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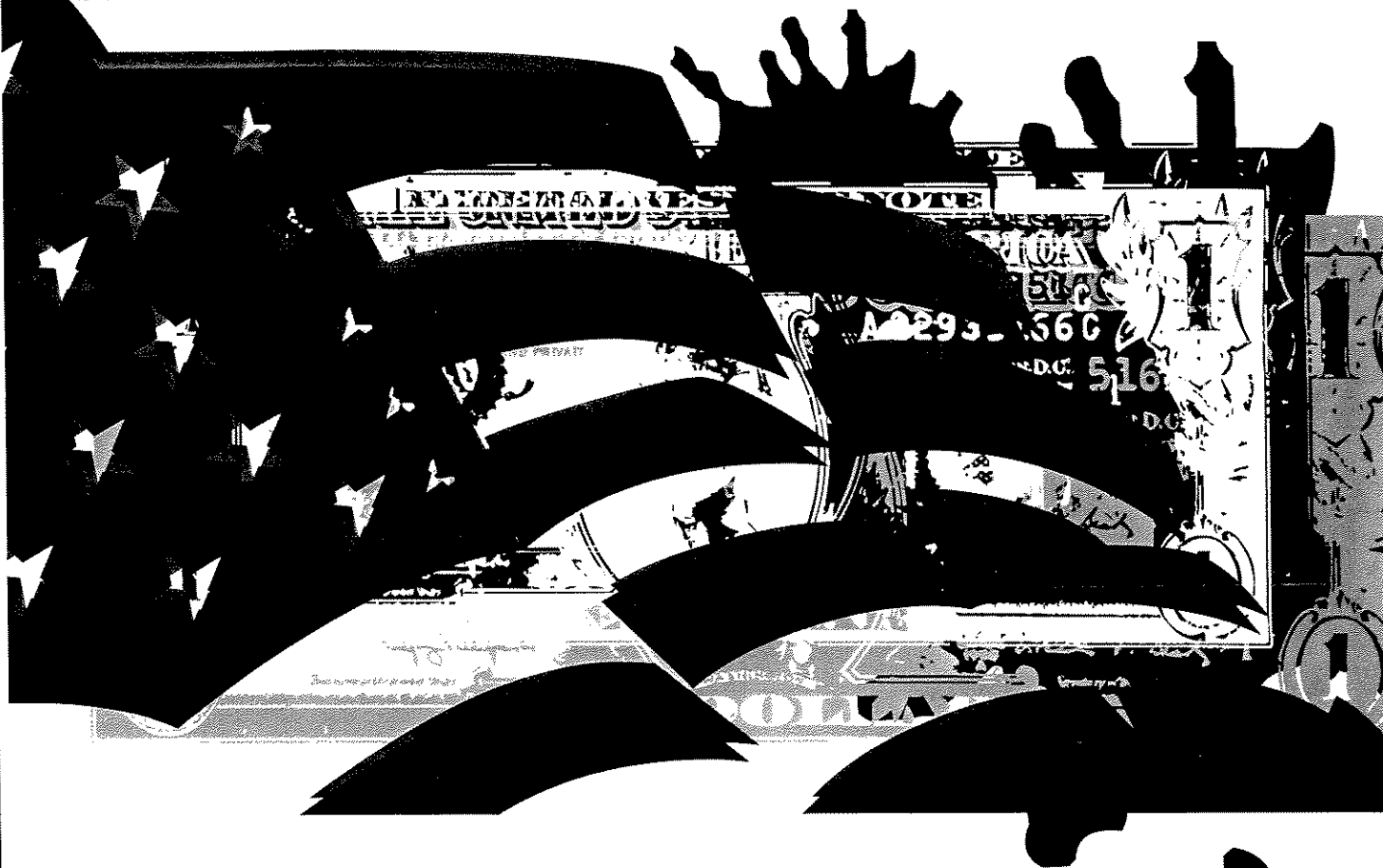
### GO ON THEN, PROVE IT

CLIENT LEGAL PRIVILEGE FROM THE OUTSIDE

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## Corruption without frontiers



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If your company is doing business with the United States, it seems you need to know the extent to which their anti-bribery legislation applies to you – wherever you're doing business. **Claudius O Sokenu** and **Christina Tsesmelis** survey the jurisdictional reach of the US Foreign Corrupt Practices Act

**T**he Foreign Corrupt Practices Act (FCPA), passed in December 1977, contains two landmark provisions: (1) the anti-bribery, and (2) accounting and internal controls provisions. The anti-bribery provision prohibits covered persons from paying, authorising, or offering to pay money or anything of value, directly or indirectly, to any foreign official or foreign political party or party official in order to obtain or retain business.

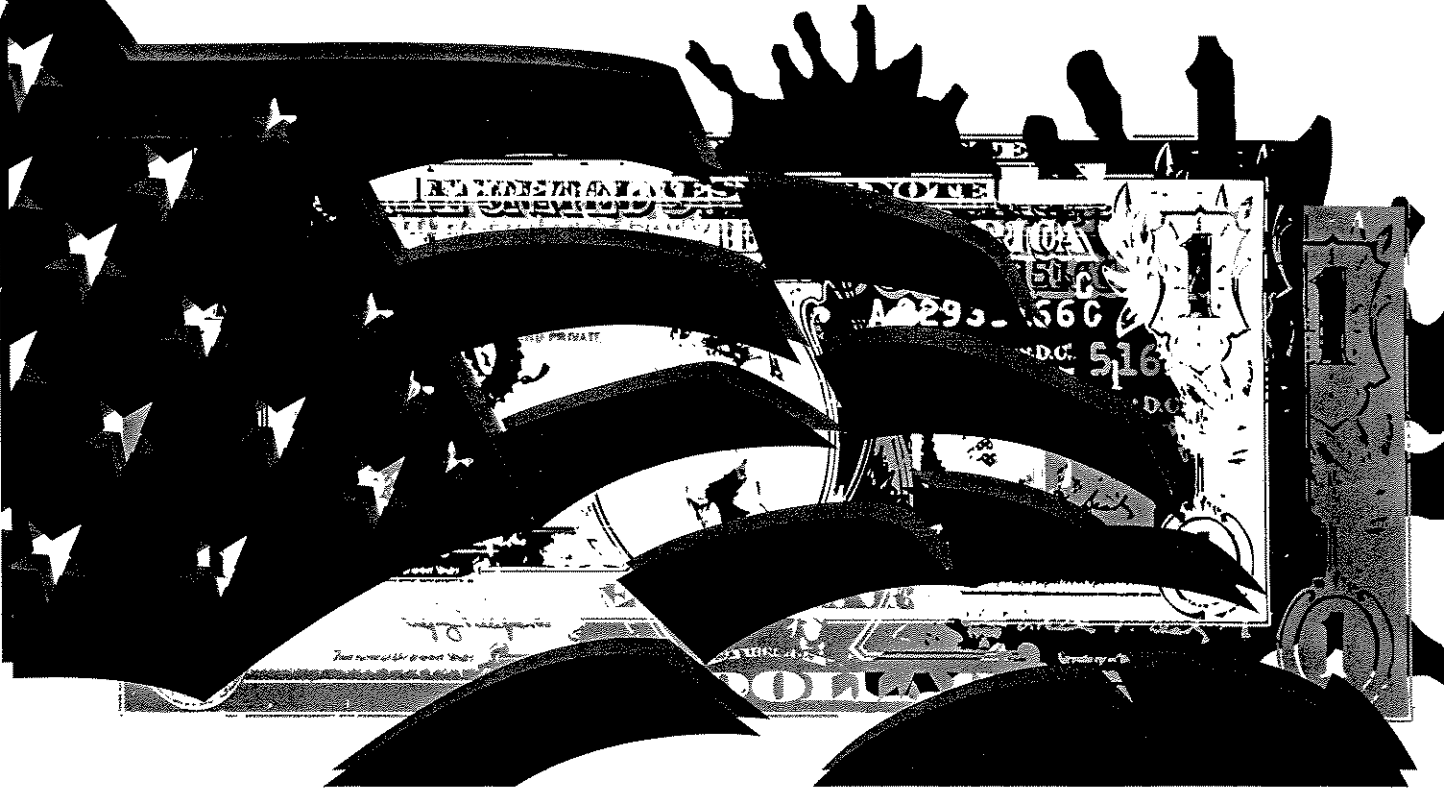
The accounting and internal controls provision (generally referred to as the books and records provision) requires US issuers to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer's assets. After first amending the FCPA in 1988, Congress again amended the FCPA in 1998 to extend the FCPA's jurisdictional reach to cover acts committed by foreign persons, foreign corporations and foreign officers of corporations while in any US territory. This article examines the extent to which the FCPA applies

to foreign entities and individuals, and the jurisdictional theories under which foreign entities and persons are being prosecuted under the FCPA.

The jurisdictional breadth of the FCPA's anti-bribery provision vary widely, particularly with respect to its application to foreign entities and persons: see 15 USC § 78dd-1(a) (covering issuers); 15 USC § 78dd-2(a) (covering domestic concerns); 15 USC § 78dd-3 (covering persons other than issuers or domestic concerns). In general, covered persons under the FCPA's anti-bribery provision include "issuers", "domestic concerns", and "persons other than issuers or domestic concerns": see 15 USC § 78dd-2(a). The term "domestic concerns" encompasses US citizens, nationals and residents, as well as private business entities organised under US law or with their principal place of business in the United States.

Issuers are companies with securities traded on a US national exchange, or entities required to file

(continued on p10)



(continued from p8)

reports pursuant to section 13(d) of the Securities Exchange Act of 1934 (Exchange Act), 15 USC § 780(d); see 15 USC § 78dd-1(a). Foreign companies with American Depository Receipts (ADRs) listed on US exchanges are issuers for purposes of the FCPA. The FCPA also covers all US nationals, permanent residents and private business entities. The anti-bribery provision of the FCPA applies with equal force to the following entities: foreign subsidiaries of US issuers and domestic concerns; US and foreign subsidiaries of foreign entities; foreign corporations; and foreign nationals. Each of these will be examined in turn.

A foreign subsidiary of a US issuer or domestic concern can be charged under the FCPA if it engages in prohibited conduct while on US territory. Irrespective of whether a foreign subsidiary of a US issuer or domestic concern can be charged under the FCPA, a foreign subsidiary's acts in violation of the FCPA can create problems for its US parent. If the parent company has knowledge of the illegal payment, the parent company can be charged under the FCPA's anti-bribery provision. Even where the violative conduct occurs without the knowledge of any employee of the US parent, the US parent, if publicly traded, may be liable for violating the books and records provision of the FCPA.

A US subsidiary of a foreign corporation, with its principal place of business in the United States or organised under US law, is a "domestic concern" subject to the FCPA: see 15 USC § 78dd-2(h)(1)(B). As it is a domestic concern, such a US subsidiary is subject to liability under the anti-bribery provision. Similarly, a foreign subsidiary of a foreign issuer may be liable under the FCPA. The government's prosecution of ABB Ltd (ABB) illustrates the point. ABB, a Swiss-based foreign issuer, and two of its subsidiaries, US-based ABB Vetco Gray, Inc (ABB-US) and UK-based ABB Vetco Gray UK, Ltd (ABB-UK), were charged with various violations of the FCPA.

As part of a plea agreement, ABB-US and ABB-UK each pleaded guilty to two felony counts of violating the FCPA and agreed to pay a fine, that between them, totaled US\$10.5 million. ABB-US was charged under the "domestic concern" provision of the FCPA's anti-bribery provision: 15 USC § 78dd-2. ABB-UK, on the other hand, was charged based on actions taken "in furtherance" of an illicit payment while on US territory: 15 USC § 78dd-3.

Finally, foreign companies that have no US presence or are not US issuers should nevertheless be aware that they may still be liable under the FCPA if any act in furtherance of a violative conduct is taken

while on US territory. For example, there are reports in both the British and US press that the US Department of Justice is investigating BAE Systems for alleged illicit payments to certain members of the Saudi royal family. Other than that BAE Systems engaged in some act on US territory in furtherance of its illegal conduct, it is unclear what other jurisdictional basis the US Government has to investigate BAE Systems.

Citizens of other countries who are not US residents may be subject to the FCPA through their connection to a US issuer or domestic concern. The FCPA's definition of "issuer" and "domestic concern" extends to any "officer, director, employee, or agent of such issuer or any stockholder [of an issuer] acting on behalf of such issuer": see 15 USC § 78dd-1(a); 15 USC § 78dd-2(a). Accordingly, a citizen of a foreign country is subject to the FCPA's anti-bribery provision to the extent that he or she acts on behalf of an issuer or domestic concern in one of the listed capacities.

For example, Edgar Valverde Acosta, a Costa Rican citizen, and Cristian Sapsizian, a French citizen, were indicted on charges of conspiring to pay, and subsequently paying, US\$2.5 million in bribes to Costa Rican officials in order to obtain a US\$149 million telecommunications contract on behalf of their employer,

**"The jurisdictional breadth of the FCPA's anti-bribery provision vary widely, particularly with respect to its application to foreign entities and persons"**

Alcatel. Alcatel, at the time of the alleged violative conduct, was a French company whose ADRs were listed on the New York Stock Exchange, and, thus, was an "issuer" within the meaning of the FCPA.

A citizen of a foreign country is also subject to the FCPA "while in the territory of the United States" even if that person has no other ties to the United States and

is not acting on behalf of an "issuer" or "domestic concern". If such an individual were to make a phone call authorising a bribery payment during a brief stopover anywhere on US territory, the government could charge that individual with violations of the FCPA. No reported FCPA decision rests on such a temporary tie to the United States, but the statute's language

arguably would countenance such an enforcement action.

Regardless of the type of covered party, it is indisputable that the FCPA is now being interpreted to more aggressively reach foreign entities and individuals. Since the 1998 amendments, there have been an increasing number of actions brought under the FCPA. The growing number of enforcement actions against foreign persons and entities under the FCPA illustrates an emerging trend reflecting the government's view of the FCPA's jurisdictional reach. In sum, the 1998 amendments and the government's expansive view of the FCPA's jurisdictional reach translates into a greater potential for liability, and, therefore, the need for heightened sensitivity toward compliance.

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