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## Investigation of Halliburton Co./TSKJ's Nigerian Business Practices: Model for Analysis of the Current Anti-Corruption Environment on Foreign Corrupt Practices Act Enforcement

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# INVESTIGATION OF HALLIBURTON CO./ TSKJ'S NIGERIAN BUSINESS PRACTICES: MODEL FOR ANALYSIS OF THE CURRENT ANTI-CORRUPTION ENVIRONMENT ON FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT

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## I. INTRODUCTION

The U.S. stood alone in its anti-bribery legislation from 1977, when the Foreign Corrupt Practices Act ("FCPA")<sup>1</sup> was initially passed, until the Organization for Economic Cooperation and Development (the "OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") in 1997, resulting in OECD signatory nations adopting implementing legislation.<sup>2</sup> France's adoption of implementing legislation in 2002 provided the basis for the investigation by one of its magistrates into the allegations that a

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<sup>1</sup> Foreign Corrupt Practices Act of 1977, Pub. Law No. 95-213, 91 Stat. 1494 (codified as amended in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, 78m, 78dd-1, 78 dd-2, 78ff (2000)); Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (enacted as part of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1001-10013, 102 Stat. 1107); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 [hereinafter FCPA].

<sup>2</sup> Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_201185\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html) [hereinafter OECD Convention].

Halliburton subsidiary, TSKJ,<sup>3</sup> had engaged in bribery activities in Nigeria.<sup>4</sup> What began as a French investigation<sup>5</sup> into allegations of improper payments by a TSKJ agent to Nigerian government officials in exchange for favorable treatment in contracts connected with the construction of a multibillion dollar natural gas liquefaction complex at Bonny Island, Nigeria has widened into an investigation by the Nigerian government<sup>6</sup> and FCPA investigations by the U.S. Department of Justice<sup>7</sup> and Securities and Exchange Commission.<sup>8</sup>

The issues raised by the French inquiry into Halliburton/TSKJ's alleged payments to Nigerian government officials of about \$180 million in exchange for securing contractual advantages provide an excellent model

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<sup>3</sup> TSKJ won contracts from the Nigerian government to build and expand the liquefied natural gas project at Bonny Island in Rivers State, Nigeria. TSKJ is a private limited liability company registered in Madeira, Portugal whose members are Technip SA of France, Snamprogetti Netherlands B.V., an affiliate of ENI SpA of Italy, M. W. Kellogg (which became Kellogg, Brown & Root or KBR after the 1998 Halliburton acquisition of M. Kellogg) of the U.S., and JGC Corporation of Japan, each of which owns 25% of the venture. Halliburton Co., Annual Report (Form 10-K), at 22 (Mar. 1, 2005), available at [www.sec.gov/Archives/edgar/data/45012/000004501205000055/0000045012-05-000055-index.htm](http://www.sec.gov/Archives/edgar/data/45012/000004501205000055/0000045012-05-000055-index.htm) [hereinafter Halliburton Co., Annual Report].

The connection to Halliburton Co. is through the "K" for "Kellogg" in the letters that make up the name of the TSKJ Consortium. M. W. Kellogg Ltd. was the original member of TSKJ before it became a subsidiary of Halliburton Company in 1998 when Halliburton acquired its parent corporation, Dresser Co. After Halliburton's acquisition of Dresser, M. W. Kellogg's business was joined with an earlier Halliburton acquisition, Brown & Root, to become KBR, the engineering and construction group within Halliburton. See Halliburton.com, History of Halliburton, <http://www.halliburton.com/about/history.jsp> (last visited Mar. 2, 2006); see Jim Landers & Richard Whittle, *Bribery Case Findings Detailed Halliburton Says Incidents Predate Ownership of Firm*, DALLAS MORNING NEWS, Sept. 3, 2004, at 2D.

<sup>4</sup> C. Pén. Art. 435, translated at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm); see also Law No. 2000-595 of June 30, 2000, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France] 9944 (2000), available at <http://www.oecd.org/dataoecd/9/61/2376874.pdf> (modifying the Penal Code).

<sup>5</sup> See Bruce Zagaris, *French Investigate Halliburton & Technip's Energy Payments in Nigeria*, 20 INT'L ENFORCEMENT L. REP. 4 (2004).

<sup>6</sup> NIG. HOUSE OF REPRESENTATIVES PETITION COMM., INTERIM REPORT: THE HALLIBURTON/TSKJ/LNG INVESTIGATION (2004), available at [http://halliburtonwatch.org/news/nigeria\\_parliament\\_report.pdf](http://halliburtonwatch.org/news/nigeria_parliament_report.pdf); see Ahamefula Ogbu, *House Probes Halliburton Bribery Scandal*, THIS DAY (NIG.), Feb. 16, 2004, available at 2004 WLNR 7020299.

<sup>7</sup> See Michael Isikoff & Mark Hosenball, *Terror Watch: Another Halliburton Probe*, NEWSWEEK WEB EXCLUSIVES, Feb. 4, 2004, available at 2004 WLNR 3639294.

<sup>8</sup> Press Release, Halliburton Co., Halliburton Announces SEC Investigation Regarding Nigerian Joint Venture (June 11, 2004), available at [http://www.halliburton.com/news/archive/2004/corpnws\\_061104.jsp](http://www.halliburton.com/news/archive/2004/corpnws_061104.jsp) [hereinafter Press Release, Halliburton Announces SEC Investigation]; see Russell Gold, *Halliburton Says SEC Opened Probe into Payments*, WALL ST. J., June 14, 2004, at A3.

for examining the influence of the current anti-corruption environment on FCPA enforcement.<sup>9</sup> The French are examining allegations of illicit payments to Nigerian government officials by the TSKJ joint venture in which Halliburton Company's subsidiary, Kellogg Brown & Root ("KBR"),<sup>10</sup> is a partner.<sup>11</sup> With an American corporation involved,<sup>12</sup> the French regulators related the information they had obtained to their U.S. compliance counterparts.<sup>13</sup>

This Paper will: 1) discuss the factual background of the alleged Halliburton/TSKJ misconduct and the pending investigations by various government agencies in several countries; 2) identify the relevant FCPA provisions, case law and policy; and 3) examine the anti-corruption environment which has influenced increased enforcement of the FCPA and its potential implications for the pending Halliburton/TSKJ investigation.

## II. CURRENT FRENCH, DOJ, SEC, AND NIGERIAN INVESTIGATIONS OF HALLIBURTON/TSKJ FOR POTENTIAL FOREIGN CORRUPT PRACTICES ACT VIOLATIONS

### A. FACTUAL BACKGROUND OF ALLEGED HALLIBURTON/TSKJ BRIBERY MISCONDUCT

TSKJ, through its agent, Tri Star, is alleged to have made payments to Nigerian government officials of up to \$180 million in exchange for lucrative contracts.<sup>14</sup> Starting in 1994, the joint venture, TSKJ,<sup>15</sup> entered into a series of contracts to build and expand the liquefied natural gas project for Nigeria LNG Limited<sup>16</sup> at Bonny Island in Rivers State. M.W.

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<sup>9</sup> Gold, *supra* note 8.

<sup>10</sup> M.W. Kellogg became a subsidiary of Halliburton when its parent, Dresser Industries was acquired by Halliburton in 1998. Landers & Whittle, *supra* note 3. M. W. Kellogg Ltd. had been a member of the TSKJ joint venture from 1994. *Id.* After the merger of Dresser and Halliburton, M. W. Kellogg Ltd. was joined with the Brown and Root operations to become Kellogg, Brown and Root or KBR.

<sup>11</sup> See Zagaris, *supra* note 5, at 4.

<sup>12</sup> Halliburton is incorporated under the laws of the State of Delaware. Halliburton Co., Annual Report, *supra* note 3, at 4.

<sup>13</sup> Michael D. Goldhaber, *A Level Playing Field—World Joins U.S. in Cracking Down on Businesses Offering Bribes Overseas*, BROWARD DAILY BUS. REV., Jan. 6, 2005, at A10.

<sup>14</sup> Gold, *supra* note 8.

<sup>15</sup> *Id.*

<sup>16</sup> Nigeria LNG Limited is owned by the Nigerian National Petroleum Corporation, Shell Gas B.V., Cleag Limited (an affiliate of Total which was formerly Elf Aquitaine), and Agip International B.V., which is an affiliate of ENI SpA of Italy. Halliburton Co., Annual Report *supra* note 3, at 22; see also Total, Total, a Multicultural, Richly Diverse Group, [www.total.com/en/group/presentation/history](http://www.total.com/en/group/presentation/history) (last visited Feb. 25, 2006).

Kellogg—a twenty-five percent partner in TSKJ—was allegedly its lead company.<sup>17</sup> M.W. Kellogg became part of Halliburton in 1998, when Halliburton acquired its parent company, Dresser Industries.<sup>18</sup> After the acquisition, M. W. Kellogg's business was merged with an earlier Halliburton acquisition, Brown & Root, to become KBR, the engineering and construction unit within Halliburton.<sup>19</sup> Some of the M.W. Kellogg executives, who later worked for KBR, have been targeted for alleged misdeeds in the government investigations of bribery.<sup>20</sup>

Commencing in 1995, TSKJ entered into an agency agreement with Tri Star Investments, a firm headed by a British lawyer, Jeffrey Tesler.<sup>21</sup> The TSKJ joint venture allegedly engaged in its subterfuge by using Tri Star to act as an agent in making payments.<sup>22</sup> Reports estimate that TSKJ paid Tri Star \$180 million which was remitted to Nigerian public officials through offshore accounts that allowed TSKJ to obtain contract awards for building the Bonny Island liquefied natural gas production units.<sup>23</sup> Some evidence has emerged in the French investigation that between 1995 and

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<sup>17</sup> See Landers & Whittle, *supra* note 3.

<sup>18</sup> Vice President Cheney was the CEO of the company at this time. Mr. Cheney remained in the position of CEO until 2000 when he became U.S. Vice President. The acquisition made Halliburton legally responsible for all of M.W. Kellogg's actions while involved in TSKJ. See Thomas Catan et al., *Halliburton Tries to Limit Fall-Out from Nigeria 'Bribes' Case*, FIN. TIMES, June 23, 2004, at 8, available at 2004 WLNR 9775449.

<sup>19</sup> See Shaka Momodu, *Halliburton Has Nothing To Do with the \$180 Million Scam*, THIS DAY (NIG.), Nov. 6, 2004, available at 2004 WLNR 16864838. The two units within Halliburton include KBR Engineering and Construction Group which "designs liquefied natural gas plants, refining and processing plants and production facilities" along with the Energy Services Group which "offers products, services, and integrated solutions for oil and gas exploration, development and production." Halliburton.com, *supra* note 3.

<sup>20</sup> Executives from M. W. Kellogg who were active participants in the alleged bribery activity were Albert "Jack" Stanley, who was with M. W. Kellogg for years, served as chairman of KBR and then a consultant, and William Chaudan, former manager of the London office of M. W. Kellogg who was a consultant on the Nigerian project. See Landers & Whittle, *supra* note 3.

<sup>21</sup> Tri Star Investments is registered in Gibraltar, a British tax haven. Isikoff & Hosenball, *supra* note 7. Jeffrey Tesler was the owner of Tri Star and also the London lawyer of M.W. Kellogg Company. Tesler was reported to have been a financial advisor to Nigeria's late military dictator, General Sani Abacha. *Id.* A French magistrate has officially placed Jeffrey Tesler under investigation for corruption of a foreign public official. *Id.*

<sup>22</sup> "French investigators have found evidence of four payments totaling \$166 million to Mr. Tesler's Tri-Star Investments from 1995 to 2002 that roughly coincided with contract awards for the Nigeria LNG project worth \$6.7 billion." See Landers & Whittle, *supra* note 3.

<sup>23</sup> Gold, *supra* note 8.

2002, dates that “roughly coincided with contract awards for the Nigeria LNG project worth \$6.7 billion,” Tri Star paid officials \$166 million.<sup>24</sup>

Handwritten notes detailing conversations among representatives of the consortium between 1993 and 1998, discuss the possibility of bribes to Nigerian officials to win bids for construction of the \$12 billion Nigeria Liquefied Natural Gas Project, thus offering support for allegations of bribery.<sup>25</sup> Subsequent to the discovery of the notes, Halliburton disclosed their contents to the SEC.<sup>26</sup>

Although some of the alleged misconduct took place from 1995 to 1998, before the M.W. Kellogg parent corporation, Dresser, was acquired by Halliburton, the merger may have carried with it the liabilities of the target company. To further attach the possibility of liability to Halliburton, the suspect payments continued until 2002—after the merger—when a partner in the Nigerian project alerted the French prosecutor of TSKJ’s alleged “slush fund.”<sup>27</sup>

## B. FRENCH INVESTIGATION

The bribery issue first came to the attention of the French in 2002 when a Paris prosecutor received information from an official of Technip,<sup>28</sup> a French company that was a partner in TSKJ consortium, about a Nigerian “slush fund” when the official was being questioned about his role in the alleged acts of fraud by the French oil company, Elf Aquitaine (subsequently Total).<sup>29</sup> In January 2002, roughly at the same time of the Technip official’s testimony, France implemented the OECD Convention through a Penal Code amendment.<sup>30</sup> The prosecutor then transferred the case to a French magistrate, Renaud van Ruymbeke of the Tribunal De Grande Instance De Paris, who began his investigation into the matter in

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<sup>24</sup> Landers & Whittle, *supra* note 3.

<sup>25</sup> Press Release, Halliburton Co., Halliburton Provides Update on Investigation into Nigerian Project (Sept. 1, 2004), available at <http://www.halliburton.com/news/archives/2004/corpnws090104.jsp>.

<sup>26</sup> *Id.*

<sup>27</sup> See Isikoff & Hosenball, *supra* note 7.

<sup>28</sup> *Id.*

<sup>29</sup> There was an “eight-year investigation of the formerly state-owned group [Elf Aquitaine] and a colorful public trial that exposed tales of bribery, adultery and influence-peddling that extended from plush government offices in Paris to the capitals of France’s former West African colonies.” Nicola Clark, *Appeal Hearings Open for 2 Former Elf Chiefs Court to Review Corruption Convictions*, INT’L HERALD TRIB., Oct. 7, 2004, at 3.

<sup>30</sup> C. Pén. Art. 435, translated at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm); see also Law No. 2000-595 of June 30, 2000, *Journal Officiel de la République Française*, *supra* note 3, at 9944 (modifying the Penal Code).

October 2003—one of the first bribery scandals under the new amendment of the French Penal Code.<sup>31</sup> After the investigation is complete, Mr. Ruymbeke has the power to recommend either a criminal trial or that the authorities drop the matter.<sup>32</sup>

Following the discovery, the French regulators informed their U.S. counterparts in the DOJ and SEC regarding the magistrate's pending investigation.<sup>33</sup>

### C. DOJ INQUIRY

In February 2004, as a result of the information obtained from French regulators, the DOJ opened an inquiry into possible FCPA violations by Halliburton.<sup>34</sup> A report of this inquiry first appeared in Halliburton's 10K filed with the SEC on March 1, 2004 in which it stated that the U.S. Department of Justice and SEC have met with Halliburton to discuss the French magistrate's investigation.<sup>35</sup> It further stated that the agencies had "asked Halliburton for cooperation and access to information in reviewing the matter in light of the requirements of the United States Foreign Corrupt Practices Act."<sup>36</sup> In later SEC filings, there is mention of the company's understanding that the DOJ had "invoked its authority under a sitting grand jury to obtain letters rogatory for the purpose of obtaining information abroad."<sup>37</sup>

### D. SEC INVESTIGATION

Although the SEC had made informal requests for cooperation earlier in the year, in June 2004 the SEC opened a formal investigation of Halliburton to determine if FCPA violations occurred.<sup>38</sup> Halliburton issued a press release regarding the SEC investigation into the "more than \$100 million in payments that a joint venture involving its Kellogg Brown & Root subsidiary in the building of a huge Nigerian natural gas complex."<sup>39</sup>

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<sup>31</sup> See Zagaris, *supra* note 5, at 4; Isikoff & Hosenball, *supra* note 7.

<sup>32</sup> Gold, *supra* note 8.

<sup>33</sup> Goldhaber, *supra* note 13.

<sup>34</sup> Isikoff & Hosenball, *supra* note 7.

<sup>35</sup> Halliburton Co., Annual Report, *supra* note 3, at 54.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 21; Halliburton Co., Quarterly Report (Form 10-Q), at 16 (Oct. 31, 2005), available at [www.sec.gov/Archives/edgar/data/45012/000004501205000346/edsept200510qfinal.htm](http://www.sec.gov/Archives/edgar/data/45012/000004501205000346/edsept200510qfinal.htm) [hereinafter Halliburton Co., Quarterly Report].

<sup>38</sup> Press Release, Halliburton Announces SEC Investigation, *supra* note 8.

<sup>39</sup> See Gold, *supra* note 8. Although the initial investigation related to "more than \$100 million in payments," the amount has been placed at closer to \$180 million. *Id.*

In SEC filings, Halliburton reports that it has produced documents to the SEC both voluntarily and pursuant to subpoenas, and that it is making its employees available to the SEC for testimony.<sup>40</sup>

#### E. NIGERIAN INVESTIGATION

The Nigerian House of Representatives Committee on Public Petitions engaged in an investigation of the alleged bribery activities of Halliburton/TSKJ and held hearings starting in early 2004 to identify those who may have benefited from the alleged bribe money and to determine the extent the Nigerian Government might have suffered losses in the transactions.<sup>41</sup> This was followed by a public inquiry into the same matter by the National Assembly.<sup>42</sup>

According to the 10Q filed with the SEC by Halliburton on October 31, 2005, the Nigerian Economic and Financial Crimes Commission, "which is organized as part of the executive branch of the government," is also investigating these matters.<sup>43</sup> The 10Q further reports that "TSKJ notified the Nigerian Attorney General that TSKJ would not oppose the Attorney General's efforts to have sums of money held on deposit in banks in Switzerland transferred to Nigeria and to have the legal ownership of such sums determined in the Nigerian courts."<sup>44</sup>

### III. RELEVANT FCPA PROVISIONS

When the Foreign Corrupt Practices Act was adopted in 1977, it was the first anti-bribery legislation ever adopted by a nation.<sup>45</sup> For the next twenty years, corporations governed by U.S. securities laws were the sole companies constrained in competing on an increasingly global level, by the

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<sup>40</sup> Halliburton Co., Annual Report, *supra* note 3, at 20; Halliburton Co., Quarterly Report, *supra* note 37, at 16.

<sup>41</sup> Zagaris, *supra* note 5, at 4; *see* Ogbu, *supra* note 6. As a result of difficulties encountered in obtaining cooperation from witnesses, the House Committee on Public Petition sought a Nigerian court order to request that the French judge allow the committee to inspect the documents in the Halliburton/TSKJ case file. *See* Mike Oduniyi, *TSKJ Probe: 'Court Ruling on French Judge Delivered,'* THIS DAY (NIG.), Jan. 24, 2005, available at 2005 WLNR 1079727.

<sup>42</sup> Hector Igbikiowubo, *N/A Opens Public Hearing into TSKJ's \$180M Bribery Scandal,* VANGUARD (NIG.), Oct. 19, 2004, available at 2004 WLNR 16857621.

<sup>43</sup> Halliburton Co., Quarterly Report, *supra* note 37, at 16.

<sup>44</sup> *Id.* at 17.

<sup>45</sup> Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business of Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 6 (1999) [hereinafter George, Lacey & Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation*].



criminal and civil penalties integral to the FCPA. These corporations were vocal in expressing their concerns that they were placed at a competitive disadvantage by the restrictions imposed by the statute.<sup>46</sup> While the global marketplace has been altered by the adoption of the OECD, it is important to consider the FCPA provisions.

The Act is divided into two sections: The first section specifically prohibits bribery of foreign officials,<sup>47</sup> and the second section includes accounting provisions—both corporate recordkeeping and internal control requirements—intended to deter and detect such illicit payments.<sup>48</sup>

To facilitate understanding of the FCPA and its impact on government's ability to curb business corruption, the substantive content of the statute and its amendments are reviewed briefly in the following sections.

#### A. ANTI-BRIBERY PROVISIONS

The anti-bribery provisions include:

1) a prohibition against the direct and indirect bribery of foreign officials by issuers and reporting firms under the jurisdiction of the Securities and Exchange Commission.<sup>49</sup>

2) a prohibition of direct and indirect bribery of foreign officials by domestic concerns, including any U.S. citizen, national, or resident, and any business entity organized under U.S. law.<sup>50</sup>

Through the use of the term "domestic concerns"<sup>51</sup> both SEC registrants and non-registrants are covered by the Act.<sup>52</sup> These prohibitions are targeting the corrupt offering, giving, or promising anything of value in order to influence the decision of an individual in an official capacity in order "to obtain, retain, or direct business" transactions.<sup>53</sup>

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<sup>46</sup> See U.S. GEN. ACCOUNTING OFFICE, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS: COMPTROLLER GENERAL'S REPORT TO THE CONGRESS 6 (1981) [hereinafter GAO REPORT] (noting that many corporate officials believe the costs of complying exceed the benefits, and that complying caused U.S. firms to lose business). See Goldhaber, *supra* note 13.

<sup>47</sup> Foreign Corrupt Practices Act of 1977, Pub. Law No. 95-213, §§ 103(a)-104(a), 91 Stat. 1494, 1495-98, (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2 (2000 & Supp. 2005)).

<sup>48</sup> § 102, 91 Stat. at 1495 (codified as amended at 15 U.S.C. § 78m(b)(2)).

<sup>49</sup> § 103a, 91 Stat. at 1495-96 (codified as amended at 15 U.S.C. § 78dd-1(a)).

<sup>50</sup> § 104, 91 Stat. at 1496-98 (codified as amended at 15 U.S.C. §§ 78dd-2(a), (h)).

<sup>51</sup> 15 U.S.C. § 78dd-1.

<sup>52</sup> *Id.*

<sup>53</sup> H.R. REP. NO. 100-576, at 921 (1988) [hereinafter CONFERENCE REPORT].

The Act prohibits bribes to “any person, while knowing *or having reason to know* that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official,”<sup>54</sup> “to any foreign political party or official thereof, or to any candidate for foreign political office.”<sup>55</sup> The “reason to know” standard facilitates the ability of prosecutors to prove the requisite intent for prohibited acts under the FCPA.<sup>56</sup>

## B. ACCOUNTING PROVISIONS

The two accounting provisions of the original Act of primary importance are:

1) Section 13(b)(2)(A) mandates the financial recordkeeping standards for all corporations, who are required to “make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;”<sup>57</sup> and

2) Section 13(b)(2)(B) obligates corporations to “devise and maintain a system of internal accounting controls sufficient to provide *reasonable assurances* that transactions and assets are properly maintained.”<sup>58</sup>

Legislative history indicates that an important factor in enacting the FCPA was a desire to protect the investor, and “to restore the efficacy of the system of corporate accountability.”<sup>59</sup> The significant effect of the passage of these sections was to give the SEC authority over the entire financial management and reporting requirements of those corporations subject to the registration and reporting provisions of the Securities Exchange Act of 1934 (“Exchange Act”).<sup>60</sup> “The accounting provisions were considered by

<sup>54</sup> 15 U.S.C.S. §§ 78dd-1(b), 78 dd-2(d)(2).

<sup>55</sup> *Id.* § 78dd-1(a)(3).

<sup>56</sup> *Id.* § 78dd-2(2).

<sup>57</sup> *Id.* § 78m(b)(2)(A).

<sup>58</sup> *Id.* § 78m(b)(2)(B).

<sup>59</sup> GAO REPORT, *supra* note 46, at 69 (citing a report to the SEC); *see* SEC. & EXCH. COMM’N, REPORT TO THE SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, 95TH CONG., 1ST SESS., QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, at b (COMM. PRINT 1976) [hereinafter SEC REPORT].

<sup>60</sup> Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)*, 7:2 FLA. ST. J. TRANSNAT’L L. & POL’Y 119, 153 (1998) [hereinafter Lacey & George, *Expansion of SEC Authority into Internal Corporate Governance*]; SEC. v. World-Wide Coin Inv., Ltd., 567 F. Supp. 724, 746 (N.D. Ga. 1983).

some to be the broadest application of federal law to corporate management and accountability since the 1934 Act.”<sup>61</sup>

The SEC exercised its expanded authority when it promulgated two rules under the authority of the FCPA. Those rules, Rule 13b2-1<sup>62</sup> and Rule 13b2-2,<sup>63</sup> further clarified the recordkeeping and internal control responsibilities of management under the FCPA. These two Rules indicate that the SEC’s interpretation of the FCPA is that the statute conferred authority on the SEC to further intervene in corporate internal affairs. A longtime critic of the SEC’s exercise of authority in the area of corporate internal governance reforms argues that “the SEC achieved its objective” of obtaining more power to regulate the internal affairs of public companies “by persuading Congress to enact section 13(b) of the Exchange Act.”<sup>64</sup>

Until 1977 federal securities law had been founded on the principle that market efficiency is enhanced by the disclosure to investors of relevant material financial information.<sup>65</sup> Through the FCPA, Congress intentionally allows the SEC to go far beyond the disclosure function by granting it new rulemaking and enforcement authority over the internal control and recordkeeping mechanisms of its registrants.<sup>66</sup>

## C. ALLOWABLE PAYMENTS AND DEFENSES

### 1. *Facilitating Payments*

An exception to the anti-bribery provisions of the FCPA applies to insubstantial payments made merely to facilitate or expedite performance of “routine governmental action.”<sup>67</sup> The “routine governmental action” contemplates non-discretionary acts of lower level government officials which are generally limited to ministerial or clerical acts which expedite the

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<sup>61</sup> Lacey & George, *supra* note 60, at 153.

<sup>62</sup> 17 C.F.R. § 240.13b2-1 (2005).

<sup>63</sup> *Id.* § 240.13b2-2.

<sup>64</sup> ROBERTA S. KARMEL, *REGULATION BY PROSECUTION* 155 (1982); Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 88 (2005).

<sup>65</sup> Lacey & George, *Expansion of SEC Authority into Internal Corporate Governance*, *supra* note 60, at 123.

<sup>66</sup> D. Goelzer, *The Accounting Provisions of the FCPA—The Federalization of Corporate Recordkeeping and Internal Control*, 5 J. CORP. L. 1, 5 (1979).

<sup>67</sup> 15 U.S.C. § 78dd-2(b) (2000 & Supp. 2005). Congress intended this exemption to cover nominal payments used to expedite a business transaction which were made to persons whose duties did not include policy-making functions. See CONFERENCE REPORT, *supra* note 53, at 921.

processing of a matter that the official is already obligated to undertake and complete.

## 2. Affirmative Defenses

The two FCPA affirmative defenses, which place the burden of proof on the defendant to show that a payment is lawful, are:

(1) "Payment, gift, offer, or promise of anything of value" provided that such offerings are in accordance with the written laws of that country.<sup>68</sup>

(2) "Payment, gift, offer, or promise of anything of value" that constitute a reasonable and bona fide expenditure, such as travel or lodging. It must be related to the promotion of products or services, or "the execution or performance of a contract with a foreign government."<sup>69</sup>

## 3. Halliburton's Defensive Arguments

Halliburton denies any wrongdoing and is launching a strong defensive strategy during the course of the investigations. The attorney for the owner of Tri Star told the *Wall Street Journal* that the money TSKJ gave his client was a fee for services rendered which would bring it within the scope of the FCPA facilitating payment exception and raise one of the affirmative defenses. Mr. Remy Caulier, Vice President of Halliburton Energy Services, defended Halliburton strenuously in an interview reported in a Nigerian newspaper in the fall of 2004.<sup>70</sup> In the interview, Mr. Caulier repeatedly referred to Halliburton's Code of Business Conduct and to the company's emphasis on ethics, but he made no reference to the company's FCPA Compliance Code.<sup>71</sup>

Although it has not been proven that payments were actually made, the handwritten "notes" from TSKJ meetings referring to a series of possible "secret" and "open" agency payments undermine the defense that the payments were legitimate business costs.<sup>72</sup> Halliburton's 10Q, filed with

<sup>68</sup> 15 U.S.C. § 78dd.-1c(1).

<sup>69</sup> *Id.* § 78dd.-1c(2).

<sup>70</sup> Momodu, *supra* note 19. Mr. Caulier argued that Halliburton's name had been unfairly connected with the TSKJ scandal, and implied that perhaps the media was responsible for exploiting the connection. He tried to substantiate his position with the tenuous argument that the link between TSKJ and Halliburton only existed through the 25% interest that its KBR business unit had in the TSKJ joint venture. *Id.*

<sup>71</sup> *Id.* Although in his interview, Mr. Caulier correctly refused to link Halliburton Energy Services and TSKJ, he failed to recognize that the structural link between Halliburton Co. and KBR carried with it the legal significance of a parent corporation's responsibility for the acts of its subsidiary. *See id.*

<sup>72</sup> Thomas Catan & Michael Peel, *SEC Widens Nigeria Bribe Probe with Shell Subpoena*, FIN. TIMES, Oct. 13, 2005, at 15.

the SEC on October 31, 2005, states that the matter is under investigation and “cover[s] an extended period of time in some cases significantly before [its] 1998 acquisition of Dresser Industries.”<sup>73</sup> This highlights the problem of an acquiring company failing to diligently assess potential liabilities in the discovery of FCPA violations prior to acquisition.<sup>74</sup> The company reports in its 10Q that there is a general disengagement from former employees of M.W. Kellogg, who allegedly participated in the acts of bribery.<sup>75</sup>

#### D. 1988 AND 1998 AMENDMENTS TO THE FCPA

In 1988 Congress amended the FCPA in the Omnibus Trade and Competitiveness Act (“Trade Act”).<sup>76</sup> Various provisions included clarification of facilitating payments (related to the anti-bribery section of the statute),<sup>77</sup> and clarification of the potential liability of a parent company for the conduct of its subsidiaries (related to the recordkeeping and internal control parts of the statute).<sup>78</sup> Importantly, the 1988 Trade Act included a provision that encouraged the U.S. President to promote an international agreement through the Organization for Economic Cooperation and Development to prohibit the payment of bribes by corporations in the industrialized nations.<sup>79</sup>

The timing of this mandate was fortuitous due to changing dynamics in the international community. Twenty years after the adoption of the FCPA, various developments in the global economy, including factors such as the transition of many former socialist countries to market economies at the end of the Cold War; the increased integration of Europe, the proliferation of international mergers, the advent of a borderless global market enhanced by technological advances; and a developing worldwide awareness of the

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<sup>73</sup> Halliburton Co., Quarterly Report, *supra* note 37, at 17.

<sup>74</sup> Lockheed Martin Corp. did not complete its plans to buy Titan Corp. after a potential FCPA compliance problem emerged during the due diligence examination and Titan failed to resolve its FCPA problems with Federal agencies. “Lockheed, eager not to inherit any liability Titan might face from the probe,” ended its efforts towards a merger. See Stephen Manning, *Lockheed Ends \$1.66 Billion Titan Deal After Deadline Passes*, ASSOCIATED PRESS WORLDSTREAM, June 26, 2004, available at <http://www.cantonrep.com/index.php?Category=5&ID=169234&r=5>.

<sup>75</sup> Halliburton Co., Quarterly Report, *supra* note 37, at 17.

<sup>76</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 [hereinafter Trade Act].

<sup>77</sup> 15 U.S.C. § 78dd-2(b) (2000 & Supp. 2005).

<sup>78</sup> *Id.* § 78m(b)(6).

<sup>79</sup> *Id.* § 78dd-1.

economic costs of corruption<sup>80</sup> led to the adoption, in 1997, of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>81</sup> The U.S., as a signatory to the OECD Convention, then needed to modify its statutes to be in compliance with the OECD Convention, resulting in the amendments incorporated in the 1998 International Anti-bribery and Fair Competition Act.<sup>82</sup> One noteworthy change under the modified statute is that “Americans and American companies are liable for bribery even if their conduct occurs completely outside U.S. terrain and they have not used the U.S. mails or otherwise engaged in interstate commerce.”<sup>83</sup> Additionally, it is clear that the FCPA applies to the actions of foreign companies that trade on the U.S. securities markets.<sup>84</sup>

The FCPA, as amended in 1988<sup>85</sup> and 1998<sup>86</sup> carries potentially serious criminal and civil penalties for violations of its provisions. Congress drastically increased the penalties for violations of the bribery section of the amended Act.<sup>87</sup> The civil liability of domestic concerns and issuers was increased to \$2 million.<sup>88</sup> “Natural persons that are officers, directors, employees or agents of such domestic concerns who willfully violate the anti-bribery sections” can be fined up to \$100,000 and imprisoned up to 5 years.<sup>89</sup> As provided in the original Act, corporations are precluded from indemnifying their employees against liability.<sup>90</sup> Penalties related to the conviction of a person for recordkeeping violations, such as the willful use of false and misleading statements in the financial records, include fines up to \$5 million and imprisonment of up to twenty years.<sup>91</sup>

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<sup>80</sup> George, Lacey & Birmele, *On the Threshold of the Adoption of Global Antibribery Legislation*, *supra* note 45, at 4.

<sup>81</sup> OECD Convention, *supra* note 2.

<sup>82</sup> International Anti-bribery and Fair Competition Act, 15 U.S.C. §§ 78dd-1(a)(2)(iii), 78dd-1(a)(3)(iii).

<sup>83</sup> Goldhaber, *supra* note 13.

<sup>84</sup> *Id.*

<sup>85</sup> *See* Trade Act, *supra* note 76.

<sup>86</sup> *See* 15 U.S.C. § 78dd-1.

<sup>87</sup> *Id.* §§ 78ff(c)(1)(A), 78dd-2(g)(1)(A).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* § 78dd-2(g)(2)(A).

<sup>90</sup> *Id.* §§ 78ff(c)(3), 78dd-2(g)1(3).

<sup>91</sup> *See id.* § 78ff(a).

#### E. RECENTLY INCREASED ENFORCEMENT OF FCPA VIOLATIONS

In the last five years, there has been an increased aggressiveness by the SEC and DOJ in enforcement of FCPA civil and criminal violations.<sup>92</sup> In 2005 alone there was a significant increase in prosecution of FCPA violations by both the SEC and DOJ. "In 2005 the average number of prosecutions by the DOJ has been four times the average of the preceding five years."<sup>93</sup> A number of pertinent issues, as discussed below, are highlighted by the increased enforcement, including the impact on corporations of voluntary disclosure of discovered FCPA violations, the imposition of liability on parent companies for the violations of their foreign subsidiaries, and potential liability of a merging corporation for past FCPA violations of its target corporation.<sup>94</sup>

#### IV. CURRENT FCPA CASES AND POLICY

##### A. POSSIBLE PARENT COMPANY LIABILITY FOR THE BRIBERY OF A FOREIGN OFFICIAL BY A SUBSIDIARY

###### 1. FCPA Subsidiary Provision

Because of the parent-subsidiary relationship between Halliburton and M.W. Kellogg (that later joined with Brown and Root to become KBR, the lead partner in the TSKJ joint venture), the FCPA section clarifying a corporation's responsibility for the financial record-keeping and internal accounting controls of its subsidiaries will be relevant for Halliburton in the pending investigations.<sup>95</sup> The amendment applies to all issuers of SEC registered securities with respect to the accounting practices of either a foreign or domestic subsidiary.<sup>96</sup> This particular provision clarifies corporate responsibility of a parent company for its subsidiaries in regard to potential liability for the subsidiaries' FCPA violations based on the percentage of ownership in the subsidiary.<sup>97</sup>

If a corporation holds 50 percent or less of the voting power in a foreign or domestic firm, the corporation is only required to "proceed in

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<sup>92</sup> See *id.* §§ 78ff(c)(3), 78dd-2(g)1(3), 78ff(a).

<sup>93</sup> DANFORTH NEWCOMB ET AL., SHEARMAN & STERLING, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT (2005), available at [http://www.shearman.com/lit\\_1005/](http://www.shearman.com/lit_1005/) (follow "Download PDF" hyperlink).

<sup>94</sup> 15 U.S.C. § 78m(b)(6).

<sup>95</sup> See *id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

good faith to use its influence, to the extent reasonable under the issuer's circumstances," to cause the subsidiary to comply with the recordkeeping and internal control requirements of the FPCA.<sup>98</sup> A corporation covered by the statute that owns more than 50 percent of the subsidiary would have to require that subsidiary to comply fully with the financial reporting and internal control provisions of the statute.<sup>99</sup>

The legislative history of the amendment reflects the concerns of business that it is often not feasible for a minority owner to exert enough influence over a subsidiary to force compliance with the FCPA accounting provisions.<sup>100</sup> The amendment, therefore, proceeds to clarify further circumstances which would be relevant in determining whether or not "good faith" efforts were reasonable.<sup>101</sup> The laws and customs governing the business operations of the country in which the subsidiary is located and the relative percentage of ownership are specifically mentioned.<sup>102</sup>

Relevant, objective documentation of attempts made to address FCPA compliance is a corporation's best opportunity to prove good faith efforts. This good faith showing legally results in a conclusive presumption of FCPA compliance for the United States parent corporation.<sup>103</sup> Therefore, it can be a vital defense to a company charged with possible violation. A U.S. company with a minority share holding in a foreign or domestic subsidiary, such as Halliburton, should develop a specific plan to address this good faith effort.

Discussed below is a recent case, demonstrating the U.S. government's perspective on enforcement of parent-subsidiary liability and its potential impact on the Halliburton investigation.

## 2. SEC vs. Schering-Plough<sup>104</sup>

Although the possibility of Halliburton's liability for misconduct rests with the 25% interest that its subsidiary, KBR, had in the TSKJ joint venture, the parent company bears the risk when it fails to ensure FCPA

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* § 78m(b)(2).

<sup>100</sup> CONFERENCE REPORT, *supra* note 53, at 917.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1016 (1990).

<sup>104</sup> SEC v. Schering-Plough Corp., No. 1:04CV00945, 2004 WL 2057340 (D.D.C. June 9, 2004) (trial pleading).



compliance by subsidiaries.<sup>105</sup> This responsibility of the parent corporation is reflected in the SEC and Schering-Plough negotiated settlement of penalties related to the asserted bribery and recordkeeping/internal control violations of one of its Polish subsidiaries.<sup>106</sup> The alleged bribery (of approximately \$76,000) related to donations made by a Polish subsidiary to a "charitable foundation to induce the foundation's president, who was also a Polish government official, to influence the purchase of Schering-Plough's pharmaceutical products."<sup>107</sup> The parent company did not have any knowledge of the subsidiary's illicit payments, yet the SEC charged that the parent company's (Schering-Plough) internal accounting controls were inadequate to prevent or detect the payments.<sup>108</sup> The settlement between the SEC and Schering-Plough included a civil fine of \$500,000 and a commitment by Schering-Plough to retain an independent consultant to monitor their internal controls, recordkeeping and financial reporting.<sup>109</sup>

This case illustrates a number of current and major concerns identified by the SEC in FCPA enforcement. First, it evidences the assertive enforcement of the SEC in investigating and prosecuting parent companies for the alleged bribery of foreign officials by their subsidiaries. Second, it clarifies the expectations of the SEC as to the nature and extent of an issuer's internal controls to identify and halt FCPA violations by a subsidiary. Thus, it may be inferred from *Schering-Plough* that when a questionable payment involving a subsidiary arises, the SEC's position is that the parent company is likely liable because its internal controls failed to deter and/or detect the illegal payment. Third, this case represents a number of recent enforcement actions where the government is utilizing an independent compliance reviewer to evaluate and ensure that the firm is implementing the appropriate FCPA mandated systems.

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<sup>105</sup> *Id.* The SEC expects an issuer's internal controls to prevent and detect FCPA violations in the issuer's foreign subsidiaries, as illustrated in SEC v. Schering-Plough trial pleading. Complaint at 11, *Schering-Plough*, No. 1:04CV00945, 2004 WL 2057340, available at <http://www.sec.gov/litigation/complaints/comp18740.pdf>.

<sup>106</sup> *Schering-Plough*, 2004 WL 2057340; Press Release, U.S. Sec. & Exch. Comm'n, SEC Files Settled Enforcement Action Against Schering-Plough Corporation for Foreign Corrupt Practices Act Violations (June 9, 2004), available at <http://www.sec.gov/litigation/litrelases/lr18740.htm> [hereinafter Press Release, SEC, SEC Files Enforcement Action].

<sup>107</sup> Complaint, *supra* note 105, at 1.

<sup>108</sup> *Id.*

<sup>109</sup> Press Release, SEC, SEC Files Enforcement Action, *supra* note 106.

## B. EFFECT OF VOLUNTARY DISCLOSURES ON SUBSEQUENT FCPA INVESTIGATIONS AND PROSECUTIONS

The SEC has encouraged voluntary disclosure of information since the passage of the first FCPA in 1977,<sup>110</sup> and the SEC has further encouraged disclosure by companies in the so-called Thompson memorandum of 2003.<sup>111</sup> This is reflected in Halliburton's 10-K filed with the SEC on March 1, 2005 when it revealed that

[a]s a result of our continuing investigation into these matters, information has been uncovered suggesting that, commencing at least 10 years ago, the members of TSKJ considered payments to Nigerian officials. We provided this information to the United States Department of Justice, the SEC, the French magistrate and the Nigerian Economics and Financial Crimes Commission. We also notified the other owners of TSKJ of the *recently uncovered information* and asked each of them to conduct their own investigation.<sup>112</sup>

The "recently uncovered information" to which Halliburton referred was handwritten notes taken at meetings of TSKJ executives as far back as 1993.<sup>113</sup> The contents of the documents were reported to "have been seen" by *Financial Times (London)*,<sup>114</sup> and the TSKJ partners "discuss a series of possible 'secret' and 'open' agency payments" with one proposal rejected because it might invite blackmail and another rejected because it sets up the "wrong' paper trail."<sup>115</sup> There were references to "cultural" agreements and some names were mentioned next to notations of "covered directly" and "already covered." The notes do not say whether the proposals were agreed to or implemented, but certainly inferences can and have been made by the investigating agencies. These notes have become a serious part of the evidence being investigated.

### 1. Pre-emptive Disclosure

A question arises as to whether Halliburton, in doing its due diligence investigation preceding its proposed merger with Dresser Industries in 1998, should have discovered and disclosed to the SEC that there had been

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<sup>110</sup> FCPA, *supra* note 1.

<sup>111</sup> Memorandum, Dep't of Justice, *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memorandum].

<sup>112</sup> Halliburton Co., Annual Report *supra* note 3, at 21.

<sup>113</sup> *Id.*

<sup>114</sup> Catan & Peel, *supra* note 72.

<sup>115</sup> *Id.*

payments to foreign officials by TSKJ based solely on its knowledge of Nigeria's reputation for high levels of corruption.<sup>116</sup>

Although the "notes" were written about meetings held by TSKJ executives some years before Halliburton acquired Dresser Industries and its subsidiary M.W. Kellogg, this situation mirrors the deal-breaker in the 2004 Lockheed Martin–Titan proposed merger in which payments made by Titan to foreign consultants were discovered and disclosed to the SEC.<sup>117</sup> The only difference is that Dresser Industries did not reveal to Halliburton any information regarding the purported bribes of Nigerian officials before the merger. However, like Lockheed, Halliburton was aware that there are some general corruption problems in the country in which the merging corporation was doing business, but did not probe further. Implicit in the cases in which companies have gone voluntarily to the SEC and DOJ while a merger was pending, but before closing, is their concern that the acquiring company risks successor liability for prior violations of the target company unless the issues were resolved prior to closing.<sup>118</sup>

## 2. Rules of Voluntary Disclosure

The primary concern that companies have with potentially incriminating information like the TSKJ "notes" described above is that the government agencies will use it as the basis for opening or furthering an investigation in which the ultimate result could be indictments for criminal misconduct or civil enforcement charges. In an attempt to mitigate the civil and criminal penalties and avoid or defer prosecution, companies can consider the option of voluntarily disclosing to the SEC or DOJ any potentially damaging information that has been discovered.

### a. The DOJ "Thompson Memorandum" and SEC "Seaboard Report"

The FCPA does not mandate disclosure of possible FCPA violations, but DOJ issued the Principles of Federal Prosecution of Business Organizations, often referred to as the "Thompson Memorandum"<sup>119</sup> on January 20, 2003, which focuses "increased emphasis on and scrutiny of the

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<sup>116</sup> Nigeria ranked eighty-one out of eighty-five with a score of 1.9 with the highest score being 10 in the 1998 Transparency International Corruption Perception Index. Transparency International, *The Corruption Perceptions Index (1998)*, [http://www.transparency.org/policy\\_and\\_research/surveys\\_indices/cpi/previous\\_cpi\\_\\_1/1998](http://www.transparency.org/policy_and_research/surveys_indices/cpi/previous_cpi__1/1998) (last visited Feb. 9, 2006).

<sup>117</sup> See Manning, *supra* note 74.

<sup>118</sup> Homer E. Moyer, Jr., *The Foreign Corrupt Practices Act—Its Many Lives*, METROPOLITAN CORP. COUNSEL, July, 2005, at 51.

<sup>119</sup> Thompson Memorandum, *supra* note 111.

authenticity of a corporation's cooperation."<sup>120</sup> The memo established a middle ground that gives corporations an opportunity to cooperate and avoid or defer prosecution.<sup>121</sup> It sets forth the factors that the DOJ considers when determining whether to prosecute a company, which includes "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the [government's] investigation."<sup>122</sup>

Under the terms of the Principles of Federal Prosecution of Business Organizations, the DOJ has a strong inducement to forego or defer prosecution of FCPA violations (i.e., enter into a non-prosecution or deferred prosecution agreement) when the errant corporation: 1) voluntarily discloses illegal payments; 2) initiates appropriate disciplinary action against the perpetrators; 3) completely discloses the results of the corporation's internal investigation; and 4) agrees to continue to cooperate with the government and to prove continuing compliance.<sup>123</sup> The Thompson Memorandum indicates that a waiver of attorney-client privilege and work-product privilege can also be counted as a bona fide indication of a corporation's willingness to work cooperatively.<sup>124</sup> However, it does not provide a guarantee against prosecution.<sup>125</sup>

The SEC, in its *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, also announced an "avoid or defer" program similar to the one enunciated by the DOJ in 2001.<sup>126</sup> This SEC Report is referred to as the "Seaboard Report" because it was issued for the purpose of explaining why it declined to file charges against Seaboard Corporation after an investigation of accounting irregularities.<sup>127</sup>

<sup>120</sup> *Id.*

<sup>121</sup> Leonard Post, *Deferrals on Rise in Foreign Bribery*, NAT'L L.J., Aug. 15, 2005, at 1, 18.

<sup>122</sup> Thompson Memorandum, *supra* note 111.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> This observation was part of comments attributed to Nicole Healy, a former Justice department FCPA specialist who is currently at a law firm in California. Post, *supra* note 121, at 18.

<sup>126</sup> Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44969, Accounting and Auditing Enforcement Release No. 1470 (Oct. 23, 2001), available at [www.sec.gov/litigation/investreport/34-44969.htm](http://www.sec.gov/litigation/investreport/34-44969.htm) [hereinafter Seaboard Report].

<sup>127</sup> Russell G. Ryan, *Cooperation in SEC Enforcement: The Carrot Becomes the Stick*, 19:33 LEGAL BACKGROUNDER, WASH. LEGAL FOUND. 1, 2 (2004).

As one author described the SEC action, the Seaboard Report is considered a critical SEC pronouncement because it 1) “represented the Commission’s first detailed, written guidance for investigated companies and their counsel concerning the benefits of cooperation,” and 2) it “demonstrated in a concrete way that a fully cooperative company could, under appropriate circumstances, spare itself from any enforcement charges.”<sup>128</sup>

b. Significance of *SEC v. InVision Technologies, Inc.*

Halliburton/TSKJ should consider the *InVision Technologies* case as an illuminating example of the way in which the DOJ makes a decision to enter into a non-prosecution agreement.<sup>129</sup> *InVision* was the first case in which the non-prosecution agreement was used in an FCPA context. Just as the TSKJ “notes” were discovered and disclosed, there was a disclosure by InVision of “facts obtained in their internal investigation into the potential FCPA violations.”<sup>130</sup> It is a strong indication that the government is willing to forego prosecution of FCPA violations where there is voluntary disclosure of the illegal payments, where appropriate disciplinary action is initiated against the perpetrators, and where the company agrees to continue to cooperate with the government and prove continuing compliance.<sup>131</sup>

In 2004, the DOJ and InVision signed a non-prosecution agreement (the first FCPA non-prosecution agreement in an FCPA case) related to an investigation of allegedly illegal payments made by InVision’s foreign agents in Thailand, China, and the Philippines in order to secure the sale of its airport security screening machines,<sup>132</sup> and in regard to an insufficient internal control system of the parent company which failed to detect the questionable payments.<sup>133</sup> InVision, whose suspect payments were uncovered during a due diligence investigation conducted by GE and InVision as part of a merger arrangement,<sup>134</sup> and which were voluntarily disclosed to the DOJ and SEC, agreed to the following terms:

- To accept responsibility for its misconduct;
- To pay a penalty of \$800,000; and

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<sup>128</sup> *Id.* at 1.

<sup>129</sup> Press Release, Dep’t of Justice, *InVision Technologies, Inc. Enters Into Agreement with the United States* (Dec. 6, 2004), available at <http://www.usdoj.gov/opa/pr/2004/December/04crm780.htm> [hereinafter Press Release, DOJ, *InVision Technologies*].

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*; NEWCOMBE ET AL., *supra* note 93.

<sup>132</sup> Press Release, Dep’t of Justice, *InVision Technologies*, *supra* note 129.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

- To “[f]ully and affirmatively disclose to the Department and the SEC activities that InVision believes may violate the FCPA” and to continue to cooperate with the government.<sup>135</sup>

In a separate agreement, GE, in exchange for a non-prosecution commitment from the DOJ, acquiesced to “[i]ntegrate the InVision business into GE’s FCPA compliance program and retain an independent consultant to evaluate the efficacy of GE’s effort in that regard” and to continue to cooperate with DOJ and SEC in any material investigations.<sup>136</sup>

### 3. *The Sentencing Guidelines as a Voluntary Disclosure Incentive*

The Sentencing Guidelines play an important role in encouraging voluntary disclosures of actual or suspected violations of the FCPA. The only way for a defendant to try to escape the consequences of a guideline sentence is to cooperate. Under section 5K1.1 of the Sentencing Guidelines, the government is permitted to reward a cooperating corporation by departing from the Guidelines and going down to whatever level it thinks appropriate in return for “substantial assistance,” which includes true, complete and reliable disclosures in pursuing an investigation.<sup>137</sup> “Pursuant to the Federal Sentencing Guidelines, in order to qualify for mitigation of criminal penalties, the [U.S.] company’s voluntary disclosure and cooperation must be both timely and thorough and may require a waiver of the attorney-client and work product privileges.”<sup>138</sup> The Guidelines allow companies to reduce their culpability score<sup>139</sup> if prior to the “imminent threat of disclosure of the government investigation,” and “within a reasonably prompt time after becoming aware of the offense, it

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> U.S. SENTENCING COMM’N, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (2004), available at <http://www.ussc.gov/2004guid/gl2004.pdf>; see also Matthew J. Jacobs, ‘Booker’ May Result in Less Defendant Cooperation, NAT. L.J., Mar. 21, 2005, at S9. The 2005 *Booker* decision has given new authority to judges, “many of whom have chafed under the constraints on their authority and who believe that their wisdom and judgment should come into play in sentencing decisions.” *Id.* The decision requires judges to “consider” the guidelines, but otherwise renders the guidelines advisory. *Id.* However, courts have been encouraged by the DOJ to rely on the guidelines just as before. *United States v. Booker*, 543 U.S. 220, 245-46 (2005).

<sup>138</sup> F. Joseph Warin & Jason A. Monahan, *Recent Developments Under the Foreign Corrupt Practices Act: Lessons for Compliance and Disclosure*, 19:6 INSIGHTS 9, 14 (2005), available at <http://drm.fostereprints.com/eprints/oss/aspden/227116/227116.pdf>.

<sup>139</sup> The sentencing judge applies the Sentencing Guidelines to determine whether an organization’s culpability score is between good (zero) and bad (10 or more). See David Meister & Albert Berry III, *Revised Guidelines Stress Self-Audits*, NAT’L L.J., Mar. 21, 2005, at S1.

reports the offense, fully cooperates, and clearly demonstrates acceptance of responsibility.” Thus, voluntary disclosure by a corporation such as Halliburton of potentially incriminating evidence to the DOJ and SEC “may enable the company to either avoid prosecution or result in partial mitigation of civil and criminal penalties.”<sup>140</sup>

## V. CONCLUSION

The increase in FCPA enforcement activities in the U.S. has been enhanced by a number of factors, including the OECD Convention which grew partly out of the mandate in the 1988 FCPA amendments that the U.S. President develop an anti-bribery agreement with member countries of the OECD.<sup>141</sup> The purpose was to level the playing field for all industrialized nations belonging to the OECD by making them abide by the same stringent anti-bribery rules.<sup>142</sup> Increasing globalization has required the development of a far different and far broader set of rules of business conduct. Under the emerging world order in the 1990s, bribes could no longer be considered a normal way of doing business in the countries in which bribery had been culturally accepted.

It was during the development of this new social and legal order that Halliburton/TSKJ became ensnared in a multi-jurisdictional investigation of its alleged bribery and recordkeeping violations. Conduct that was acceptable or ignored in 1994 when “notes” taken at meetings of TSKJ executives included references to “cultural agreements” collided with the new international legal concepts that disavow business corruption and bribery. In the ten-year period between the formation of the TSKJ joint venture and the opening of the bribery investigation by the French magistrate, the world began to shun bribery of government officials for the purpose of obtaining contracts.<sup>143</sup> The Halliburton investigation and allegations of illicit conduct in relation to both bribery of a foreign official and improper financial recordkeeping and internal control violations under the FCPA, illustrate a number of legal and jurisdictional issues that are

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<sup>140</sup> Warin & Monahan, *supra* note 138, at 14.

<sup>141</sup> 15 U.S.C. § 78dd-1 (2000 & Supp. 2005).

<sup>142</sup> Most of the corporations engaging in bribery of public officials come from the OECD member countries. An anti-bribery agreement signed by these countries was viewed as a very effective way to reduce this corrupt practice.

<sup>143</sup> A 2005 Transparency International poll reveals that at this time there is widespread concern about corruption around the globe. See Press Release, Transparency Int’l, Global Corruption Barometer 2005 (Dec. 9, 2005), available at [http://www.transparency.org/news\\_room/in\\_focus/2005/anti\\_corruption\\_day/press\\_releases/barometer2005\\_press\\_release](http://www.transparency.org/news_room/in_focus/2005/anti_corruption_day/press_releases/barometer2005_press_release)

pertinent in the current international and domestic anti-corruption environment.

One salient factor is the potentially multi-jurisdictional aspect of suspected violations of anti-corruption measures. As previously noted, in Halliburton, the U.S. government was notified by French anti-corruption officials who were investigating the company for potential violation of the French Penal Code implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Additionally, Nigeria is investigating Halliburton's actions; thus there are three separate jurisdictions that can cooperate and share information in this investigation.

Another existing characteristic of FCPA enforcement by the SEC and DOJ is the assertive position that those agencies are taking in regard to the liability of a parent corporation for the actions of its subsidiaries. These characteristics are further influenced by the present enforcement policy.

Other relevant factors to an assessment of recent FCPA enforcement policy include the mitigation, in regard to negotiating a potential non-prosecution agreement with the government agencies, that can emanate from voluntary disclosure and cooperation with the government and "the government's insistence on the waiver of attorney-client privilege and work-product privilege as a bona fide indication of willingness to work cooperatively with the government."<sup>144</sup>

The legal evolution of global anti-corruption initiatives and policy from the initial unilateral anti-bribery position adopted by the U.S. in the 1977 FCPA, through the adoption of the OECD Convention in 1999, and the implementing legislation of its signatory nations has made a remarkable transformation in the current international business environment. Multinational corporations, such as Halliburton, which is currently under investigation, need to be cognizant of the keen scrutiny of the various national regulators and the potentially grave consequences for FCPA violators. Multinational firms should consider two critically important principles. First, a well-informed and thorough FCPA compliance program, supported by top management and reinforced at every corporate level, is the best guarantee for avoiding criminal or civil bribery and recordkeeping charges. Second, when a company discovers probable violations, through a due diligence investigation linked to a possible merger or an internal control review, it benefits a U.S. firm to voluntarily disclose their findings to government, cooperate in the investigation and negotiate a favorable settlement based on their cooperation.

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<sup>144</sup> NEWCOMBE ET AL., *supra* note 93.



