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# Financial Crimes

## Anti-Corruption

### Go Directly to Jail: Sentencing of Individual Criminal Defendants in Foreign Corrupt Practices Act Cases [\(Back to top\)](#)

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During the past few years, U.S. Department of Justice (DOJ) efforts to prosecute corporations and individuals under the Foreign Corrupt Practices Act (FCPA)<sup>1</sup> have skyrocketed. While the media has focused its attention on the volume of FCPA enforcement actions and the record-breaking criminal fines levied against corporate criminal defendants, the sentences imposed on individual defendants have received relatively little publicity. A survey of criminal cases brought by the DOJ against individuals in the past ten years reveals a fair number of cases involving prosecution of senior executives and other high-ranking employees for violations of the FCPA.

Moreover, most of the individuals convicted of violating the FCPA have received a sentence that includes a term of incarceration, particularly those sentenced during the past five years. These sentences range from a term of several months to a term exceeding five years. A 2002 amendment to the [Federal Sentencing Guidelines](#) (Guidelines) has contributed to this trend by reclassifying FCPA violations as public corruption offenses, which typically results in harsher sentences than those prescribed by the commercial bribery section of the Guidelines, under which sentences for FCPA offenders were determined previously. Although the data set is modest, and it is difficult to discern precisely how the courts will apply the Guidelines when sentencing a particular defendant for violating the FCPA, the overall trend is unmistakable: incarceration is a near certainty for individuals convicted of violating the FCPA. Given the recent zeal with which the DOJ has pursued FCPA cases in recent years, the trend toward aggressive prosecution of individuals and imposition of severe penalties will not likely abate.

#### *Application of the FCPA to Individuals*

The anti-bribery provisions of the FCPA<sup>2</sup> criminalize giving or offering money or anything of value directly or indirectly to a foreign government official or candidate, including all employees of foreign governments and any subordinate agencies, as well as any person acting in an official capacity on behalf of a foreign government or international organization, in order to obtain an unfair commercial advantage or to obtain or retain business. It is also unlawful to authorize or approve an improper payment. The DOJ has the authority to enforce the FCPA against a broad range of individuals and entities, including (1) any U.S. citizen, national, or permanent resident; (2) any U.S. issuer and individual acting on behalf of a U.S. issuer; (3) any business entity organized under the laws of the United States and any individuals acting on behalf of that entity; (4) any business entity that has its principal place of business in the United States and any individuals acting on behalf of that entity; and (5) any foreign individual or entity that commits acts in furtherance of an unlawful bribe in the United States. The U.S. Securities and Exchange Commission (SEC) has civil authority to enforce the FCPA against any U.S. issuer and individual acting on behalf of a U.S. issuer. Foreign-registered companies whose securities are not traded in the United States and their employees are therefore only subject to the FCPA if they use instrumentalities of U.S. interstate or foreign commerce in connection with an unlawful bribe. Recent enforcement actions have expanded the reach of the FCPA to impose liability for bribes paid by foreign entities that act as agents of U.S. companies.<sup>3</sup>

The FCPA also contains accounting provisions,<sup>4</sup> which require U.S. issuers to make and keep reasonably detailed books, records, and accounts that accurately and fairly reflect the transactions and dispositions of the assets of the issuer. The accounting provisions also require U.S. issuers to implement a system of internal accounting controls that provide reasonable assurances that (1) transactions are executed in accordance with management's general or

specific authorization; (2) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets; (3) access to assets is permitted only in accordance with management's general or specific authorization; and (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Criminal penalties for individuals found guilty of FCPA violations may include both incarceration and fines, and companies may not indemnify their employees for violations of the FCPA.<sup>5</sup> An individual faces up to five years in prison and a \$250,000 fine for each criminal violation of the anti-bribery provisions of the FCPA. Under the [Alternative Fines Act](#), the DOJ may instead seek a criminal fine equal to twice the benefit that the defendant sought to gain by making an unlawful payment.<sup>6</sup> Criminal violations of the accounting provisions of the FCPA may result in fines for individual defendants as high as \$5 million and up to twenty years in prison for willful violations. Needless to say, the stakes are high for individuals charged with violations of the FCPA.

In this Article, we focus on DOJ prosecutions of individuals for their roles in schemes to bribe foreign officials. Some of the cases contain allegations that the individuals involved violated the accounting provisions of the FCPA by improperly recording the allegedly unlawful payments in the company's books and records or other related charges, such as wire fraud or violations of the Travel Act.

#### *Recent Focus on Prosecution of Individuals*

In the last few years, the number of DOJ enforcement actions related to FCPA violations has increased sharply. In addition to prosecuting more U.S. and foreign corporations under the statute, the DOJ has begun targeting corporate executives and other individuals who bribe foreign officials. Mark Mendelsohn, the Deputy Chief of the Fraud Section in the DOJ's Criminal Division and the government's top criminal FCPA enforcer, said at an American Bar Association panel discussion in October 2007 that the recent trend toward more prosecutions of individuals is "part of a very concerted effort to supplement our prosecution of corporations... with our prosecution of natural persons." He reiterated this message a few weeks later at the American Conference Institute's annual FCPA conference, where he described several recent cases in which individuals received prison sentences and listed "prosecution of individuals" as one of the top ten trends in FCPA enforcement activity.

The SEC has matched the DOJ's accelerating pace in aggressively pursuing FCPA enforcement actions. Cheryl Scarboro and Fredric Firestone, two Associate Directors in the Division of Enforcement at the SEC who focus on FCPA cases, have said publicly in the past year that the SEC continues to focus on pursuing civil enforcement actions against individual defendants. The DOJ and the SEC frequently coordinate their investigations, raising the prospect that an investigation launched by one agency might result in an enforcement action by either or both agencies, and both Mr. Mendelsohn and Ms. Scarboro have expressed a desire to target the most senior executives who play a role in corporate bribery schemes.

Moreover, approximately 100 companies are currently the subject of open FCPA investigations, any of which could result in criminal prosecutions of the individuals involved in the allegedly unlawful conduct. Given the increasing number of FCPA investigations and prosecutions, coupled with the heightened focus of both the DOJ and the SEC on enforcing the FCPA against individuals, the trend toward aggressive prosecution of corporate executives for their participation in bribery schemes will not likely subside in the near future.

#### *Survey of Recent Sentences for Individuals*

Based on our own survey of FCPA cases and a review of publications that track FCPA enforcement actions,<sup>7</sup> we have identified forty-six individuals who have been charged by the DOJ

over the last ten years for allegedly participating in foreign bribery schemes. Many of these individuals were senior executives or high-ranking employees of corporations or international organizations. The majority of these prosecutions were initiated in only the last three years. Of these forty-six individuals, approximately two-thirds—thirty-three individuals—have been convicted of at least one charge arising from their participation in the foreign bribery scheme at issue. Of these thirty-three individuals, the overwhelming majority—twenty-eight—have pled guilty. The other fourteen cases include six individuals who are currently awaiting trial, two individuals who remain fugitives at-large, and two individuals who reside overseas and whose extradition to the United States is pending. In only three of the forty-five cases brought since 1998 have the individuals escaped conviction to date, including one individual against whom the charges were dismissed and only two individuals who were acquitted at trial. See Figure 1.

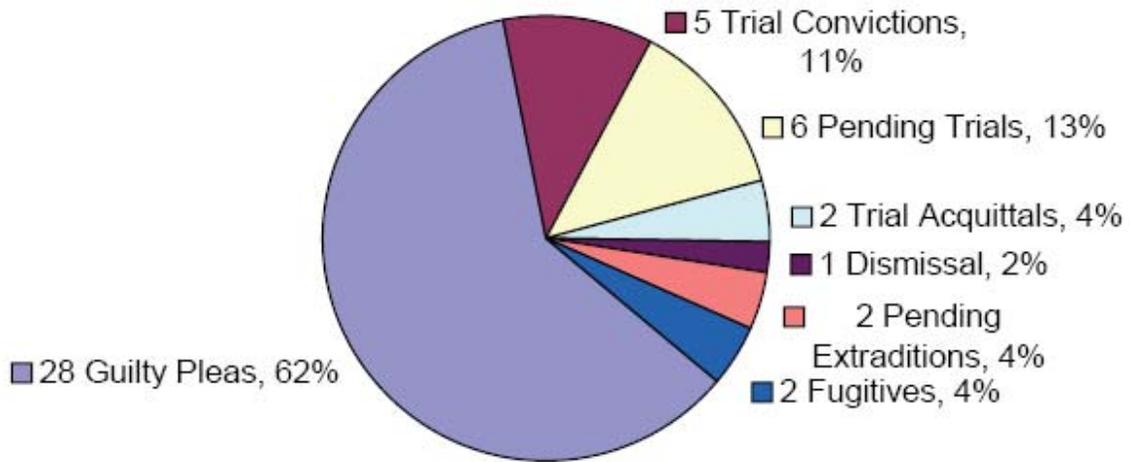


Figure 1: Resolution of Criminal FCPA Anti-Bribery Cases Brought Against Individuals from 1998 to the present.

Of the thirty-three defendants who have pled guilty or been found guilty at trial during the last ten years, twenty have been sentenced to date. Thirteen of those defendants have received a sentence that includes a term of imprisonment, including all four individuals who were convicted at trial and have been sentenced. See Figure 2. In just the last five years, eight of the ten defendants who were sentenced received a sentence that includes a term of imprisonment. See Figure 3. In addition, each of the thirteen defendants whose sentencing is pending face the prospect of being sentenced to at least some term of incarceration, and we anticipate that many, if not all, of these individuals will be sentenced to some term of imprisonment.

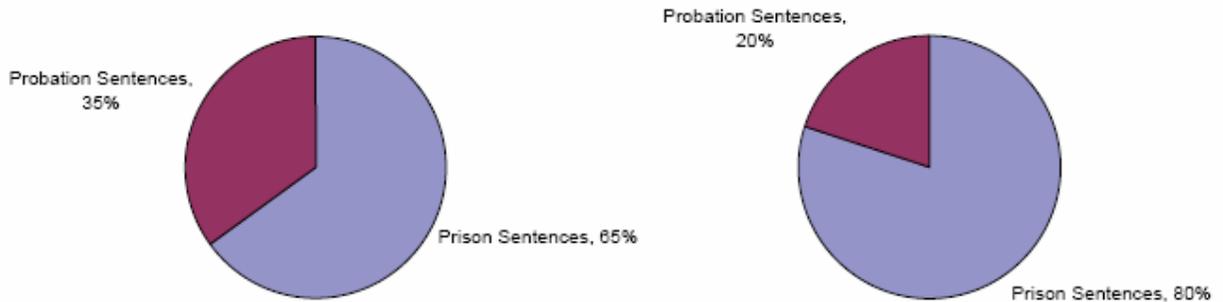


Figure 2: Sentences for Individual Criminal Defendants Convicted in FCPA Anti-Bribery Cases from 1998 to the present.

Figure 3: Sentences for Individual Criminal Defendants Sentenced in FCPA Anti-Bribery Cases from 2003 to the present.

Although this data set is modestly sized, the message is clear: most individuals who are prosecuted for allegedly participating in foreign bribery schemes are convicted and sentenced to some term of imprisonment. This is true regardless of whether a particular defendant pled guilty or was convicted at trial. Indeed, all four defendants who were convicted at trial and sentenced and nine of the sixteen defendants who pled guilty and have been sentenced have received some term of imprisonment as a component of their sentences.

This data is indicative of the DOJ's increasingly aggressive FCPA enforcement practice, which includes vigorous prosecution and pursuit of severe sentences for corporations and individuals. Although the DOJ has historically been willing to dismiss FCPA charges in some foreign bribery cases in which an individual defendant agreed to plead guilty to a related charge, such as wire fraud or violations of the Travel Act, most defendants in recent years have pled guilty to violating, or conspiring to violate, the FCPA. In fact, of the eighteen defendants who have pled guilty in connection with foreign bribery cases in the past five years, only three did not plead guilty to an FCPA violation.<sup>8</sup> This trend is notable because the DOJ has consistently sought, and courts have been increasingly likely to impose, sentences that include an incarceration component for defendants who plead guilty to violating or conspiring to violate the FCPA. As noted above, only two individuals who have pled guilty to charges arising from a foreign bribery cases in the past five years have escaped a prison sentence. Neither of those two individuals, who were both prosecuted for their respective roles in the same scheme, ultimately pled guilty to violations of the FCPA.<sup>9</sup> In the other case in which the defendant did not plead guilty to an FCPA violation, he still received a sentence that included forty-six months in prison after pleading guilty to conspiracy to defraud the United States and tax evasion.<sup>10</sup>

#### *Application of the Federal Sentencing Guidelines in Criminal FCPA Cases*

Given the severe sentences that individuals found guilty of violating or conspiring to violate the FCPA face, it is useful to analyze how the courts decide what sentence to impose in such cases.

#### *Overview of the Federal Sentencing Guidelines*

Federal courts typically determine criminal sentences for individuals found guilty of committing federal offenses based on the Guidelines promulgated by the U.S. Sentencing Commission. Application of the Guidelines in any particular case is a multi-step process. First, the defendant starts at a "base offense level," which is prescribed by the Guidelines based upon the particular federal statute that the defendant violated. The offense level is then increased or decreased based on the presence of certain aggravating or mitigating factors related to the crime. Once the final offense level is determined, the court then calculates the defendant's "criminal history points" based on his or her criminal past. Finally, the court reaches a recommended sentence range based on a table that takes into account both the offense level and the defendant's criminal history points.

Despite the fact that the sentence ranges determined by the Guidelines are no longer binding on federal courts following the Supreme Court's 2005 decision in *United States v. Booker*,<sup>11</sup> federal courts are still required to consult the Guidelines before determining a sentence.<sup>12</sup> Moreover, an emerging consensus among federal appellate courts that any sentence imposed within the ranges recommended by the Guidelines is presumptively reasonable<sup>13</sup> may also constrain federal judges to some degree because it implies that judges are expected to depart from the Guidelines' recommendations only under unusual circumstances.

Although it is not always entirely clear why a specific defendant receives a particular sentence, plea agreements and the DOJ's sentencing memoranda shed some light on how the government believes the Guidelines should be applied in particular cases. It also appears that federal courts rely heavily on the DOJ's analysis. In many FCPA cases, the courts have imposed sentences that fall within the sentence range suggested by the government.

#### *Base Offense Levels and Aggravating Factors in FCPA Cases*

Sentences for individuals found guilty of violating the anti-bribery provisions of the FCPA are determined based on § 2C1.1 of the Federal Sentencing Guidelines, which is the section generally applied in cases involving public corruption. Prior to November 2002, sentences for violations of the anti-bribery provisions of the FCPA were determined under § 2B4.1, which is the standard used for cases involving commercial bribery. The rationale for this change, according to the U.S. Sentencing Commission's commentary accompanying the 2002 amendments to the Guidelines, is that FCPA violations are "more akin to public corruption than commercial bribery" because they involve unlawful "payments to foreign officials for the purposes of influencing their official acts or decisions."<sup>14</sup> The practical result of this change is more severe recommended sentences for individuals convicted of violating the anti-bribery provisions of the FCPA.

Sentences under § 2B4.1 carry a base offense level of eight, which provides for a recommended sentence of no more than six months in prison for defendants without a criminal record. In contrast, sentences under § 2C1.1 start at a base offense level of twelve, which allows for prison sentences exceeding one year. As noted above, however, the base offense level is only the starting point for determining the recommended sentence range in a given case. Under both § 2B4.1 and § 2C1.1, the offense level can increase by up to thirty points, depending on the value of the benefit that the defendant sought to obtain by paying the bribe. Courts calculate the benefit of a bribe in terms of the value of the favor obtained as a result of the bribe. For example, if an individual offered a \$10,000 bribe to a foreign government official to win a contract that results in \$75,000 worth of profits for his or her company, the benefit of the bribe is \$75,000. The greater the benefit of the bribe, the more the offense level increases. In the hypothetical situation offered above, the offense level would increase by ten points because the benefit of the bribe was greater than \$70,000. Under § 2C1.1, the defendant in this example would be eligible for a sentence that could include more than four years imprisonment, whereas under § 2B4.1, the defendant would have been eligible for a sentence that could include approximately two-and-a-half years in prison. Additionally, § 2C1.1 provides for further enhancements of sentences if the defendant paid multiple bribes or made payments to "an elected public official or any public official in a high-level decision-making or sensitive position," both of which are common features in many foreign bribery cases.

Although § 2C1.1 of the Guidelines may produce severe sentences for individuals convicted of violating the FCPA, § 2B4.1 was by no means generous to the guilty. In the highest-profile FCPA case to date, the DOJ prosecuted David Kay and Douglas Murphy, two former senior executives of American Rice, Inc., a large Texas-based rice exporter, for allegedly paying bribes to Haitian customs officials in exchange for the officials' agreement to falsify customs documents to enable American Rice to evade over \$1 million in taxes.<sup>15</sup> In the fall of 2004, a jury found both defendants guilty of twelve counts of violating the FCPA and one count of conspiring to violate the FCPA. Murphy, the former president of American Rice, was also convicted of obstruction of justice for making false statements to SEC officials during the government's investigation of the payments.

In July of 2005, the defendants were sentenced under § 2B4.1 because the offenses were committed before the 2002 amendments to the Guidelines went into effect. Although § 2B4.1 is less harsh than § 2C1.1, the court sentenced Murphy to sixty-three months in prison and Kay, the former vice president of American Rice, to thirty-seven months in prison. Both defendants' offense levels were enhanced by three points under § 3B1.1, which provides for a two- to four-point offense level enhancement if the defendant acted as a leader in committing the offense, with the precise level of the enhancement depending on the number of people under the

defendant's direction. Murphy's sentence was enhanced further because he was also found guilty of obstruction of justice and because he abused a position of trust in making the payments. The Fifth Circuit subsequently affirmed both sentences over various objections, including Murphy's claim that the district court inappropriately applied the Guidelines by enhancing his sentence based on his abuse of a position of trust.<sup>16</sup>

Had Kay and Murphy been sentenced under § 2C1.1 of the Guidelines instead of § 2B4.1, they almost certainly would have received harsher sentences. Kay was sentenced to thirty-seven months incarceration based on an offense level calculation of twenty-one. Under § 2C1.1, this offense level would have increased by at least four additional points because the base offense level is four points higher than under § 2B4.1. He also would have received a two-point enhancement because multiple bribes were paid and an additional possible four-point enhancement if the court concluded that the bribes were paid to an elected public official or a public official in a "high-level decision-making or sensitive position." Accordingly, Kay's offense level under § 2C1.1 would have been thirty-one instead of twenty-one, potentially resulting in a much more significant sentence. Murphy's sentence would have been enhanced similarly, although the enhancement for abuse of a position of trust is not applicable under § 2C1.1.

### *Mitigating Factors in FCPA Cases*

To reduce the offense level that the court uses to determine the sentence range for individual criminal defendants, a variety of mitigating factors are available under the Federal Sentencing Guidelines, including acceptance of responsibility by way of a guilty plea and promises to cooperate with the FCPA enforcement agencies in any ongoing investigation. Although these actions are likely to result in a somewhat lighter sentence for individual criminal defendants convicted of violating the FCPA, they are unlikely to spare a defendant from incarceration altogether because the baseline sentences under § 2C1.1 are so significant.

Pursuant to § 3E1.1, the DOJ will typically suggest a two- or three-point reduction in the defendant's offense level if the defendant accepts responsibility for his or her action by pleading guilty. In *United States v. Faheem Mousa Salam*,<sup>17</sup> for example, the defendant, a translator who worked in Iraq for a U.S. government contractor, pled guilty to offering bribes to a senior Iraqi bureaucrat on multiple occasions in order to secure a contract to supply equipment to the Iraqi police force. Because the potential benefit to be gained from the proposed bribe was valued between \$30,000 and \$70,000, the DOJ suggested in its sentencing memorandum that six points be added to the base level of 12 points under § 2C1.1. The DOJ also recommended a four-point enhancement because Faheem Mousa Salam offered the bribes to a senior Iraqi official and a two-point enhancement because he offered bribes on multiple occasions. Taking into account these enhancements, Salam's offense level would be twenty-four, which would render him eligible for a sentence that includes as much as four-and-a-half or five years in prison. The DOJ, however, recommended a three-point offense level reduction because Salam accepted responsibility for his actions. This reduction would reduce Salam's offense level to twenty-one and his potential sentence to only three to four years in prison.

The DOJ may also request that the court depart from the Guidelines and impose a significantly lesser sentence than the Guidelines suggest pursuant to § 5K1.1, which provides for reduced sentences for defendants who cooperate with the law enforcement agencies investigating the matter. The DOJ will exercise its discretion under § 5K1.1 and request a lesser sentence only if it is satisfied that the defendant provided "substantial assistance in the investigation or prosecution of another person who has committed an offense." In *United States v. Salam*, the DOJ made such a recommendation in its sentencing memorandum, suggesting that the court reduce Salam's offense level by an additional two points to nineteen. This reduction resulted in a recommendation that Salam be sentenced to incarceration for thirty to thirty-seven months, and the DOJ urged the court to impose a sentence at the lower end of that range because of Salam's cooperation with its investigation. Despite the DOJ's suggestion, the court sentenced Salam to three years in prison. It is clear, however, that Salam received a real benefit by pleading guilty

and agreeing to cooperate with the DOJ because without these mitigating factors, he could have been sentenced for up to five years in prison.

In certain circumstances, the DOJ's recommendation that the court depart from the Guidelines pursuant to § 5K1.1 will give the court considerable room to reduce a particular defendant's sentence by a significant amount. In *United States v. Yaw Osei Amoako*,<sup>18</sup> for example, a regional director of ITXC Corp., a multinational provider of telecommunications services, allegedly helped arrange payments to state-owned telecommunications providers in several African countries in exchange for lucrative contracts for ITXC. As was the case with Faheem Mousa Salam, Yaw Osei Amoako faced up to four years in prison after his offense level had been reduced from twenty-four to twenty-one because he pled guilty. The government moved for a downward departure pursuant to § 5K1.1 and filed a letter under seal detailing Amoako's cooperation. The court sentenced Amoako to only eighteen months in prison, which suggests that the court departed from the Guidelines by six or seven points. It is unclear why the court treated Amoako significantly more generously than Salam, but it may be the case that the cooperation provided by Amoako proved to be especially helpful in a related investigation.

### *Beware the Trend*

The current trend toward aggressive prosecution of individuals for FCPA violations and imposition of severe penalties is unmistakable, although it remains difficult to discern precisely how the courts will apply the Guidelines when sentencing a particular defendant who has been convicted of violating the FCPA. To date, only a few individual criminal defendants have been sentenced under § 2C1.1 for violating the FCPA, and the sentencing determinations appear to be very fact-specific. The size of the benefit obtained or sought as a result of the bribe, the defendant's role in the bribery scheme, the defendant's acceptance of responsibility, and the defendant's degree of cooperation with ongoing investigations are all likely to influence the sentence that the court imposes on a particular defendant. Generally speaking, however, senior executives and other high-ranking employees who are implicated in a foreign bribery scheme are likely to face at least some term of incarceration, even if they accept responsibility for their actions, plead guilty, and agree to cooperate with any ongoing government investigation.

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<sup>1</sup> [Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 \(amended 1988 and 1998\)](#), codified at 15 U.S.C. §§ 78m-78ff.

<sup>2</sup> [15 U.S.C. §§ 78dd-1 to 78dd-3](#).

<sup>3</sup> See, e.g., *United States v. Vetco Gray Controls, Inc.*, No. 07-cr-00004 (S.D. Tex. filed Jan. 5, 2007).

<sup>4</sup> [15 U.S.C. § 78m](#).

<sup>5</sup> [15 U.S.C. § 78ff](#).

<sup>6</sup> [18 U.S.C. § 3571\(d\)](#).

<sup>7</sup> See Danforth Newcomb and Philip Urofsky, FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977, Feb. 13, 2008, [http://www.shearman.com/files/upload/FCPA\\_Digest.pdf](http://www.shearman.com/files/upload/FCPA_Digest.pdf); Transparency International, 2007 TI Progress Report on OECD Convention Enforcement, Questionnaire for TI National Chapters in OECD Signatory States, Questionnaire for the United States of America, May 16, 2007, [http://www.transparency-usa.org/documents/OECD\\_progress\\_report\\_07\\_USA.pdf](http://www.transparency-usa.org/documents/OECD_progress_report_07_USA.pdf).

<sup>8</sup> Almost universally, these cases involve alleged violations of the anti-bribery provisions of the FCPA or conspiracies to violate those provisions. We have identified only one criminal case in which the defendant pled guilty only to a violation of the accounting provisions of the FCPA for his role in a foreign bribery scheme. See *United States v. Steven Lynwood Head*, No. 06-cr-01380 (S.D. Cal. filed June 23, 2006).

<sup>9</sup> Vincent Nico, former vice president of the HealthSouth Group, pled guilty to one count of wire fraud in connection with the alleged bribery scheme. See *United States v. Vincent Nico*, No. 04-cr-00092 (N.D. Ala. filed Mar. 2, 2004). Thomas Carman, a former executive vice president of the HealthSouth Group, pled guilty to one count of making a false statement to a Federal Bureau of Investigation officer during the course of the DOJ's investigation. See *United States v. Thomas Carman*, No. 04-cr-00093 (N.D. Ala. filed Mar. 2, 2004). In connection with this alleged foreign bribery scheme, two other senior executives were also prosecuted and

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opted to go to trial, where a jury acquitted both of all charges. See *United States v. Robert E. Thomson and James C. Reilly*, No. 04-cr-00240 (N.D. Ala. filed July 1, 2004).

<sup>10</sup> *United States v. J. Bryan Williams*, No. 03-cr-00406 (S.D.N.Y. filed Apr. 2, 2003).

<sup>11</sup> [543 U.S. 220, 264](#) (2005).

<sup>12</sup> *Booker*, 543 U.S. at 264.

<sup>13</sup> See, e.g., *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

<sup>14</sup> [U.S. SENTENCING GUIDELINES MANUAL app. C \(2003\)](#).

<sup>15</sup> *United States v. David Kay and Douglas Murphy*, No. 01-cr-00914 (S.D. Tex. filed Mar. 25, 2002).

<sup>16</sup> See *United States v. Kay*, No. 05-20604, slip op. at 51-56 (5th Cir. Oct. 24, 2007).

<sup>17</sup> No. 06-cr-00157 (D.D.C. filed Mar. 8, 2006).

<sup>18</sup> No. 06-cr-00702, (D.N.J. filed Sept. 6, 2006).

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