civil actions, and investigations conducted by investigating magistrates in civil law systems. *Id.* at 5.

9. *Id.* at 9.

10. *Id.*; TI 2011 Progress Report, note 4, *supra* at 8.

11. TI 2012 Progress Report, note 1, *supra* at 6.

12. *Id.*

13. *Id.* at 9.

TI Progress Report ■ Continued from page 9

investigations respectively, for a total of 185 of the active investigations across the globe – nearly 65 percent of the world total.¹⁴

The Progress Report decried the concentration of enforcement effort in only a handful of countries, noting, “[a]t a time when most OECD countries are beset by the global recession, it has become more difficult to get political leaders to provide strong support to combating foreign bribery.”¹⁵ The Report urged member countries to “reject arguments” that bribery is necessary to “winning foreign orders” as “short-sighted.”¹⁶ The Report worried that such arguments could give rise to a “competitive race to the bottom.”¹⁷ The Progress Report also urged member countries to “maintain[] adequate funding” for anti-bribery enforcement, despite the “pressure” on such funding during recessionary times.¹⁸

From the standpoint of anti-bribery enforcement, the Progress Report highlighted a handful of “positive changes,” including increased levels of enforcement

activities in Australia, Austria and Canada, and the accession of Russia to the Convention in 2011.¹⁹ The Progress Report noted, however, that Russia still

“The Progress Report confirmed that the bulk of anti-bribery enforcement worldwide takes place in just two countries: the United States and Germany”

needs to take prompt and effective action to implement its anti-bribery law.²⁰ The Progress Report also noted that four G20 member countries still have not joined the Convention: China, India, Indonesia and Saudi Arabia.²¹

The Progress Report, which TI publishes annually, is described as an

“independent assessment” of OECD Convention enforcement levels in 37 of the 39 signatory countries for the year ended 2011.²² The Report’s conclusions were based upon information provided by national experts in each reporting country, and take into account the views of government officials and other knowledgeable persons, as well as reports from the OECD Working Group on Bribery and other official review reports.²³

The Progress Report confirmed that the bulk of anti-bribery enforcement worldwide takes place in just two countries: the United States and Germany. Those two countries account for 451 of the 708 cases brought since the inception of the Convention and for 156 of the 286 active investigations in 2011.²⁴ Despite the advent of the Bribery Act, the United Kingdom lagged far behind. According to the Progress Report, both Switzerland and Italy started more anti-bribery cases in 2011 than the United Kingdom.²⁵

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14. *Id.*

15. *Id.* at 7.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 6.

20. *Id.* at 8.

21. *Id.* at 7. China recently has gained publicity for adopting legislation targeting bribery of foreign officials. *See* PRC Criminal Law Art. 164. Mexico and Russia also have taken recent steps in the direction of added enforcement. *See* Federal Law Against Corruption in Public Procurement (June 11, 2012) (Mex.), <http://www.diputados.gob.mx/LeyesBiblio/doc/LFACP.doc>; “Executive Order on National Anti-Corruption Plan for 2012–2013: “Executive Order on National Anti-Corruption Plan for 2012–2013” (Mar. 13, 2012), <http://eng.kremlin.ru/news/3539>.

22. TI 2012 Progress Report, note 1, *supra* at 4, 5. The Report does not include Russia, which only acceded to the OECD Anti-Bribery Convention in 2011, and Iceland, where TI does not have a national chapter. *Id.* at 5, n.1.

23. *Id.* at 5.

24. *Id.* at 9.

25. *Id.*

TI Progress Report ■ Continued from page 10

Other OECD signatory countries deemed by TI to have engaged in moderate enforcement of the Convention have lagged even farther behind the United States and Germany.²⁶ Japan, the largest exporter in this group, initiated just two cases and three investigations in 2011,²⁷ prompting TI to comment that “Japan still does not appear to be actively enforcing its bribery ‘offence.’”²⁸ Other important world economies deemed to have moderate enforcement included France, whose prosecutors, TI noted, brought cases at an “extremely slow” rate;²⁹ South Korea, which brought no new cases or investigations in 2011;³⁰ and Canada, which brought one new case and had 34 ongoing investigations in 2011.³¹

TI also found that almost half of the countries examined, representing 10 percent of 2011 exports worldwide, had engaged in little to no enforcement of the Convention.³² These countries included some of the United States’s largest trading partners, such as Brazil, which had no enforcement activity in 2011, and Mexico, which brought no new cases and has only two ongoing investigations.³³

TI acknowledged that anti-bribery enforcement had improved since 2010, when TI’s Progress Report concluded that

“no overall progress” had been made.³⁴ But the Progress Report also expressed concern about what it termed “significant resistance” from the private sector and Congress to United States enforcement efforts and “recent cutbacks” in the United Kingdom that could “reduce resources and downgrade the priority attached to foreign bribery.”³⁵ The Progress Report urged Convention subscribers to resist efforts to relax enforcement and to provide adequate funding to enforcement efforts.³⁶

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26. “Moderate Enforcement” countries were those that did not qualify for Active Enforcement, but had at least one major case as well as one active investigation. *Id.* at 5.

27. *Id.* at 9.

28. *Id.* at 8.

29. *Id.* at 8, 9.

30. *Id.* at 9.

31. *Id.*

32. *Id.* “Little Enforcement” countries were those that did not qualify for the two higher categories and included countries that brought only minor cases and those that initiated only investigations. *Id.* at 5. “No Enforcement” countries were those that had not initiated any cases or investigations. *Id.*

33. See *id.* at 9; U.S. Census Bureau, “Top Trading Partners – Total Trade, Exports, Imports” (Dec. 2011), <http://www.census.gov/foreign-trade/statistics/highlights/top/top1112yr.html> (as of year-end 2011, Mexico was ranked third and Brazil was ranked eighth in total trade with the United States).

34. See TI 2012 Progress Report, note 1, *supra* at 6; TI 2011 Progress Report, note 4, *supra* at 5.

35. TI 2012 Progress Report, note 1, *supra* at 37, 38.

36. *Id.* at 7.

U.K. Serious Fraud Office Issues New Bribery Act Policies

The United Kingdom's Serious Fraud Office (the "SFO") has announced changes to its policies and guidance concerning its enforcement of the U.K. Bribery Act 2010. The new policies, which came into force on October 9, 2012, mark a change in the SFO's approach toward corporate self reporting and settlement of corruption offenses, and clarify the agency's positions on facilitation payments and business expenditures (hospitality and gifts).

The SFO explained that the policy revisions were intended to:

1. restate the SFO's primary role as an investigator and prosecutor of serious or complex fraud, including corruption;
2. ensure there is consistency with other prosecuting bodies; and
3. meet certain OECD [Organization for Economic Cooperation and Development] recommendations."¹

Emphasizing that the SFO is first and foremost a prosecutorial body, the new policies indicate that the agency will base decisions whether to prosecute companies on the application of the Full Code Test in the Code for Crown Prosecutors, as well as the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010 ("Joint Bribery Act Guidance")² and the Joint Guidance on Corporate Prosecutions.³ The Full Code Test requires that there must be "sufficient evidence to provide a realistic prospect of conviction" and "a prosecution [must be] required in the public interest."⁴

• **Self Reporting.** Restating the Full Code Test, the SFO's new policy statement on corporate self reporting states: "If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so."⁵ While noting that, under the Joint Guidance

on Corporate Prosecutions, a self-report may "be taken into consideration as a public interest factor tending against prosecution [if it] form[s] part of a 'genuinely proactive approach adopted by the corporate management team when the offending [conduct] is brought to their notice,'" and although the SFO restates that it "encourages" corporate self-reporting, the new policy makes clear that "[s]elf-reporting is no guarantee that a prosecution will not follow."⁶

- The new policy replaces the SFO's July 2009 guidance titled "The Serious Fraud Office's Approach To Dealing With Overseas Corruption" (the "Approach"),⁷ which explicitly encouraged businesses to self-report as a route to civil outcomes. In fact, the Approach indicated an express desire "to settle self referral cases . . . civilly wherever possible."⁸ Stepping away from that prior policy, the SFO's website confirms that "[t]he revised policies make

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1. SFO Press Rel., Revised Policies (Oct. 9, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>.

2. The Joint Bribery Act Guidance was released on March 30, 2011 alongside separate Bribery Act Guidance issued by the Ministry of Justice in advance of the Bribery Act becoming effective on July 1, 2011. Serious Fraud Office & Crown Prosecution Service, Bribery Act 2010: Joint Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions (Mar. 2011), http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf; Ministry of Justice, The Bribery Act 2010: Guidance (March 2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [hereinafter "Joint Bribery Act Guidance"].

3. See Serious Fraud Office, "The Bribery Act: Questions and Answers" (last visited Oct. 18, 2012), <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx> [hereinafter, "SFO Q&A"].

4. Code for Crown Prosecutors, 2010, ¶¶ 4.1, 4.5, 4.11.

5. Serious Fraud Office, "Self Reporting Corruption" (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery--corruption/self-reporting-corruption.aspx> [hereinafter, "SFO Self Reporting Corruption"].

6. *Id.*

7. Serious Fraud Office, "The Serious Fraud Office's Approach To Dealing With Overseas Corruption" (July 2009) [Hereinafter, "SFO Approach"]. Note that the reference to the *Approach* has been removed from the Joint Bribery Act Guidance.

8. *Id.* at ¶ 5.

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it clear that there will be no presumption in favor of civil settlements in any circumstances.⁹ However, the SFO states that, in appropriate circumstances, it will continue to use its civil recovery powers under the Proceeds of Crime Act 2002 (“POCA”), either as an alternative or in addition to criminal prosecution.¹⁰

The new policy also indicates that, when the SFO does enter into civil settlements with corporate entities, those entities can no longer expect the details of the settlements to remain confidential. The Approach had assured self-reporting corporate entities some degree of confidentiality in their communications with the SFO and indicated that the parties would work together on any public statements relating to settlements.¹¹ The new policy, however, states: “If the SFO uses its [civil recovery] powers under the proceeds of crime legislation, it will publish its reasons, the details of the illegal conduct and the details of the disposal.”¹² This change appears to have been made, at least in part, in response to a report issued earlier this year by the

OECD Working Group on Bribery, which criticized the lack of transparency in the SFO’s civil settlements.¹³

Importantly, and in addition to its policy change regarding the reporting of past improper conduct, the SFO has signaled a reduced willingness to discuss

“The new policy also indicates that, when the SFO does enter into civil settlements with corporate entities, those entities can no longer expect the details of the settlements to remain confidential.”

prospective conduct with businesses. The agency stated, “[i]t is not the role of the SFO to provide corporate bodies with advice on their future conduct.”¹⁴

- **Facilitation Payments.** The new policy regarding facilitation payments emphasizes that the SFO’s prosecutorial decisions regarding the Bribery Act will be governed by the Full Code Test, the Joint Bribery Act Guidance and the Joint Guidance on Corporate Prosecutions.¹⁵ This policy replaces prior indications from the SFO that businesses may be shielded from prosecution for facilitation payments so long as: (1) they had issued a clear policy regarding such payments; (2) they had written guidance available to employees on the procedures for handling requests for such payments; (3) employees followed those procedures; (4) evidence existed that the company accurately recorded all such payments; (5) evidence existed that proper action was taken to inform the appropriate authorities in the countries concerned that such payments were being demanded; and (6) the business was taking what practical steps it could to curtail the making of such payments.¹⁶ Although some of these considerations are identified in the Joint Bribery Act Guidance as public interest

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9. SFO Q&A.

10. SFO Self Reporting Corruption.

11. SFO Approach at ¶¶ 9, 10, 15.

12. SFO Self Reporting Corruption.

13. OECD, Phase 3 Report on implementing the OECD Anti-bribery Convention in the United Kingdom at 5 (Mar. 2012), <http://www.oecd.org/dataoecd/52/19/50026751.pdf>. A recent example of the SFO’s move toward greater transparency when settling matters through POCA civil recovery orders can be found in the Oxford Publishing Ltd. settlement, which was the subject of an article in the July 2012 issue of *FCPA Update*. SFO Press Rel., Oxford Publishing Ltd to pay almost £1.9 million as settlement after admitting unlawful conduct in its East African operations (July 3, 2012), <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx>; K. Seeger, M. Getz & M. Howe, “UKBA Update: The SFO’s Latest Bribery-Related Settlement,” *FCPA Update*, Vol. 3, No. 12 (July 2012), http://www.debevoise.com/files/Publication/b3766732-ab24-44f7-bc43-b5cc2a308754/Presentation/PublicationAttachment/f3ff1ae9-fe3d-4921-8770-df94fdc1a12e/FCPA_Update_July_2012.pdf.

14. SFO Q&A.

15. Serious Fraud Office, “The Bribery Act: Facilitation Payments” (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx>.

16. See Barry Vitou & Richard Kovalevsky QC, “Facilitation Payments After July 1st: A Six Step Solution,” *The Bribery Act.com* (June 9, 2011), <http://thebriberyact.com/2011/06/09/exclusive-facilitation-payments-after-july-1st-a-six-step-solution/>.

New Bribery Act Policies ■ Continued from page 13

factors tending against prosecution, the SFO's new policy clarifies that they do not represent exemptions to prosecution. The new policy states: "Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency."¹⁸ There has not yet been a prosecution in the United Kingdom for facilitation payments.

- **Business Expenditures.** In line with the other revisions, the new policy on business expenditures states that prosecutorial decisions with respect to bribes disguised as hospitality expenses will be based on the Full Code Test, the Joint Bribery Act Guidance and the Joint Guidance on Corporate Prosecutions. The policy provides reassurance, however, that "[b]ona fide hospitality or promotional or other legitimate business expenditure is recognized as an established and important part of doing business," which echoes the discussion of such payments in the Joint Bribery Act Guidance.²⁰

The SFO's policy revisions further heighten the need for businesses to ensure that they have effective anti-corruption

compliance programs in place to prevent violations of the Bribery Act. The new policies also reinforce the importance of careful consideration with counsel about how appropriately to address violations when they are detected.

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17. Joint Bribery Act Guidance, at 8-9.

18. Serious Fraud Office, "The Bribery Act: Facilitation Payments," note 15, *supra*.

19. Serious Fraud Office, "The Bribery Act: Business Expenditures" (Oct. 9, 2012), <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/business-expenditure.aspx>.

20. Compare *id.* with Joint Bribery Act Guidance at 10, note 2, *supra*.

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Matthew Howard Getz

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Lord Goldsmith QC

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Frederick T. Davis

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Karolos Seeger
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American Conference Institute
Gaylord National Resort and Convention Center, Washington, D.C.
More information:
<http://www.FCPAConference.com>

December 4-5, 2012

Philip Rohlik

“The Anatomy of a Multi-Jurisdictional Corruption Investigation”
Singapore Summit on Anti-Corruption Compliance and Risk Management
American Conference Institute
Singapore
More information:
<http://www.americanconference.com/singaporeanticorruption>

January 29-30, 2012

Karolos Seeger

“How Approaches to Compliance with the UK Bribery Act Have Evolved Within Leading Multinational Companies Two Years On”
Advanced European Forum on Anti-Corruption
C5
Frankfurt
More information:
<http://www.c5-online.com/home>