THE INTERSECTION OF THE DODD-FRANK ACT AND THE FOREIGN CORRUPT PRACTICES ACT:

WHAT ALL PRACTITIONERS, WHISTLEBLOWERS, DEFENDANTS, AND CORPORATIONS NEED TO KNOW

Joel Androphy & Ashley Gargour*

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* Joel Androphy is a partner at Berg & Androphy (http://www.bafirm.com) and the author of the six-volume treatise, White Collar Crime, Thompson/West (2010) and Federal False Claims Act and Qui Tam Litigation, Law Journal Press (2011), the research sources for the issues discussed in this article. Androphy, with Sarah Frazier and Ashley Gargour, recently represented John O'Shea, an ABB manager, in his acquittal of FCPA charges.

Ashley Gargour is an associate at Berg & Androphy.

I. Introduction

With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[1] government authorities are no longer the only ones with a monetary interest in ferreting out those who violate federal laws. Specifically, section 922 of the Dodd-Frank Act provides a whistleblower program that rewards individuals who assist the Securities and Exchange Commission (SEC) in uncovering securities violations, including Foreign Corrupt Practices Act (FCPA) violations. Because the Dodd-Frank Act allows individual whistleblowers to reap significant benefits by reporting offenders and because the SEC and Department of Justice (DOJ) have increased FCPA prosecutions in recent years, global companies and their employees, especially those in the pharmaceutical and medical device industry, should understand how the Dodd-Frank Act and the FCPA intersect.

II. The Dodd-Frank Act and the SEC Whistleblower Program

A. Overview of the SEC Whistleblower Program

The SEC's whistleblower program was implemented under section 922 of the Dodd-Frank Act and is primarily intended to reward individuals who provide original information to the SEC that leads to a successful enforcement action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the SEC with information about possible securities violations. The protection from retaliation extends to all whistleblowers, irrespective of whether the whistleblower qualifies for an award.

In passing the Dodd-Frank Act, Congress substantially expanded the agency's authority to compensate individuals who provide the SEC with information about violations of the federal securities laws. Under Dodd-Frank, awards can now be up to thirty (30) percent of the monetary sanctions or recovery obtained by the SEC.

Before turning to the rules regarding the SEC's whistleblower program, it is worth noting what the rules do not require. In adopting the final rules, the SEC rejected a proposal in which employees would have been required to internally report their information to management before being eligible to present information under the SEC's whistleblower program. Instead, the program provides incentives for whistleblowers to report internally when it is appropriate to do so.

B. Requirements of an SEC Whistleblower (17 C.F.R. § 240.21F-3, -4)

To be eligible for an award under the SEC whistleblower program, a whistleblower must: (1) voluntarily provide the SEC, (2) with original information that (3) leads to the successful enforcement by the SEC of a federal court or administrative action, (4) in which the SEC obtains monetary sanctions totaling more than $1 million. Each of these requirements is explained in turn:

1. A whistleblower is deemed to have provided information voluntarily if the whistleblower has provided information before the government, a self-regulatory organization or the Public Company Accounting Oversight Board asks for it directly from the whistleblower or the whistleblower's representative.

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[1] Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1841 (2010).

2. Original information must be based upon the whistleblower's independent knowledge or independent analysis, not already known to the Commission and not derived exclusively from certain public sources.

3. A whistleblower's information can be deemed to have led to a successful enforcement action if: (1) the information is sufficiently specific, credible and timely to cause the SEC to open a new examination or investigation, reopen a closed investigation, or open a new line inquiry in an existing examination or investigation; (2) the conduct was already under investigation when the information was submitted, and the information significantly contributed to the success of the action; or (3) the whistleblower reports original information through his or her employer's internal whistleblower, legal, or compliance procedures before or at the same time it is passed along to the SEC; the employer provides the whistleblower's information (and any subsequently-discovered information) to the SEC; and the employer's report satisfies prongs (1) or (2) above.

4. With regard to the $1 million requirement, the rules permit aggregation of multiple SEC cases that arise out of a common nucleus of operative facts as a single action. These may include proceedings involving the same or similar parties, factual allegations, alleged violations of the federal securities laws, or transactions or occurrences.

C. Excluded as SEC Whistleblowers (17 C.F.R. 240.21F- 4(b)(4))

Under the SEC Whistleblower program, certain people generally will not be considered for whistleblower awards, including:

- People who have a pre-existing legal or contractual duty to report their information to the Commission;

- Attorneys (including in-house counsel) who attempt to use information obtained from client engagements to make whistleblower claims for themselves (unless disclosure of the information is permitted under SEC rules or state bar rules);

- People who obtain the information by means or in a manner that is determined by a U.S. court to violate federal or state criminal law;

- Foreign government officials;

- Officers, directors, trustees or partners of an entity who are informed by another person (such as by an employee) of allegations of misconduct, or who learn the information in connection with the entity's processes for identifying, reporting and addressing possible violations of law (such as through the company hotline).

- Compliance and internal audit personnel; and

- Public accountants working on SEC engagements, if the information relates to violations by the engagement client.

However, under certain circumstances, compliance and internal audit personnel, as well as public accountants, can become whistleblowers when: (1) the whistleblower believes disclosure may prevent substantial injury to the financial interest or property of the entity or investors; (2); the whistleblower believes that the entity is engaging in conduct that will

impede an investigation; or (3) at least 120 days have elapsed since the whistleblower reported the information to his or her supervisor or the entity's audit committee, chief legal officer, chief compliance officer—or at least 120 days have elapsed since the whistleblower received the information, if the whistleblower received it under circumstances indicating that these people are already aware of the information.

Certain other people, such as employees of certain agencies and persons who are criminally convicted in connection with the conduct, are already excluded by Dodd-Frank. In order to prevent wrongdoers from benefitting by, in effect, blowing the whistle on themselves, the rules do not allow the SEC to pay a culpable whistleblower an award that is based on either: (1) the monetary sanctions that such culpable individuals themselves pay in the resulting SEC action or (2) the monetary sanctions paid by entities whose liability is based substantially on conduct that the whistleblower directed, planned or initiated.

D. Enforcement and the Office of the Whistleblower

Although the SEC whistleblower program is still relatively new,[2] the SEC reports an increase in the quality of tips received since Dodd-Frank was passed.[3] Among other activities, the Office of the Whistleblower, established in 2011 by the SEC pursuant to section 924(d) of Dodd-Frank, set up a hotline staffed twenty-four hours a day by attorneys with the Office of the Whistleblower. The hotline received over 900 phone calls between May and November 2011 alone.[4] Whistleblowers from around the country and several foreign countries, including China and the United Kingdom, have submitted tips to the program.[5]

While 170 applicable enforcement judgments were issued from July 21, 2010 through July 31, 2011 that included the imposition of sanctions exceeding the $1 million threshold, no whistleblower awards had been paid as of the end of fiscal year 2011 because the application period for awards had not yet passed.[6] During the fiscal year 2012, 143 enforcement judgments were issued, and the SEC made its first award to a whistleblower under the program.[7]

III. Foreign Corrupt Practices Act

The Dodd-Frank Act's SEC whistleblower program offers substantial rewards to individuals for assisting the SEC in uncovering FCPA violations. Because the number of FCPA investigations has increased, international companies and their employees need to understand the FCPA and how to deter FCPA violations.

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[2] The final rules became effective August 12, 2011.

[3] Mary L. Shapiro, Chairman, U.S. Sec. & Exch. Comm'n, Opening Statement at SEC Open Meeting: Item 2 – Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm.

[4] U.S. Sec. & Exch. Comm'n, *Annual Report on the Dodd-Frank Whistleblower Program*, (Nov. 2011), *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

[5] *Id.*

[6] *Id.*

[7] U.S. Sec. & Exch. Comm'n, *Annual Report on the Dodd-Frank Whistleblower Program*, (Nov. 2012), *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

A. Overview of the FCPA

The FCPA subjects U.S. citizens and issuers to criminal liability for payments to foreign officials in order to secure business.[8] Although certain foreign countries have laws similar to the FCPA,[9] the SEC and the DOJ's ability to enforce the FCPA civilly and criminally only extends to American companies and citizens who bribe foreign officials, not the foreign officials who are the bribe recipients—an aspect of the law that causes Americans to be on an uneven playing field in terms of competitive advantages.[10]

1. *Who Is Covered*

The FCPA applies to "issuers," "domestic concerns," or "any persons" other than issuers and domestic concerns in the territory of the United States that take any action to violate the anti-bribery provisions.

An "issuer" is a company whose securities are registered in the United States or who is required to file periodic reports with the SEC.[11] A "domestic concern" includes "a citizen, national, or resident of the United States; and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its primary place of business in the United States or […] is organized under the laws of a State of the United States or" one of its territories, possessions, or commonwealths.[12] Issuers and domestic concerns are liable for acts within the territory of the United States that further a corrupt payment to a foreign official through the use of the U.S. mails or other means of interstate commerce.[13] Issuers and domestic concerns also are liable for acts taken outside of the United States, regardless of whether any means or instrumentalities of interstate commerce were used.

Persons other than nationals of the United States and concerns not organized or resident in the United States also can be liable under the anti-bribery provisions of the FCPA for actions taken within the territory of the United States. There is no requirement that the U.S. mails or other means of interstate commerce be used.

2. *Elements of Bribery*

To prove a violation of the FCPA's anti-bribery provisions, the government must prove the following eight elements:

1. The defendant was a "domestic concern" or an officer, director, employee, or agent of a "domestic concern" or an "issuer" or an officer,

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[8] *See* 15 U.S.C. § 78dd-2(a) (2006) (domestic concerns); 15 U.S.C. § 78dd-1 (issuers).

[9] *See* S. REP. NO. 95-114, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4101 (testimony of Treasury Secretary W. Michael Blumenthal that in many nations, such payments are illegal). For example, in the United Kingdom, the Serious Fraud Office enforces its overseas corruption laws, and in Canada, the Corruption of Public Officials Act is the equivalent of the FCPA in the United States.

[10] *See* United States v. Castle, 925 F.2d 831 (5th Cir. 1991) (per curiam) (holding that foreign officials who take bribes cannot be prosecuted under the FCPA or the general conspiracy statute and discussing the policy decisions behind Congress' decision to exclude foreign officials from prosecution).

[11] *See* 15 U.S.C. § 78dd-1(a).

[12] *See* 15 U.S.C. § 78dd-2(h)(1) (defining "domestic concern").

[13] *See* 15 U.S.C. § 78dd-2(h)(5) (defining "interstate commerce").

director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer;[14]
2. The defendant with respect to the charged conduct specifically intended to make use of the mails or means of interstate commerce;
3. The defendant acted corruptly and willfully;
4. The defendant specifically intended to act in furtherance of a payment—or an offer, promise or authorization for payment—or an offer, gift, promise to give or authorization of the giving of anything of value;
5. The recipients of the payments were "foreign officials;"[15]
6. The defendant knew that all or a portion of the payment was to be offered, given, or promised, directly or indirectly, to a foreign official;
7. The payment was specifically intended to be for one of three purposes: (1) to influence an act or decision of the foreign public official in his or her official capacity; (2) to induce the foreign public official to do or omit to do any act in violation of that official's lawful duty; or (3) to induce that foreign official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality; and
8. The payment was specifically intended to obtain or retain business for or with, or directing business to, any person.

B. Issues and Ambiguities in FCPA Elements

With the increased number of prosecutions under the FCPA, some of its terms and provisions have received criticism, including the definitions and interpretations of "corruptly and willfully," "knowingly," and "foreign official."

1. *Corruptly and Willfully*

In prosecuting a defendant for an FCPA violation, the government must prove that the defendant acted both corruptly and willfully. A person acts "corruptly" if he acts voluntarily and intentionally, with a bad, wrongful, or improper purpose or evil motive and a specific intent to influence a foreign official to misuse his or her official position to achieve an unlawful result, or a lawful result by some unlawful method or means.[16]

And a person acts "willfully" if he acts deliberately and with the specific intent to do something that the United States laws forbid, that is, with a bad purpose to disobey or disregard the law.[17] In other words, the government must prove that the defendant acted with knowledge that his conduct violated United States laws.[18] The defendant must believe the

[14] *See* 15 U.S.C. § 78dd-1(a).

[15] *See* 15 U.S.C. § 78dd-1(f)(1) (2006) (defining "foreign official" but not defining "instrumentality" of a foreign official); 15 U.S.C. § 78dd-2(h)(2) (same).

[16] *See* United States v. Kozeny, 493 F. Supp. 2d 693, 704 (S.D.N.Y. 2007) (defining "corruptly" as being beyond the element of "general intent" present in most criminal statutes and defining it as "a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position"), *aff'd*, 541 F.3d 166 (2d Cir. 2008); *see also* S. REP. NO. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108 (According to the Senate Report for the FCPA, "[t]he word 'corruptly' connotes evil motive or purpose, an intent to wrongfully influence the recipient.").

[17] Bryan v. United States, 524 U.S. 184, 190 (1998).

[18] *See* Jury Instructions in United States v. Bourke, No. S2-05-CR-518 (SAS), 2011 U.S. Dist. LEXIS 146545 (S.D.N.Y. Dec. 15, 2011); *Bryan*, 524 U.S. at 191 (holding that to prove that a defendant acted "willfully," the government must prove that the defendant knew his conduct was unlawful); United States v. Kay, 513 F.3d 432, 448–50 (5th Cir. 2007) (holding that proving a defendant acted "willfully" requires the government to prove that the defendant knew his conduct was unlawful).

transaction was illegal. He cannot be convicted of being negligent or mistaken—more is required than that.[19]

Proving that a defendant acted both corruptly and willfully requires the government to prove that the defendant knew his actions violated the FCPA—a difficult burden if the defendant never received FCPA training.

2. *Foreign Official*

Another issue at the center of FCPA prosecutions is the FCPA's definition of "foreign official." The FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[20] But the FCPA does not define "instrumentality."[21]

Without defining who is an instrumentality of a foreign official, the government has expanded the definition to cover employees not intended to be covered either under the text of the FCPA or the underlying purpose of the FCPA. For example, the government has recently taken the position that all employees of a government-owned foreign entity are "foreign officials" within the meaning of the statute because the word "instrumentality" in the definition of foreign official includes state-owned or state-controlled foreign entities. Recent FCPA litigation has focused on whether the definition of "instrumentality" includes foreign state-owned entities and their employees.[22]

3. *Knowingly*

An additional hurdle that the government must overcome in an FCPA prosecution is proving that the defendant *knew* that the intended recipient of a payment was a foreign official.[23] American employees and corporations often conduct business in a foreign country with foreign state-owned and state-controlled companies without knowing that the U.S. government will later contend that the employees of these companies are foreign officials. As noted above, whether a person is a foreign official is ambiguous because the statute itself fails to provide adequate guidance on this term, and therefore, proving that a defendant *knew* that a certain employee was a foreign official is a significant burden for the government.

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[19] *See* Jury Instructions in United States v. Jefferson, No. 1:07-CR-209 (E.D. Va. 2009) (For the knowledge element of the FCPA, the court instructed the jury "If the evidence shows you that the defendant actually believed the transaction was legal, he cannot be convicted, nor can he be convicted of being stupid or negligent or mistaken. More is required than that.").

[20] 15 U.S.C. § 78dd-2(h)(2)(A) (2006); 15 U.S.C. § 78dd-1(f)(1)(A).

[21] *See* 15 U.S.C. § 78dd-2(h)(2)(A); 15 U.S.C. § 78dd-1(f)(1)(A).

[22] *See* United States v. O'Shea, No. 09-629 (S.D. Tex. 2012); United States v. Aguilar, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); United States v. Esquenazi, No. 09-21010, 2010 U.S. Dist. LEXIS 143572 (S.D. Fla. Nov. 19, 2010); United States v. Carson, No. 09-00077, 2011 U.S. Dist. LEXIS 88853 (C.D. Cal. May 18, 2011).

[23] *See* 15 U.S.C. § 78dd-1(f)(2) (defining knowing as used in the FCPA); 15 U.S.C. § 78dd-2(h)(3)(A) (same); *see also* Stipulation re: Further Briefing Regarding Jury Instructions, *Carson*, No. 09-00077 (C.D. Cal. Sept. 21, 2011) (stipulation between the government and the defense that the answer to the court's question, "Must [the defendant] know that the individual is in fact a government official?" is "yes").

C. Statutory Exception and Defenses

In addition to using the above-mentioned ambiguities and issues to defend against an FCPA prosecution, the FCPA expressly provides a statutory exception and two affirmative defenses.

1. *Exception*

Under the FCPA's exception, payments are not in violation of the FCPA if the payments were facilitating or expediting payments to a foreign official "the purpose of which is to expedite or to secure the performance of a routine governmental action"—a defined term under the FCPA.[24] This exception to the FCPA is commonly referred to as the "grease payment" exception.

2. *Affirmative Defenses*

The FCPA sets forth two affirmative defenses: (1) the payments, while a violation of the FCPA, were legal under the written laws of the foreign country, and therefore, defendant should not be convicted of the charges in the indictment;[25] (2) the payment, gift, offer, or promise of anything of value that was made, while a violation of the FCPA, was a reasonable and bona fide expenditure.[26]

IV. Enforcement Trends in FCPA Healthcare Cases

In recent years, FCPA enforcement activity by the SEC and the DOJ has increased sharply. For example, in 2000, the government did not prosecute a single FCPA case, but in 2010, the DOJ's Criminal Division imposed $1 billion in penalties in FCPA cases—the largest in the history of FCPA enforcement.[27]

In the pharmaceutical and medical device industry, American companies are often at an increased risk of FCPA liability because many companies conduct business in foreign countries that have national healthcare systems. These national healthcare systems have publicly-owned and operated hospitals whose health care providers are government employees providing health care services in their official capacities. According to the U.S. government's interpretation of the FCPA, these employees are foreign officials under the FCPA.

Examples of potential FCPA violations include American pharmaceutical companies and their employees paying doctors and health officials abroad to encourage those individuals to order or prescribe their products or paying foreign doctors to oversee clinical trials of drugs and devices. These payments draw the attention of the U.S. government, and if these payments are made to persons who qualify as "foreign officials" under the FCPA, the pharmaceutical company may face civil or criminal charges in the United States.

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[24] *See* 15 U.S.C. § 78dd-1(b) (2006) (setting forth the exception); 15 U.S.C. § 78dd-2(b) (same); 15 U.S.C. § 78dd-1(f)(3) (defining "routine governmental action"); 15 U.S.C. § 78dd-2(h)(4) (same).

[25] *See* 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. § 78dd-2(c)(1).

[26] *See* 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. § 78dd-2(c)(2).

[27] *See* Press Release, Dept. of Justice, Department of Justice Secures More Than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), http://www.justice.gov/opa/pr/2011/January/11-crm-085.html.

In a speech on November 17, 2009 at the 22nd National Forum on the Foreign Corrupt Practices Act, Lanny A. Breuer, the Assistant Attorney General for the DOJ's criminal division, commented on how the nature of the pharmaceutical industry itself exposes American companies to FCPA liability:

> In some foreign countries and under certain circumstances, nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product may involve a 'foreign official' within the meaning of the FCPA. The depth of government involvement in foreign health systems, combined with fierce industry competition and the closed nature of many public formularies, creates, in our view, a significant risk that corrupt payments will infect the process.[28]

The potential prosecution of pharmaceutical companies should influence these companies' marketing strategies abroad, and company executives should insist that their foreign subsidiaries not pay bribes to foreign health officials or doctors.

As many international pharmaceutical companies have already discovered, the DOJ and SEC have been increasing the number FCPA investigations by examining the entire pharmaceutical and medical device industry.[29] For example, the SEC and DOJ have reportedly investigated AstraZeneca, Lilly Eli & Co., Johnson & Johnson, Medtronic, Merck & Co., and Zimmer; and other companies, including Novo Nordisk and Syncor, have already paid substantial fines for violations of the FCPA.[30] Given the international nature of the industry, pharmaceutical and medical device companies need to be prepared to face FCPA investigations by the DOJ and SEC.

V. Considerations for all Corporate Defendants, Individual Defendants, Whistleblowers, and their Counsel

A. Corporate Defendant's Perspective

Companies that violate the FCPA pay significant fines and penalties, often willingly as a risk-based decision, with the understanding that these sanctions are part of the cost of doing business in foreign countries. The government's primary resolution vehicles for FCPA enforcement actions are plea agreements, deferred prosecution agreements (DPAs), and non-prosecution agreements (NPAs). Rather than endure a lengthy, expensive trial and potentially suffer harm to their business and goodwill, many companies prefer to enter plea agreements, DPAs, and NPAs.[31] Before signing any agreement with the government, companies should be aware that such agreements often require the company to implement a compliance monitoring program, waive the attorney-client privilege, turnover employees' private documents and data,

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[28] Lanny A. Breuer, Assistant Attorney General, U.S. Dep't of Justice Criminal Div., Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17, 2009), http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf.

[29] *See* Gardiner Harris, *U.S. Inquiry of Drug Makers Is Widened*, N.Y. TIMES, Aug. 13, 2010, www.nytimes.com/2010/08/14/health/policy/14drug.html?_r=3&ref=todayspaper (discussing the increase in DOJ and SEC investigations of major drug and device makers regarding illegal payments to doctors and health officials in foreign countries).

[30] *See* Appendix A attached hereto for a listing of certain drug and device companies and the FCPA issues each has encountered.

[31] *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 406 (2010) (noting that "no business entity has publicly challenged either enforcement agency in an FCPA case in the last twenty years").

cut off support for certain employees' legal defense, and terminate the employment of those who do not cooperate with government investigations.

Another arrow in the government's quiver is debarment from participation in federal and state health care programs. Under 42 U.S.C. § 1320A-7, the government has the authority to debar or exclude entities from participation in Medicare and State Health Care Programs.[32] All the disadvantages of plea agreements, DPAs, and NPAs pale in comparison to debarment from participation in these government programs. But as a practical matter, the government rarely imposes this devastating sanction in part because certain companies that bribe foreign officials also do extensive business with various U.S. agencies under government contracts; thus, debarment for these companies penalizes not only the companies, but also the government agency with which they do business.[33]

Knowing all the consequences that accompany FCPA litigation, many companies choose to be proactive and self-report to the DOJ and SEC to take advantage of any leniency that the government might offer. Because a company is often held to a strict liability standard for the acts of its employees, a company should take steps to lessen the probability that it will violate the FCPA. For example, all companies should consider the following preventative measures:

- Train employees on the FCPA and the consequences for U.S. citizens doing business abroad who violate the FCPA's anti-bribery provisions by bribing foreign officials
- Educate employees on the cultural differences in the countries in which the company conducts business
- Caution employees to be mindful of who might be considered a foreign official in third world countries because the government often has extensive "ownership" and "control" over all economic activities, and in recent FCPA actions, the U.S. government has considered employees of state-owned foreign entities to be foreign officials under the FCPA
- Implement an FCPA compliance program, a code of conduct, and specific policies and procedures regarding conducting business in foreign countries
- Incorporate provisions into contracts with intermediaries setting forth strict guidelines on their interaction with foreign government officials and prohibitions on acts that would violate the FCPA
- Provide resources and procedures for employees to report FCPA violations or meet with general counsel to address questionable foreign business practices that might violate the FCPA
- Request an opinion from the Attorney General under 15 U.S.C. § 78dd-2(f) to determine whether prospective conduct would violate the FCPA
- Consider the advantages of self-reporting through voluntary disclosures to the SEC and DOJ if internal investigations reveal violations of the FCPA

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[32] *See* 42 U.S.C. § 1320A-7 (2006).

[33] *See generally* Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775 (2011).

B. Individual Defendant's Perspective

FCPA prosecutions of individuals are not as prevalent as corporate prosecutions. Individuals charged with FCPA violations more likely than not worked at companies that failed to take precautionary measures, implement FCPA policies and procedures, or provide FCPA training. But unlike the companies for which they worked, individuals do not have deep pockets to pay FCPA sanctions. Consequently, many FCPA defendants plead guilty without a fight to avoid the possibility of being sent to prison.

As long as FCPA defendants—both individuals and corporations—enter into plea agreements, DPAs, and NPAs, the government will continue to build its arsenal of "prosecutorial common law" to support its aggressive and slanted interpretation of the FCPA.[34] Court acceptance of plea agreements does not convert the government's pronunciations on the law into sources of legal authority. Indeed, the government's strategy of creating its own would-be common law threatens to strip the federal courts of their judicial power to interpret the FCPA. The federal courts, and not the Department of Justice nor any other division of the executive branch, are the final arbiters of what the FCPA actually provides.[35]

Obstacles in defending an FCPA action that are common to both individual defendants and corporate defendants include obtaining records from foreign countries, hiring experts on foreign law, and gathering related opinions from foreign courts or government agencies regarding the alleged conduct. Given the adversities associated with defending an FCPA case, for many individuals, the process is cost-prohibitive.

C. Whistleblower's Perspective

Much like the False Claims Act (and to a lesser extent the IRS whistleblower program),[36] the SEC's whistleblower program may foster an environment that will lead to more individuals coming forward as whistleblowers. The SEC whistleblower provisions describe the procedures for submitting information to the SEC and for making a claim for an award after an action is brought. The claim procedures provide opportunities for whistleblowers to present their claim before the SEC makes a final award determination. Under the provisions, the SEC will also pay an award based on amounts collected in related actions brought by certain agencies that are based upon the same original information that led to a successful SEC action.

Regarding the increased anti-retaliation provisions, a whistleblower who provides information to the SEC is protected from employment retaliation if the whistleblower possesses a reasonable belief that the information he or she is providing relates to a possible securities law violation that has occurred, is ongoing, or is about to occur. In addition, the rules make it unlawful for anyone to interfere with a whistleblower's efforts to communicate with the SEC, including threatening to enforce a confidentiality agreement.

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[34] *See Bingham's Michael Levy on the Rise of Prosecutorial Common Law*, 25 CORPORATE CRIME REPORTER 6, (Feb. 7, 2011), http://www.corporatecrimereporter.com/michaellevy020711.htm (describing "prosecutorial common law").

[35] *See* U.S. CONST. art. III, § 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); United States v. Nixon, 418 U.S. 683, 704 (1974) (noting that judicial powers cannot be shared with the Executive Branch).

[36] *See* JOEL ANDROPHY, FEDERAL FALSE CLAIMS ACT AND QUI TAM LITIGATIONS, Law Journal Press (2010).

Although the SEC's whistleblower provisions do not require that employee whistleblowers report violations internally in order to qualify for an award, the rules strengthen incentives that had been proposed and add certain additional incentives intended to encourage employees to use their own company's internal compliance programs when appropriate to do so. For example, the rules make a whistleblower eligible for an award if the whistleblower reports internally and the company informs the SEC about the violations. In addition, an employee is considered a whistleblower under the SEC program as of the date that the employee reports the information internally—as long as the employee provides the same information to the SEC within 120 days.

Through this provision, employees are able to report their information internally first while preserving their "place in line" for a possible award from the SEC. More importantly, the rules provide that a whistleblower's voluntary participation in a company's internal compliance program is a factor that can increase the amount of an award, and that a whistleblower's interference with internal compliance and reporting is a factor that can decrease the amount of an award.

VI. Conclusion

Whether the new whistleblower provisions will have a significant or a negligible impact on FCPA enforcement remains to be seen. In any event, corporations, individuals, and their counsel should be aware of the potential consequences associated with FCPA violations and the provisions of the Dodd-Frank Act's SEC whistleblower program.

APPENDIX A - Pharmaceutical and Medical Device Companies and the FCPA

Company	Description of FCPA Issue
AstraZeneca PLC	On April 28, 2011, AstraZeneca disclosed that it received inquiries from the DOJ and SEC in connection with an investigation into FCPA issues in the pharmaceutical industry across several countries. "AstraZeneca is cooperating with these inquiries and is investigating, among other things, sales practices, internal controls, certain distributors, and interactions with healthcare providers, institutions, and other government officials. AstraZeneca is investigating inappropriate conduct in certain countries, including China."[37]
Lilly Eli & Co.	"In August 2003, we received notice that the staff of the SEC is conducting an investigation into the compliance by Polish subsidiaries of certain pharmaceutical companies, including Lilly, with the U.S. Foreign Corrupt Practices Act of 1977."[38]
Johnson & Johnson	In February 2007, J&J voluntarily disclosed to the DOJ and the SEC that non-U.S. subsidiaries may have violated the FCPA through improper payments in connection with the sale of medical devices in two small-market countries.[39] In April 2011, J&J paid $70 million ($21.4 million criminal fine via a DOJ DPA; $48.6 million in disgorgement and prejudgment interest via a SEC settlement) to resolve FCPA enforcement actions for conduct in Greece, Poland, Romania, and an investigation of J&J subsidiary companies in the United Nations Oil-for-Food Program in Iraq.[40] J&J also paid approximately $7.9 million in a related U.K. Serious Fraud Office civil recovery action against its company DePuy International Limited, a subsidiary of DePuy Incorporated.[41]
Medtronic, Inc.	On September 25, 2007, the SEC sent Medtronic a letter requesting information relating to potential FCPA violations, such as payments to government-employed doctors, in connection with the sale of medical devices in foreign countries, including Greece, Poland, Germany, Turkey, Italy, and Malaysia.[42]

[37] AstraZeneca PLC, Annual Report (Form 20-F) 13 (Apr. 28, 2011).

[38] Lilly Eli & Co., Quarterly Report (Form 10-Q) 28 (Apr. 29, 2011).

[39] Johnson & Johnson, Quarterly Report (Form 10-Q) 32 (Aug. 11, 2010).

[40] *See* Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), http://www.justice.gov/opa/pr/2011/April/11-crm-446.html.

[41] *See* Press Release, U.K. Serious Fraud Office, DePuy International Limited ordered to pay 4.829 million pounds in Civil Recovery Order (Apr. 8, 2011), http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-in-civil-recovery-order.aspx.

[42] Medtronic, Inc., Annual Report (Form 10-K) 36 (June 23, 2009).

Company	Description of FCPA Issue
Merck & Co., Inc.	"The Company has received letters from the DOJ and the SEC that seek information about activities in a number of countries and reference the Foreign Corrupt Practices Act. The Company is cooperating with the agencies in their requests and believes that this inquiry is part of a broader review of pharmaceutical industry practices in foreign countries."[43]
Novo Nordisk A/S	In May 2009, Novo Nordisk pled guilty and paid a $9 million fine for paying $1.4 million to former Iraqi government officials in the UN Oil-for-Food Program for government contracts to provide insulin and other drugs, and Novo also paid $3,025,066 in civil penalties and $6,005,079 in disgorgement of profits.[44]
Syncor Taiwan, Inc.	In December 2002, Syncor pled guilty and paid $2 million in criminal fines and $500,000 in civil penalties.[45]
Zimmer Holdings, Inc.	In September 2007, the SEC informed Zimmer that it was investigating potential FCPA violations in medical device sales in foreign countries by companies, and that in November 2007, the DOJ requested any information provided to the SEC also be provided to the DOJ on a voluntary basis.[46]

[43] Merck & Co., Inc., Quarterly Report (Form 10-Q) 26 (Aug. 6, 2010).

[44] *See* Press Release, U.S. Dept. of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-for-food Program (May 11, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-461.html.

[45] *See* Press Release, U.S. Dept. of Justice, Syncor Taiwan, Inc. Pleads Guilty to Violating the Foreign Corrupt Practices Act (Dec. 10, 2002), http://www.justice.gov/opa/pr/2002/December/02_crm_707.htm.

[46] Zimmer Holdings, Inc., Annual Report (Form 10-K) 63 (Feb. 25, 2010).