

Lights, Cameras, and FCPA Actions: The Problem of Foreign Corrupt Practices by Hollywood

By Danielle Siegel

I. Introduction

The film industry is one of the largest and most well-known industries in the world. Billions of dollars are spent and earned each year making and watching movies. Whether it is in Hollywood, Bollywood or somewhere in between, the global film industry is constantly growing and changing. With the most movie screens and the largest box office, the United States has one of the major film industries.¹ The Asian film industry is also large and growing.² India has the most admissions and produces more films annually than any other country.³ China's movie market is second to the U.S. in box office size,⁴ and many Asian countries, including Thailand and Japan, have very successful film festivals.⁵

The United States market is shrinking while the Asian market is growing.⁶ Piracy in East Asia is extremely widespread.⁷ As with many other industries, corruption of all kinds, such as purposefully keeping inaccurate books and bribing officials, is not unusual. It is made even more complicated by the lack of laws defining and outlawing corruption abroad and lack of consistency in enforcement. Anti-corruption law in the United States is primarily governed by the Foreign Corrupt Practices Act (FCPA).⁸ As American companies continue to expand internationally, the media and entertainment industries are the focus of corruption investigations⁹ under the FCPA. Hollywood film studios are the latest in the trend of investigations,¹⁰ as China and other Asian countries have become crucial to Hollywood, not only for increased viewership, but also for additional sources of financing for movie production.¹¹

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There is a lack of regulation of corruption in both the domestic and international media and entertainment industries, as parties do not always know what constitutes corruption. Even when corruption is discovered, it is hard to mete out effective punishment. Under the FCPA, punishments, such as huge fines, may be given, but they are not always effective deterrents. Non-financial companies are not used to FCPA considerations. Just in terms of legal fees alone, FCPA investigations can cost millions of dol-

lars.¹² When punishment or settlement, and intangibles like a decreased stock price are added, the cost can reach over \$100 million.¹³

II. Background

A. Corruption

Corruption is a global phenomenon. Often, bribes are seen as a necessary expense of completing transactions abroad. The United States faces many problems in dealing with corruption. The first is prevention, the second is detection, and the third is punishment. Corruption, as defined by the FCPA, includes bribery of a foreign government official and/or accounting record issues.¹⁴

Asia, generally, and China, in particular, are considered a high risk territory for business purposes. A large percentage of the FCPA actions filed are based in China.¹⁵ China, in addition to lacking transparency and clarity in its policies on corruption, has a number of state-controlled and state-dominated industries, including its film industry, which is dominated by the China Film Group. Custom also plays a role here, as Chinese custom often encourages gift giving, which triggers potential FCPA problems.

B. Industry Sweeps

In their eagerness to enforce the FCPA, the United States Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have initiated industry-wide sweeps, which are large scale investigations into the practices of media and entertainment companies, by investigating multiple companies in the same time period. In an industry sweep, the major industry leaders are required to submit documents, and anything suspicious can be investigated. The media and entertainment industries, specifically the major Hollywood film studios, are often hit by such sweeps. The SEC investigation was announced at the Beijing Film Festival in 2012.¹⁶ Many major companies, including Disney, Sony Pictures Entertainment (Sony), News Corporation subsidiaries—Twentieth Century Fox Films and Twenty-First Century Fox—DreamWorks Animation SKG (DreamWorks), Warner Bros. Entertainment, Paramount Pictures, Universal Studios, and others were investigated for possible corruption.¹⁷ A common theme in the investigations includes looking into the film studios' dealings with China. China is also investigating corruption in the film industry. The SEC sent inquiry letters to many of the major film studios and the Chinese Central Commission for Discipline Investigation concurrently started a widespread crackdown

on corruption.¹⁸ Almost all of these investigations are still ongoing.¹⁹

“The Thai tourism official who allegedly accepted the bribes faces corruption charges in the US, but if the official is indicted by Thailand, then those charges will take precedence.”

Incentives for corruption are not hard to find. In Asia, audiences are large, locations are scenic, and production is less expensive than in the U.S.²⁰ As the movie market in the United States decreases, the movie market in China increases. In addition, India’s Bollywood is now as active as Hollywood. In order to compete, many Hollywood studios are trying to get their movies released into China, India, Thailand, and all over Asia, and many countries there have very tight restrictions on what films can be shown in their countries and how many international films can be shown in their theaters.²¹

Corruption is not limited to the United States, and is a problem for all parts of the media and entertainment industries, not just film studios. Newspapers, professional sports, casinos and theme parks are all the subjects of corruption investigations.²² For example, News Corp. in Britain and the United States, Sony in India and the United States, and FIFA in Europe and South America are being investigated over corruption allegations. News Corp. is being investigated for corrupt practices related to paying police for access to wiretappings.²³ Sony is being investigated for potential FCPA violations, including some that were exposed through internal investigations in 2013 and when its servers were hacked in 2014.²⁴ The U.S. government found Sony to be guilty of fraud, kickbacks and other FCPA violations in India.²⁵ FIFA officials, including its then-President Sepp Blatter, are being investigated for corruption regarding money laundering and fraud.²⁶ FIFA’s corruption issues also showcase the jurisdictional issue inherent in an entertainment industry. FIFA has dealings in the United States and the U.K. Therefore, the DOJ or the SEC, the FBI, the U.K. Serious Fraud Office, and the international branch of the London Police, can have jurisdiction under the FCPA or the U.K. Bribery Act.²⁷

The media and entertainment industries are very competitive. Companies compete for distribution and viewers. Disney and other American film studios are building theme parks, movie studios, animation centers and other major attractions all over the world. DreamWorks paired with China Media Capital to create Oriental DreamWorks Film studios. Many entities are courting Asian government officials to get increased quotas, real estate deals for theme parks, increased distribution and tax breaks.²⁸ Much of the international business occurs in

countries like China, Thailand and India, which have low levels of government control and high rates of bribery.²⁹

Protocol for dealing with other countries can be complicated and intricate, as every country has its own customs, laws, and procedures relating to international business transactions. As a result, United States companies have to walk a fine line between appropriate and inappropriate activity. Companies directly and indirectly (via agents) can violate the FCPA.³⁰ For example, paying for a foreign official’s business trip is allowed, but if it is too lavish, can be considered a bribe.

C. Examples of Corruption

1. Criminal Corruption

The most prominent case of criminal corruption and criminal FCPA violation in film involves Gerald and Patricia Green, who were movie producers. Both were convicted of bribery and money laundering while getting the rights to and running a prominent film festival in Thailand. In addition to each account of bribery and money laundering, they were also charged with conspiracy to violate the FCPA. The Greens paid a high-ranking Thai tourism official an estimated \$1.8 million to obtain profitable contracts.³¹ Ultimately, the Greens were convicted and sentenced to six months in jail.³² The prosecutor rescinded his appeal for a harsher prison sentence.³³ The Thai tourism official who allegedly accepted the bribes faces corruption charges in the U.S., but if the official is indicted by Thailand, then those charges will take precedence.³⁴

2. Civil Corruption

Movie studios have to be very careful about what goes on while “on location” abroad. Under the FCPA, studios are no longer able to:

...condone or ignore practices such as making payments for expedited film permits, the use of a favorable shooting location, smoothing things over with local film crews, ensuring the safe transit of equipment, and preventing the many possible costly delays that can easily derail a project. Further, production companies cannot allow such payments to be hidden as petty cash or “operating” expenditures in a film’s budget under the FCPA’s accounting provisions.³⁵

In addition to the case against the Greens, the SEC turned its attention to the movie studios’ relationship with China, due to the easing of stringent box office and quota restrictions in China shortly after Xi Jinping³⁶ visited the United States and met with Hollywood businesses and senior government officials.³⁷ Until recently, China’s state-controlled film industry only allowed up to 20 American movies per year to be shown in theaters.³⁸

The deal negotiated between China and the United States “increased the number of 3-D, IMAX, and other enhanced-format American films” allowed into China.³⁹ It also exempted 14 “enhanced-format films from China’s continuing 20-film import quota.”⁴⁰ Hollywood film companies are at high risk for corruption claims because they all have representatives in China. They compete with each other and lobby the Chinese government’s China Film Group Corporation, which is responsible for importing films, as well as with the government body that controls censorship requirements for all scripts in production and before release of finished movies.⁴¹

i. Sony

In 2013, Sony was investigated for corruption.⁴² Sony used a company called the Dynamic Marketing Group (DMG), based in Beijing, to circumvent Chinese quotas and censorship restrictions.⁴³ The SEC is now investigating DMG’s methods of distributing Sony’s films, particularly the 2010 film *Resident Evil: Afterlife*. The movie made \$21.6 million in China. An email by a Sony employee stated that DMG had used “special influence” to secure distribution in China.⁴⁴ The emails and other indicators of bribery, along with some of the FCPA investigation details, were leaked in the 2014 hack of Sony’s servers.⁴⁵ Sony also conducted an internal investigation, with help from Ernst & Young, LLP, of its Indian Entertainment Group, to check whether there had been fraud or excessive kickbacks to government officials in India. The investigation found potential Sony corruption in relation to a joint venture between a local company called Discovery Communications, Inc. and Sony’s Multi-Screen Media Pvt. (the joint venture is known as MSM Discovery).⁴⁶

“Disney was accused of bribing foreign government officials to get exclusive film distribution rights and of bribing to get permits and privileges in connection with building its theme park in Shanghai, which opened this past summer.”

Possible evidence of FCPA violations was found in an email by a Sony company official, which outlined “areas of concern” in the MSM Discovery relationship, including kickbacks related to “carriage fees,” which are paid to the broadcaster by the distributor, gifts in excess of MSM Discovery policy, including very expensive sports tickets, and customs payments by the Indian Marketing group.⁴⁷ Further evidence of these potential FCPA violations was found contained in an October 6, 2015 letter between Sony officials, which accused the head of MSM Discovery’s motion-pictures unit of colluding with an agent to raise the cost of movies that Sony purchased to air on TV by as much as 35%, in return for kickbacks.⁴⁸ The letter further accused an MSM Discovery deputy president of

routing the company’s movie purchases through a contact at Goldmines Telefilms, which increased the film prices, and told producers, who offered to sell their films to MSM Discovery, to direct their proposals to Goldmines Telefilms.⁴⁹ These actions would violate the anti-bribery provisions of the FCPA⁵⁰ and were in contravention of MSM Discovery’s company policies.⁵¹

These allegations could have a major effect on Sony, as the Indian market is its largest foreign market. The potential harm to its reputation, both in India and in the United States, could affect its stock prices and goodwill. More immediately, Ernst & Young, LLC’s investigation for Sony alone cost approximately \$176 million, which is an expensive liability.⁵²

ii. Dreamworks

The SEC began investigating DreamWorks for potential FCPA violations by sending it a letter of inquiry in 2012.⁵³ *Kung Fu Panda 2* made \$100 million in China,⁵⁴ which resulted in a focus on China by both film studios and regulators, because it focused attention on the earning potential, and therefore the high risk of corruption, inherent in the movie industry. DreamWorks was accused of paying money to open the Chinese market for films and for bringing Chinese officials to the United States in an attempt to secure exclusive distribution rights.⁵⁵ DreamWorks also teamed up with Chinese partners to create Oriental DreamWorks, which makes and distributes films, the first of which was *Kung Fu Panda 3*, and Oriental DreamWorks will also build an entertainment complex.⁵⁶ The animation studio and joint venture were announced after Jinping’s visit to the United States.⁵⁷

DreamWorks has very close relations with China, which helps it gain distribution. Jiang Mianheng, an industrial mogul, runs the Shanghai Alliance Investment Ltd., which is a partner of DreamWorks. Jiang’s father is Jiang Zemin, the former General Secretary of the Communist Party, and former President of China.⁵⁸ Although these relationships are not *per se* improper, they are material facts and ought to be disclosed to the proper regulatory authorities. They also justify an increase in caution to ensure that these close ties are not being used in way that violates the FCPA.

iii. Disney

Disney was one of the major film studios investigated in the SEC’s FCPA industry sweep. Disney was accused of bribing foreign government officials to get exclusive film distribution rights and of bribing to get permits and privileges in connection with building its theme park in Shanghai, which opened this past summer.⁵⁹ With DreamWorks and Vice President Biden, Disney was also involved in negotiating the deal that opened more of China’s box office.⁶⁰ In addition, Disney, Marvel and Disney’s China counterpart DMG coproduced *Iron Man 3*. This, while not an indicator of corruption, is a potential red flag. As coproducing this movie in China necessitated

close relations and constant communication with Chinese companies and government officials, Disney needed to be careful about whom it hired (i.e., hiring someone recommended by a government official could potentially violate the FCPA).⁶¹

iv. News Corporation

News Corp. and its Executive Chairman Rupert Murdoch were investigated by the DOJ for bribery.⁶² Several companies owned by Murdoch, including newspapers and both Twentieth Century Fox and 21st Century Films, were being investigated.⁶³ The British tabloid, *News of the World*, was accused of bribing police, phone hacking and wiretapping, all potential violations of both the FCPA and the U.K. Bribery Act. News Corp. is an American-based company, so both it and its subsidiaries fall under FCPA jurisdiction, even though the violation occurred outside the United States. At the end of the U.S. investigations, the wiretapping was found to be illegal, as were the payments to the British police department, which constituted “giving money to a foreign official,” an explicit violation of the FCPA anti-bribery provision. Additionally, the undisclosed payments also triggered the accounting fraud provisions of the FCPA. The News Corp. settlement, even after the corporation split, was hundreds of millions of dollars for both the News entity and Twentieth Century Fox. Although according to the Company’s Form 8-K SEC report, the DOJ’s investigation of 21st Century Fox was formally concluded with no formal charges brought,⁶⁴ Twentieth Century Fox continued to be part of an ongoing investigation of film studios.⁶⁵

v. International Corrupt Acts

The international entertainment industries are not immune to corruption. In Britain, producers allegedly created the film *A Landscape of Lies*, in order to cover up tax fraud.⁶⁶ In China, the *21st Century Business Herald* was alleged to have extorted and bribed in order to get access to phone records.⁶⁷ In 2011, the media alleged that Czech Republic police officers were arrested for illegally helping movie productions, including by working for the production companies, shutting down streets or giving access to streets, and moving cars.⁶⁸ In Morocco, the *Los Angeles Times* reported that the 2005 Hollywood film *Sahara* was made with hundreds of thousands of dollars that were recorded as “local bribes.”⁶⁹

III. Existing Measures Against Corruption

A. Domestic Measures Against Corruption

1. Foreign Corrupt Practices Act

The FCPA was passed in 1977 and amended in 1988. It increases accounting transparency and reporting requirements for individuals and corporations.⁷⁰ The FCPA is also aimed at stopping bribery of foreign officials. It applies to any person or business with a certain amount of connections to the United States, whether in the United States or abroad. The FCPA bans payment of money or

gifts to foreign government officials, parties, by United States citizens, businesses, or foreigners in companies with American Securities.⁷¹ The FCPA is divided into two parts, anti-bribery and accounting.

The first part bans payment of money or anything of value to a foreign official, who is defined by the FCPA as being “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.”⁷² The payment in question must be to “obtain or retain business.”⁷³

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The second part requires that companies “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets”⁷⁴ and to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances.”⁷⁵ The FCPA accounting provisions can be widely applied, covering everything a company does, without a materiality threshold and regardless of whether there is bribery.⁷⁶ Both falsified and inaccurate books can violate these provisions.⁷⁷ The provisions also require internal controls.⁷⁸

The FCPA is enforced by the SEC and the DOJ. The federal government can charge people with actual FCPA violations, or conspiracy to violate the FCPA. The SEC can impose civil fines, both through administrative and judicial proceedings,⁷⁹ and the DOJ can prosecute and impose criminal punishments and fines. The punishments for bribery violations for companies can be millions of dollars, in addition to fees and negative publicity.⁸⁰

The FCPA got off to a weak start. For many years, it was not really enforced.⁸¹ However, once other countries began enforcing anti-corruption measures (encouraged by the passage of the United Nations Convention Against Corruption (UNCAC)),⁸² the United States began to actively enforce the FCPA. As a result, companies have begun to take extra precautions. Ideally, internal controls and training should prevent corruption. Regulators detect discrepancies when corruption occurs, or companies self-report it. The SEC and DOJ can punish corruption, or impose huge settlements to deter corruption.

When it passed the FCPA, and years later when it began to enforce it against Hollywood, the government had the stated goal to:

(i) prosecute company executives, not just their corporate employers, for knowingly participating in a bribe scheme; (ii) hold companies and their executives accountable for failing to implement systems that permit accounting snafus and potential subterfuges, even absent their knowledge of corrupt dealings; and (iii) ensure that companies doing business abroad will conduct proper due diligence and implement adequate controls to prevent and detect bribing foreign officials.⁸³

The government enforces the FCPA by investigating both individual companies and entire industries. It targets major players and requisitions their books and documents. The government looks for possible markers of corruption. Some of these markers include: the heavy use of third parties, use of government-recommended specialists or locals, dummy entities, inflated invoices, and misnamed entries in the financial records.⁸⁴ When the government begins an FCPA enforcement proceeding, it begins by looking for red flags. For example, the government began investigating Hollywood after the conviction of Gerald and Patricia Green, whose conviction for bribery focused attention on what film companies and executives were doing abroad.

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In order to prove an FCPA violation, the government must show eight factors. It must prove that the defendant was a “domestic concern” or an officer, director, employee, or agent of a “domestic concern” or an “issuer” or an officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.⁸⁵ The defendant must have specifically intended that the alleged problematic act was going to involve mail or interstate commerce.⁸⁶ The defendant must have acted corruptly and willfully.⁸⁷ The defendant must have specifically intended to act in order to receive a payment, a gift, or anything else of a certain value.⁸⁸ The payments must have been made to “foreign officials.”⁸⁹ The defendant must have known that at least some part of the payment was offered, given, or promised, directly or indirectly, to a foreign official.⁹⁰

The payment must have been explicitly 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 vio-

lation 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.⁹¹ Lastly, the payment was specifically intended to get or keep business for or with, or directing business to, any person.^{92, 93}

The burden is on the government, not only to prove that the alleged conduct occurred, but also that the defendant knew when it acted that it was violating United States law.⁹⁴ The DOJ will often use the business purpose test to determine whether the payment violates the “obtaining or retaining business”⁹⁵ provision in the FCPA.⁹⁶

The FCPA imposes a duty on companies and individuals to have the proper procedures in place to know what constitutes corruption and legitimate accounting, and to conduct reasonable due diligence to ensure that no bribes are being paid when they work with foreign governments or other third parties.⁹⁷ There is one exception, two affirmative defenses, and several partial defenses to alleged violations of the FCPA. There is a “facilitating or expediting”⁹⁸ exception to prosecution for FCPA violations, which is also known as the “grease payment” exception,⁹⁹ defined as money paid to ensure the “performance of a routine governmental action.”¹⁰⁰ The first affirmative defense is the “local laws” defense, which is that the payment must be explicitly legal¹⁰¹ under the laws of the country where it occurred.¹⁰² The other affirmative defense is the “bona fide business expenditure defense” that the payment or gift was a “reasonable” and “bona fide” business expense.¹⁰³ Other defenses include negating relevant factors such as showing that the payment was not “willful” or that the company did not have “knowledge.” A more successful, but not complete, defense is that the company has good procedures for FCPA compliance.

2. Dodd-Frank

In addition to the FCPA, the SEC and the DOJ have power to investigate corruption under the Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. 111-203 (Dodd-Frank).¹⁰⁴ Section 1504 of Dodd-Frank also requires disclosure of legitimate payments to foreign governments.¹⁰⁵ Section 922 of Dodd-Frank includes an incentive program for whistleblowers to report FCPA violations.¹⁰⁶ Whistleblowers can receive up to 30% of the rewards and sanctions gathered by the government, if the whistleblower’s information was voluntarily given in a successful FCPA enforcement action, and the total money recovered is worth more than \$1 million.¹⁰⁷ Whistleblowers under Dodd-Frank are also protected from retaliation.¹⁰⁸

3. Cases

Although there are very few FCPA cases specifically relating to the entertainment industries, other FCPA

cases, where they define relevant terms, apply relevant tests, or invoke defenses, have impacted how the FCPA is applied to the entertainment industry. For example, some cases try to define terms such as “corrupt” and “willful.” In *United States v. Kay*, the Fifth Circuit Court of Appeals explains the common-law definitions of “willfully” and determined the degree of knowledge necessary to establish a willful violation of the FCPA.¹⁰⁹ This case is important because it provides a standard and because it holds that the defendant does not need to know the terms of the FCPA in order to willfully violate it.¹¹⁰ *United States v. Kozeny*, discusses attempts to invoke affirmative defenses.¹¹¹

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In *United States v. Aguilar*, the court denied a motion to dismiss because the electric utility involved was wholly owned by the Mexican government and may be considered an “instrumentality” of a foreign government within the definitions of the FCPA.¹¹² This holding could potentially be applied to the China Film Group, which could be considered an “instrumentality” of a foreign government within the meaning of the FCPA.

B. International Measures Against Corruption

1. The United Nations Convention Against Corruption

The UNCAC was the first legally binding, international anti-corruption policy. The goal of UNCAC was to decrease corruption, specifically bribery and accounting fraud, by increasing international enforcement via judicial policies and a more uniform set of international enforcement guidelines.¹¹³ UNCAC divided the problem of corruption into four parts: prevention, criminalization, international cooperation, and technical assistance. As of October 2016, 180 parties were involved, including 140 signatories to the agreement.¹¹⁴ However, the UNCAC came with a host of problems. It has been difficult to general an agreeable system that discovers corruption, determines who has jurisdiction, and sets up workable enforcement policies.

2. The U.K. Bribery Act

The U.K. Bribery Act (the Act) functions very similarly to the FCPA. Under the Act, previous laws about bribery were replaced with criminal laws governing bribery. The law governing bribery of foreign officials is in §6.¹¹⁵ Punishment for violating the Act can include an unlimited fine and up to 10 years in prison.¹¹⁶ Ernst & Young, LLC partner Jonathan Middup said:

Film and TV making is particularly exposed to bribery and corruption risk.

Films are shot all over the world and in some cases they are in countries where corruption is commonplace. There is a lot of cash being used and there is a need to get access to areas closed to the public, creating a lot of potential touch points with local governments or even the military. In some countries, how one accesses those things can run afoul of UK law even though they might be accepted practices in the country in question.¹¹⁷

3. The China Anti-Bribery Law

The Chinese Anti-Bribery Law applies to corruption within China, and has two sections. One section concerns bribing government officials, and the other is for commercial bribery between private parties.¹¹⁸ There are special concerns that particularly affect film studios when doing business in China. For example, for FCPA purposes, is the Chinese Film Group considered a foreign official for both the SEC and the DOJ? It is likely yes for the latter, as the DOJ adopted rules saying that state-owned entities are foreign officials.¹¹⁹ If so, what is the possibility of enforcement? The government has internal procedures for handling bribes and is likely to prosecute internally. In addition, the recipients of the bribes are not likely to voluntarily come to the United States to testify at a FCPA proceeding. China’s anti-bribery laws do, however, include a long-arm provision,¹²⁰ and commercial bribery cases can often lead to supplementary FCPA cases.¹²¹

In addition, China passed a 2011 amendment to its anti-bribery laws that prohibits bribing a foreign official. This amendment functions similarly to the U.K. Bribery Act and the FCPA.¹²² Violations of this amendment are often also FCPA violations. In these cases, it is unclear as to who would have the first right to prosecute.

4. Indian Anti-Corruption Laws

India recently passed anti-corruption laws, which include more effective implementation of UNCAC.¹²³ They also include improvements on the Prevention of Corruption Act of 1988, India’s current anti-corruption law.¹²⁴

C. FCPA and Hollywood

Film studios sometimes conduct business in ways that raise multiple red flags with respect to possible FCPA violations. They operate in high risk territories, often use third parties, and interact with government officials for various reasons, including seeking permits, distribution, and other related purposes.¹²⁵

The movie industry has been suspected by the United States government of bribing government officials across Asia for distribution or for arranging kickbacks.¹²⁶ Some argue that it is an accepted practice in Hollywood. However, as the Asian market expands, film studios are also being accused of shelling out bribes for many other proj-

ects, including online distribution, facilitating IMAX and other premium movie formats, and land use permits for studios and theme parks. In addition, even if a payment is not classified as a bribe under the FCPA, it can sometimes still be illegal if it was improperly recorded.¹²⁷

Film studios' reliance on third party contracts pose additional problems when the third party company is recommended by a foreign official. Often, American film companies will enter into business contracts with third party companies for everything from securing locations to full production partnerships, without conducting full and proper due diligence.¹²⁸ A number of FCPA problems can be avoided by parties taking the time to learn about the people and companies with whom they are working.

"Cameos of politicians, which count as political appearances, can definitely meet the threshold value requirement that triggers the FCPA."

Travel and entertainment expenses are part and parcel of the film industry and provide huge areas of potential corruption. Companies, including film studios, sometimes gift government officials or clients with free hotels, meals, travel expenses, entertainment, and holiday gifts. While reasonably priced gifts are acceptable under the FCPA,¹²⁹ the FCPA limits the amounts that companies can spend on government officials and clients.¹³⁰ For example, it is not an FCPA violation to send Christmas cookie baskets to foreign officials. It is also permissible for companies to pay for dinner, as long as there is a receipt, and it is not overly lavish in relation to normal business practice, the status of the individual, and the country's standards. However, frequent dinners raise suspicion, and the aggregate value is compared.¹³¹ Proper documentation and disclosure are instrumental in ensuring that these expenses are legitimate in order to rebut an allegation of corruption.¹³² Trips, sports cars, and charitable donations allegedly have been used as "gifts" to local officials.¹³³ These would not meet FCPA standards. Some film studios, which in the past often sent expensive gifts to foreign officials, are now trying to avoid FCPA problems by sending gifts with the studio's logo, making the objects unique, yet rendering them inexpensive. They would still satisfy the cultural gift requirements, but would fall under the allowance for promotional gifts.¹³⁴

Another new possible area of corruption is giving politicians cameos in movies.¹³⁵ The act of giving a politician a cameo is not a *per se* violation of the FCPA. Cameos can fall under the "anything of value" category in the FCPA. However, cameos can be effective bribes; they can induce government officials to speed up a government process and are hard to track and prevent. Cameos of politicians, which count as political appearances, can definitely meet the threshold value requirement that triggers

the FCPA.¹³⁶ Politicians may be willing to pay big money for appearances, with the politician deriving intangible benefits. FCPA enforcers must ask about the length of the cameo, the possible royalties or other benefits (such as publicity) derived from the cameo, and the motivation for giving the cameo. Once granted, even a showing of a reasonable motivation can be a sufficient defense to corrupt intent. A business purpose test is then applied to the cameo to test the studio's motivation. Bribing people with cameos is very complicated. The enforcer must prove corrupt intent in order for a cameo to be an FCPA violation.¹³⁷ Filmmakers can be held liable just for inviting a foreign official to make a cameo appearance.¹³⁸

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In addition, product placement has become a potential new way to incentivize, potentially problematically, for foreign companies to help film studios with their needs in China. For example, some companies will require that their brand products be placed in the movie when it is shown in their target market countries.

D. China in the United States

Corruption does not only affect United States businesses abroad, it also affects foreign businesses with United States interests and securities. Chinese companies have been collaborating with United States companies in order to become involved and to learn how to compete in every stage of the movie making process.¹³⁹ A new trend has been for large Chinese companies, such as the Dalian Wanda Group and Alibaba, to meet with companies in Hollywood, or even buy large stakes in entertainment companies and help Hollywood film studios expand into China.¹⁴⁰ For example, the Dalian Wanda Group paid \$3.5 billion to acquire the controlling stake in Legendary Entertainment, a prominent Hollywood company,¹⁴¹ with the stated goal of the acquisition to help Legendary "increase its market opportunities, especially in the fast-growing Chinese market."¹⁴² The deal raised a number of potential FCPA concerns, including jurisdictional issues and the fact that the deal might better enable Legendary to avoid Chinese quota limits, as some of the films will be made in cooperation with or in close connection to the China Film Group. Alibaba, which is China's e-commerce giant, has met with various Hollywood companies.¹⁴³ Using Alibaba, film studios could have a tremendous increase in their ability to reach a wider Chinese audience.¹⁴⁴ Other Chinese businesses have also started

investing in and collaborating with Hollywood entertainment companies.¹⁴⁵

E. The Fallout

The cost of corruption charges under the FCPA is tremendous. Charges of FCPA violations require independent audit fees and outside counsel fees just in the investigative stage. If a company is found guilty, it can receive heavy fines. News Corp. ended up paying \$191 million in settlement fees to close its FCPA matter, not to mention \$179 million in professional and legal fees, which mostly consisted of investigative fees.¹⁴⁶ Sony's reputation and stock price plummeted after the FCPA violations were disclosed. Sony also paid an estimated \$176 million to Ernst & Young, LLC just for the investigation.¹⁴⁷

The proceedings also take up a great deal of the companies' time and resources. In addition, FCPA investigations sometimes result in shareholder litigation¹⁴⁸ and harm to a company's goodwill.¹⁴⁹

Another major consequence of corruption is in tax treatment. How does a company report an improper payment in its taxes? Can tax records be used in investigations and as evidence? Furthermore, certain methods of reporting can lead not only to FCPA violations, but also to criminal fraud allegations as well. An example of this is Patricia Green, who according to the judge's opinion, "well knew, that figure [on her tax returns] was a false and overstated amount including bribes to a foreign official for obtaining and retaining business with SASO that were not commissions or costs of goods sold."¹⁵⁰ The tax allegations were worth up to 10 years in jail per count, in addition to any potential jail time from the FCPA violation.¹⁵¹

F. The Process

Film studios and related business have to constantly deal with regulators, both in the United States, including FCPA regulation and abroad, wherever they are filming. Companies should endeavor to determine which regulatory agencies are involved, and how to best utilize the regulators to minimize and mitigate FCPA liability. Once a company is in a potential FCPA situation, it has to undergo investigations. First, the company can investigate internally, and then it might have to defend against a government investigation.¹⁵²

"Government investigations can be brought by the DOJ, the SEC, both agencies together, or both agencies separately."

Internal investigations are almost always the first step. It is a way for a company's general counsel to show its efforts to management, for management to show necessary actions taken to the Board of Directors, and

for the board and management to be able to show to the government that they are taking the necessary steps to avoid or to remedy any violations. Internal investigations give outside counsel the knowledge and ability to best advise the Board and management, particularly if there is a subsequent government investigation. The internal investigation determines the nature of the issue, gather facts by interviews and may use forensic accounting, in order to best advise the company.¹⁵³

Once the internal procedures are complete, the company can choose to self-report to the government or wait for the inquiry. Both options are risky. By self-reporting, a company should get lighter punishments because of compliance, but it would most definitely be investigated, which is expensive. By not reporting, a company runs the risk of the government seeking and having a harsher punishment for noncompliance. Business entities rarely publicly challenge the DOJ or the SEC in FCPA enforcement actions.¹⁵⁴ The most popular recourse for corporations is to agree to plea, deferred prosecution, or non-prosecution agreements.¹⁵⁵

As FCPA investigations encompass a wide array of diverse issues, once the government begins a formal investigation, a company will spend much of personnel time, money, and resources. The procedure is often complex and challenging, as investigations require outside counsel, auditors, business intelligence experts, forensic accounting and technology experts, and locals from each relevant international location.¹⁵⁶ The government usually comes out on top in FCPA cases, collecting large fines.¹⁵⁷ A company's best hope is often convincing the federal prosecutor not to indict anyone.

Government investigations can be brought by the DOJ, the SEC, both agencies together, or both agencies separately. The standard of proof for bribery is minimal intent and knowledge, and the anti-accounting fraud provisions require no intent.¹⁵⁸ Criminal investigations, which are brought by the DOJ, are usually initiated by a grand jury, which subpoenas records and witnesses. The United States Attorney's Office advises whether the company is a "subject or a target."¹⁵⁹

Civil actions are more common. For a civil case, the standard is only a preponderance of the evidence. The SEC's Division of Enforcement will investigate informally through its own initiative, or formally through the SEC's subpoena power.¹⁶⁰ The SEC has experts who look at relevant documents, including financial statements, statements by employees, and results of the internal investigations. Initially, the investigations are private; however, any formal charges can be published on the SEC's website.¹⁶¹ The SEC can then bring an action either in federal court or before an administrative law judge. Currently, for reasons of efficiency, the SEC is moving towards administrative actions in FCPA enforcement cases.¹⁶²

G. Settlement

FCPA investigations often conclude in court-mandated fines or settlements. The payments can be in the millions of dollars, separate from fees and potential stock price losses. Settlements can be extremely detailed, and in exchange for reduced fines and non-prosecution, agreements can include other conditions, such as periodic FCPA audits, mandatory compliance trainings, and access to documents. Both the company and the government also agree to conditions, such as monitoring terms and what will be disclosed to the public.¹⁶³

“Some companies also choose to seek advisory opinions from the Department of Commerce or the DOJ before engaging in questionable trade or behavior.”

IV. Current Solutions

A. Current Methods in Use

Legislation has become a trending method of fighting corruption. Beyond the national laws mentioned above, some companies have also begun inserting specific FCPA-related provisions into representations and warranties, termination, breach, and indemnity provisions of international contracts. In addition, most companies have internal compliance procedures that allow them to deal with their corruption-related problems without outside interference and enables them to develop internal mechanisms that can be used consistently in different locations.¹⁶⁴ Some companies also choose to seek advisory opinions from the Department of Commerce or the DOJ before engaging in questionable trade or behavior.¹⁶⁵ Companies can submit Wells Submissions¹⁶⁶ to the SEC or Position Papers to the DOJ for advice. However, the opinion process is underdeveloped and underutilized. Many companies use mediation in large lawsuits that include FCPA settlements. Companies can also settle FCPA claims.¹⁶⁷ This has the advantage of being faster and less expensive.

“One possible way of changing this would be to require or encourage countries to formally pass laws that standardize UNCAC’s provisions and add on to them, including on how to deal with extraterritoriality and jurisdictional issues.”

B. Disclosures

Full and complete disclosure can alleviate or mitigate many of the potential FCPA problems. Disclosure is crucial to ensuring prevention of accounting fraud. In addition, disclosure of any payments or gifts to foreign

officials is necessary to avoid the appearance of corruption and to mitigate the government investigation if corruption allegations are made. Disclosure is also one of the factors that the government considers when determining whether to take action with regard to prosecuting a corporation.¹⁶⁸

V. Potential Solutions¹⁶⁹

Anti-corruption compliance programs, legislation and contract provisions are some of the methods currently used to handle corruption problems. Corruption can be extremely difficult to detect and anti-corruption measures can be equally difficult to enforce. In order for corruption to be effectively dealt with, all solutions must encourage safe reporting by both internal and external whistleblowers. It is vital that solutions also encourage international cooperation.

A. Government-Based Solutions

1. Legislation

Legislation by other countries can help stamp out corruption by giving the United States, local governments, and international authorities legal justifications for enforcing anti-corruption measures. In addition, if other countries pass new laws or enforce their existing anti-corruption laws, then they can limit or eliminate the “local law” affirmative defense.¹⁷⁰ However, there is no mechanism in place to compel governments to enforce anti-corruption laws and policies. In addition, it is further complicated by the fact that anti-corruption legislation is not consistent from country to country. Countries define corruption, who can be bribed, and penalties differently. For example, in the United States, the penalties for bribery range from fines, to jail, to losing the right to operate a business,¹⁷¹ whereas in Thailand, bribery is punished by jail time, or even the death penalty.¹⁷² One possible way of changing this would be to require or encourage countries to formally pass laws that standardize UNCAC’s provisions and add on to them, including on how to deal with extraterritoriality and jurisdictional issues. Another solution would be to have WIPO or another multi-national organization promulgate uniform standards and procedures for countries to formally adopt.

2. Centralization of Government Authority

Another potential solution could be to centralize all things to do with the FCPA into one government authority. For example, a party could go to one FCPA government entity to ask questions, get advisory opinions, self-report, cooperate with investigations, discuss settlements, and if necessary, to participate in some form of alternate dispute resolutions or litigation preparation. This will decrease confusion and increase efficiency—both financially and judicially—by decreasing burdens on the courts and on different governmental agencies involved.

B. Company-Based Solutions

1. Compliance Programs

Anti-corruption training and compliance programs are essential to preventing FCPA violations or mitigating liability. Companies should train their employees as to what constitutes corruption. Employees should also be given a clear path to management with any questions about or reports of alleged FCPA violations. A good compliance program complies with the *In re Caremark Derivative Litigation* requirements for good procedures, as set out by the KPMG report at issue in *Stone v. Ritter*.¹⁷³

“As part of FCPA compliance programs, there should be mandatory education for employees at all levels and types, from CEOs to directors, officers, and employees.”

The cases, which were primarily about corporate governance and the failure to monitor, set out criteria for best practices that included a compliance department, which should be headed by a single director, a corporate security department, audit, and suspicious activity oversight committees.

As part of FCPA compliance programs, there should be mandatory education for employees at all levels and types, from CEOs to directors, officers, and employees. Employees should be educated in what the FCPA is, what constitutes corruption, how to ask questions before they become problems and how to report problems once they occur. Companies should also include education on global compliance, other countries’ anti-corruption definitions, statutes and enforcements. In addition, compliance programs should include general FCPA education for international third parties with whom the companies work.

A good compliance program should include annual reports to the Board, quarterly reports to a Board committee, a system for employees to report problems up through the hierarchy,¹⁷⁴ access to advice from outside advisors (such as lawyers and accountants), and an independent committee to investigate claims.

“The provisions could outline what constitutes potential corruption and what is simply negotiation protocol.”

2. Contract Provisions

Many companies have begun including FCPA provisions in their contracts. Use of specific FCPA-related provisions should be required. For example, a company could insert a provision stipulating that no party to the contract will knowingly violate the FCPA. The provision

could be structured similarly to the one below, which was recommended by the Association for Corporate Counsel, and which states:

Notwithstanding any other provision in this Agreement, neither any Party nor Company shall be obligated to take any action or omit to take any action under this Agreement or in connection with the business of this Company that it believes, in good faith, would cause it to be in violation of any applicable laws, including the FCPA.¹⁷⁵

The provisions could outline what constitutes potential corruption and what is simply negotiation protocol. Additional provisions could require the foreign companies to agree to cooperate with any FCPA investigations, including allowing audits of relevant documents,¹⁷⁶ detail penalties for violation, and indicate who has the authority to enforce the penalty. Contracts could require a provision in which a party agrees “not to do anything that will violate the FCPA”¹⁷⁷ in addition to FCPA provisions relating to termination, breach and indemnity. Other provisions could require that in international contracts, all parties to agree to submit to FCPA jurisdiction first, and the jurisdiction where it occurred second, or specifying that bribery of any type would constitute a *per se* violation of the FCPA, even if it is legal in the country where the bribery occurred.

“The investigations, and their potential ramifications for relations with Asia, are an issue of concern for film studios, industry leaders and other countries.”

VI. Quick Recommendations for Hollywood

As of early 2016, all the major film studios had been under investigation for roughly four years.¹⁷⁸ The investigations, and their potential ramifications for relations with Asia, are an issue of concern for film studios, industry leaders and other countries. Presumably, the studios have already conducted internal investigations, with appropriate outside advisors. They should determine what needs to be disclosed. Meanwhile, as a preventative measure, they should ensure that they conduct proper due diligence when taking on third party business partners; increase their compliance programs; educate their employees and third parties with which they do business; and update their contracts to include FCPA enforcement provisions. Once a company has good controls and policies, and is able and willing “to investigate, remediate and properly document,”¹⁷⁹ then it has significantly protected itself by minimizing risks and does not have to report every little thing.¹⁸⁰

VII. Conclusions

As the United States and Asian governments increase their enforcement of anti-corruption measures, it is important for media and entertainment companies to ensure compliance with the FCPA, both by their own employees and by relevant third parties. Strict company controls, internal investigative and dispute resolution procedures, and regular training as part of anti-corruption corporate compliance programs can help media and entertainment companies prevent costly and intensive corruption investigations. Companies should also add highly specific negotiated contractual provisions stating that the parties will not violate anti-corruption laws, and which specify binding enforcement procedures. Meanwhile, the government should centralize FCPA authority in one entity, to ensure clarity, facilitate enforcement, and increase efficiency.

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129. *Id.* (Although there is no *de minimis* provision, the FCPA does stipulate that any gifts should be small.).
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158. *Id.*
159. Tarun, *supra* note 152, at 37.
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162. Gibson Dunn, *supra* note 148.
163. Tarun, *supra* note 152, at 49.
164. *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996).
165. DOJ, *supra* note 96, at 1, 6.
166. A Wells Submission is a response to a Wells Notice, which is a warning to a company that it is being investigated by the SEC. In a Wells Submission, the business that receives the warning has the chance to respond, arguing that no action should be brought. Cornell University Law School, Legal Information Institute, Wells Submission, https://www.law.cornell.edu/wex/wells_submission.
167. Riyaz Dattu, *Lessons from Avon's FCPA-Related Settlements*, LAW360.COM (October 1, 2015), available at <http://www.law360.com/articles/707553/lessons-from-avon-s-fcpa-related-settlements>.
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169. This section sets out potential solutions that are currently in use. Companies use some combination of or all of these methods. While none of these methods comes with guaranteed success, all can help tremendously.
170. FCPA, *supra* note 8, at §§ 78dd-1(c) (1), 78dd-2(c) (1), 78dd-3(c) (1).
171. *Id.* at §§ 78dd-2 (g) (1) (A), 78dd-3(e) (1) (A), 15 U.S.C. §§ 78dd-2(g) (2) (A), 78dd-3(e) (2) (A). 15 U.S.C § 78ff (a).
172. Wendy Zeldin, *Thailand: Anti-Corruption Law Penalties Extended to Foreigners*, GLOBAL LEGAL MONITOR, LIBRARY OF CONGRESS (August 7, 2015), available at <http://www.loc.gov/law/foreign-news/article/thailand-anti-corruption-law-penalties-extended-to-foreigners/>.
173. *Stone v. Ritter*, 911 A.2d 362 (Del. 2006). (The report recommended, among other things, a compliance department, a director, a corporate security department, a BSA, an audit committee, trainings, quarterly reports to the audit committee and annual reports to the entire Board.).
174. *Id.*
175. Association for Corporate Counsel (sponsored by Morrison & Foerster), *The Foreign Corrupt Practices Act and Global Anti-Corruption Law 122* (December, 2010).
176. Nelson, *supra* note 16.
177. Madubuko, *supra* note 10.
178. Viswanatha, *supra* note 39 (the SEC sent inquiry letters to major film studios in 2012); Shearman & Sterling *supra* note 17, at 536 (the investigations into almost all the companies are still ongoing).
179. Mark Mendelsohn, *Doing Business Internationally: Minimizing FCPA Risk Exposure*, Gibson Dunn & Deloitte (May 21, 2008).
180. *Id.*

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