Chapter 8

Fines, Penalties, and Other Sanctions

§ 8:1 Violation of FCPA

§ 8:1.1 The Accounting Provisions

The civil remedies and penalties for a violation of the accounting provisions by issuers are those available to the SEC under the general enforcement authority for a violation of the federal securities laws.[1] This includes authority to seek injunctive relief, cease and desist

1. 15 U.S.C. § 78u (Supp. 2006). In Gabelli v. SEC, 568 U.S. 442, 454 (2013), the U.S. Supreme Court held that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies when the SEC seeks civil monetary penalties. In Kokesh v. SEC, No. 16-529, slip op. (U.S. June 5, 2017), the U.S. Supreme Court resolved a disagreement among several circuit courts over whether disgorgement claims in SEC proceedings are subject to the five-year limitation period. It held that the five-year statute of limitations also applies to SEC enforcement actions seeking disgorgement. *Compare* SEC v. Graham, 823 P.3d 1357, 1363 (11th Cir. 2016) (holding that section 2462 applies to SEC disgorgement claims), *with* Riordan v. SEC, 627 F.3d

orders, and the imposition of civil fines.[2] The SEC also has the authority to institute administrative proceedings and to fashion remedies in administrative proceedings, including the authority to issue cease and desist orders, to impose civil penalties, and to order an accounting or disgorgement.[3]

The SEC has, in recent settlements of enforcement actions, required the disgorgement of profits plus the payment of prejudgment interest.[4]

1230, 1234 (D.C. Cir. 2010) (holding that section 2462 does not apply to SEC disgorgement claims), *and* Sec. and Exch. Comm'n v. Straub, No. 11 Civ. 9645 (RJS) (S.D.N.Y. Sept. 30, 2016) (holding that, under the Second Circuit, section 2462 does not apply to claims for disgorgement).

2. *Id.* §§ 78u, 78u-1. For violations of the accounting provisions, a civil penalty may not exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violations, or (ii) a specified dollar limitation. The specified dollar limitations are based upon the egregiousness of the violations, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company. 15 U.S.C. § 78u(d)(3); 17 C.F.R. § 201.1005 (2016). *See In re* BHP Billiton Ltd. and BHP Billiton Plc, Exchange Act Rel. No. 74,998 (May 20, 2015), involving the payment of hospitality expenses for government officials/employees to attend the 2008 Summer Olympic Games, wherein the SEC imposed a civil penalty of $25 million. *In re* GlaxoSmithKline plc, Accounting and Auditing Enforcement Rel. No. 3810 (Sept. 30, 2016) ($20 million civil penalty involving improper payments and entertainment made by its China subsidiaries to healthcare professionals); *In re* Las Vegas Sands Corp., Securities Exchange Act of 1934 Release No. 77,555 (Apr. 7, 2016) ($9 million civil penalty); *In re* Biomet, Inc., Accounting and Auditing Enforcement Rel. No. 3843 (Jan. 12, 2017) ($6.5 million civil penalty).

3. *Id.* §§ 78u-2, 78u-3. There has been some controversy over the SEC's increased use of its own administrative proceedings to enforce the FCPA's accounting provisions, rather than pursuing civil enforcement actions in federal courts. *See, e.g.*, Megan Leonhardt, *Republicans Question Fairness of SEC In-House Judgments*, WEALTHMANAGEMENT.COM (Mar. 19, 2015), http://wealthmanagement.com/legal/republicans-question-fairness-sec-house-judgments. *See also* Adam C. Pritchard and Stephen Choi, The SEC's Shift to Administrative Proceedings: An Empirical Assessment, Law & Economics Working Papers 119 (2016). In Raymond J. Lucia Cos. v. SEC, 832 F.2d 222 (D.C. Cir. 2016), the court rejected a challenge to the use of administrative proceedings to resolve matters.

4. *See, e.g.*, SEC v. Teva Pharm. Indus., Ltd., Case 1:16-cv-25298 (S.D. Fla. Dec. 22, 2016) (the company paid $236 million in disgorgement and interest); Press Release No. 2016-77, DOJ, Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges (Dec. 22, 2016); *In re* Mead Johnson Nutrition Co., Exchange Act Rel. No. 75,532 (July 28, 2015) (company paid disgorgement and prejudgment interest of $9,030,000, in addition to a civil penalty of $3,000,000); *In re* Goodyear Tire & Rubber Co., Accounting and Auditing Enforcement Rel. No. 3640 (Feb. 24, 2015) (company paid disgorgement and prejudgment interest totaling $16,228,065); United States v. Pfizer H.C.P. Co., No. 12-CR-169 (Aug. 2012) (disgorgement and

prejudgment interest of over $26 million); United States v. Tyco Valves & Controls Middle E., Inc., No. 12-CR-00418-CMH (Sept. 2012) (despite agreeing to pay over $13 million in penalties for violating multiple aspects of the FCPA, Tyco was also required to pay over $10 million in disgorgement and over $2 million in prejudgment interest); In the Matter of Allianz SE, File No. 3-15132 (Dec. 2012) (disgorgement and prejudgment interest of over $7 million); United States v. Parker Drilling Co. (Deferred Prosecution Agreement, dated Apr. 16, 2013) (disgorgement and payment of prejudgment interest of over $4 million); In the Matter of Koninklijke Philips Elecs. N.V., File No. 3-15265 (Apr. 2013) (agreement requiring payment of $4.5 million in disgorgement and prejudgment interest); *In re* Ralph Lauren Corp. (announced Apr. 22, 2013) (disgorgement, interest and penalties total over $1.6 million); SEC v. Biomet, Inc., No. 01:12-CV-00454 (D.D.C. Mar. 26, 2012) (disgorgement and prejudgment interest amounting to $5.5 million); Sec. & Exch. Comm'n v. Smith & Nephew PLC, Civil Action No. 1:12-CV-00187 (D.D.C.) (GK) (Feb. 2012) (disgorgement and prejudgment interest amounting to $5.4 million). In *SEC v. Tenaris, S.A.*, SEC (May 17, 2011), the SEC entered into its first Deferred Prosecution Agreement. *See* Press Release No. 2011-112, SEC (May 17, 2011). Tenaris agreed to pay $5.4 million in disgorgement and prejudgment interest. *See also* SEC v. John W. Lawton, No. 09-368ADM/AJB (D. Minn. 2011) (disgorgement and prejudgment interest totaled more than $4.4 million); SEC v. Int'l Bus. Mach. Corp., No. 01:11-CV-00563 (D.D.C. Mar. 18, 2011) (disgorgement and prejudgment interest in the amount of $5 million); SEC v. Willbros Grp., Inc., No. 4-08-CV-01494 (S.D. Tex. 2008) (disgorgement and prejudgment totaled $10.3 million); SECv. Daimler, AG, No. 1:10-CV-00473 (D.D.C. 2010) ($91.4 million disgorgement); SEC v. Alcatel-Lucent S.A., No. 10-CV-24620 (S.D. Fla. Feb. 29, 2010) (disgorgement and prejudgment interest in the amount of $45,372,000); SEC v. Noble Corp., No. 4:10-CV-04336 (S.D. Tex. Nov. 4, 2010) (disgorgement and prejudgment interest totaled more than $5.5 million); SEC v. Gen. Elec. Co., Litig. Rel. No. 21,602 (July 27, 2010) (disgorgement and prejudgment interest totaled more than $22.4 million); SEC v. Maxwell Techs. Inc., No. 1:11-CV-00258 (D.D.C. 2010) (disgorgement and prejudgment interest totaled more than $6.3 million); SEC v. Halliburton Co. & KBR, Inc., Accounting and Auditing Enforcement Rel. No. 2935A (Feb. 11, 2009) (disgorgement and prejudgment interest total $177 million); SEC v. Fiat S.p.A. & CNH Glob. N.V., Litig. Rel. No. 20,835 (Dec. 22, 2008) (disgorgement and prejudgment interest total more than $7.2 million); SEC v. Siemens AG, Accounting and Auditing Enforcement Rel. No. 2911 (Dec. 15, 2008) (disgorgement and prejudgment interest total $350 million); *In re* Faro Techs., Inc., Accounting and Auditing Enforcement Rel. No. 2836 (June 5, 2008) (disgorgement and prejudgment interest total more than $1.8 million); SEC v. Akzo Nobel, N.V., Litig. Rel. No. 20,410 (Dec. 20, 2007) (disgorgement and prejudgment interest totaled more than $2.2 million); SEC v. Chevron Corp., Litig. Rel. No. 20,363 (Nov. 14, 2007) ($25 million disgorgement); SEC v. Baker Hughes Inc., Litig. Rel. No. 2602 (Apr. 26, 2007) (disgorgement and prejudgment interest totaled more than $23 million); *In re* The Titan Corp., Litig. Rel. No. 19,107 (Mar. 1, 2005); SEC v. Titan Corp., Civil Action No. 05-0411 (D.D.C. Mar. 1, 2005) (disgorgement and prejudgment interest in the amount of $15,479,000); *In re* GE InVision, Inc., Accounting and Auditing Enforcement Rel. No. 51,199

A violation of the accounting provisions may be subject to criminal sanctions under the general criminal penalty provision of the Exchange Act.[5] Under this provision, a violation would be subject to a

(Feb. 14, 2005) (disgorgement and prejudgment interest in the amount of $617,700); *In re* ABB Ltd., Accounting and Auditing Enforcement Rel. No. 20,496 (July 6, 2004) (disgorgement and prejudgment interest in the amount of $5,915,000); In the Matter of Statoil, ASA, Administrative Proceeding, Exchange Act Rel. No. 54,599 (Oct. 13, 2006) ($10.5 million disgorgement); Plea Agreement, United States v. Baker Hughes Servs. Int'l, Inc., No. CR H-07-0129 (S.D. Tex. Apr. 11, 2007) (disgorgement and prejudgment interest totaled more than $23 million).

5. 15 U.S.C. §§ 78u, 78ff(a) (Supp. 2006). *See* United States v. Sociedad Quimica Y Minera De Chile ("SQM"), Case 1:17-cr-00013-TSC (D.D.C. Jan. 13, 2017) (Deferred Prosecution Agreement charging the company with a violation of the books and records and internal control provisions of the FCPA), Press Release No. 17-065, DOJ, Chilean Chemicals and Mining Company Agrees to Pay More Than $15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017); United States v. Jerds Luxembourg Holding S.A.R.L., Case 1:17-cr-00007-RBW (D.D.C. Jan. 12, 2017), Press Release No. 17-045, DOJ, Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017) (Jerds Luxembourg Holding, an indirect subsidiary of Zimmer Biomet, pled guilty to causing Biomet to violate the books and records provisions of the FCPA); United States v. Embraer S.A., Case No. 16-cr-60294-JIC (S.D. Fla. Oct. 24, 2016) (Deferred Prosecution Agreement charging the company with conspiracy to violate the bribery provisions, books and records provisions and internal controls provisions of the FCPA), Press Release No. 16-1240, DOJ, Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016); United States v. Och-Ziff Capital Mgmt. Grp., No. 16-516 (E.D.N.Y. Sept. 29, 2016) (Deferred Prosecution Agreement charging the company with violating the books and records provisions and internal control provisions of the FCPA), Press Release No. 16-1130, DOJ, Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016); United States v. Latam Airlines Grp. S.A., Case 0:16-cr-60195-DTKH (July 25, 2016); Press Release No. 16-862, DOJ, LATAM Airlines Group Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $12.75 Million Criminal Penalty (July 25, 2016) (Deferred Prosecution Agreement for violations of the accounting provisions of the FCPA, for bribery payments made to labor union officials); Deferred Prosecution Agreement between Dep't of Justice and VimpelCom Ltd., 16-cr-131-ER (Feb. 10, 2016) (company charged with conspiracy to violate the anti-bribery, and books and records provisions, and violating the internal controls provisions of the FCPA); Information, United States v. Alstom S.A., Case No. 3:14-cr-00246-JBA (D. Conn. Dec. 22, 2014) (guilty plea to violation of the books and records, and internal control provisions of the FCPA); Deferred Prosecution Agreement between Department of Justice and Avon Products, Inc. (Dec. 15, 2014) (company charged with conspiracy to violate the books and records provisions, and

a violation of the internal controls provisions of the FCPA), www.justice.gov/file/188591/download; Non-Prosecution Agreement between Department of Justice and Bio-Rad Laboratories, Inc. (Nov. 3, 2014) (for violation of the books and records, and internal controls provisions of the FCPA), www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/03/Bio-Rad-NPA-110314.pdf; *see also* Information, United States v. Diebold, Inc., Case No. 5:13-cr-00464-SO (N.D. Ohio Oct. 22, 2013) (deferred prosecution agreement for books and records violations arising out of bribery payments made to private commercial books in Russia); Non-Prosecution Agreement with Archer Daniels Midland Co. (Dec. 20, 2013) (violations of the internal control provisions arising from improper payments made by its subsidiaries to obtain value-added tax (VAT) refunds); DOJ Press Release, Dec. 20, 2013, www.justice.gov/opa/pr/2013/December/13-crm-1356.html; United States v. Weatherford Int'l Ltd., Case No. 4-13-cr-00733 (S.D. Tex. Nov. 26, 2013) (criminal violation of internal control provisions of FCPA); Criminal Information, United States v. Biomet, Inc. (Mar. 26, 2012) (deferred prosecution agreement for violations of the books and records, and the bribery provisions of the FCPA); Criminal Information, United States v. Smith & Nephew, Inc., No. 1:12-cr-00030 (Feb. 6, 2012) (deferred prosecution agreement for books and records violation, as well as conspiracy and bribery); Non-Prosecution Agreement between the Department of Justice and Aon Corporation (Dec. 20, 2011) (violation of the bribery, books and records, and internal controls provisions of the FCPA); Criminal Information, United States v. Alcatel-Lucent, S.A., No. 10-20907-CR-Moore/Simonton (S.D. Fla. Dec. 27, 2010) (entered into deferred prosecution agreement); United States v. Siemens Aktiengesellschaft, No. 1:08-CR-00367-RJL (D.D.C. Dec. 12, 2008) (DOJ's Sentencing Memorandum) (Siemens pled guilty to a criminal violation of the internal control provisions, and books and records provisions of the FCPA). In United States v. Novo Nordisk, Crim. No. 09-12C (RJL) (D.D.C. May 11, 2009), the criminal information filed with the court as part of a deferred prosecution agreement charged a conspiracy to violate the books and records provision of the FCPA. *See also* United States v. Baker Hughes Servs. Int'l, Inc., Criminal No. H-07-129 (S.D. Tex. Apr. 11, 2007) (plea agreement) (defendant knowingly and willingly aided, abetted and assisted in falsification of books and records); Indictment and Plea Agreement, United States v. UNC/Lear Servs., Inc., *reprinted in* 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 600.050 (involving a violation of § 13(b)(2)(A) for failing to keep books, records, and accounts in reasonable detail by falsely recording payments); Indictment and Plea Agreement, United States v. Sam P. Wallace, Inc., *reprinted in* 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 690.01–.05 (involving a violation of § 13(b)(2)(A) for causing its wholly owned subsidiary to fail to keep books, records, and accounts in reasonable detail by creating false books and fictitious purchase orders to conceal a bribe to a foreign official); Indictment, United States v. Harris Corp., *reprinted in* 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 698.95 (involving a violation of § 13(b)(2)(A) for creating certain check request forms, and wire transfer and expense journal entries that falsely represented that Harris paid a retainer to its consultant), United States v. O'Hara, 960 F.2d 11 (2d Cir. 1992) (aiding and abetting acts of false record-keeping).

maximum fine of $5 million and/or imprisonment of not more than twenty years[6] for individuals, and a maximum fine of $25 million for organizations.

The Exchange Act's general criminal penalty provision[7] states in relevant part:

> Any person who *willfully* violates any provision of this chapter . . . , or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who *willfully and knowingly* makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement . . . , which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, . . . ; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no *knowledge* of such rule or regulation.[8]

Notwithstanding section 78ff(a), the 1988 Amendments provided for criminal liability for a violation of the accounting provisions where a person "knowingly circumvent[s] or knowingly fail[s] to implement a system of internal accounting controls or knowingly falsif[ies] any book, record, or account. . . ."[9]

The legislative history to the 1988 Amendments regarding the addition of the "knowingly" requirement specifies that "[i]t is not intended that the use of the term 'knowingly' . . . affect the general requirement that criminal violations of the 1934 Act be 'willful.'"[10] While this statement is less than clear, it indicates that Congress intended the standard for a criminal violation of section 13(b)(2) to therefore encompass both "willful" and "knowing" conduct.[11]

Whether the addition of the "knowingly" requirement makes any significant substantive change is less than clear. The addition of

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6. 15 U.S.C. § 78ff(a).
7. *Id.* Unlike the accounting provisions, the bribery section of the FCPA is a criminal statute, and separately provides for penalties and sanctions for violation of the foreign payment provisions. *See infra* section 8:1.2.
8. *Id.* (emphasis added).
9. 15 U.S.C. § 78m(b)(4), (5).
10. S. REP. NO. 99-486, at 9 (1986).
11. No corresponding change was made to SEC Rules 13b2-1 and 13b2-2. Accordingly, a criminal violation of these rules would require a finding that the defendant acted "willfully," or in the case of a false or misleading filing, "willfully and knowingly," under 15 U.S.C. § 78ff(a).

"knowingly" to the second clause of section 78ff(a) suggests some distinction between the meaning of the terms "willful" and "knowing," at least in the context of the Exchange Act's general penalty provision.[12] A commentator, writing at the time of the Exchange Act's enactment, suggested that the addition of "knowingly" in the second clause of section 78ff(a) requires a finding that the alleged violator had knowledge of the precise illegality of the act in question, as opposed to a mere general awareness that he was doing a wrongful act (which would be required for "willful" conduct).[13] Under this definition, "knowingly" would require a finding that the defendant had actual knowledge of the false or misleading character of the statement made by him.[14]

Nevertheless, "willfully" has been interpreted to include some element of knowledge. For example, in *United States v. Peltz*,[15] the court held that the mental state that must be proved to establish a "willful" violation is

> a realization on the defendant's part that he was doing a wrongful act . . . that the act be wrongful under the securities laws and that the knowingly wrongful act involve[d] a significant risk of effecting the violation that has occurred.[16]

In *United States v. Reyes*,[17] the Ninth Circuit rejected the assertion that a knowing falsification of the books and records required knowledge of the securities laws being violated or was intended to connote a higher scienter requirement than willfully. Rather, the defendant need only knowingly commit the act of falsification.

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12. *See, e.g.*, *In re* Colonial Ltd. P'ship Litigs., 854 F. Supp. 64, 106 (D. Conn. 1994); *In re* Crazy Eddie Sec. Litig., 812 F. Supp. 338, 351 (E.D.N.Y. 1993); United States v. Dixon, 536 F.2d 1388, 1396 (2d Cir. 1976); United States v. Peltz, 433 F.2d 48, 54 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971); William B. Herlands, *Criminal Aspects of the Securities Exchange Act*, 21 VA. L. REV. 139, 148–49 (1934) [hereinafter Herlands].
13. Herlands, *supra* note 12, at 148–49. *See* discussion *supra*, chapter 4, notes 124–130 and accompanying text.
14. *Id.* at 149.
15. United States v. Peltz, 433 F.2d 48, 54 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).
16. *Id.* at 54–55. *See also* Metromedia Co. v. Fugazy, 983 F.2d 350, 364 (2d Cir. 1992), *cert. denied*, 508 U.S. 952 (1993); Citron v. Citron, 539 F. Supp. 621, 626 (S.D.N.Y. 1982), *aff'd*, 722 F.2d 14 (2d Cir. 1983), *cert. denied*, 466 U.S. 973 (1984); Hentzner v. State, 613 P.2d 821, 827 (Alaska 1980); United States v. Chiarella, 588 F.2d 1358, 1370 (2d Cir. 1978), *rev'd on other grounds*, 445 U.S. 222 (1980); United States v. Charnay, 537 F.2d 341, 351–52 (9th Cir.), *cert. denied*, 429 U.S. 1000 (1976).
17. 577 F.3d 1069 (9th Cir. 2009).

While it may be argued that "knowingly" requires a greater level of awareness on the part of the defendant of the wrongfulness or illegality of his conduct, the case law is far from clear on this issue.[18]

§ 8:1.2 The Bribery Provisions

The bribery section of the FCPA is a criminal statute.[19] The bribery section provides maximum statutory penalties and sanctions per each violation of the Act by individuals and corporations or other legal entities. Violation by a U.S. entity carries a maximum fine of $2 million per violation.[20] Importantly, however, where the offense results in pecuniary gain or loss, the provisions of 18 U.S.C. § 3571(d) provide an alternative maximum fine: the greater of twice the gross gain that the defendant obtained or twice the gross loss to a person other than the defendant. Violations by individuals carry a maximum fine of $250,000 or up to twice the amount of the gross gain or loss that any person derived from the offense,[21] or imprisonment of not more than five years,[22] or both.[23]

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18. *See, e.g.*, United States v. Erickson, 601 F.2d 296, 304 n.12 (7th Cir.) ("It is not clear whether the requirement that defendants act 'knowingly' adds anything at all to the requirement that they act 'willfully.'"), *cert. denied*, 444 U.S. 979 (1979); KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY: A PRIMER FOR CORPORATE COUNSEL § 8.15, at 45 & n.239 (2d ed. rev. 1994) ("Just what, if anything, the requirement of knowledge adds to the ordinary significance of the concept of willfulness is not entirely clear."); LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 4691–92 (3d ed. 1993) ("the word *knowingly* [is] redundant when it is used together with the word *willfully*"). *See also* Tanya Epstein et al., *Securities Fraud*, 35 AM. CRIM. L. REV. 1167, 1176 (Spring 1998); Robert F. Koets, Annotation, *What Constitutes "Willfulness" for Purposes of Criminal Provisions of Federal Securities Laws*, 136 A.L.R. Fed. 457 (1997).
19. A violation of the bribery provisions by an issuer is explicitly excluded from the application of the general penalty provisions of the Exchange Act. *See* 15 U.S.C. § 78ff(a) (Supp. 2006).
20. 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A) (2006).
21. 15 U.S.C. §§ 78dd-2(g)(2)(A), (2)(B); 78ff(c)(2)(A), (c)(2)(B).
22. On April 19, 2010, Charles Paul Edward Jumet, a former executive of Ports Engineering Consultants Corporation, was sentenced to the longest term of incarceration ever imposed in an FCPA case—eighty-seven months. Press Release, DOJ (Apr. 10, 2010), www.justice.gov/opa/pr/2010/April/10-CRM-442.html. This record term of incarceration was surpassed one year later. On October 25, 2011, Joel Esquenazi, the former President of Terra Telecommunications Corp., received a sentence of fifteen years in prison for his role in a scheme to pay bribes to Haitian government officials. This sentence constitutes the longest period of incarceration for a defendant found to have violated the FCPA. Press Release, DOJ (Oct. 25, 2011), www.justice.gov/opa/pr/2011/October/11-crm-1407.html.
23. 15 U.S.C. §§ 78ff(c)(2)(A), 78ff(c)(2)(B), 78dd-2(g)(2)(A), 78dd-2(g)(2)(B). The FCPA has a five-year statute of limitations. 18 U.S.C. § 3282. In FCPA investigations, the government may be able to utilize the extended statute

Within the limitations of the statutory maximum,[24] the determination of the amount of the fine is calculated under the Federal Sentencing Guidelines.[25] These Guidelines, which are now advisory and not mandatory for the courts, took effect with regard to individuals on November 1, 1987, and apply to all offenses committed by individuals on or after that date.[26] On November 1, 1991, the United States Organizational Sentencing Guidelines became effective,[27] and apply to offenses committed by corporations and other organizations[28] on or after that date.

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of limitations period, up to three years, to enable it to obtain evidence located outside the United States. 18 U.S.C. § 3292. The rationale for the extended tolling is that obtaining foreign evidence, such as transaction records, often involves a process that is cumbersome and may have delays beyond the government's control. If a trial court approves the request by the government to obtain evidence that "reasonably appears" to be in the foreign country, then the government may have an extension period of up to three years. In United States v. Kozeny, 493 F. Supp. 2d 693, 714 (S.D.N.Y. 2007), the Southern District of New York issued a rare and first impression opinion on the statute of limitations, dismissing all counts of an indictment for violations of the FCPA, because the government did not move to "suspend the running of the statute of limitations until after it had expired." However, on reconsideration, the court reinstated three counts where it appeared that illegal conduct occurred within the limitation period. The court held that if violations are performed within the limitations period, then the prosecutors can reach back further to cover conduct that transpired before those acts. In *Kozeny*, the court let some counts stand because at least some of the conduct that was alleged to be part of the violation occurred during the limitations period.

24. *See* United States Sentencing Commission, GUIDELINES MANUAL, § 8C3.1 (Nov. 2016) [hereinafter GUIDELINES MANUAL], www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf. However, where the organization is convicted of multiple counts, the maximum fine authorized by statute may increase accordingly, § 8C3.1 Comm.
25. *See id.* § 2B4.1.
26. *Id.* at ch. 1, pt. A, intro. cmt. In United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), the Supreme Court determined that the Federal Sentencing Guidelines violated the Sixth Amendment's guarantee to a trial by jury, as they allowed judicial (rather than jury) fact-finding to form the basis for sentencing. The Court therefore held that the appropriate remedy was to make the guidelines advisory rather than mandatory. However, judges are advised to explain their reasons for varying from the provisions of the Sentencing Guidelines. *See, e.g.*, U.S. Sentencing Commission Office of General Counsel, *Departure and Variance Primer*, (June 2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Departure_and_Variance.pdf.
27. *Id.* at ch. 8, intro. cmt.
28. "Organizations" means a person other than an individual. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations. GUIDELINES MANUAL, *supra* note 24, § 8A1.1.

One effect of the application of the Guidelines is generally to raise the fines and sentences imposed for white collar crimes, including violations of the FCPA. The manner of ascertaining the penalty is also more closely aligned to the amount of the money involved in the bribe or the gain resulting from the bribe. The Sentencing Guidelines require the individual or the corporation to make restitution or take other action to remedy the harm that has occurred and to prevent future injury from the violators. In addition to restitution, the Sentencing Guidelines require that a mandatory fine be imposed upon a corporation[29] and individual.[30]

For individuals, the sanctions are determined by a variety of factors including the base offense level;[31] the characteristics of the offense, including the value of the bribe or the benefit to be conferred; the individual's role in the activity; and the defendant's criminal history.[32] For corporations, the sentencing factors include the base offense level; the greater of the value of the unlawful payment, the benefit to be received, or the consequential damages resulting therefrom;[33] prior misconduct;[34] the existence of an effective compliance program to prevent violations;[35] the voluntary disclosure of the offense by the organization; the extent of cooperation in an investigation; and the acceptance of responsibility for the conduct.[36]

In addition to criminal penalties, the Act also authorizes civil fines. For violations by an issuer, the SEC may bring a civil action to impose a civil penalty against a corporation, or any officers, directors, employees, agents or stockholders acting on behalf of the issuer in an amount up to $10,000.[37] The SEC can also bring a civil action to enjoin any act or practice of an issuer (or an officer, director, employee, agent,

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29. *Id.* § 2C1.1(d)(v).
30. *See id.* §§ 2C1.1(a); 5E1.2(a), (c).
31. A violation of the bribery provision of the FCPA is placed in the same category as the domestic bribery offense, at a base level of 12. *Id.* § 2C1.1. Willful violation of the accounting provisions is placed under the fraud and deceit category at a base level of 6. *Id.* § 2B1.1.
32. *See id.* On October 25, 2011, Joel Esquenazi, former president of Terra Telecommunications Corp., was sentenced to 180 months in prison, the longest prison term ever imposed under the FCPA. *See* Department of Justice Press Release (Oct. 25, 2011), www.justice.gov/opa/pr/2011/October/11-crm-1407.html. This sentence came just six months after Charles Jumet, a former executive of Ports Engineering Consultants Corp., was sentenced to a then record term of eighty-seven months in April 2010. *See* Department of Justice Press Release (Apr. 10, 2010) www.justice.gov/opa/pr/2010/April/10-CRIM-442.html.
33. *See id.* §§ 8C2.1, 2C1.1(c).
34. *Id.* § 8C2.5(c).
35. *Id.* § 8C2.5(f). See discussion *infra* in chapter 10.
36. *Id.* § 8C2.5(g).
37. 15 U.S.C. § 78ff(c) (Supp. 2006). This amount, adjusted for inflation, is $16,000. *See* 17 C.F.R. § 201.1001 (2017).

or stockholder acting on its behalf) that is or may be violative of the FCPA.[38] For violations by other domestic corporations, or any officer, director, employee, agent or stockholder acting on its behalf, the Department of Justice is authorized to institute a civil action for fines up to $10,000.[39] In addition, the Department of Justice has civil injunctive and subpoena power with respect to domestic concerns.[40]

Fines imposed upon individuals, for either criminal or civil penalties, may not be paid by the corporation.[41]

Recent FCPA enforcement actions have seen the imposition of substantial criminal and civil penalties. The combined enforcement actions of the Department of Justice and the SEC against Siemens AG and three of its subsidiaries resulted in criminal and civil fines totaling $800 million, the largest settlement in FCPA history. Several months later, the Department of Justice and SEC once again combined to make history, this time producing the largest FCPA settlement ever paid by a U.S. company. The Texas-based company Halliburton, and its former subsidiary Kellogg Brown & Root LLC, agreed to pay a combined fine of $579 million.[42] This penalty was

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38. *Id.* § 78u(d). *See* SEC v. Thomas Wurzel, Litig. Rel. No. 21,063; Accounting and Auditing Enforcement Rel. No. 2980; Civil Action No. 09-Civ-01005 (D.D.C. 2009) (Complaint for Permanent Injunction); Complaint for Permanent Injunction, Consent and Undertaking of Sam P. Wallace Co. and Consent to Entry of Final Judgment of Permanent Injunction, SEC v. Sam P. Wallace Co., *reprinted in* 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 683–90; SEC v. Ashland Oil, Inc., *reprinted in* 2 FOREIGN CORRUPT PRAC. ACT REP. (Bus. Laws, Inc.) 696.95.
39. 15 U.S.C. § 78dd-2(g)(1)(B).
40. *Id.* § 78dd-2(d).
41. *Id.* § 78ff(c)(3).
42. United States v. Kellogg Brown & Root LLC, No. 4:09-cr-00071 (S.D. Tex. 2009); SEC v. Halliburton Co., Accounting and Auditing Rel. No. 2935A, No. 4:09-CV-399 (S.D. Tex. 2009). *See also* Teva Pharmaceutical Industries Ltd. paid $519 million to settle parallel civil (SEC) and criminal (DOJ) charges that it violated the FCPA by paying bribes to foreign government officials in Russia, Ukraine and Mexico, Press Release No. 2016-277 (Dec. 22, 2016), www.sec.gov/news/pressrelease/2016-277.html; Press Release No. 16-1522 (Dec. 22, 2016), www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt; Och-Ziff Capital Management Group LLC paid $412 million to settle combined civil (SEC) and criminal (DOJ) charges that it violated the FCPA by paying bribes to high-level government officials in Africa, Press Release No. 2016-203 (Sept. 29, 2016), www.sec.gov/news/pressrelease/2016-203.html, Press Release No. 16-1130 (Sept. 29, 2016), www.justice.gov/opa/pr/och-ziff-capital-management-admits-role-africa-bribery-conspiracies-and-agrees-pay-213. *See also* Information, United States v. Total S.A., No. 1:13-CR-239 (E.D. Va. May 29, 2013) (Department of Justice Press Release, May 29, 2013) (combined SEC and DOJ penalties of $398.2 million). Vimpelcom Ltd. paid $397.6 million to settle combined SEC and

exceeded when Alstom S.A., a French power and transportation company, pled guilty to a widespread scheme of bribery in numerous countries and agreed to pay a $772 million criminal fine in December 2014.[42.1] The Justice Department has also let it be known that it has increased its focus on prosecuting individuals, and not just corporations, for corrupt payments.[42.2]

At the same time, the Department of Justice has entered into Deferred Prosecution and Non-Prosecution Agreements with corporate defendants in numerous enforcement actions.[43] The SEC has

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DOJ penalties arising from bribes paid to government officials in Uzbekistan, Press Release No. 2016-34 (Feb. 18, 2016), www.sec.gov/news/pressrelease/2016-34.html, Press Release No. 16-194, www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million. *See also In re* Alcoa, Inc., Accounting and Auditing Enforcement Rel. No. 3525 (Jan. 9, 2014) (combined SEC and DOJ penalties of $384 million). SEC v. ENI, S.p.A. and Snamprogetti Netherlands, B.V., Accounting and Auditing Enforcement Rel. No. 3149 (July 7, 2010) (combined SEC and DOJ penalties of $365 million); SEC v. Technip, Accounting and Auditing Enforcement Rel. No. 21,578 (June 28, 2010) (combined SEC and DOJ penalties of $338 million). *See also supra* chapter 1, section 1:1, note 19.

42.1. This is the largest FCPA-related criminal fine imposed by the Department of Justice, Press Release No. 14-1448, DOJ, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery.

42.2. Leslie R. Caldwell, Assistant Attorney General, Address at Conference Institute's 31st International Conference on the Foreign Corrupt Practices Act (November 19, 2014), http://www.justice.gov/opa/speech/assistant-attorney-general-leslie-r-caldwell-speaks-american-conference-institute-s-31st.

43. *See, e.g.*, Las Vegas Saudi Corp. (Non-Prosecution Agreement, Jan. 17, 2017), Press Release No. 017-101 (Jan. 19, 2017); United States v. Rolls-Royce PLC, Case No. 2:15-cr-247 (S.D. Ohio Dec. 20, 2016) (Deferred Prosecution Agreement), Press Release No. 17-074 (Jan. 17, 2017); United States v. Sociedad Quimica y Minera De Chile, S.A., Case 1:17-cr-00013-TSC (D.D.C. Jan. 13, 2017) (Deferred Prosecution Agreement), Press Release No. 17-065 (Jan. 13, 2017); United States v. Zimmer Biomet Holdings, Inc., Crim. No. 12-CR-00080 RBW (D.D.C. Jan. 12, 2014) (Deferred Prosecution Agreement), Press Release No. 17-045 (Jan. 12, 2017); General Cable Corporation (Non-Prosecution Agreement, Dec. 22, 2016), Press Release No. 16-1536 (Dec. 29, 2016); JP Morgan Securities (Asia Pacific) Limited (Non-Prosecution Agreement, Nov. 17, 2016), Press Release No. 16-1343 (Nov. 17, 2016); United States v. Embraer S.A., Case 0:16-cr-60294-JIC (S.D. Fla. Oct. 24, 2016) (Deferred Prosecution Agreement), Press Release No. 16-1240 (Oct. 24, 2016); United States v. Och-Ziff Capital Mgmt. Grp. LLC, Case 1:16-cr-00516-NGG (E.D.N.Y. Sept. 29, 2016) (Deferred Prosecution Agreement), Press Release No. 16-1130 (Sept. 29, 2016); United States v. Louis Berger Int'l Inc. (Deferred Prosecution Agreement, July 7, 2015), Press Release No. 15-903 (July 17, 2015),

also utilized FCPA-related Deferred Prosecution Agreements[44] and Non-Prosecution Agreements.[45]

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www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges; United States v. IAP Worldwide Servs. Inc. (Non-Prosecution Agreement, June 16, 2015), Press Release No. 15-745 (June 16, 2015), www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation; United States v. Parker Drilling Co. (Deferred Prosecution Agreement, dated Apr. 16, 2013); DOJ Press Release, www.justice.gov/opa/pr/2013/April/13-crm-431.html; United States v. Total, S.A. (Deferred Prosecution Agreement dated May 29, 2013), www.justice.gov/criminal/fraud/fcpa/cases/totalsa/2013-05-29-total-dpa-filed.pdf; United States v. Daimler AG (Deferred Prosecution Agreement dated Mar. 24, 2010), www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-24-10daimler-russia-plea.pdf; United States v. Agco Corp. & Agco Ltd. (Deferred Prosecution Agreement dated Sept. 24, 2009), www.justice.gov/criminal/fraud/fcpa/cases/docs/09-30-09agco-deferred-prosecution.pdf; United States v. Novo Nordisk (Deferred Prosecution Agreement (discussed in Press Release No. 09-46, DOJ (May 11, 2009), www.usdoj.gov/opa/pr/2009/May/09-crm-461.html)); United States v. Monsanto (Deferred Prosecution Agreement dated Jan. 6, 2005, www.justice.gov/criminal/fraud/fcpa/cases/monsanto-co/03-16-05monsanto-order-dpa.pdf); Micrus Corp. (Non-Prosecution Agreement dated Feb. 28, 2005), www.justice.gov/criminal/fraud/fcpa/cases/micrus-corp/02-28-05micrus-agree.pdf; United States v. InVision Techs., Inc. (Non-Prosecution Agreement dated Dec. 6, 2004, www.usdoj.gov/opa/pr/2004/December/04_crm_780.htm); United States v. Schnitzer Steel Indus., Inc. (Deferred Prosecution Agreement dated Oct. 16, 2006), www.secinfo.com/d1znFa.v22t.7.htm); United States v. Ingersoll-Rand (Deferred Prosecution Agreement dated Oct. 31, 2007), www.justice.gov/opa/pr/2007/october/07-crm-872.html; United States v. AGA Med. Corp. (Deferred Prosecution Agreement dated June 3, 2008), www.justice.gov/opa/pr/2008/June/08-crm-491.html.

44. The SEC first entered into a Deferred Prosecution Agreement with Tenaris S.A. arising from allegations of bribing Uzbekistan officials. The agreement, intended to reward cooperation in SEC investigations, is available at www.sec.gov/news/press/2011/2011-112.htm. The SEC has continued to utilize deferred prosecution agreements. *See, e.g.*, United States v. Pfizer H.C.P. Co., No. 12-CR-169 (Aug. 2012) (SEC entered into a deferred prosecution agreement with corporation to pay over $26 million in disgorgement and prejudgment interest); Press Release No. 2015-13 (Jan. 22, 2015) SEC entered into a Deferred Prosecution Agreement with The PBSJ Corporation, www.sec.gov/news/pressrelease/2015-13.html. The first DPA with an individual is in SEC v. Yu Kai Yuan (Feb. 18, 2016), https://www.sec.gov/litigation/admin/2016/34-77145-dpa.pdf.

45. The SEC entered into its first Non-Prosecution Agreement with Ralph Lauren Corp. in which the corporation agreed to disgorge over $700,000 in illicit profits and interest obtained in connection with bribes paid by a subsidiary to government officials in Argentina from 2005–2009. The agreement is available at www.sec.gov/news/press/2013/2013-65.htm. In June 2016, the SEC entered into Non-Prosecution Agreements with two unrelated companies, Nortek, Inc. and Akamai Technologies, whose foreign subsidiaries paid bribes to Chinese officials, https://www.sec.gov/news/pressrelease/2016-109.html.

To further encourage voluntary disclosures for FCPA-related misconduct, the Department of Justice initiated, on April 15, 2016, for a one-year period, an FCPA enforcement pilot program.[45.1] The pilot program was subsequently extended beyond the one-year period.[45.2] When a company makes a self-disclosure under this program, takes timely and appropriate remediation, and cooperates with the DOJ, the DOJ may, under this program, provide up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, generally will not require the appointment of a monitor, and may even decline prosecution, where appropriate. But to qualify for mitigation credit, the company may be required to disgorge all profits from the FCPA misconduct.[45.3]

§ 8:2 Ineligibility for Government Programs

In addition to the possibility of criminal and civil sanctions and fines, a violation of the bribery provisions of the FCPA by a U.S. company can have serious ramifications with regard to its eligibility for certain U.S. government programs. The adverse impact on eligibility can have a far greater commercial and financial effect upon a company than the fines and penalties assessed for a violation of the FCPA. An indictment alone can lead to the suspension of export licensing privileges for defense articles or services, or the suspension/debarment of participation in U.S. government procurement activity.

We summarize some of these collateral areas below.

45.1. DOJ, The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance, https://www.justice.gov/criminal-fraud/file/838416/download.

45.2. Speech by Kenneth Blanco, Acting Assistant Attorney General for the Criminal Division, Mar. 10, 2017, at the ABA National Institute on White Collar Crime, www.justice.gov/opa/speech/acting-assistant-attorney-general-Kenneth-blanco-speaks-american-bar-association-national.

45.3. The DOJ issued, as of August 2017, seven declinations under the pilot program. In three cases involving public companies (*i.e.*, issuers) in which the DOJ issued public declination letters, Novtek, Inc. (June 3, 2016), Akamai Technologies, Inc. (June 6, 2016), and Johnson Controls, Inc. (June 21, 2016), the companies paid disgorgement to the SEC as part of their settlements. In the other four cases involving non-issuers, HMT LLC (Sept. 29, 2016), NCH Corporation (Sept. 29, 2016), Linde North America Inc. (June 16, 2017), and CDM Smith Inc. (June 21, 2017), the DOJ required disgorgement.

§ 8:2.1 U.S. Government Procurement

The Federal Acquisition Regulations (FAR),[46] which comprise the regulatory framework for U.S. government procurement, provide for the suspension or debarment of a contractor or subcontractor from continuing to do business with the U.S. government if it engages in certain improper conduct. One of the grounds for suspension or debarment is the commission of bribery.[47]

A party can be suspended upon adequate evidence of the commission of a bribe. An indictment under the FCPA has provided the basis for such a suspension.[48] Suspension is intended as a temporary exclusion from government contracting pending completion of an investigation or legal proceeding.[49] A party can be debarred upon the criminal conviction of or civil judgment for the commission of bribery.

A decision to suspend or debar a company is discretionary and essentially concerns an assessment of the contractor's character and integrity. Remedial measures taken by the company and other mitigating factors will also be taken into account in making such a determination.[50]

It is also theoretically possible that a foreign company that engages in bribery abroad, even though it may not be subject to the FCPA, may be subject to suspension or debarment under the FAR. Since the decision to suspend a party is essentially a statement of the contractor's character/integrity, illicit payments made by a foreign company to foreign officials abroad could provide a basis for a suspension decision against the foreign company. This could be the case whether or not the bribe would be a crime under U.S. law, or even if the foreign bribe was not discovered or prosecuted by foreign authorities. A foreign bribery

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46. 48 C.F.R. ch. 1 (2015).
47. 48 C.F.R. § 9.406-2(a)(3) (2015). The reference to "bribery" does not refer to the violation of any specific law or regulation.
48. For example, Harris Corp. was suspended for authorizing its consultant to pay a portion of his commission to a foreign official. *See supra* note 5.
49. If legal proceedings are not initiated within twelve months after the date of suspension notice, the suspension must be terminated except in the case of an extension (up to six months) by the Assistant Attorney General. *See* 48 C.F.R. § 9.407-4(b) (2015); Frequency Elecs., Inc. v. U.S. Air Force, 151 F.3d 1029 (4th Cir. 1998) (applying eighteen-month maximum debarment unless legal proceedings are initiated).
50. *See* 48 C.F.R. § 9.406-1(a) (2015). For example, in United States v. Siemens AG, No. 08-367 (D.D.C. 2008), the corporation only pled guilty to criminal violations of the FCPA's internal controls, and books and records provisions. It avoided a plea against bribery charges in part due to its "uncommonly sweeping remedial actions," such as replacing all of its top leadership and expanding its compliance organization.

conviction could also provide the basis for debarment if it provided a basis to conclude that the foreign contractor lacked integrity. As a practical matter, such action is unlikely absent a violation of some U.S. law or regulation, or unless the matter is of such a nature as to create significant political pressure for some action.

In addition to the possible suspension or debarment from U.S. government procurement under the FAR, other government agencies also have specific provisions that provide for suspension or debarment, or other sanctions, for a violation of the FCPA. For example, the conviction for a violation of the FCPA that is related to a project supported by the Overseas Private Investment Corporation (OPIC) may result in the denial of an insurance payment and the suspension from eligibility for OPIC services.[51] Moreover, the indictment or conviction for bribery or any offense that indicates a lack of business integrity can result in the suspension or debarment of a party for federal financial and nonfinancial assistance and benefits.[52] The suspension or debarment by one agency generally has government-wide effect.[53] A person debarred or suspended by any federal agency may therefore be excluded from federal financial and nonfinancial assistance and benefits by other federal agencies.[54]

§ 8:2.2 Export Licenses for Defense Articles

The Arms Export Control Act (AECA)[55] authorizes the President to control the import and export of defense articles and defense services. Under the AECA, if an applicant for a license to export is subject to an indictment for a violation of the FCPA, the President may disapprove the application.[56] If the applicant has been convicted of a violation, a license to export a defense article or defense service may not be issued, except as may be determined on a case-by-case basis.[57]

The International Traffic in Arms Regulations (ITAR)[58] implement the AECA. The authority under the statute has been delegated to the

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51. 22 C.F.R. § 709 (2012).
52. *See, e.g.*, 2 C.F.R. ch. VII, pt. 780 (Agency for International Development).
53. *See* Exec. Order No. 12,549, 51 Fed. Reg. 6370 (Feb. 18, 1986); Notice, 53 Fed. Reg. 19,160 (May 26, 1988) (implementing uniform rules for government-wide suspension or debarment action for nonprocurement activities).
54. Exec. Order No. 12,549, 51 Fed. Reg. 6370 (Feb. 18, 1986).
55. 22 U.S.C. § 2778 *et seq.* (Supp. 2006).
56. *Id.* § 2778(g)(3) and (g)(1)(A)(vi).
57. *Id.* § 2778(g)(4) and (g)(1)(A)(vi).
58. 22 C.F.R. § 120 (2012).

State Department.[59] The defense articles and services subject to the ITAR are set forth in the U.S. Munitions List.[60]

The ITAR[61] provide for the suspension, revocation, amendment or denial of an export license whenever an applicant is the subject of an indictment for a violation of the FCPA, or has been convicted of a violation of the FCPA.[62]

The practice of the Department of State has generally been to automatically disapprove an export license application of any company indicted under the FCPA.[63] In such instances, an export license application will be approved, on a case-by-case basis, only if there is an overriding foreign policy or national security reason to do so.[64]

In some instances, the suspension may apply only to the offending division or subsidiary.[65] In other instances, the suspension may be applied to the parent entity as well as the subsidiary that violated the FCPA.

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59. On February 11, 2014, 22 C.F.R. § 120.1(a) was amended to read:

> "(a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778), as amended, authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 13,637. This subchapter implements that authority, as well as other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 *et seq*.). By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary of State for Defense Trade Controls, Bureau of Political-Military Affairs."

78 Fed. Reg. 21,523-01.

60. 22 C.F.R. § 121 (2017).
61. 22 C.F.R. § 126.7(a) (2012).
62. *See* 22 C.F.R. § 126.7(a)(3) and (4); § 120.27(a)(6) (2013).
63. For example, Lockheed was barred indefinitely from exporting its C-130 Hercules aircraft as a result of charges that the company bribed an Egyptian official. This had the effect of undermining its $1.6 billion bid to supply the United Kingdom with replacement transport aircraft. *See* FIN. TIMES (Aug. 26, 1994).
64. In the wake of the corruption related settlement by BAE Systems plc for conspiracy to make false statements to the U.S. government and pay a fine of $400 million (Press Release No. 10-209, DOJ, Mar. 1, 2010), the U.S. State Department proposed a freeze on export licenses for products made by, or products with components made by BAE and its U.S. subsidiary. On March 9, 2010, the State Department modified the freeze by allowing new licenses for BAE products that support the war efforts in Iraq and Afghanistan or related to existing programs for allied countries. Nevertheless, the freeze on BAE-related export licenses illustrates the potential collateral consequences a company may face as a result of an anti-bribery investigation, even if the DOJ plea agreement does not contain substantive FCPA violations.
65. *Id*.

While the export privileges of the company may be reinstated, this generally requires an extensive interagency review regarding the circumstances surrounding the indictment or conviction and a finding that appropriate steps have been taken to mitigate the enforcement concerns.[66]

It can, therefore, take a considerable period of time, even in the best of circumstances, to regain export licensing privileges in the event of an indictment or conviction under the FCPA. For companies that require export licenses for some or all of their business operations, the adverse commercial ramification from a loss of export licensing privileges can be far more substantial than the penalties and fines imposed under the FCPA.[67]

§ 8:3 Tax Consequences[68]

Congress was sensitive to the fact that the prohibition in the FCPA on the bribery of foreign officials would be weakened if an illicit payment could be taken as a deductible business expense or U.S. taxes otherwise could be reduced through the payment of a bribe. To address these concerns, Congress included in the Internal Revenue Code (Code) provisions to (1) deny deductions for payments to officials or employees of a foreign government if such payments are unlawful under the FCPA, and (2) require that payments made by certain foreign subsidiaries of U.S. companies be treated as taxable income to the U.S. company where such payments, if made by a U.S. corporation, would have been unlawful under the FCPA. Summarized below are the applicable tax provisions and some practical issues that may arise under them.

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66. *See* 22 U.S.C. § 2778(g)(4) (Supp. 2006). The Department of State has applied this same standard to the reinstatement of export privileges for indictments.

67. *See also* 22 C.F.R. § 126.7(a)–(b) (2012), which provides for the disapproval of a license where any party to the export, any manufacturer of the defense article or service or any person who has a significant interest in the transaction has been debarred or suspended under the ITAR; 22 C.F.R. § 127.1(d) (2014), which prohibits a person who knows that a party is suspended or debarred under the ITAR from purchasing for export any defense article or service from such person. The Contractor's Certification and Agreement with Defense Security Assistance Agency requires, for any defense articles or services sold under the Foreign Military Sales program, the certification that the contractor is not suspended or debarred from conducting business with the U.S. government, that export privileges are not suspended or revoked, and that no suspended or debarred firm will be used as a source of supplies or as a subcontractor. Def. Sec. Cooperation Agency, Guidelines for Military Financing of Direct Commercial Contracts (Aug. 2001).

68. Ronald S. Cohn, a former tax partner in Dechert Price & Rhoads, contributed to this section.

§ 8:3.1 Disallowance of Deductions

Code section 162[69] generally provides that ordinary and necessary expenses incurred in operating a business are tax deductible. However, section 162(c) eliminates the deduction for a payment to a foreign government official or employee that is unlawful under the FCPA. Significantly, section 162(c) and the regulations thereunder also provide that the Internal Revenue Service (IRS) bears the burden of proving with clear and convincing evidence that a payment is unlawful under the FCPA. While this departs from the normal rule in tax cases that places the burden of proof on the taxpayer, the IRS nonetheless often requests information directly from a taxpayer that it believes may have claimed a deduction in contravention of section 162(c) or failed to include subpart F income as described below.[70]

There has been limited guidance on whether disgorgement paid to resolve enforcement actions involving the FCPA is tax deductible. The tax law provides that no deduction shall be allowed for any fine or similar penalty paid to a government for the violation of any law, as a taxpayer should not be permitted to benefit from the payment of an amount intended to be punitive.[70.1] Recently, the Internal Revenue Service released an internal memorandum that concluded that disgorgement paid in an FCPA enforcement action is not deductible because the "payment was primarily punitive."[70.2]

§ 8:3.2 Inclusion of Unlawful Payments in Taxable Income

Under the "subpart F" rules of Code sections 951 through 965,[71] a U.S. person (which includes U.S. individuals, corporations, partnerships, trusts, and estates) having a substantial interest in a "controlled foreign corporation" (CFC) generally is required to include in taxable income its share of the CFC's "subpart F income" for the year.[72]

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69. 26 U.S.C. § 162 (2012).
70. In United States v. Titan Corp., Case No. 05CR0314 (S.D. Cal. Mar. 1, 2005), Titan pled guilty to a three-count Information for violating the FCPA. One of the counts was for the preparation and filing of a tax return which included the improper payments as a tax deduction, in violation of 26 U.S.C. § 7206(2).
70.1. 26 U.S.C. § 162(f).
70.2. IRS Office of Chief Counsel Advice Memorandum (Jan. 29, 2016, released on May 6, 2016), https://www.irs.gov/pub/irs-wd/201619008.pdf. Even though the CCA is not precedential and cannot be cited as authority, it may reflect the position that could be taken in audits of other taxpayers in similar situations. *See also* Kokesh v. SEC, No. 16-529, slip op. (U.S. June 5, 2017) (in SEC actions, disgorgement operates as a penalty).
71. 26 U.S.C. §§ 951–65 (Supp. 2006).
72. In general, a CFC is a foreign corporation that is majority-owned or majority-controlled by U.S. persons who hold significant interests in the

Consequently, under these rules, a U.S. parent company normally will be currently taxed on its share of its foreign subsidiary's subpart F income whether or not the income is currently distributed by the subsidiary to the parent.

As one means of effectuating fully Congress's intent in enacting the FCPA, section 952(a)(4) provides that subpart F income includes any payment by a CFC that would be unlawful under the FCPA if the CFC were a U.S. corporation. Absent this provision, foreign subsidiaries of U.S. corporations could use income not currently taxable in the United States to make illicit payments. Section 952(a)(4) treats such payments as Subpart F income, thereby subjecting them to U.S. tax in the current year. Here, too, the IRS bears the burden of proving that the payment is unlawful under the FCPA.

While the tax law clearly provides that payments unlawful under the FCPA (or that would be unlawful under the FCPA if the payor were a U.S. entity) will either be disallowed as a deduction or result in an income inclusion (in the latter case where the payor is a CFC), the practicalities of dealing with these tax law rules rarely are as clear. This stems from the fact that, in many situations, potential violations of the FCPA are discovered by a taxpayer only after its tax return is filed for the year in which the payment was made. Moreover, regardless of when a potential violation is discovered, whether a payment is in fact "unlawful" may be subject to differing views. How should the U.S. corporation's tax returns be handled in these situations? Could the U.S. company be charged with fraud for failing to correct returns already filed once facts are discovered indicating that an FCPA violation has or might have occurred? Might civil penalties be due?

Assuming that the taxpayer believed in good faith that its return was correct when filed, the later discovery of information regarding a possible FCPA violation generally should not subject the taxpayer to charges of criminal fraud or to civil fraud penalties, even if the taxpayer does not amend the return to disclose information discovered after the filing. However, the taxpayer may still be subject to regular civil penalties. These penalties generally are imposed at the rate of 20% of the underpaid tax where a taxpayer is found to have been negligent, to have disregarded the tax rules and regulations in computing its tax liability, or, in the case of a substantial understatement of tax,[73] does not have substantial authority for its treatment of the item on its original return.

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foreign entity. For this purpose, a significant interest is, in general, ownership of stock in the foreign corporation representing 25% or more of the value of, or voting power in, that company. *See* 26 U.S.C. § 957.

73. For most corporations, an understatement is substantial if it is more than the greater of $10,000 or 10% of the correct tax liability.

The regular civil penalties may be eliminated if the taxpayer is able to demonstrate that there were reasonable grounds for the position taken on the return filed originally and that the taxpayer acted in good faith in taking that position. The success of this defense likely will depend upon what the taxpayer knew or should have known about potential FCPA violations at the time its return was filed. Thus, it would be important for the taxpayer to be able to demonstrate the facts known (or not known) at the time its tax return was filed.[74]

74. *See* Press Release, DOJ, United States v. Gerald Green & Patricia Green, No. 09-952 (Sept. 14, 2009) (in addition to being found guilty of violations of the FCPA and money laundering laws, Patricia Green was also found guilty of falsely subscribing U.S. income tax returns in connection with the bribery scheme).