The Foreign Corrupt Practices Act (FCPA) has two main provisions—(1) anti-bribery, and (2) books-and-records. The anti-bribery provision is enforced by the Department of Justice (DOJ), and the books-and-records provision is enforced by the Securities Exchange Commission (SEC). See our previous article on the topic **here**. As we told you, the FCPA originated from public revelations of corrupt payments made by Lockheed (now known as Lockheed Martin) in order to induce foreign governments to purchase its planes. So the inter-relationship between aerospace/defense companies and the FCPA goes back to the beginning.

Military services contractor Blackwater (now known as Xe Services LLC) was accused of committing bribery (but *not* violations of the FCPA) in April, 2010. Here's a **blog post** that explores the allegations against the company. It states that several company executives—

--were charged with 15 counts of conspiracy to violate firearms laws, making false statements and representations on federally licensed firearms dealers' records, possession of machine guns, possession of other firearms (short-barrelled shotguns) not registered in the National Firearms and Registration and Transfer Record, and aiding and abetting

The blog post linked to a November, 2009 **article** by the New York Times alleging that senior Blackwater executives "authorized secret payments of about $1 million to Iraqi officials that were intended to silence their criticism and buy their support after a September 2007 episode in which Blackwater security guards fatally shot 17 Iraqi civilians in Baghdad, according to former company officials."

The blog post summed-up the situation thusly—

Four former employees the *Times* interviewed for the November story claimed the payments were approved by the company's president and money was wired to Iraq from accounts in Jordan. The employees didn't know if the payments were actually made. The [Times] report said 'Blackwater's strategy of buying off the government officials, which would have been illegal under American law, created a deep rift inside the company, according to the former executives.'

A report by the *Times* Friday **said**, 'While the indictment is somewhat limited in scope, it could be the government's opening salvo in a broader offensive to bring criminal charges against the company. They could include charges for bribery and export violations, according to officials familiar with the case, perhaps under a strategy of turning former and current executives of the company against one another.'

From Lockheed to Blackwater, defense contractors have been caught up in the apparent need to offer illegal inducements to foreign officials, in order to secure favorable treatment. But a recent law aims to add teeth to the U.S. enforcement mechanisms.

This GovExec.com **story** by Robert Brodsky reported that the U.S. House of Representatives had passed the 2010 **Overseas Contractor Reform Act** (H.R. 5366). Mr. Brodsky's story reported that the law (if passed and signed) " would require agencies to debar companies and individuals found in violation of the 1977 Foreign Corrupt Practices Act, and sever their existing government contracts and grants."

The proposed bill contains a provision for an agency head to waive the penalty. In addition—as Mr. Brodsky notes—many contractors have been able to craft

artful settlement agreements with the DOJ "that allowed them to admit wrongdoing, but not necessarily confess to bribery." Thus, companies such as Halliburton and BAE Systems, that have paid millions of dollars in FCPA settlement agreements, might escape the bill's intent.

This article at Corporate Compliance Insights noted some other issues—

Because most FCPA enforcement actions are settled through a non-prosecution agreement (NPA) or deferred prosecution agreements (DPA) … the bill may need some tweaking if it is to be effective.

Among other issues will be: is a company that agrees to an NPA or DPA to resolve an FCPA case 'found to be in violation of the FCPA.' Likely not.

Also, the bill defines 'final judgment' as when 'all appeals of the judgment have been finally determined, or all time for filing such appeals has expired.' Again, this assumes that all FCPA enforcement actions are resolved through actual judicial proceedings – which is not how FCPA enforcement works in many cases.

Other potential shortcomings with the bill is that it only applies to violations of the FCPA's antibribery provisions. Thus, the bill would not be triggered by the recent 'bribery, yet no bribery' cases (Daimler, BAE, and Siemens) … In these cases, despite DOJ allegations that would seem to establish that the company violated the FCPA's antibribery provisions, none of these companies were charged with violating the FCPA's antibribery provisions. Instead, non-FCPA

charges or FCPA books and records and internal controls violations were charged in an attempt to avoid application of the European Union debarment provisions. …

The big picture flaw with H.R. 5366 (as currently drafted) is it assumes all FCPA enforcement actions are resolved through judicial proceedings and it assumes all FCPA enforcement actions are resolved with charges that actually fit the facts.

Neither of these assumptions are accurate ….

So perhaps H.R. 5366 is not the giant-killer its drafters hoped it would be. The biggest targets will likely continue to skate around the FCPA rocks without tripping. But for other (smaller) companies, it might be the “death penalty” as they lose the ability to be awarded new U.S. Government contracts, based on a poorly crafted settlement agreement.