Fall 2014

Civil Consequences of Corruption in International Commercial Contracts

Padideh Ala'i

PADIDEH ALA'I*

Civil Consequences of Corruption in International Commercial Contracts†

TOPIC II. B

The United States legal system seeks to prevent and prohibit bribery and corruption through a myriad of laws, regulations and policies. Anti-corruption jurisprudence is more developed in the context of public sector contracts where the United States criminalizes bribery of public officials through 18 U.S.C. §201 (Bribery of Public Officials and Witnesses). In addition, the United States was the first country to criminalize bribery of foreign government officials in 1977 with the passage of the Foreign Corrupt Practices Act (FCPA). The FCPA has since been amended to comply with the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). The FCPA does not have a private right of action, but FCPA investigations and convictions have led to collateral civil actions, and it is predicted that as FCPA prosecutions increase in number, such collateral FCPA actions will also continue to increase. There is no federal law prohibiting private sector bribery per se, but thirty-seven states have enacted "commercial bribery" statutes that criminalize bribery and corruption on the state level. In addition, at the federal level, there are a variety of criminal and civil statutes that allow private parties to address corruption, including, but not limited to, mail and wire fraud statutes, securities and anti-trust laws, and the Travel Act. Furthermore, federal government contracts can be voided under certain criminal conflict of interest statutes. Finally, there are contract law principles that have found utility in instances where a contract has been tainted due to actual bribery or potential breach of fiduciary duty, such as illegality, public policy, and unclean hands.

* Professor of Law and Director of the Hubert Humphrey Fellowship Program, American University, Washington College of Law. The author wishes to thank Nancy Zucker Boswell for her contribution and assistance in preparing this report.

† http://dx.doi.org/10.5131/AJCL.2014.0006

I. Introduction

The United States legal system seeks to prevent and prohibit bribery and corruption through a myriad of laws, regulations, and policies. Anti-corruption jurisprudence is most developed in the context of public sector contracts, but there are numerous statutes and common law principles that also address private-sector bribery and corruption, and provide adequate remedies for both offenses. The United States was the first country to criminalize bribery of foreign government officials in 1977 with the passage of the Foreign Corrupt Practices Act (FCPA).[1] The FCPA was globalized through the adoption of the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (OECD Convention) that entered into force on February 15, 1999. The United States has amended the FCPA to comply with the OECD Convention.[2]

The FCPA was modeled on the United States law criminalizing bribery of domestic officials: 18 U.S.C. § 201 (Bribery of public officials and witnesses).[3] Although there is no federal law criminalizing private-sector bribery *per se,* there are many states in the United States that criminalize commercial bribery by enacting commercial bribery statutes.[4] At the federal level, there are a variety of criminal and civil statutes that allow private parties to address corruption, including, but not limited to, those statutes that criminalize mail and wire fraud,[5] anti-trust behavior, conspiracy, securities fraud and racketeering (through the Travel Act),[6] to name a few. Though the FCPA does not have a private right of action, FCPA investigations and convictions have led to collateral civil actions. It is predicted that as FCPA prosecutions increase in number, such collateral FCPA actions will also continue to increase.

II. The United States Legal Framework

A. *Domestic Anti-Bribery Statutes*

The United States' anti-bribery statutes are part of a multifaceted, comprehensive, and complex approach to corruption that involves a myriad of statutes, regulations, and policies. This approach includes (1) the notice and comment provisions of the

1. 15 U.S.C. § 78dd–1 to 78m (1977).
2. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (amending the Foreign Corrupt Practices Act of 1977).
3. 18 U.S.C. § 201 (2006).
4. *See* discussion in Section II below.
5. 18 U.S.C. §§ 1341, 43 (2006).
6. *Id.* § 1952 (2006) (governing interstate and foreign travel or transportation in aid of racketeering enterprises).

Administrative Procedures Act (APA),[7] (2) laws relating to transparency and accountability, such as the Freedom of Information Act,[8] and (3) measures that address proper management of public affairs and public property,[9] integrity systems[10] (such as Codes of Conduct), and asset disclosure requirements for all three branches of the government. The same approach also uses (1) criminal statutes that are applicable to the conduct of public officials set forth in Title 18 of the United States Criminal Code, FCPA, and those relating to money laundering,[11] (2) restrictions regarding procurement activities under Title 41,[12] (3) non-criminal statutes involving gifts and travel by federal employees,[13] and (4) other statutes related to employment, such as anti-nepotism laws[14] or whistleblowing laws.[15] In addition, the False Claims Act allows any person to file a legal action, known as a *qui tam* action, in the appropriate District Court against government contractors on the basis that the contractor has committed fraud against the government.[16]

These laws are vigorously enforced, and it is constitutionally permissible, given the federal system, for natural persons (individuals) or legal persons (companies) to be prosecuted by *both* national and state governments. Such double prosecution does not constitute double jeopardy.[17] In discussing the "civil consequences" of corruption in international commercial contracts, this Report concentrates on federal statutes that directly address domestic and foreign bribery as well as the impact of corruption or bribery on the validity and enforceability of a contract under United States contract law.

The United States criminalizes bribery of domestic public officials through 18 U.S.C. § 201 (Bribery of Public Officials and

7. 5 U.S.C. §§ 551-59 (2006).

8. Freedom of Information Act, 5 U.S.C. § 551 (2006). *See, e.g.*, Electronic Government Act, 44 U.S.C. § 101 (2006); Government in the Sunshine Act, 5 U.S.C. § 552b (2006); Federal Records Act, 44 U.S.C. § 3101 (2006).

9. *See*, *e.g*., 48 C.F.R. (providing regulations concerning Federal Acquisition); 18 U.S.C. § 641 (2006) (establishing the criminal code on misuse of public money, property, and records).

10. *See*, *e.g*., 18 U.S.C. § 201-19 (2006) (governing bribery and criminal and civil conflicts of interest statutes).

11. 18 U.S.C. §§ 1956, 57 (2006).

12. 41 U.S.C. § 423 (2006) (regulating procurement integrity).

13. *See*, *e.g*., 5 U.S.C. § 7353 (2006) (prohibiting gifts to federal employees); 5 U.S.C. § 7351 (2006) (limiting gifts to superiors).

14. 5 U.S.C. § 3110 (2006) (Anti-Nepotism law); 28 U.S.C. § 458 (2006) (governing relatives of justice or judge).

15. Whistleblower Protection Act (WPA), 5 U.S.C. § 2302 (b) (2006) (prohibiting the taking or failing to take personnel action as a result of disclosure of information by any employee or applicant which the employee or applicant reasonably believes evidence a violation of the law. The WPA protects public sector employees. Private sector whistleblowers are protected under Sarbanes-Oxley Whistleblower Protection Provisions at 18 U.S.C. § 1514(A) (2006)); *see* Appendix A for a fuller listing of laws.

16. 31 U.S.C. § 3730 (2006).

17. *See* Abbate v. United States, 359 U.S. 187, 193-96 (1959).

Witnesses). Specifically, section 201(b) prohibits any person from "corruptly" giving, offering or promising "anything of value to any public official or person selected to be a public official", or offering or promising "any public official or any person who has been selected to be a public official to give anything of value to any other person or entity," with intent (A) to influence any official act, (B) to influence such public official to commit fraud, or (C) to induce such public official to do or omit to do any act in violation of his or her official duties. Section 201(b) imposes a fine of "not more than three times the monetary equivalent of the thing of value [offered or given] to the public official [,] or imprisonment for not more than 15 years, or both." In addition, it provides the possibility of disqualification from holding in the future "any office of honor, trust or profit" in the United States.[18] Lastly, in cases involving bribery related to U.S. government contracts, an organization or individual may be barred from doing business with the United States government generally or with specific government agencies.[19] Bribery is even a predicate offense under the Money Laundering Control Act.[20]

Currently, there is no federal statute criminalizing commercial or private-sector bribery. However, thirty-seven states have enacted "commercial bribery" statutes that criminalize bribery and corruption: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin.[21] These commercial bribery statutes criminalize private-sector bribery by stating, for example, that "any employee who *solicits, accepts or agrees to accept* money or anything

18. U.S. Response to OECD Convention Phase 1 Questionnaire, ¶ 3.1 *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf (last visited Dec. 12, 2013).

19. *See* Federal Acquisitions Regulation, 48 C.F.R. § 9.4 (2005).

20. Money Laundering Control Act, 18 U.S.C. § 1956(c)(7)(a) (2006).

21. *See* Ala. Code §§ 13A-11-120 to 121; Alaska Stat. §§ 11.46.660 -.670; Ariz. Rev. Stat. Ann. § 13-2605; Cal. Penal Code § 641.3; Colo. Rev. Stat. § 18-5-401; Conn. Gen. Stat. Ann. §§ 53a-160–161; Del. Code Ann. tit. 11, §§ 881–882; Fla. Stat. Ann. §§ 838.15-.16; Haw. Rev. Stat. Ann. §§ 709-880; Ill. Com. Stat. Ann., ch. 720, §§ 5/29A-1, A-2; Iowa Code Ann. § 722.10; Kan. Stat. Ann. § 21-4405; Ky. Rev. Stat. Ann. §§ 518.020 –.030; La. Rev. Stat. Ann. § 14:73; Me. Rev. Stat. Ann. tit. 17-A, § 904; Mass. Ann. Laws ch. 271, § 39; Mich. Comp. Laws Ann. § 750.125; Minn. Stat. Ann. § 609.86; Miss. Code Ann. § 97-9-10; Mo. Ann. Stat. § 570.150; Neb. Rev. Stat. § 28-613; Nev. Rev. Stat. Ann. § 207.295; N.H. Rev. Stat. Ann. § 638:7; N.J. Stat. Ann. § 2C:21-10; N.Y. Penal Law §§ 180.00 - .08; N.C. Gen. Stat. § 14-353; N.D. Cent. Code § 12.1-12-08; 18 Pa. Cons. Stat. Ann. § 4108; R.I. Gen. Laws §§ 11-7-3, 4; S.C. Code Ann. § 16-17-540; S.D. Codified Laws Ann. §§ 22-43-1, -2; Tex. Penal Code Ann. § 32.43; Utah Code Ann. § 76-6-508; Va. Code Ann. § 18.2-444; Wash. Rev. Code Ann. § 9A.68.060; and Wis. Stat. Ann. § 134.05.

of value from a person . . . corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for benefit of that other person, *and* any person *who offers or gives* an employee money or anything of value . . . is guilty of commercial bribery."[22]

No state has passed a law that explicitly prohibits foreign bribery, but according to the United States government report to the OECD, the U.S. state commercial bribery statutes can be used to prosecute foreign bribery where a foreign official is viewed as an agent or employee of his or her government.[23] The FCPA is *the* federal statute that addresses foreign bribery, and it will be dealt with in some detail in Section B below. As will be discussed below, the FCPA does not have a private right of action. However, many federal and state statutes mentioned in this section can be invoked in FCPA collateral private civil actions. Such civil actions continue to increase as the number of FCPA enforcement actions also increases.

B. Other Related Federal Statutes

In absence of a federal statute establishing commercial or private-sector bribery as a criminal offense, there are other criminal and civil statutes that can be used to prosecute and provide remedy in case of such misconduct. In particular, commercial or private-sector bribery can be charged federally under the Travel Act.[24] The Travel Act criminalizes bribery as a violation of both the laws of the state in which the bribery was committed and state commercial bribery laws. In states where a commercial bribery statute does not exist, the conduct can be punished under unfair-trade-practices laws that define bribery as an improper means of gaining a competitive advantage.[25] Other federal statutes that are often used in the context of private- and public-sector bribery and corruption include, but are not limited to, wire[26] or mail fraud[27] (prohibit the use of interstate communications in furtherance of a scheme to defraud someone of property, such as embezzlement); anti-trust or anti-competitive causes of action, securities fraud, conspiracy, civil and criminal provisions of the

22. Cal. Pen. Code §641.3 (*emphasis added*).

23. U.S. Report on Implementation of the OECD Anti-Bribery Convention, Phase 2, ¶ 1.3 *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf.

24. 18 U.S.C. § 1952 (2006) (regulating interstate and foreign travel or transportation in aid of racketeering enterprises).

25. *USA UNCAC Self-Assessment Report*, UNITED NATIONS OFFICE ON DRUGS AND CRIME: UNITED NATIONS CONVENTION AGAINST CORRUPTION, 16 (July 10, 2010), http://www.state.gov/documents/organization/158105.pdf [hereinafter *USA UNCAC Self-Assessment Report*].

26. 18 U.S.C. § 1343 (2006).

27. *Id.* § 1341.

Racketeer Influenced and Corrupt Organizations Act (RICO);[28] the Hobbes Act (Interference with Commerce by Threats or Violence);[29] and the Money Laundering Act.[30] Section 1957 of the Money Laundering Control Act makes it an offense to conduct any monetary transaction with proceeds of more than $10,000. This offense is punishable by a fine, imprisonment for not more than 10 years, or both.[31]

It is important to note that prosecutions have taken place under multiple statutes, for example, under both the FCPA and the Travel Act (in a case incorporating the commercial bribery law of the State of New Jersey).[32] In addition, bribery of foreign public officials that is addressed by the FCPA can be a predicate offense under the civil and criminal provisions of RICO and the Money Laundering Control Act.[33]

In cases where the federal government suffers a loss as a result of fraud or corruption in government contracts, the persons (individuals, corporations or other entities) who corruptly obtain public contracts are liable under the False Claims Act for three times the damages sustained by the United States due to misrepresentation or fraud, plus a civil penalty of $5,000 or $10,000 for each false or fraudulent claim.[34] Actions under the False Claim Act may be initiated by the United States (through the Attorney General or the Department of Justice) or by a private party on behalf of the United States (called a *qui tam* action). When a private individual initiates the action, the United States may pay the individual from 15-30% of the recovery as a reward for bringing the action.

C. *Conflict-of-Interest Statutes and Contract Validity*

18 U.S.C. § 218 permits the federal government to void contracts relating to a conviction under certain criminal conflict-of-interest statutes set forth in Title 18 of the United States Code.[35] Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations.[36] Subpart 3.2 of these regulations specifically require that government contracts per-

---

28. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961–1968 (1970).

29. Hobbes Act, 18 U.S.C. § 1951 (1946).

30. Money Laundering Control Act, 18 U.S.C. §§ 1956, 7 (1986) (consisting of three provisions dealing with domestic money laundering, international money laundering and undercover "sting" cases, respectively); *see* 18 U.S.C. §§ 1956(a)(1)-(3).

31. 18 U.S.C. § 1957 (1986).

32. United States v. Mead, Cr. 98-240-01 (D.N.J. 1998).

33. U.S. Report on the Implementation of the OECD Anti-Bribery Convention, Phase 1 at 17-18, *available at* www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf (last viewed on Dec. 12, 2013).

34. False Claims Act, 31 U.S.C. §§ 3729–3733 (2006), cited to in *USA UNCAC Self-Assessment Report*, *supra* note 25, at 171.

35. 18 U.S.C. § 218 (2006).

36. Federal Acquisition Regulations (FAR), 48 C.F.R. § 3.7 (2005).

mit termination in the event of a bribery or gratuities violation.[37] The federal government is also empowered to administratively bar a private firm from receiving further government contracts if it concludes that the contractor has engaged in "corrupt acts in the acquisition or performance of a government contract."[38]

Conflict-of-interest statutes play an important role in addressing bribery and corruption in the public sector.[39] Conflict-of-interest provisions are preventative, aiming at conduct that "tempts dishonor."[40] Because these statutes prohibit the mere *potential* of a breach of fiduciary duty, they require no showing of actual loss or actual corruption or bribery.[41] In both federal and state courts, a showing of a conflict of interest renders the public contract illegal, and thus void, regardless of whether corruption is established in criminal proceedings.[42] Remedies awarded include disgorgement, restitution, and the right to avoidance. In fact, even if the superior of a government employee has condoned the conflict of interest, the government may still void the contract.[43] These harsh results are justified on the grounds of public interest.[44] The treatment of mitigation attempts has been inconsis-

37. *Id*. at § 3.2; *USA UNCAC Self-Assessment Report, supra* note 25.

38. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 88.

39. *See*, *e.g*., 18 U.S.C. § 208 (2006) (describing acts affecting personal financial interest).

40. United States v. Miss. Valley Generating Co., 364 U.S. 520, 550 (1961).

41. Although actual bribery and corruption are unnecessary to prove for the purposes of conflict of interest claims, criminal conviction may be used as evidence of the illegality of a contract in civil cases. This also means that parallel suits may be initiated and that civil actions are not dependent on criminal proceedings.

42. *See* Kevin E. Davis, *Civil Remedies for Corruption in Government Contract: Zero Tolerance versus Proportional Liability*, IILJ Working Paper 2009/4, 15, http://ssrn.com/abstract-1393326 (stating that typical findings of bribery involve violations of the specific procedures set out in this legislation. This involves illegality in performance rather than in the formation of the contract, and reflects the seriousness of public policy concerns regarding commercial bribery).

43. Miss. Valley Generating Co., 364 U.S. 520, 561 (differentiating from the private context where the defense of public policy does not arise if the principal is aware of the bribery). *See* Davis, *supra* note 42, at 12-14.

44. *See* Pan-Am. Petro. & Transp. Co. v. United States, 273 U.S. 456, 509–10 (1927) ("The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them . . . Equity does not condition the relief here sought by the United States upon a return of the consideration."); S. T. Grand, Inc. v. City of New York, 298 N.E.2d 105, 109 (N.Y. 1973) (acknowledging that the "result may be harsh, but . . . necessary . . ."); *K & R Eng'g Co. v. U. S.*, 616 F.2d 469 (Fed. Cl., 1980) ("the general principles of equity . . . will not be applied to frustrate the purposes of its laws or to thwart public policy." (citing *Pan-Am.*, 273 U.S. at 506)); Thomson v. Call, 699 P.2d 316, 316 (Cal. 1985) (discussing that no person can serve two masters); County of Essex v. First Union Nat'l Bank, 891 A.2d 600, 607 (N.J. 2006) ("Strong remedies are necessary to combat unlawful conduct involving public officials. Disgorgement in favor of the public entity serves as a harsh remedy against those who bribe a public official to secure a public contract and provides a deterrent to such unlawful activity."); *see also* Sheridan Strickland, *Municipality of Anchorage v. Hitachi Cable, Ltd. – Time for Adoption of a Void Contract Remedy for Alaska Public Contracting Authorities*, 6 ALASKA L. REV. 227, 238 (1989).

tent among state courts, with some courts explicitly rejecting attempts to mitigate the harsh impact in some cases, while accepting mitigation in others.[45] In contrast, federal treatment has been consistent, rejecting any consideration of mitigation efforts.

The defining conflict-of-interest case was decided in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), which involved a federal conflict-of-interest statute[46] and a contract for the supply of electrical energy. Here, the private entity brought suit against the government for canceling its contract for the construction of a power plant.[47] Though the government had in fact canceled the contract because the power to be generated was no longer needed, its primary defense—which the Court ultimately accepted—was that the contract was unenforceable due to a conflict of interest.[48] The finding of a conflict of interest involved neither actual corruption nor loss.[49] It was enough that the individual was acting on behalf of the government, while simultaneously holding an executive position with a contracting company that was *likely* to benefit from the award of contract.[50] The Court took into account (1) the purposes of the statute; (2) the level of connection with the government to satisfy the "government agent" criterion; and (3) the activities that constituted "direct or indirect interest in the pecuniary profits or contracts of the sponsors."[51]

In *Mississippi Valley Generating Co.*, the statute did not provide the appropriate sanction. Instead, the Court permitted the government to void its contract as a matter of consistent and essential

45. *See*, *e.g.*, K & R Eng'g Co., 616 F.2d 469 at 477 ("There should, logically, be no difference in ultimate consequence between the case where a (contractor) has been paid under an illegal contract and the one in which payment has not yet been made." (citing Gerzof v. Sweeney, 239 NE.2d 521, 524 (N.Y. 1968)); Thomson, 699 P.2d at 316.

46. The statute at issue was 18 U.S.C. § 434, but has since been repealed. The current statute, 18 U.S.C. § 208, has the same purpose, but has expanded the prohibition to include a greater variety of conduct. "Comparison of Old and New Conflict of Interest Sections of Title 18, United States Code," Memorandum Re the Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962, *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/html/USCODE-2011-title18-partI-chap11-sec201.htm.

47. M.V. Generating, 364 U.S. at 523.

48. *Id*. at 524, 566 (stating that while "the government could not avoid the contract merely because it turned out to be a bad bargain," the issue before the Court was purely whether the government may "disaffirm a contract infected by . . . [a] conflict of interest.").

49. *Id*. at 550.

50. *Id*. at 524.

51. The court employed a reasonable test, arguing that the executive was the key representative in crucial preliminary negotiations between the government and contracting sponsors, satisfying the government agent criteria irrespective of the fact that he had not taken oath of office, received tenure or salary, occupied a merely consultative role to the government, and been present in the final rounds of contract negotiations. The court pointed to the fact that the statute did not require employment. *Id*. at 555.

effectuation of the public policy of the statute.[52] It reasoned that "if the Government's sole remedy . . . is merely a criminal prosecution against its agent . . . then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent."[53] In light of public policy, the contract was adjudged illegal and thus void.

State courts have applied similarly harsh remedies against the wrongdoing party and relatively generous awards towards the public entities, which, in these cases, are the municipal governments. In *Thomson v. Call*, a taxpayer suit challenging a building permit award, the California Supreme Court applied strict enforcement of a conflict-of-interest statute.[54] The building permit was procured in exchange for purchase of a parcel of land owned by the city officer for the purpose of dedicating its use as a park and permanent open space for the City. This arrangement tainted the contract because the conflict-of-interest statute involved forbade city officers from being financially interested in any contract that they would make in their official capacity.[55] As the aforementioned federal statutes presented a conflict of interest, the court held that the California statute prohibited the potential for disloyalty: "Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council."[56] A showing of a conflict of interest, irrespective of whether the contract was fair or more advantageous to the public entity, rendered the contract illegal, void, and unenforceable.[57]

The court acknowledged that imposing a bright-line remedy was harsh and that, theoretically, the lower court could have imposed an intermediate approach.[58] However, the court refused to consider any mitigating factors that would have formed part of such an approach[59]; it held that the City was entitled not only to retain the land but also to recover the purchase price plus interest from the city officer without needing to restore the benefits under the contract. Echoing the rationale in *M.S. Generating*, the court held that the wrongdoing party was not entitled to any rights arising under the tainted contract, nor was the City's recovery conditioned on actual loss, fraud, or dishonesty. For reasons of public policy, these seemingly harsh results were justified to "provide [ ] a strong disincentive

52. *Id*. at 566 (stating that "[a]lthough non-enforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection which Congress degreed by enacting Section 434.").

53. *Id*. at 563.

54. Thomson v. Call, 699 P.2d 316, 316 (Cal. 1985).

55. *Id*.

56. *Id*. at 326.

57. *Id*. at 325.

58. *Id*. at 326–27.

59. *Id*. at 326.

for those officers who might be tempted to take personal advantage of their public offices."[60]

Without exception, a showing of actual bribery or corruption is sufficient to require disgorgement irrespective of whether the contract remains valid. While some states grant equitable remedies, the primary remedies employed include denial of any restitution to the wrongdoing private entity and an award of disgorgement and avoidance for the public entity, regardless of the level of performance by the wrongdoing private entity or innocence of the third party.

In *S. T. Grand, Inc. v. City of New York*,—a case involving a public contract for reservoir-cleaning that was awarded without a competitive bidding process—the Court of Appeals of New York found that the criminal conviction of a contractor rendered the contract illegal, and thus void.[61] Grand and its president were convicted of conspiracy to use interstate facilities with the intent to violate the New York state bribery laws in an illegal kickback scheme between the Commissioner of Water Supply and Grand. The court allowed the City of New York retroactive avoidance and disgorgement without restitution to the wrongdoing entity, despite the fact that the entity had already completed performance.[62] The court distinguished this general rule of complete forfeiture in *Grand* from the equitable exception it made in *Gerzof v. Sweeney*,[63] wherein an equitable remedy was granted to the wrongdoing party. While the court in *Gerzof* had a "fair idea"—i.e., a reasonable estimate—of the damage suffered from the illegal agreements,[64] the court in *Grand* found that the absence of a single round of competitive bidding[65] did not allow it to compute the damages to the City of New York. Moreover, the illegality affected only the final stages of the contracting process in *Gerzof*, in contrast to *Grand* where the illegality "goes to the origin of that process."[66] As in the federal cases, the court acknowledged its harsh ruling, but argued that it was necessary to deter violations.[67]

The prohibition against bribery and corruption is unwavering, even where the third party to the public contract is an innocent vic-

60. *Id.* at 328.

61. S. T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 303-305 (N.Y. 1973) [hereinafter S. T. Grand, Inc.].

62. *Id.* at 305 ("[W]e make it quite clear that courts of this State will decline to lend their aid to the fraudulent bidder who seeks recovery.").

63. Gerzof v. Sweeney, 239 N.E.2d 521, 523 (N.Y. 1968).

64. S. T. Grand, Inc., 32 N.Y.2d, at 306 (finding that in *Gerzof* it had a "fair idea" of the damage which the village had suffered, because "the village had already determined that it needed a new generator and there had been one round of legitimate bidding, from which there developed a responsible low bid").

65. The City's Commissioner of Water had invoked a public emergency exception to the bidding requirements for municipal contracts, awarding Grand the contract uncontested. S. T. Grand, Inc., 32 N.Y.2d, at 302.

66. *Id.* at 306-07.

67. *Id.* at 305.

tim. The Court of Appeals of California has held that, where the contract is tainted, the public entity is entitled to recover all consideration paid to that third party and that such disgorgement is automatic.[68] In *Carson Redevelopment Agency v. Padilla*, the owners of a senior housing project paid the mayor a $75,000 bribe to secure a buy-down agreement under which the Carson Agency made the owners a loan of $850,000 which it agreed not to collect so long as the owners fulfilled their obligations to provide senior housing.[69] This extortion payment, which was exchanged for approval of a public contract, created an indirect financial interest for the public official, rendering the contract void.[70] Though the owners were victims of the public official's extortion, the court insisted that they ought to have reported the incident to law enforcement rather than pay the bribe. Once the payment is made and the extortion discovered, the victim could not be permitted to retain any consideration received.

The New Jersey Supreme Court awarded disgorgement[71] to the County even where the contract remained valid, as in *County of Essex v. First Union National Bank*.[72] When, in 1995, the bank's senior vice president pled guilty to falsifying records to induce the purchase and sale of municipal securities through an illegal kickback scheme, the Bank sought, in a subsequent suit, to retain the fees that were charged in connection to these bond transactions.[73] The court recognized that while a valid contract would not result typically in disgorgement, such an award was necessary because the corruption was committed against the general public:

> Strong remedies are necessary to combat unlawful conduct involving public officials. Disgorgement in favor of the public entity serves as a harsh remedy against those who bribe a public official to secure a public contract and provides a deterrent to such unlawful activity. We hold that when a public contract is obtained by bribing a public official, the public entity is entitled to the gross profits obtained by the wrongdoer.[74]

68. Carson Redevelopment Agency v. Padilla, 140 Cal. App. 4th 1323, 1323 (2d Dist. 2006) [hereinafter Carson].

69. *A Public Contract Procured by Bribery is Void, and the Person Who Paid the Bribe Must Disgorge Any Consideration for the Bribe*, 16 NO. CAL. CONSTRUCTION L. REP. 205 (July 2006).

70. Carson, 140 Cal. App. 4th at 1323.

71. New Jersey law allowed the award of punitive damages only where compensatory damages are awarded. However, here the jury did not find a breach of fiduciary duty nor evidence of actual loss suffered by the County; therefore, the issue was not elaborated upon in the decision. *Id*. at 605.

72. County of Essex, 891 A.2d at 600. (referring to the First Union National Bank as First Fidelity Bank because it was renamed between 1985 and 1991).

73. *Id*. at 604.

74. *Id*. at 607.

D. *Contract Law Principles in Cases involving Corruption or Potential for Corruption*

1. Overview

Under U.S. common law, contracts that violate public policy are unenforceable.[75] A contract is unenforceable if legislation so provides, or if the interest in enforcement is clearly outweighed by public policy.[76] In balancing the public interest and the interest in enforcement, courts usually take into account, *inter alia*, (1) the parties' reasonable expectations, (2) the strength of a public policy that derives from a statute or the courts' own judgment of the need to protect public interest,[77] (3) the gravity of the misconduct, and (4) the relation of the contract to the public policy and misconduct involved.[78]

Where there is a statute that criminalizes corruption and bribery—i.e., FCPA, 18 U.S.C. Section 201—or state laws prohibiting commercial bribery, a contract that contravenes such a statute by providing a bribe would infringe public policy, and thus, is unenforceable.[79]

Additionally, where commercial or private-sector bribery is not explicitly prohibited under state law, the court will decide whether the enforcement of such contracts is against public policy. In princi-

75. Response of the United States Supplementary Questions Concerning Phase 3, OECD Working Group on Bribery, 16 (May, 21, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf. (citing *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 135 (1985) ("No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out.")); Lewis & Queen v. N.M. Ball Sons, 308 P.2d 713, 719 (1957) ("the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act"); Trotter v. Nelson, 684 N.E.2d 1150, 1153 (Ind. 1997) ("If an agreement is in direct contravention of a statute, then the court's responsibility is to declare the contract void."); *see also* Erie Telecommunications, Inc. v. City of Erie, Pa., 853 F.2d 1084, 1092 (3d Cir. 1988) ("in the absence of fraud, mistake, duress, public policy violation, or agreement of the parties, the court was unable to void or rescind the contract").

76. *See, e.g.*, Jackson Purchase, Etc. v. Local Union 816, Etc., 646 F.2d 264, 267, 270 (6th Cir. 1980); Morrison v. Marsh & McLennan Cos., 439 F.3d 295, 300 (6th Cir. 2006); *see also* Restatement of the Law of Contracts 2d § 178 (1) (1981), [hereinafter Restatement of Contracts] ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

77. Restatement of Contracts, § 179 ("Bases of Public Policies Against Enforcement: A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare . . .").

78. Restatement of Contracts, § 178 (2), (3).

79. *See e.g.*, Sirkin v. Fourteenth Street Store, 124 A.D. 384, 388 (N.Y. App. Div. 1908) (" a contract made in violation of a penal statute, although not expressly prohibited or declared to be void, was prohibited, void, and unenforceable, whether executory or executed"); KK, LLC v. United States Aviation Underwriters, Inc., 2005 U.S. Dist. LEXIS 8678, *16, (S.D. Ind. May 5, 2005) (quoting Trotter v. Nelson, *supra* note 75).

ple, contracts tending to corrupt[80] or to induce a violation of the private duty that the bribe-taker owes to the principal are considered to be against public policy, and hence, unenforceable.[81]

2. Public Sector Contracts

A contract may become tainted as a result of actual bribery or corruption, or as a result of violation of conflict-of-interest statutes that prohibit the *potential* of the breach of fiduciary duty. These statutes apply to public officials and require no showing of actual loss or corruption to void a contract (see Section C above). The consequences of finding a tainted contract in contracts involving local or federal government can be harsh. In public contracts, the public entity is permitted to avoid its obligations under the tainted contract and is entitled to compensatory damages and disgorgement. In such cases, the public entity relies on the defense of *illegality* for its own breach of contract in any action brought by a private entity challenging its refusal to pay. This defense consequently bars the private entity from claiming *restitution* irrespective of its completion of the task or obligation under the contract. Also used in such instances is the doctrine of unclean hands, which is based on public policy concerns. U.S. courts have consistently allowed the public entity to breach its obligations under a tainted contract, arguing that the private entity's breach terminated the public entity's contractual obligations to the private party.

Private individuals who are victims of corruption may obtain compensation by bringing private lawsuits based on: "fraud, contract, tort, or civil-rights theories."[82] Common law permits the rescission of contracts obtained fraudulently in certain instances.[83]

80. Sinnar v. LeRoy, 44 Wn.2d 728, 731 (Wash. 1954) (reaffirming the court's statement in Goodier v. Hamilton, 172 Wash. 60 (Wash. 1933) that "to anticipate and prevent a subversion of a proper administration of justice, the law should make it impossible for any such temptation to be carried into fruition by condemning a contract that contains the germ of possible corruption. The record not only discloses that this transaction 'contains the germ of possible corruption,' but the evidence, and all inferences which may be drawn, lead us to conclude that the parties contemplated the use of means other than legal to accomplish the end desired").

81. Restatement of Contracts, § 193 ("A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy"); *see, e.g.*, McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 470 (N.Y. 1960) ("A seller cannot recover the price of goods sold where he has paid a commission to an agent of the purchaser; neither could the agent recover the commission, even at common law and before the enactment of section 384-r of the Penal Law [now N.Y. Penal Law § 439]).

82. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 88.

83. *See, e.g.*, Old Colony Trust Co. v. Dubuque Light & Traction Co., 89 F. 794, 809-10 (E.D.N.D. Iowa 1898) (holding that a false statement intended to induce as to a future event is a promise which authorizes rescission where it is not only unfulfilled, but where the promisor had no such intention at the time); Barnes v. Century Savings Bank, 128 N.W. 541, 547 (Iowa 1910) (deciding that false and willful misrepresentations is ground for rescission despite no actual damage resulting); Herndon v.

The United States courts have recognized the concept of "faithless agent" by stating that "no man can faithfully serve two masters whose interests are or may be in conflict."[84] The courts have held that federal and state conflict-of-interest statutes recognize this concept when they state that an agent who is acting in a fiduciary capacity cannot also be acting for himself in his individual capacity, as such a conflict of interest may cause an agent not to be able to exercise "absolute loyalty and undivided allegiance" to the best interests of its principal.[85]

An agent is an individual or entity in the employ of the principal. The agent agrees to act wholly under the control or direction of the principal. The legal relationship between an agent and a principal may be either express or implied, wherein the agent exercises a duty of loyalty to the principal. This relationship is fiduciary in nature, and therefore, a proof of faithless agent, such as through the acceptance of bribery, renders the contract voidable. The consequences of the faithless agent's wrongdoings vary depending on the cause of action. In the strictest application of the faithless agent principle, courts have required absolute forfeiture from the wrongdoer and general liability for all compensation from the date of breach.[86] Even if the principal of the recipient of the bribe either authorizes (*ex ante*) or ratifies (ex post) a contract procured through bribery, the contract may still be declared voidable.[87]

The defenses of illegality, public policy and unclean hands each can prevent enforcement of a tainted contract. The reasoning underpinning these defenses is that a party seeking enforcement cannot have the help of the court if it has engaged in corrupt acts, such as bribery. Remedies are determined based on the relative seriousness of both the defendant's and plaintiff's misconduct, as well as whether the denial of relief to the plaintiff would unjustly enrich the defendant.[88] In the private context, where neither party is entirely innocent, there is no obligation to make restitution of benefits conferred under an illegal contract unless the plaintiff can show that it

---

Wakefield-Moore Realty Co., 79 So. 318, 319 (La. 1918) (permitting rescission where the misrepresentation bore on a material part of the promise of sale).

84. Thomson v. Call, 699 P.2d 316, 324 (Cal. 1985).

85. *Id.*; *see also* Pearl Zuchlewski & Geoffrey A. Mort, *"Faithless Servant" Doctrine Still Followed by Some States but Rejected as Overly Punitive by Others* (2011), *available at* www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/027.authcheckdam.pdf (discussing the evolution of the faithless servant doctrine under New York state law by citing Murray v. Beard, 102 N.Y. 505 (1886); Feinger v. Iral Jewelry, Ltd., 41 N.Y.2d 928 (1977); and *William Floyd Union Free School District v. Wright*, 61 A.D.3d 856, 859 (2d Dpt. 2009)).

86. Zuchlewski & Mort, *supra* note 85, at 2.

87. Davis, *supra* note 42, at 49.

88. *See generally* Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. REV. L. & SOC. CHANGE 681, 681-86 (2011).

was less culpable than the defendant. In effect, the bribe payer is entitled to restitution only if it can show that it paid under *duress* or was *mistaken* about the legality of its conduct.[89]

In the context of public contracts, the courts have employed a "zero-tolerance" stance on grounds of public policy and have held that the public should not bear the burden of obligation under an illegal contract.[90] Public policy may be statutorily defined or weighed against the private interest in the enforcement of the contract. Conflict of interest statutes are based entirely on public policy so that violations generally result in denial of restitution to the wrongdoing party, irrespective of level of completion or performance.

The doctrine of "holder in due course" allows a second contract to remain voidable and not void against innocent third parties even if the underlying contract has been tainted and not enforceable. In such cases, the courts can enforce contracts and permit disgorgement in favor of an innocent third party. In *Bankers Trust Co. v. Litton Systems, Inc.,* 599 F.2d 488 (2d Ct. App. 1979), the defendant Litton entered into a contract with Bankers Trust to finance its lease of photocopiers under a leasing contract. That leasing contract was tainted as an employee of a Litton affiliate, Royal, had allegedly received bribes from Regent Leasing. In a separate contract, Regent had borrowed money from the plaintiff, Bankers Trust, to finance the leasing arrangement. The court held that the illegality defense under New York Uniform Commercial Code § 3-305(2) (b) is available only if under the applicable state law the effect of illegality is to make the obligations entirely null and void. The defense is ineffective against a holder in due course if the illegality causes the contract to be merely voidable and not void. The court states that "where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument is inapplicable because the plaintiff had done no wrong for which it should be penalized."[91] The court further states the policy reasons behind the holder in due course, i.e., that it would be poor policy for courts to impose on banks and other finance companies any obligations to police those agents charged with responsibility of searching out commercial bribery committed by their assignors.

E. Transnational Bribery: FCPA

1. Overview

The FCPA was enacted in 1977,[92] following disclosures that a significant number of American corporations had made illegal or

89. *See generally* Davis, *supra* note 42.
90. *Id.*
91. Bankers Trust Co. v. Litton Systems, Inc., 599 F.2d 488, 492-93 (2d Cir. 1979).
92. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1, 78ff (1998).

questionable payments to foreign officials, as well as illegal campaign contributions with funds that were undisclosed and falsely or inaccurately recorded on the company's books. The initial objective of the Act was to encourage accountability among publicly traded companies, or "issuers," by prohibiting falsification of corporate accounting records or false and misleading statements to auditors and by requiring an internal control system that would provide meaningful assurance that transactions were executed as authorized and properly recorded.[93]

The FCPA requires issuers to keep accurate books and records and have a "system of internal controls sufficient to . . . provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization."[94] Although these accounting provisions apply only to issuers, the issuer's books and records include those of its consolidated subsidiaries and affiliates under its control.[95]

In addition to the accounting provisions, the drafters found it necessary to include a criminal provision in the FCPA[96] to prohibit the offer, payment, promise or authorization of bribes, directly or indirectly, to foreign officials to assist in obtaining or retaining business.[97] The anti-bribery prohibition applies to U.S. and foreign companies[98] listed on U.S. stock exchanges or those required to file periodic and other reports with the SEC[99] ("issuers"),[100] to U.S. persons and businesses (domestic concerns),[101] and to officers, directors, employees, and agents of stockholders acting on behalf of an issuer or domestic concern. Federal jurisdiction in these cases requires the use of U.S. mails or any means or instrumentality of interstate com-

93. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, U.S. Sec. & Exch. Comm'n, at 57-59, (May 1976), *amending* the Securities Exchange Act, 15 U.S.C. §§ 78a-78ll (1934).

94. *Spotlight on Foreign Corrupt Practices Act*, U.S. Sec. & Exch. Comm'n (last visited Nov. 30, 2013), www.sec.gov/spotlight/fcpa.shtml [hereinafter *Spotlight*].

95. *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division, U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exch. Comm'n, 43 (2012) [hereinafter *A Resource Guide*] *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

96. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 Nw. J. Int'l L. & Bus. 269, 275.

97. *See* 15 U.S.C. § 78dd-1(a) (1998).

98. Foreign companies with American Depository receipts listed on a U.S. exchange are also defined as issuers. *A Resource Guide*, *supra* note 95, at 11.

99. *See* 15 U.S.C. § 78m (describing the filing requirements).

100. *Id.* § 78dd-1(a).

101. Domestic concerns include "any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States." 15 U.S.C. §§ 78dd-2(h)(1)(A), 78dd-2(h)(1)(B).

merce.[102] Such use is not required for the provisions to apply to certain foreign persons and businesses acting within the territory of the United States[103] and to U.S. individuals and entities for acts entirely outside the United States.[104]

In recent years, FCPA enforcement has hit "historic highs," involving individuals and companies from the United States and abroad for a broad scope of actions in locations around the world.[105] The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) share enforcement authority, and often work together to bring parallel suits. The DOJ has criminal enforcement authority over issuers and their officers, directors, employees, agents, or stockholders acting on their behalf. With respect to the anti-bribery provisions, it has both criminal and civil enforcement authority over domestic concerns and certain foreign persons and businesses acting in furtherance of an FCPA violation in the territory of the United States. However, while the Department of Justice has vigorously prosecuted the FCPA and has the authority to pursue civil actions, "the DOJ has exercised the civil authority in limited circumstances over the last thirty years."[106]

The SEC's Division of Enforcement has civil enforcement authority for violations of the FCPA accounting and internal controls provisions by issuers and their officers, directors, employees, agents, or stockholders acting on their behalf.

Although the FCPA has no express private right of action, "victims of corruption may obtain compensation for their losses by bringing private actions in state or federal court against the responsible persons or institutions, providing the victims can prove that they suffered damages as a result of corruption."[107] These "FCPA-inspired" lawsuits may be based in common law or statute and can be premised on fraud, contract, tort, or civil-rights theories.[108]

2. FCPA Criminal Provisions

The FCPA prohibits the offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official to influence any act of that official in his official capacity, to induce that official to act or omit any act in violation of his lawful

102. *Id.* §§ 78dd-1 (a), 78dd-2(a).

103. *A Resource Guide*, *supra* note 95, at 10.

104. *See id.* at 12 (noting that the FCPA was amended in 1988 to add "alternative jurisdiction" based on the nationality principle).

105. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 16.

106. *A Resource Guide*, *supra* note 95, at 117 n.357.

107. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 171.

108. *Id.*

duty, or to secure any improper advantage.[109] It is also unlawful to seek to induce a foreign official to use his influence to assist in obtaining or retaining or directing business.[110] Perhaps one of the most contentious issues has been the government's broad interpretation of the definition of foreign official, which includes any officer or employee of a foreign government, agency or instrumentality thereof or any public international organization or any person acting in an official capacity for or on their behalf.[111]

In addition to prohibiting payments to foreign officials, the prohibition extends to payments to foreign political parties, officials and candidates for the purpose of influencing that official or a foreign government or instrumentality to assist in obtaining or retaining business.[112]

Indirect payments through third parties, such as distributors, agents, consultants, joint-venture partners and others, who are frequent conduits for bribery, are also prohibited if there is knowledge that such payments will be used, directly or indirectly, for proscribed purposes.[113] The statute's definition of "knowing" includes awareness of a high probability that such conduct is going to or will occur or that circumstances exist that make it substantially certain that such conduct will occur.[114] Typically, the term "knowing" has been interpreted broadly.

The FCPA requires corrupt intent, applying to payments intended to wrongfully influence or induce a foreign official to use his position to help secure business for, or direct it to, any person. This requirement has been interpreted broadly, and it is the payer's corrupt intent, not the final outcome, that is relevant.[115] However, FCPA liability will not arise for payments made in response to "true extortion" defined as demand for payment under imminent threat of physical harm."[116] Economic extortion does not count as true extortion and does not protect the person from liability under the FCPA.

The FCPA applies only to payments intended to obtain or retain business.[117] It provides two affirmative defenses[118] and provides a

109. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a)(1)(A) (1998).

110. *Id.* § 78dd-1(a)(1)(B).

111. *Id.* § 78dd-1(f). *See also A Resource Guide*, *supra* note 95, at 19-20.

112. 15 U.S.C. § 78dd-1(a)(2).

113. *Id.* § 78dd-1(a)(3).

114. *Id.* § 78dd-1(f)(2).

115. Response of the United States to the Phase I Questionnaire, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, (Oct. 30, 1998), [hereinafter U.S. Response to the Phase I Questionnaire] *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf.

116. *A Resource Guide*, *supra* note 95, at 27.

117. U.S. Response to the Phase I Questionnaire, *supra* note 115.

118. 15 U.S.C. § 78dd-1(c).

narrow exception for facilitating payments to expedite or secure a routine governmental action.[119]

FCPA liability may also attach through parent-subsidiary and successor liability.[120] Where a parent company has participated sufficiently, by direct participation in or by directing the activity of its subsidiary, the parent company may be liable.[121] A company may also acquire successor liability when it merges with or acquires another company with liabilities.[122]

3. Civil Provisions & Liability: FCPA Accounting & Internal Control Provisions

The FCPA's accounting provisions operate in tandem with the anti-bribery provisions.[123] They require issuers,[124] and subsidiaries and affiliates subject to their control,[125] to maintain accurate books and records and have an adequate system of internal controls. This system of internal controls must be sufficient to provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization.[126] The SEC rules to implement these provisions prohibit any person from directly or indirectly falsifying an issuer's books and records, or from lying to an issuer's accountant in connection with an audit or preparation of any report filed with the SEC or to an independent auditor.[127]

The books and records provisions are directed at the mischaracterization of bribes, both large and small, as legitimate payments, such as commissions, consulting fees or marketing expenses. These provisions require information in "reasonable detail" so as to effectively prevent false or off-the-books accounts that could be used to conceal bribes. "Consistent with the FCPA's approach to prohibiting bribe payments of any value that are made with a corrupt purpose, there is no materiality threshold."[128] The internal controls

119. *Id.* § 78dd–3(b); *see also A Resource Guide*, *supra* note 95, at 25.

120. *A Resource Guide*, *supra* note 95, at 27.

121. *Id.*

122. *Id.* at 28; *see also* Jason Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, STOEL RIVES LLP, 21, (Mar. 2009), *available at* www.stoel.com/Files/09MarAprAdv.pdf.

123. *A Resource Guide*, *supra* note 95, at 38.

124. Privately held companies are not 'issuers' under the FCPA.

125. *A Resource Guide*, *supra* note 95, at 43 (discussing if parent owns 50% or less, it must only use good faith efforts to cause the sub or affiliate to adopt internal controls consistent with its own FCPA obligations).

126. 15 U.S.C. § 78m(b)(2). *Spotlight*, *supra* note 94.

127. Securities and Exchange Act Rule 13b2–1 to 13b2–2, 17 C.F.R. § 240 (1934); *see also* United States Review of Implementation of the Convention and 1997 Recommendation, OECD WORKING GROUP ON BRIBERY, (April 1999), [hereinafter OECD Convention Phase 1 Report on the United States] *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf.

128. *A Resource Guide*, *supra* note 95, at 39.

provisions are designed to help ensure a controlled environment that will reduce the likelihood of bribery. While the FCPA does not specify the elements of a control environment, best-practice programs should reflect the particular operations, risk, needs and circumstances of the company.[129] SEC cases indicate that the absence of such programs may lead not only to FCPA violations, but to other misconduct, including financial fraud, commercial bribery and embezzlement by company employees.[130]

4. Sarbanes Oxley Accounting Requirements

The Sarbanes Oxley Act, enacted in 2002[131] in response to accounting scandals, imposes requirements on issuers that have FCPA implications. As inferred previously, provisions that require a public company to maintain accurate recordkeeping act as a deterrent against bribery, as such provisions prevent companies from concealing or mischaracterizing payments whose sole purpose would be to bribe foreign officials. Section 302 requires an issuer's senior executives, or "principal officers," to take responsibility for and certify to the integrity of financial reporting on a quarterly basis.[132] They must also certify that there are no material misstatements or omissions, that financial statements are accurate in all material respects, that internal controls are properly designed, and that all significant internal control deficiencies have been disclosed to the issuer's audit committee.[133] Section 404 of the Act requires issuers to report annually on the effectiveness of the company's internal controls over financial reporting. The issuer's independent auditor must also attest to and report on its assessment of the effectiveness of these internal controls. Under the SEC rules, these internal controls apply to illegal acts and fraud, including bribery, which could result in a material misstatement of the company's financial statements.[134] The principal executive and the financial officer can be held liable for false certifications.

5. Civil Enforcement

The SEC Division of Enforcement has civil enforcement authority for violations of the FCPA accounting and internal controls provisions by issuers and their officers, directors, employees, agents,

---

129. *Id.* at 40.
130. *Resource Guide*, *supra* note 95, at 41.
131. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903(a)-(b), 2002 U.S.C.C.A.N. (116 Stat.) 745, 805 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.).
132. 15 U.S.C. § 7241 (1998).
133. Securities and Exchange Act Rule 13a-14, 17 C.F.R. § 240 (1934).
134. *A Resource Guide*, *supra* note 95, at 114 n.242.

or stockholders acting on behalf of the issuers.[135] They can be subject to civil liability for violating, circumventing, or failing to implement[136] the accounting and internal control requirements or for aiding and abetting or causing an issuer to violate them.[137] The SEC must show by a preponderance of the evidence that the defendant more likely than not engaged in the alleged misconduct.[138] This standard is less burdensome than the "beyond reasonable doubt" standard in criminal enforcement, and there is no "knowing" requirement.

However, for companies and individuals to be held *criminally* liable for violations of the books and records and accounting provisions, there must be a willful and knowing failure to comply. Individuals found to have willfully violated the provisions may be fined up to $1 million, imprisoned up to ten years, or both; issuers so found may be fined up to $2.5 million.[139]

In addition to civil liability for violations of the FCPA accounting and internal controls requirements, issuers may be subject to charges for failure to comply with SEC reporting obligations. "Failure to properly disclose material information about the issuer's business, including material revenue, expenses, profits, assets, or liabilities related to bribery of foreign government officials, may give rise to anti-fraud and reporting violations under Sections 10(b) and 13(a) of the exchange Act."[140]

For FCPA bribery violations by individuals and enterprises, civil penalties of up to $10,000 may be imposed in addition to criminal penalties.[141] For violations of the FCPA accounting provisions, the SEC may obtain a civil penalty in actions filed in federal court and in administrative proceedings.[142] The penalty will be the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company, depending on the egregiousness of the violation.[143] A company may

135. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 3.

136. 15 U.S.C. § 78(b)(5).

137. Securities Exchange Act § 20(c), (1934), 15 U.S.C. § 78t(c) (2012). Exchange Act Rule 13b2-1, 17 C.F.R. § 240, (1934) (prohibiting directly or indirectly falsifying or causing to be falsified any book, record or account subject to the Act).

138. U.S. Response to the Phase I Questionnaire, *supra* note 115, at 18; *see also*, Thomas C. Newkirk & Ira L. Brandriss, SEC Staff, *SEC Speech: The Advantages of a Dual System* (Sept. 19, 1998) (citing footnote 23, Addington v. Texas, 441 U.S. 418 (1979), *available at* www.sec.gov/news/speech/speecharchive/1998/spch222.htm.

139. OECD Convention Phase 1 Report on the United States, *supra* note 127, at 18.

140. *A Resource Guide*, *supra* note 95, at 41.

141. OECD Convention Phase 1 Report on the United States, *supra* note 127, at 12.

142. *A Resource Guide*, *supra* note 95, at 69.

143. *Id.*

also be suspended or debarred from doing business with the U.S. federal government upon a civil judgment for falsification or destruction of records, making false statements or commission of another offense indicating a lack of business integrity that affects its present responsibility.[144]

Besides civil penalties and sanctions, the SEC has pursued other actions in cases of FCPA violations, including civil injunctive actions, civil administrative actions, deferred prosecution agreements (DPA), Non-Prosecution Agreements (NPA), termination letters, and declinations. Defendants commonly agree to settle civil injunctive actions[145] under terms in which the defendant accepts the entry of a final judgment, without admitting or denying the SEC's allegations.[146] The final judgment typically orders the defendant to refrain from future violations of securities laws,[147] and grants the equitable relief of disgorgement of ill-gotten gains, pre-judgment interest and civil monetary penalties when a defendant has profited from a violation of law.[148] The SEC may bring civil or criminal contempt proceedings for violation of the injunction.[149] Civil contempt sanctions are remedial in nature, either compensating the party injured by the violation, or forcing compliance with the injunction.[150] Most recent civil injunctive settlements have included disgorgement. The SEC may also seek remedial measures or the retention of an independent compliance consultant or monitor.[151]

The SEC may also initiate an administrative proceeding against an individual or entity before an SEC administrative law judge,[152] whose decision may be appealed to the SEC. A U.S. Court of Appeals may then review the SEC's decision. Administrative proceedings provide for several types of relief.[153] Actions against regulated persons and entities, such as broker-dealers and investment advisers and persons associated with them, can result in sanctions ranging from censure, limitation on activities, suspension of up to twelve months, and debarment from association or revocation of registration.[154] For

144. Federal Acquisition Regulations, 48 C.F.R. §§ 9.406-2, 9.407-2 (2005).

145. Joel M. Cohen & Mary Kay Dunning, *Does That Settle It? Well, Maybe Not*, NAT'L L.J, Apr. 9, 2012 [hereinafter Does that Settle It?] *available at* http://www.gibsondunn.com/publications/Documents/CohenDunning-Doesthatsettleit.pdf. *See also A Resource Guide*, *supra* note 95, at 76.

146. Does that Settle It?, *supra* note 145.

147. *Id*.

148. 17 C.F.R. § 201.600 (2011); *see also* S. Sec. and Exchange Comm., Enforcement Manual § 6.1.2 (Oct. 19, 2013), [hereinafter Enforcement Manual] *available at* www.sec.gov/divisions/enforce/enforcementmanual.pdf.

149. *A Resource Guide*, *supra* note 95, at 76.

150. *Id.*

151. *A Resource Guide*, *supra* note 95, at 76.

152. *Id.*

153. *Id.*

154. *Id.*

professionals such as attorneys and accountants, the SEC can order in Rule 102(e) proceedings that the professional be censured, suspended, or barred from practicing before the SEC.[155] SEC staff can seek an order from an administrative law judge requiring the respondent to cease and desist from any current or future violations of the securities laws.[156] In addition, the SEC can obtain disgorgement, pre-judgment interest, and civil money penalties in administrative proceedings under Section 21B of the Exchange Act, it can also obtain other equitable relief, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.[157]

In making a determination as to whether or not to bring an FCPA enforcement action, the SEC is guided by its mission to protect investors and markets.[158] It also considers factors, such as how egregious the conduct and potential violations are; the resources available to pursue the investigation; the adequacy and strength of the evidence; the extent of potential investor harm absent an action; and the length of time elapsed since the underlying conduct occurred.[159]

In 2010, the SEC launched a new initiative providing incentives to encourage individuals and companies to provide information about misconduct that would assist in the SEC's investigations and enforcement actions.[160] Under the initiative, the SEC would make use of tools not previously available in SEC enforcement, but widely used by the DOJ in criminal enforcement. Those tools included Cooperation Agreements, Deferred Prosecution Agreements, and Non-Prosecution Agreements. Under these formal written agreements, the SEC would provide credit for cooperation depending on (1) the extent of cooperation, (2) the importance of the underlying matter, (3) the societal interest in accountability for misconduct, and (4) the risk profile of the cooperating individual or entity.[161]

Under a DPA, the SEC would forego prosecution provided that the individual or company agreed to cooperate and comply for an agreed period with express undertakings and, under certain circumstances, admitted to or agreed not to contest underlying facts that the SEC could assert to establish a violation of the federal securities

155. *Id.*

156. *Id.*

157. *Id.*

158. Enforcement Manual, *supra* note 148, at 119.

159. *A Resource Guide*, *supra* note 95, at 77. *See also* Enforcement Manual, *supra* note 148 at 4-6.

160. Press Release, U.S. SEC. AND EXCH. COMM'N, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, Press Release No. 2010-6 (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-6.htm.

161. Enforcement Manual, *supra* note 148, at 119.

laws.[162] Undertakings generally include continued cooperation and instituting or upgrading compliance programs, practices and training. A violation of the DPA could trigger an SEC enforcement action, using factual admissions.[163]

Under an NPA, the SEC would, in limited circumstances, agree not to pursue an action in exchange for cooperation and compliance with express undertakings.[164] If the agreement were violated, the SEC could pursue an enforcement action.[165] In the SEC's first NPA, the Ralph Lauren Corporation was given credit for immediately reporting and remediating misconduct uncovered in an internal review and for providing extensive cooperation.[166] It agreed to pay disgorgement and prejudgment interest.

6. Recent Trends in SEC Enforcement

Recent years have seen a significant uptick in FCPA enforcement by both the SEC and DOJ. Since 2008, the SEC has brought an average of sixteen FCPA actions annually.[167] Although ongoing FCPA investigations are not public, it is estimated that there are 116 pending DOJ and SEC investigations.[168] Recent notable trends in SEC enforcement include prosecution of individuals, broad reading of "foreign official," an expanded exercise of jurisdiction and rewards for significant cooperation in investigations. In addition to numerous cases related to foreign bribery, the SEC has filed cases seeking civil penalties and disgorgement of profits based on books and records and internal control charges even with no formal bribery charge.[169]

F. FCPA Collateral Suits

While the FCPA does not provide a private right of action,[170] individuals damaged by corruption may "bring private actions for

---

162. U.S. Securities and Exchange Commission, Enforcement Cooperation Program, *available at* www.sec.gov/spotlight/enfcoopinitiative.shtml (last visited Nov. 6, 2013).

163. Enforcement Manual, *supra* note 148, at 128.

164. *Id* at 130.

165. *Id* at 131.

166. U.S. Securities and Exchange Commission, Non-Prosecution Agreement, *available at* http://www.sec.gov/news/press/2011/npa-pr2011-267-fanniemae.pdf.

167. Chart, *FCPA Actions Brought By The SEC*, U.S. Sec. and Exchanges Comm., *available at* http://www.sec.gov/spotlight/fcpa/fcpa-enf-acts-chart.pdf. In fiscal year 2008, the SEC brought 16 FCPA actions; 13 actions in 2009, 16 actions in 2010, 20 actions in 2011, and 15 actions in 2012.

168. Shearman & Sterling LLP FCPA Digest at 434-556, *available at* http://shearman.symplicity.com/files/e92/e9263053e7f0083efaddfa8a241e66df.pdf.

169. Response of the United States to the OECD Questionnaire for Round 3 at 12–13, *available at* http://www.oas.org/juridico/english/mesicic3_usa_resp.pdf.

170. *See* Lamb v. Philip Morris, Inc., 915 F.2d 1024, 1024 (6th Cir. 1990) (finding that a private right of action under the FCPA would be inconsistent with the legislative scheme).

monetary damages against the violator in state or federal court."[171] These collateral actions are "common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories."[172] They may also be based on "securities law, derivative shareholder, ERISA, employment, commercial, and bankruptcy law."[173]

In recent years, robust FCPA enforcement has led to an increase in private plaintiffs bringing collateral civil actions[174] against several major American multinational companies, such as Baker Hughes,[175] and Johnson & Johnson,[176] and against corporate officers and directors. The most prevalent are shareholder derivative actions and securities class action suits, usually filed following disclosure of an FCPA investigation or resolution.[177] *In re Wal-Mart Stores, Inc. Shareholder Derivative Litigation* was filed following a New York Times exposé of an alleged bribery scheme involving Wal-Mart's largest subsidiary, Wal-Mex.[178]

FCPA-related shareholder derivative actions are brought by shareholders on behalf of the corporation for harm to the company by its officers and directors as the result of a violation or oversight failure, including FCPA non-compliance. In *Freuler v. Parker*, a shareholder brought a derivative action on behalf of the corporation, against its officers and directors, alleging breach of fiduciary duties and violations of the Securities Exchange Act.[179] The complaint alleged that the defendants breached their fiduciary duties by "failing to maintain adequate internal controls in compliance with FCPA or its underlying directives regarding books, records, and accounting, designed to uncover the type of improper payments made."[180]

To pursue a claim, courts generally require shareholders to make a demand on the company to pursue the claim or demonstrate to the court why such a demand would be futile.[181] While a high bar, where

---

171. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 169.

172. *Id.*

173. Response of the United States Supplementary Questions Concerning Phase 3, OECD WORKING GROUP ON BRIBERY, 16 (May, 21, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf.

174. *Id.*

175. Baker Hughes Inc. v. Deaton, No. 4:08-cv-01809 (S.D. Tex. June 6, 2008) (settling for $44.1 million).

176. Johnson & Johnson v. Coleman, No. 3:11-cv-02511-MLC-TJB (D.N.J. May 2, 2011) (paying a $21.4 million criminal penalty for improper payments in violation of the FCPA).

177. Samuel W. Cooper, S. Joy Dowdle, Christie A. Mathis, *Preparing for Shareholder Lawsuits When Dealing with Foreign Corrupt Practices Act Investigations*, Client Alert from Paul Hastings, September 2013, [hereinafter *Shareholder Lawsuits and FCPA Investigations*].

178. *In re Wal-Mart Stores, Inc. Shareholder Derivative*, No. 4:12-cv-4041, 2012 WL 5935340, at *1 (W.D. Ark. 2012).

179. Freuler v. Parker, 803 F. Supp. 2d 630, 633 (S.D. Tex. 2011).

180. *Id.* at 643.

181. *Shareholder Lawsuits and FCPA Investigations*, *supra* note 177.

the shareholder can demonstrate that the board has a conflict of interest or lacks independence to fairly consider whether to pursue the claim, the court may permit the shareholder to do so.[182]

Unlike shareholder derivative suits, shareholder securities fraud actions are generally brought as class actions on behalf of the shareholders, rather than the corporation.[183] Such claims generally allege violations of federal securities laws. These include disclosure violations under Section 10(b) of the 1934 Act[184] and Rule 10b-5,[185] prohibiting false or materially misleading statements or omissions. These may be with respect to disclosures of FCPA material risks, investigations or oversight of compliance programs. In the Wal-Mart litigation against current and former directors, the plaintiffs alleged violations of Section 14(a)[186] of the Securities Exchange Act, by causing Wal-Mart to issue proxies "that materially misrepresented the effectiveness of the board's supervision and oversight, and its compliance" with federal laws; and Section 29(b)[187] of the Securities Exchange Act, by receiving incentive compensation and fees that should be rescinded because of their violation of Section 14(a)."

As with shareholder derivative actions, plaintiffs in securities fraud actions must meet a high bar to pursue a claim. Courts have required that plaintiffs demonstrate that those making misleading statements know that their statements are false. Knowledge may be inferred if defendants personally benefited, deliberately participated, or failed in their oversight duty to verify the statements.[188] Although plaintiffs have often been unsuccessful in meeting the court's procedural requirement in either shareholder derivative actions or securities fraud actions, defendants have settled for significant sums.[189] For example, the FCPA collateral action suits against FARO Technologies, Inc.[190] and Syncor International[191] settled for far more than their settlements with the DOJ and SEC.

---

182. *Id.*

183. *Id.*

184. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998).

185. Securities and Exchange Act Rule 10b-5, 17 C.F.R. § 240 (2012).

186. 15 U.S.C. § 78n; *In re Wal-Mart Stores, Inc. Shareholder Derivative*, 2012 WL 5935340, at 3.

187. 15 U.S.C. § 78cc; *In re Wal-Mart Stores, Inc. Shareholder Derivative*, 2012 WL 5935340, at 3.

188. *Shareholder Lawsuits and FCPA Investigations*, *supra* note 177.

189. Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L. J. 5, 1217, 1246 (2012) [hereinafter *Double Trouble*].

190. Faro entered into a $2.92 million settlement with the DOJ and the SEC for making $444,492 in illegal payments to employees of Chinese state-owned enterprises in order to secure sales contracts. The securities fraud class action settled for $6.875 million. In Milton Arbitrage Partners, LLC v. Syncor Int'l Corp., shareholders sued Syncor and several of its officers for misrepresenting the basis for Syncor's overseas growth and omitting mention of illegal payments. While Syncor settled its FCPA litigation with the SEC for $500,000, the shareholder litigation settled for $15.5 million.

Private plaintiffs may seek monetary damages in FCPA-related cases by alleging fraud, breach of contract or RICO violations.[192] FCPA-related civil suits may also be brought by foreign governments, alleging fraud, RICO and FCPA violations and they may be expected to increase.[193] For example, in 2008, Aluminum Bahrain BSC ("Alba"), the Kingdom of Bahrain's state-controlled aluminum smelter, sued its Pennsylvania-based raw materials supplier, Alcoa, Inc., alleging RICO, fraud and conspiracy to defraud.[194]

III. International Legal Framework

The United States is signatory to the following international conventions and instruments: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed and ratified in 1998), the Inter-American Convention Against Corruption adopted by the Organization of American States (signed in 1996 and ratified in 2000), the United Nations Convention against Corruption (UNCAC) (signed in 2003 and ratified in 2006), the Criminal Law Convention on Corruption adopted by the Council of Europe (signed in 2000),[195] and the United Nations Convention Against Transnational Organized Crime (signed in 2000 and ratified in 2005). The United States has also played a leadership role in the fight against corruption. It has included anti-corruption provisions in its free trade agreements, and contributed to and participated in the APEC Course of Action on Fighting Corruption and Ensuring Transparency.[196]

---

191. Westbrook, *supra* note 189, at 1217, 1246; Jeffrey S. Johnston, Erika A. Tristan, *The Next FCPA Battleground: Private Civil Lawsuits Following Foreign Corrupt Practices Act Settlements with U.S. Government Authorities* (2011), *available at* www.velaw.com/uploadedFiles/VEsite/Resources/VELitigationNewsWinter2011.pdf.

192. *2013 Mid-Year FCPA Update*, Gibson Dunn, (Jul. 8, 2013), *available at* www.gibsondunn.com/publications/pages/2013-Mid-Year-FCPA-Update.aspx.

193. Response of the United States Supplementary Questions Concerning Phase 3, OECD Working Group on Bribery, 16 (May, 21, 2010), *available at* www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf.

194. *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 866 F. Supp. 2d 525, 525 (W.D. Pa. 2012).

195. Criminal Law Convention on Corruption, E.U., Jan. 27, 1999 *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm.

196. 16th APEC Ministerial Meeting, Santiago, Chile (Nov. 17-18, 2004) *available at* www.apec.org/~/media/Files/Groups/ACT/04_amm_033rev2.pdf.