DEBEVOISE & PLIMPTON LLP

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The Government's $48 Million ATM Withdrawal: Is it Time to Start Sweating Again?

On October 22nd, Diebold, Inc., an Ohio manufacturer of ATMs and bank security systems that is listed on the NYSE entered into a deferred prosecution agreement with the U.S. Department of Justice ("DOJ")[1] and a settlement with the U.S. Securities and Exchange Commission ("SEC"),[2] agreeing to a $25.2 million fine and an 18-month monitorship as part of its deferred prosecution agreement and $22.9 million in disgorgement and prejudgment interest as part of its SEC settlement.

The Information and the Complaint alleged that Diebold conferred approximately $1.75 million in improper travel, entertainment and gifts upon "foreign officials" between 2005 and 2010 in China and Indonesia and an additional approximately $1.2 million in bribes to private persons in Russia and the Ukraine during the same period, in violation of the FCPA's books and records and internal controls provisions.[3]

Although there are significant aggravating factors that might explain imposing $48 million in penalties and disgorgement on a company that voluntarily disclosed what are, unfortunately, common improprieties in China, combined with wholly unrelated commercial bribery in Russia, the size of the financial resolution – apart from the substantial burdens of the monitorship – raises questions about future enforcement of the FCPA, as well as the incentives for companies to self-report.

The first noteworthy aspect of this resolution is the enforcement agencies' decision to use the books and records and internal controls provisions as a vehicle for obtaining monetary relief penalizing purely commercial bribery (40% of the improper payments at issue). While not entirely novel or outside the theoretical reach of those provisions, were the enforcement agencies routinely to investigate issuers in connection with commercial bribery abroad, the "risk-based" calculus of almost all corporate compliance programs would potentially need to be rebalanced.

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1. *United States v. Diebold, Inc.*, No. 5:13CR464, Deferred Prosecution Agreement (N.D. Ohio 2013) [hereafter Deferred Prosecution Agreement].
2. SEC Press Rel. 2013-225, SEC Charges Diebold With FCPA Violations (Oct. 22, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273.
3. *United States v. Diebold, Inc.*, No. 5:13CR464, Information (N.D. Ohio 2013) [hereafter DOJ Information]; *SEC v. Diebold, Inc.*, Complaint (D.D.C. 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273 [hereafter SEC Complaint].

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Second, the total financial aspect of the resolution was 16 times the total value of alleged improper payments. In describing the improper payments, the enforcement agencies aggregated a number of often small payments over five years. When considered alongside the Ralph Lauren enforcement action from earlier this year, the Diebold enforcement action, and in particular its imposition of a monitor, long-considered one of the most burdensome aspects of FCPA settlements, could call into question one common view of the statements relating to gifts and corrupt intent in the November 2012 DOJ/SEC joint Resource Guide to the U.S. Foreign Corrupt Practices Act: namely, that FCPA-covered companies should not "sweat the small stuff."[4]

Use of the FCPA to Punish Commercial Bribery

Both the DOJ Information and the SEC Complaint are clear that the alleged improper payments made by Diebold business units in Russia involved purely private banks.[5] Both charge Diebold with violating the books and records provisions of the FCPA in connection with these payments, and the SEC alleged, as well, violations of the internal controls provisions of the statute.[6]

According to the DOJ's Information, Diebold is alleged to have created false contracts with a distributor ("Distributor 2") that paid bribes to Diebold's private bank customers. There is no allegation that Diebold senior executives were aware of the illicit payments.[7] During due diligence relating to the possible acquisition of a another distributor ("Distributor 1"), a "director of Corporate Development," whose duties included "performing due diligence in connection with acquisitions," informed a "high level executive" responsible for "overseeing and approving due diligence efforts" that Distributor 1 paid bribes and that "given what I know of the region," Distributor 2 was also a risk.[8] Diebold did not go forward with the acquisition of Distributor 1,[9] but, despite being on notice of problems with commercial bribery by distributors, Diebold apparently failed to make any improvements to its controls relating to its business with Distributor 2.[10]

The Diebold resolution is not the first time the SEC has used the FCPA's books and records and internal controls provisions to attack commercial bribery.[11] In a 2006 enforcement action against Schnitzer Steel, the SEC charged Schnitzer with paying bribes

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4. *See, e.g.*, Mark Friedman, *DOJ to Industry: Don't Sweat the Small Stuff*, FCPA BLOG, (Nov. 19, 2012, 6:08 AM), http://www.fcpablog.com/blog/2012/11/19/doj-to-industry-dont-sweat-the-small-stuff.html; Alexandra Theodore, *"Don't sweat the small stuff" in FCPA Investigations, says Deloitte*, ETHIKOS, (Nov. 20, 2012), http://www.ethikospublication.com/html/newsarchive.html.
5. DOJ Information, note 3, *supra* at ¶ 17; SEC Complaint, note 3, *supra* at ¶ 3.
6. DOJ Information, note 3, *supra* at ¶¶ 45-46; SEC Complaint, note 3, *supra* at ¶¶ 38-40.
7. DOJ Information, note 3, *supra* at ¶ 18.
8. *Id.* at ¶¶ 5, 8, 19-21.
9. SEC Complaint, note 3, *supra* at ¶ 33.
10. *Id.* at ¶¶ 32-33; DOJ Information, note 3, *supra* at ¶¶ 17-22.
11. The DOJ has also used the Travel Act, 18 U.S.C. § 1952, to proceed against commercial bribery in the context of an FCPA investigation. *See United States v. Control Components, Inc.*, No. SACR-0900162, Information (C.D. Cal. 2009).

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

Moscow
+7 495 956 3858

London
+44 20 7786 9000

Hong Kong
+852 2160 9800

Paris
+33 1 40 73 12 12

Shanghai
+86 21 5047 1800

Frankfurt
+49 69 2097 5000

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Steven S. Michaels
Executive Editor
+1 212 909 7265
ssmichaels@debevoise.com

Erich O. Grosz
Co-Managing Editor
+1 212 909 6808
eogrosz@debevoise.com

Philip Rohlik
Co-Managing Editor
+852 2160 9856
prohlik@debevoise.com

Erin W. Sheehy
Co-Managing Editor
+1 202 383 8035
ewsheehy@debevoise.com

Noelle Duarte Grohmann
Co-Deputy Managing Editor
+1 212 909 6551
ndgrohmann@debevoise.com

Jane Shvets
Co-Deputy Managing Editor
+1 212 909 6573
jshvets@debevoise.com

James H. Graham
Assistant Editor
+1 212 909 6526
jhgraham@debevoise.com

Samantha J. Rowe
Assistant Editor
+1 212 909 6661
sjrowe@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

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to employees of state-owned steel mills in China (in violation of the anti-bribery and books and records provisions of the FCPA) and with making similar payments to privately-owned mills in China and South Korea.[12] The DOJ also charged the case under the U.S. wire fraud statute.[13] The Schnitzer Steel action appears to have involved some of the same subsidiaries paying public and commercial bribes in the same country or region and both types of bribery were penalized.

Unlike Schnitzer Steel, Diebold's business in Russia does not appear to have had any connection to its business in China. While one could infer that the Russia-focused accounting provisions charges simply reflected a way to bring a case related to the matters in Russia that apparently first caused Diebold's internal compliance function to take notice before self-reporting,[14] a key takeaway is that the Diebold case potentially reflects a renewed interest by the U.S. government in commercial bribery. It has long been understood that the FCPA's internal controls and books and records provisions provide a form of strict liability related to control and accounting failures that go beyond the substance of anti-bribery violations. Nevertheless, the focus of the enforcement agencies on the failure of a "senior executive" to react to notice of potential commercial bribery is potentially a wake up call to compliance professionals used to focusing on risks under the anti-bribery provisions of the FCPA with the attendant focus on an FCPA-covered company's interactions with public officials.

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Time (Again) to Sweat the Small Stuff?

The Information and the Complaint also allege facts common to numerous FCPA enforcement actions in China and Indonesia. There are no allegations of suitcases full of cash, no allegations of elaborate uses of third parties and no allegations of particularly large bribes going to specific foreign officials. The facts alleged by the government relate entirely to gifts, entertainment and travel.

In China, Diebold is alleged to have "lavished"[15] $1.6 million in gifts, entertainment and travel over a five-year period on employees of at least two Chinese banks, asserted to be instrumentalities of the People's Republic of China.[16] Leisure travel, improperly recorded as "trainings," involved trips to tourist destinations in Australia, New Zealand, North America, Europe and Asia.[17] According to the DOJ Information, it appears that senior regional executives attempted to hide the purpose of at least one trip when queried about it by auditors.[18] Similar trips, valued at approximately $175,000 over five years (*i.e.*, an average of $35,000 per year) were provided to employees of Indonesian banks.

Diebold also provided gifts to employees of Chinese banks. The DOJ Information

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12. *See In re. Schnitzer Steel Indus., Inc.*, No. 3-12456, Order Instituting Cease-and-Desist Proceedings (SEC 2006), ¶¶ 1, 4, 11.
13. *United States v. SSI Int'l Far East, Ltd.*, No CV'06-398, Information (D. Or. 2006), ¶¶ 15-19.
14. *See* Diebold, Inc. 10-Q at 15 (Apr. 30, 2012). Further complicating an analysis of the Diebold case is DOJ's allegation that Diebold's distributors in Russia were "agents" under the anti-bribery provisions of the FCPA. DOJ Information, note 3, *supra* at ¶¶ 9-10. This is confusing because liability for the actions of agents relates to the anti-bribery provisions of the FCPA (which cannot be violated in the absence of a "foreign official"), but the DOJ charged Diebold with books and records violations instead.
15. SEC Complaint, note 3, *supra* at ¶ 1.
16. *See* DOJ Information, note 3, *supra* at ¶¶ 11-12 (the banks were "controlled and 70% owned by the People's Republic of China … [two of] several state-owned banks in the People's Republic of China that together maintained a monopoly over the banking system in the People's Republic of China and provided core support for the government's projects and economic goals.") The DOJ does not provide support for this allegation; nor does it explain why these facts make the banks "instrumentalities" under the FCPA, how "several" separate banks can form a monopoly or (most interestingly) why it used the past tense to describe that monopoly.
17. SEC Complaint, note 3, *supra* at ¶¶ 16-23.
18. DOJ Information, note 3, *supra* at ¶¶ 41-42.

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quotes extensively from internal emails describing cash gifts provided at Chinese Spring Festival (Chinese New Year) as "a big expense" and "the total amount is huge,"[19] but the total amounts listed are RMB 27,500 for 12 bank employees in 2005 and RMB 55,000 for 26 bank employees in 2006.[20] Although these figures are not converted into dollars in the Information, at the relevant then-prevailing rates, these amounts are approximately $3,300 for 2005 (or an average of $271 per person) and $6,840 for 2006 (or an average of $263 per person). Each employee apparently did not receive the same amount, as the SEC Complaint describes "cash gifts ranging from less than $100 to over $600 that were given to dozens of officials annually."[21]

> "Neither enforcement agency attempts to explain how a gift of less than $100 to an employee who lacks the ability to influence purchasing decisions meets the 'obtaining or retaining business' element of the offense."

According to the SEC, "[m]any of the government bank employees who received these alleged leisure trips and improper gifts were senior officials who had the ability to influence purchasing decisions by the banks."[22] The use of the word "many" suggests that at least a significant number of employees to whom benefits were provided were not in a position to influence purchasing decisions. The charges are also a reminder that the U.S. enforcement agencies consider all employees (regardless of level) of state-owned enterprises to be "foreign officials" for the purpose of the FCPA. It is unclear whether the gifts described in the Complaint and the Information are alleged to have violated the anti-bribery provisions of the FCPA (or conspiracy to violate the same) or the books and records provisions.[23] Neither enforcement agency attempts to explain how a gift of less than $100 to an employee who lacks the ability to influence purchasing decisions meets the "obtaining or retaining business" element of the offense.

The settled criminal law fine portion of the Diebold financial resolution ($25.2 million) took into account the company's voluntary disclosure and cooperation and was approximately 50% of the DOJ's calculation of the otherwise applicable fine under the United States Sentencing Guidelines ($36 vs. $72 million).[24] The size of the total financial resolution ($48 million), however, is notable in relation to the relatively small amount ($3 million) of alleged improper payments. This disparity is potentially attributable to: (1) the involvement of (relatively) senior regional executives, (2) possible deliberate misleading of auditors, (3) notice (from foreign actions[25] or due diligence) to the company regarding the improper activities and (4) the fact that Diebold had previously been enjoined from violating the securities laws as part of a 2010 accounting fraud settlement with the SEC.[26]

Whatever the explanation, the Diebold enforcement actions revive the pre-guidance confusion about the government's enforcement priorities and raise significant questions about the value of voluntary disclosure. The confusion, arising from repeated charges related to relatively small expenditures, including, even, $500 for four pairs of shoes provided as gifts to Chinese officials,[27] was part of the background of frustration with the government's enforcement of the FCPA

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19. *Id.* at ¶¶ 32, 36.
20. *Id.* at ¶ 37.
21. SEC Complaint, note 3, *supra* at ¶ 24.
22. *Id.* at ¶ 25.
23. It would appear that the DOJ conspiracy count relates primarily to the anti-bribery provisions as separate paragraphs deal with the attempts to mislead auditors and the falsifying of books and records. DOJ Information, note 3, *supra* at ¶ 24.
24. Deferred Prosecution Agreement, note 1, *supra* at ¶¶ 6-7.
25. *See* SEC Complaint, note 3, *supra* at¶ 28. Diebold was investigated and fined by a provincial Administration of Industry and Commerce (the entity responsible for enforcing anti-kickback and commercial bribery prohibitions in China's Anti-Unfair Competition Law). The investigation involved gifts and travel provided to bank employees and was settled for RMB 600,000 (about $80,000 at the time).
26. SEC Litig. Rel. 21543, SEC Charges Diebold and Former Financial Executives with Accounting Fraud (June 2, 2010), http://www.sec.gov/litigation/litreleases/2010/lr21543.htm.
27. SEC Litig. Rel. 21156, SEC Files Settled Charges Against Avery Dennison Corporation for Violating the Books and Records and Internal Controls Provisions of the Foreign Corrupt Practices Act, http://www.sec.gov/litigation/litreleases/2009/lr21156.htm.

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that led to publication of the joint DOJ/SEC Resource Guide.[28] It has been commonly thought that the Resource Guide's distinctions between "expensive gifts" and "token[s] of esteem or gratitude"[29] signified at least an implicit recognition by U.S. enforcement agencies that compliance resources would be better allocated to topics other than gifts valued at a few hundred dollars, let alone gifts that individually do not exceed $100 in value. But the Diebold case will raise new questions about the government's enforcement priorities, questions that will only be amplified by the imposition of a monitor, potentially one of the most disruptive, burdensome, and costly components of FCPA settlement tools, and one that had been in declining use for several years.

That the total financial penalty was sixteen times the amount of bribes paid should give pause to anyone operating in a high risk jurisdiction. And although 40% of the total value of alleged improper payments were asserted by the government to be commercial bribes, much of the remaining 60% appears to be an aggregation of relatively small (often very small) payments. "Training" trips and cash gifts for Chinese New Year are common in FCPA enforcement actions and certainly were common in the market before improvements were made to compliance programs after 2007 and 2008, in the wake of the SEC's and the DOJ's increased enforcement. The large penalty and the fact that both agencies pointed to cash gifts of less than $300 (in the case of the DOJ) and less than $100 (in the case of the SEC) calls into question whether companies will need, once again, to start "sweating the small stuff."

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Paul R. Berger
Sean Hecker
Andrew M. Levine
Bruce E. Yannett
Philip Rohlik

Paul R. Berger is a partner in the Washington, D.C. office. Sean Hecker, Andrew M. Levine, and Bruce E. Yannett are partners in the New York office. Philip Rohlik is a counsel in the Hong Kong office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at prberger@debevoise.com, shecker@debevoise.com, amlevine@debevoise.com, beyannett@debevoise.com, and prohlik@debevoise.com. Full contact details for each author are available at www.debevoise.com.

28. *See* http://www.justice.gov/criminal/fraud/fcpa/guidance/ ("Resource Guide").

29. Resource Guide at 15.

FCPA-Related Money Laundering: Risks for Financial and Non-Financial Firms

On August 29 and 30, 2013, three defendants in the ongoing U.S. criminal prosecutions arising out of bribes allegedly paid by New York broker-dealer Direct Access Partners LLC ("DAP") to officials employed by Venezuelan state-owned banks pleaded guilty to conspiracy, FCPA bribery, Travel Act violations, and money laundering.[1] These guilty pleas raise the natural question: What difference do the additional, non-FCPA charges make?

This article analyzes the increasing use in FCPA-related matters of money laundering charges, one of the non-FCPA criminal charges brought in the DAP matter. This increase has been particularly pronounced in cases against individuals, both on the bribe-paying and bribe-receiving sides of transactions. We first address the implications of money laundering charges in FCPA cases, which include, among others, the DAP, Bodmer, and Haiti Teleco cases, to identify the factors driving the increased use of such charges and their consequences, which can include longer sentences of imprisonment and forfeiture. We also explain the implications of these developments for financial institutions, which in addition to the already significant burdens of complying with the FCPA itself, and the related challenges posed by aiding and abetting and conspiracy liability, have obligations under the Bank Secrecy Act and related laws to report certain transactions. We conclude the use of money laundering charges in FCPA cases presents potentially unique risk for financial and non-financial institutions alike and provides another key reason for such institutions to devote appropriate legal, compliance, and audit resources to mitigating the risk of being caught up in an FCPA-related prosecution.

Why Charge Money Laundering in FCPA Cases?

For bribe-payers, a key incentive for prosecutors to charge money laundering in FCPA cases appears to flow from the fact that a money laundering conviction can have a potentially significant effect on a sentence of incarceration for an individual, as illustrated by the *Esquenazi* case now pending before the Eleventh Circuit.[2] In that case, defendant Joel Esquenazi was sentenced in 2011 to 15 years for FCPA anti-bribery and money laundering offenses arising out of payments allegedly made to officials of Haiti Teleco. Esquenazi's term of imprisonment, the longest in the history of FCPA-related criminal prosecutions, was driven by the money laundering counts on which he was convicted.[3]

This sentencing disparity is related to the fact that, while both FCPA charges and money laundering are criminally punishable by roughly similar fines,[4] an individual may be sentenced to up to twenty years in prison on each money laundering count, but to only five years on each FCPA bribery count.[5] Even bearing in mind judges' discretion to sentence individuals to concurrent or consecutive prison terms upon a conviction on multiple counts,[6] the potential 20-year sentence is a powerful threat. For bribe recipients, the impact may be even more significant. "Foreign officials" cannot be charged under the FCPA or with conspiracy to violate it. Thus, money laundering may be the only U.S. federal criminal offense with which they can be charged.[7]

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1. DOJ Press Rel. 13-980, Three Former Broker-dealer Employees Plead Guilty in Manhattan Federal Court to Bribery of Foreign Officials, Money Laundering and Conspiracy to Obstruct Justice (Aug. 30, 2013), http://www.justice.gov/opa/pr/2013/August/13-crm-980.html.
2. *United States v. Esquenazi*, No. 11-15331-C (11th Cir. argued Oct. 11, 2013).
3. Bruce E. Yannett, Sean Hecker, & David M. Fuhr, "Esquenazi Sentence of 15 Years in Prison More than Doubles Previous FCPA Record," *FCPA Update*, Vol. 3, No. 4 at 3 (Nov. 2011), http://www.debevoise.com/files/Publication/0f4c1703-b083-4622-ac28-27f36e5f10dc/Presentation/PublicationAttachment/41b5e776-9403-4311-a47a-8fae3badb6f3/FCPAUpdateNovember2011.pdf.
4. Under the money laundering statutes, a defendant can be fined the greater of $500,000 or double the value of the property involved in the money laundering transaction(s). *See* 18 U.S.C. §§ 1956(a)(1) & 1957(b)(2). The base FCPA fines are higher than the base money laundering fines – sometimes significantly so. *See, e.g.*, 15 U.S.C. § 78ff(a) (willful false and misleading statements in violation of FCPA books and records provision can carry fines of up to $25 million for entities). Under 18 U.S.C. § 3571(d), an alternative fine of twice the gross gain or loss from the offense may be imposed.
5. *Compare* 18 U.S.C. § 1956(a)(3) (20 year maximum sentence under the money laundering statute), *with* 15 U.S.C. § 78dd-2(g)(2)(A) (5 year maximum sentence under the FCPA statute).
6. *See* 18 U.S.C. § 3584; *see also Oregon v. Ice*, 555 U.S. 160, 168-69 (2009).
7. *Compare, e.g., United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) (U.S. cannot circumvent the FCPA's inapplicability to foreign officials by charging such officials with violating 18 U.S.C. § 371 by conspiring to violate the FCPA), *with, e.g.*, DOJ Press Rel. 10-260, Former Haitian Government Official Pleads Guilty to Conspiracy to Commit Money Laundering in Foreign Bribery Scheme (Mar. 12, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-260.html (foreign official pleading guilty to money laundering charges in an FCPA case).

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In the case of corporations, the impact of a conviction for money laundering is potentially variable. Corporations, which cannot be incarcerated, are potentially subject to terms of probation, but those terms cannot exceed periods longer than five years, even for money laundering.[8]

> "[T]he relative paucity of money laundering charges against corporations [may be explained by the fact that]… companies may bargain hard not to be charged with, or otherwise to avoid having to acknowledge and admit, via a Non-Prosecution Agreement, money laundering crimes."

Thus, a money laundering count against a corporation might not make a significant difference to the outcome, all else being equal. On the other hand, as most FCPA corporate prosecutions are settled, there may be larger dynamics that explain the relative paucity of money laundering charges against corporations in such matters. These could include the possible impact money laundering charges can have under various forfeiture statutes, which can include forfeiture of an entire business sufficiently "tainted" by laundered funds.[9] For these and other reasons outlined below, companies may bargain hard not to be charged with, or otherwise to avoid having to acknowledge and admit, via a Non-Prosecution Agreement, money laundering crimes.

Money Laundering and the FCPA: The Bribe Payer and Bribe Receiver Cases

In 1986, nine years after it passed the FCPA, Congress enacted the Money Laundering Control Act, which made it a crime to launder proceeds derived from the commission of certain predicate crimes. The Act, a response to "the spiraling growth and pervasiveness of money laundering in the United States and the nexus between money laundering and organized crime,"[10] made it a separate crime to transfer money obtained illegally through apparently legitimate channels in order to obscure its original source.[11]

Sections 1956 and 1957 of Title 18 of the United States Code codify the Money Laundering Control Act, and prohibit domestic and international money laundering transactions. Under Section 1956, it is unlawful to "conduct[] or attempt[] to conduct" a financial transaction with proceeds known to be derived from illegal activity.[12] The statute sets forth a variety of predicate illegal acts for purposes of the money laundering statute, of which FCPA anti-bribery violations are one.[13] In conducting the transaction, the defendant must have intended to (1) promote illegal activity, (2) evade taxes, (3) conceal or disguise proceeds from illegal activity, or (4) avoid transaction reporting requirements under state or federal law.[14] Under Section 1957, it is illegal to conduct a monetary transaction in an amount greater than $10,000 with property known to be derived from criminal activity. The extraterritorial scope of Section 1957 is narrower than that of Section 1956.[15] As a result, money laundering violations related to FCPA anti-bribery charges are usually charged under Section 1956.

The Hans Bodmer case involving bribes allegedly paid in Azerbaijan provides a ready example from among the many cases in which money laundering charges were

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8. *See* U.S. Sentencing Commission, 2012 Federal Sentencing Guidelines Manual § 8D1.2 (effective Nov. 1, 2012), http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/8d1_2.htm (setting five years as the maximum term of organizational probation under the sentencing guidelines for all crimes).
9. *See id.* § 8C1.1 ("If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.").
10. Jimmy Gurulé, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 Am. Crim. L. Rev. 823, 824 (1995).
11. *See* 18 U.S.C. §§ 1956 & 1957; *see also* Black's Law Dictionary 1097 (Bryan A. Garner ed., 9th ed. 2009) (defining money laundering in general terms); Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, Cong. Research Serv. (Feb. 8, 2012).
12. 18 U.S.C. § 1956(a)(1).
13. *Id.* § 1956(c)(7)(D).
14. *Id.* § 1956(a)(1)(A) & (B). Note that international money laundering transactions conducted with the intent to evade taxes are not covered by the statute.
15. *Compare id.* § 1956(f) (extraterritorial jurisdiction (1) where the conduct is by a U.S. citizen or occurs in part in the U.S. or (2) where the transaction or transactions collectively involve funds exceeding $10,000), *with id.* § 1957(d) (extraterritorial jurisdiction for transactions abroad only when conducted by "United States person[s]"). Note that conspiracies to launder money are also covered by Section 1956. *See id.* § 1956(h).

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brought in an FCPA context.[16] In 1997, the government of Azerbaijan was in the process of privatizing the State Oil Company of the Azerbaijan Republic ("SOCAR"). Frederic Bourke, Viktor Kozeny, and a consortium they formed paid bribes to Azeri officials to induce them to rig the auction for SOCAR in the consortium's favor. Bodmer, a Swiss lawyer, represented various U.S. entities connected to the consortium, and in his capacity as an agent paid and authorized the payment of a number of bribes on its behalf.[17]

Bodmer was charged in a two-count indictment with conspiracies to violate the FCPA and money laundering statutes. The FCPA-related count was dismissed, on the basis that the FCPA (prior to its amendment in 1998) did not clearly apply to non-resident foreign nationals merely because they acted as agents of domestic concerns.[18] The District Court held this fact did not bar prosecution for money laundering to "promote" those violations.[19] Bodmer pleaded guilty to money-laundering conspiracy.[20]

More recently, in the DAP cases involving bribes paid to officials at Venezuela's state-run economic development bank, the Banco de Desarrollo Economico y Social de Venezuela ("BANDES"), the government employed the same language prohibiting "promotional" international money laundering that it invoked against Bodmer. The BANDES cases involved a conspiracy by employees of a U.S. broker-dealer to bribe BANDES officials in exchange for trading business. In the informations to which the U.S. defendants pleaded guilty, the government alleged that the defendants "willfully and knowingly transported, transmitted, and transferred… monetary instruments and funds from a place in the United States to and through a place outside the United States… with the intent to promote the carrying on of specified unlawful activity," specifically, FCPA and Travel Act violations.[21] As the DOJ's press release noted, defendants faced "a maximum penalty of five years in prison on each count except money laundering, which carries a maximum penalty of 20 years in prison."[22] Sentencings are scheduled for 2014.

The Haiti Teleco case is another example of how the DOJ uses money laundering charges in FCPA cases. Telecommunications D'Haiti S.A.M., or Haiti Teleco, is a Haitian state-owned telecommunications company that provides land-line telephone services. The case involved two Florida-based telecommunications companies that paid bribes to government officials who worked at Haiti Teleco in order to obtain various business advantages, including favorable rates and the continuation of certain contracts.[23]

The DOJ charged the executives of the Florida companies and the Haitian officials in the same indictment. The indictment charged FCPA violations and an FCPA conspiracy as to the executives, and charged money laundering and a money laundering conspiracy as to both the executives and the foreign officials.[24] The executives and the Haitian officials, it was alleged, conducted transactions "designed, in whole and in part, to conceal and disguise the nature, the

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16. *See, e.g., United States v. Clarke Bethancourt*, No. 13-cr-670, Information (S.D.N.Y. Aug. 29, 2013); *United States v. Pierucci*, No. 12-cr-238, Superseding Indictment (D. Conn. Apr. 30, 2013); *United States v. Kowalewski*, No. 12-cr-07, Indictment (N.D. Okla. Jan. 5, 2012); *United States v. Sharef*, No. 11-cr-1056, Indictment (S.D.N.Y. Dec. 12, 2011); *United States v. Granados*, No. 10-cr-20881, Indictment (S.D. Fla. Dec. 14, 2010); *United States v. Aguilar*, No. 10-cr-1031, First Superseding Indictment (C.D. Cal. Oct. 21, 2010); DOJ Press Rel. 10-048, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), http://www.justice.gov/opa/pr/2010/January/10-crm-048.html; *United States v. Esquenazi*, No. 09-cr-21010, Indictment (S.D. Fla. Dec. 4, 2009); *United States v. O'Shea*, No. 09-cr-629, Indictment (S.D. Tex. Nov. 16, 2009); *United States v. Nexus Techs., Inc.*, No. 08-cr-522, Superseding Indictment (E.D. Pa. Oct. 29, 2009); *United States v. Green*, No. 08-cr-059, Second Superseding Indictment (C.D. Cal. Mar. 11, 2009); *United States v. Steph*, 07-cr-307, Indictment (S.D. Tex. July 19, 2007); *United States v. Jefferson*, No. 07-cr-209, Indictment (E.D. Va. June 4, 2007); *United States v. Smith*, No. 07-cr-069, Indictment (C.D. Cal. Apr. 25, 2007); *United States v. Sapsizian*, No. 06-cr-20797, Superseding Indictment (S.D. Fla. Mar. 20, 2007); *United States v. Kozeny*, No. 05-cr-518, Indictment (S.D.N.Y. May 12, 2005); *United States v. Giffen*, No. 03-cr-404, Second Superseding Indictment (S.D.N.Y. Aug. 4, 2004); *United States v. Steindler*, No. 94-cr-029, Indictment (S.D. Ohio Mar. 17, 1994).

17. *See United States v. Bodmer*, 342 F. Supp. 2d 176, 179 (S.D.N.Y. 2004).

18. *Id.* at 181, 189 (dismissing pre-1998 FCPA charges against Bodmer based on the rule of lenity). The 1998 amendments to the FCPA clarified the statute, such that its applicability to foreign nationals who act as agents of U.S. concerns is no longer in doubt.

19. *Id.* at 190-91 ("The language of the statute clearly penalizes the *transportation of monetary instruments in promotion* of unlawful activity, not the underlying unlawful activity.… The elements of a money laundering offense do not include, or even implicate, the capacity to commit the underlying unlawful activity.").

20. *See United States v. Bodmer*, No. 03-cr-00947, Judgment (S.D.N.Y. Mar. 7, 2013).

21. *United States v. Clarke Bethancourt*, No. 13-cr-670, Information ¶ 21 (S.D.N.Y. Aug. 29, 2013); *see also United States v. Lujan*, No. 13-cr-671, Information ¶ 21 (S.D.N.Y. Aug. 29, 2013) (same); *United States v. Hurtado*, No. 13-cr-673, Information ¶ 21 (S.D.N.Y. Aug. 29, 2013) (same).

22. DOJ Press Rel. 13-980, note 1, *supra*.

23. *See, e.g.*, DOJ Press Rel. 11-1020, Two Telecommunications Executives Convicted by Miami Jury on All Counts for Their Involvement in Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti (Aug. 5, 2011), http://www.justice.gov/opa/pr/2011/August/11-crm-1020.html.

24. *See United States v. Esquenazi*, No. 09-cr-21010, Indictment (S.D. Fla. Dec. 4, 2009).

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location, the source, the ownership, and the control of the proceeds" of the bribes paid in violation of the FCPA.[25] One Haitian official pleaded guilty to money laundering in furtherance of the FCPA scheme, while the other official was convicted of money laundering by a jury.[26] A jury convicted the executives of both the FCPA and the money laundering counts.[27]

The result in the Haiti Teleco cases points up the dual uses of money laundering counts in FCPA prosecutions: first, the government was able to obtain convictions of foreign officials, who could not be charged with the underlying FCPA violations, and second, the government was able to obtain additional convictions, with associated additional potential criminal sanctions, against the U.S. perpetrators of FCPA violations. As a result of the money laundering conviction, Joel Esquenazi, one of the Florida executives, was sentenced to fifteen years in prison – the longest term ever imposed in an FCPA case.[28] This record sentence was driven by a money laundering sentence ordered to be served consecutively to the FCPA sentence.[29]

Money laundering charges are used against companies less frequently than they are against individual defendants, but some companies have been charged with – and have pleaded guilty to – money laundering. In 2010, Nexus Technologies Inc., an export company based in Pennsylvania, pleaded guilty to FCPA and money laundering charges.[30] The charges stemmed from bribes Nexus and its executives paid to Vietnamese officials in exchange for valuable contracts to provide equipment and technology to Vietnamese government agencies. The bribes were routed from Nexus accounts to accounts of a shell company in Hong Kong, which Nexus and its executives used as an intermediary for payments to government officials.[31] The money laundering allegations in the superseding indictment to which both the company and its executives ultimately pleaded guilty stated the transfers to the intermediary were undertaken to "promote the carrying on of a specified unlawful activity, that is, bribery of a foreign official."[32]

Above and beyond the fines allowed by the criminal law, a money laundering conviction can carry significant financial consequences for both individuals and companies. Under the civil forfeiture statute, any property "involved in" a money laundering transaction, or "traceable" to property involved in such a transaction, may be subject to forfeiture.[33] Civil forfeiture may also be sought with respect to proceeds derived from or traceable to any offense that the money laundering statute defines as "specified unlawful activity" – a category that includes felony violations of the FCPA.[34] For money laundering, criminal forfeiture is available as well.[35] However, criminal forfeiture is different from civil forfeiture[36] in ways that make it, in many

"Money laundering charges are used against companies less frequently than they are against individual defendants, but some companies have been charged with – and have pleaded guilty to – money laundering."

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25. *Id.* at 25.
26. *See* DOJ Press Rel. 10-260, note 7, *supra*; DOJ Press Rel. 12-310, Former Haitian Government Official Convicted in Miami for Role in Scheme to Launder Bribes Paid by Telecommunications Companies (Mar. 13, 2012), http://www.justice.gov/opa/pr/2012/March/12-crm-310.html.
27. *See* DOJ Press Rel. 11-1020, note 23, *supra*.
28. *See, e.g.*, Yannett, Hecker & Fuhr, note 3, *supra*, at 1.
29. *United States v. Esquenazi*, No. 09-cr-21010, Judgment as to Joel Esquenazi at 3 (S.D. Fla. Oct. 26, 2011).
30. DOJ Press Rel. 10-270, Nexus Technologies Inc. and Three Employees Plead Guilty to Paying Bribes to Vietnamese Officials (Mar. 16, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-270.html.
31. *United States v. Nexus Techs., Inc.*, note 16, *supra*, at 5, 26-28.
32. *Id.* at 26.
33. 18 U.S.C. § 981(a)(1)(A).
34. *Id.* § 981(a)(1)(C); *see also id.* § 1956(c)(7)(D).
35. *See id.* § 982(a)(1).
36. Criminal forfeiture is imposed by the court "in imposing sentence," *id.* (although pre-trial restraint is available, *see, e.g., In re Restraint of Bowman Gaskins Fin. Grp.*, 345 F. Supp. 2d 613 (E.D. Va. 2004)), while civil forfeiture of property can be available before a criminal trial begins. *See United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992). Civil forfeiture is obtained *in rem* while criminal forfeiture is *in personam*. *See, e.g., United States v. Cherry*, 330 F.3d 658, 668 n.16 (4th Cir. 2003) (citing *United States v. Sandini*, 816 F.2d 869, 872 (3d Cir. 1987)).

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legal as well as practical senses, a "more *limited* tool of law enforcement than is civil forfeiture."[37] For example, under the civil forfeiture statute, the government can – and does – seek forfeiture of property traceable to criminal activity even before the related criminal proceedings have been concluded.[38]

Under these statutes, a person or business that commits money laundering can be forced to forfeit significant sums. In some cases, companies have had all of their assets seized and forfeited. In 2000, the owners of two Panamanian jewelry businesses, Speed Joyeros and Argento Vivo S.A., were accused of money laundering and pleaded guilty in 2002. As the DOJ reported this month, as a result the corporate assets of the two firms were seized, forfeited in full, and shared in part with the Panamanian government.[39] Under the sentencing guidelines applicable to organizations, this result – total forfeiture and cessation of business – is well within the range of expected outcomes for companies that exist for the purpose of carrying on criminal activity.[40] Even for companies whose assets would not be forfeited completely, there is significant financial risk from forfeiture proceedings. In addition, by incentivizing foreign governments to assist in U.S. anti-money laundering investigations and prosecutions, the DOJ practice of sharing with such governments recoveries in forfeiture proceedings addressing the proceeds of cross-border crimes – which will include most FCPA antibribery offenses – can increase these risks.

The Bank Secrecy Act and Compliance-Related FCPA Risk for Financial Entities

The DOJ's increasing use of money laundering charges in FCPA prosecutions may be a harbinger of increased risks for financial institutions. A wide variety of federal laws and regulations may be used to draw such firms into FCPA cases other than as mere repositories of evidence if the DOJ's increased interest in the financial transactions that underlie such cases reveals deficient compliance practices. The DOJ may have already indicated a shift to more aggressive investigation of FCPA-related activity by the financial services industry. When the Department announced the indictments in the BANDES case earlier this year, it termed the charges "a wake-up call to anyone in the financial services industry who thinks bribery is the way to get ahead."[41] But potential risks for the financial services industry extend well beyond "basic" FCPA compliance.

In 1992, Congress amended the Bank Secrecy Act to give authority to the Secretary of the Treasury to require banks and other financial institutions to report suspicious transactions that may be connected to illegal activity and to implement anti-money laundering programs.[42] The statutory and regulatory regime, which has been amended several times, most significantly in the USA PATRIOT Act, requires banks, securities broker-dealers and other classes of financial institutions to establish risk-based anti-money laundering compliance programs, including customer identification programs, and to report on suspicious activity (in "Suspicious Activity Reports," or "SARs"), among other requirements. As a result of these requirements, banks and other financial institutions must develop sophisticated compliance procedures, and the deficiency of these procedures can lead to significant penalties in connection with bribery-related activity, even if an institution's conduct does not aid or abet the FCPA-governed conduct or give rise to conspiracy charges related to the same.

Federal anti-money laundering law thus requires that "each financial institution shall establish anti-money laundering programs."[43] These programs must include "(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program;

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37. Stefan D. Cassella, "Overview of Asset Forfeiture Law in the United States," *United States Attorneys' Bulletin*, Vol. 55, No. 6, at 14 (Nov. 2007), http://www.justice.gov/usao/eousa/foia_reading_room/usab5506.pdf.

38. *See, e.g., All Assets of Statewide Auto Parts, Inc.*, 971 F.2d at 898-99 (affirming forfeiture in an *in rem* proceeding against property owned by a criminal defendant who had not yet been tried).

39. *See* DOJ Press Rel. 13-1121, U.S. Deputy Attorney General Cole and Panamanian Attorney General Belfon Sign Agreement to Share Forfeited Assets (Oct. 22, 2013), http://www.justice.gov/opa/pr/2013/October/13-dag-1121.html; *see also United States v. Speed Joyeros*, S.A., 410 F. Supp. 2d 121 (E.D.N.Y. 2006) (granting a motion to strike claims made by employees of businesses that forfeited their assets; holding that the employees' claims for wages were inferior to the United States' forfeiture claims).

40. *See* U.S. Sentencing Commission, note 8, *supra* at § 8C1.1 (providing for a fine under the guidelines sufficient to divest all assets of "Criminal Purpose Organizations").

41. DOJ Press Rel. 13-515, Two U.S. Broker-dealer Employees and Venezuelan Government Official Charged for Massive International Bribery Scheme (May 7, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-515.html.

42. Pub. L. No. 102-550, § 1517(b), 106 Stat. 3672, 4059 (1992) (codified at 31 U.S.C. § 5318(g) & (h)); *see generally* Randall Guynn, Mark Plotkin, & Ralph Reisner, Regulation of Foreign Banks and Affiliates in the United States § 12:4 (6th ed. 2012).

43. 31 U.S.C. § 5318(h)(1).

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and (D) an independent audit function to test programs."[44] The anti-money laundering program requirement is implemented via regulations from a variety of agencies, including most prominently the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") and largely parallel regulations from federal functional regulators, such as the Federal Reserve and the Office of the Comptroller of the Currency in the case of banking organizations.[45] The purpose of these programs is to involve financial institutions in the detection, reporting, and prevention of money laundering and other crimes involving financial transactions.

Financial institutions must also report any "suspicious activity" to regulators. Financial institutions are required to report to FinCEN "any suspicious transaction relevant to a possible violation of law or regulation."[46] Banks, which have borne these reporting requirements for longer than other types of financial institutions, must report any transaction involving an aggregate of $5,000 or more that (1) involves funds derived illegally or is intended to hide or disguise such funds; (2) is designed to evade any requirements of Bank Secrecy Act regulations, or (3) "has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage."[47] These reports typically must be made within 30 days of a transaction and their existence generally cannot be disclosed to any person or organization other than law enforcement and regulators. In addition, financial institutions and their agents that file SARs enjoy a broad safe harbor from any liability for such disclosures.[48]

> "Anti-money laundering compliance issues have made significant news in the past year. In December 2012, HSBC agreed to a record-setting settlement[.]"

These and other requirements[49] impose a variety of duties on financial institutions to assist law enforcement in investigating and prosecuting crimes involving financial transactions. Failures to abide by these requirements can lead to significant enforcement actions against financial services institutions, as illustrated in recent settlements for deficiencies in money laundering controls outside the FCPA context: firms have incurred billions of dollars in fines and settlements in recent money laundering and Bank Secrecy Act cases. The large size of the recent financial institution settlements evokes the adage that parties bargain in the shadow of the law – and here, the possibility that a bank might even face revocation of its license to do business casts a long shadow indeed.[50]

Anti-money laundering compliance issues have made significant news in the past year. In December 2012, HSBC agreed to a record-setting settlement[51] in which it paid $1.92 billion in forfeitures and fines because of its "blatant failure to implement proper anti-money laundering controls."[52] The DOJ alleged that the bank did not devote sufficient staff to its anti-money laundering functions and, thus, was unable sufficiently to identify and report suspicious transactions. The DOJ alleged HSBC facilitated significant financial transactions for drug cartels and money launderers.[53] The HSBC settlement and deferred prosecution agreement ultimately allowed HSBC to avoid criminal prosecution, but

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44. *Id.*
45. *See* Guynn, Plotkin, & Reisner, note 42, *supra*, § 12:3.
46. *See* 31 U.S.C. § 5318(g)(1); 31 C.F.R. § 1020.320(a)(1).
47. 31 C.F.R. § 1020.320(a)(2). Banks also must report on other types of transactions, such as insider abuse involving any amount of money. *See, e.g.*, 12 C.F.R § 21.11.
48. *See* 31 U.S.C. § 5318(g)(3).
49. Other major areas of regulation under the Bank Secrecy Act that are relevant here include enhanced due diligence requirements for financial institutions that maintain certain types of accounts for non-United States persons and financial institutions. *See id.* § 5318(i).
50. *See* 12 U.S.C. § 93(d) ("Forfeiture of franchise for money laundering or cash transaction reporting offenses."); *see also, e.g.*, Gavin Finch & Howard Mustoe, "Standard Chartered CEO Says 'No Grounds' to Revoke License," *Bloomberg Businessweek* (Aug. 9, 2012), http://www.bloomberg.com/news/2012-08-08/standard-chartered-ceo-sands-rejects-n-y-regulator-s-claims-1-.html ("New York regulator Benjamin Lawsky threatened to strip [Standard Chartered] of its license to operate in the state.").
51. *See* Jonathan Stempel, "HSBC wins OK of record $1.92 billion money-laundering settlement," *Reuters* (July 2, 2013), http://www.reuters.com/article/2013/07/02/us-hsbc-settlement-laundering-idUSBRE9611B220130702.
52. DOJ Press Rel. 12-1478, HSBC Holdings Plc. And HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), http://www.justice.gov/opa/pr/2012/December/12-crm-1478.html.
53. *Id.*

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this failure of oversight cost the bank a sum that was more than double the largest U.S. government corporate resolution in the history of the FCPA.

More recently, in September 2013, TD Bank settled claims related to its alleged failure to file SARs to alert regulators to a Ponzi scheme perpetrated by one of its customers, Florida attorney Scott Rothstein.[54] The bank paid $52.5 million ($37.5 million to FinCEN and the OCC, and the remainder to the SEC) to settle charges that it "violated the federal Bank Secrecy Act by failing to uncover and report in a timely manner suspicious activities" related to the scheme.[55]

Although there is evidence that financial institutions increasingly have become the focus of FCPA enforcement,[56] FCPA-related settlements with financial institutions have yet to dominate over other regulatory and compliance issues.[57] However, increasing attention being given by prosecutors to money laundering in the FCPA context may present a risk for institutions that lack adequate internal controls. As seen above in the non-FCPA money laundering context, financial institutions face substantial risk when they serve as conduits for (and fail to file SARs regarding) monetary transactions that violate federal law. As the use of money laundering charges in FCPA cases increases, banks and other financial institutions should expect that their involvement on the wrong end of FCPA-related prosecutions may increase if their anti-money laundering programs are deficient. Financial institutions subject to anti-money laundering control requirements would therefore do well to coordinate with FCPA counsel as well as anti-money laundering experts when framing their compliance program and internal controls relating to U.S. anti-money laundering obligations.

Conclusion

As political pressures mount against bank secrecy, and press reports, social media, and other sources of evidence drive up the number of FCPA cases being investigated internally by companies within and without the financial sector, the risk of money laundering charges in addition to FCPA offenses being charged is substantial. The financial sector as well is exposed to increased parallel regulatory and enforcement risk, not only from the primary risk that banks and other institutions themselves might commit bribery, or aid, abet or conspire with others who do, but also from more elemental risk of violation of "know your customer" and suspicious activity reporting requirements.

Companies and individuals alike who are subject to the FCPA, or who might be in the position of providing financial services to those who are, would therefore be well advised to consider and weigh these risks when allocating compliance resources or evaluating particular business transactions or specific allegations of misconduct.

Satish M. Kini
Andrew M. Levine
Steven S. Michaels
Derek Wikstrom

Satish M. Kini is a partner in the Washington, D.C. office, a member of the Corporate Department, Co-Chair of the firm's Banking Group and a member of the Financial Institutions Group. Andrew M. Levine is a partner, Steven S. Michaels is a counsel, and Derek Wikstrom is an associate in the firm's New York office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at smkini@debevoise.com, amlevine@debevoise.com, ssmichaels@debevoise.com, and dwikstrom@debevoise.com. Full contact details for each author are available at www.debevoise.com.

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54. Rothstein pleaded guilty to a conspiracy to commit money laundering count, among other charges. *See* FBI Press Rel., Fort Lauderdale Attorney Sentenced to 50 Years in Billion-Dollar Ponzi Scheme (June 9, 2010), http://www.fbi.gov/miami/press-releases/2010/mm060910.htm.

55. Jonathan Stempel, "TD Bank to pay $52.5 million in U.S. settlements over Ponzi scheme," *Reuters* (Sept. 23, 2013), http://www.reuters.com/article/2013/09/23/us-tdbank-settlement-ponzi-idUSBRE98M10Y20130923.

56. Barclays and Goldman Sachs, for example, have both reported that they were cooperating with FCPA-related government investigations in recent years. *See* Barclays PLC, Interim Management Statement (Sept. 30, 2012), http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail.html?announcementId=11380155; Goldman Sachs Group, Inc., Quarterly Report (Form 10-Q), at 99 (Aug. 8, 2011), http://www.goldmansachs.com/investor-relations/financials/archived/10q/10-q-2q-2011.pdf.

57. Some of the largest fines have been paid in the context of alleged facilitation of transactions with individuals or entities currently subject to U.S. sanctions, and although these settlements may not resolve criminal charges that include money laundering or Bank Secrecy Act counts, they are often investigated by state and federal entities responsible for oversight in those areas, as well as anti-bribery statutes. In 2010, the former ABN Amro Bank settled claims it violated the Bank Secrecy Act and other federal laws and forfeited $500 million. DOJ Press Rel. 10-548, Former ABN Amro Bank N.V. Agrees to Forfeit $500 Million in Connection with Conspiracy to Defraud the United States and with Violation of the Bank Secrecy Act (May 10, 2010), http://www.justice.gov/opa/pr/2010/May/10-crm-548.html. Settlements for the alleged facilitation of violations of U.S. sanctions have also included more than half a billion dollars paid to the DOJ and Manhattan District Attorney by Standard Chartered Bank. *See* DOJ Press Rel. 12-1467, Standard Chartered Bank Agrees to Forfeit $227 Million for Illegal Transactions with Iran, Sudan, Libya, and Burma (Dec. 10, 2012), http://www.justice.gov/opa/pr/2012/December/12-crm-1467.html; Manhattan D.A. Press Rel., Standard Chartered Bank Reaches $327 Million Settlement for Illegal Transactions (Dec. 10, 2012), http://manhattanda.org/press-release/standard-chartered-bank-reaches-327-million-settlement-illegal-transactions. Another enforcement action led to a $619 million settlement with the Treasury Department by ING Bank. U.S. Treasury Dep't Press Rel., U.S. Treasury Department Announces $619 Million Settlement with ING Bank, N.V.: Largest-Ever Settlement Reached in a Sanctions Case (June 12, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx.