FOREIGN CORRUPT PRACTICES ACT: WHEN YOUR CLIENT CONDUCTS BUSINESS ABROAD

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I. The FCPA: From 1977 to Today

In 1977, Congress enacted the U.S. Foreign Corrupt Practices Act ("FCPA") in an attempt to fight worldwide corruption by U.S. businesses.[1] The FCPA makes it unlawful to pay or offer to pay anything of value, directly or indirectly, to a foreign official for the purposes of gaining a business advantage.[2] Sounds simple, right? Just do not pay bribes to get business. Well, the FCPA is anything but simple due to the United States government's expansive interpretation of the law.

Despite the fact that the FCPA statute was passed in 1977, the federal government, until recently, provided very little guidance on how it interpreted the law. From 1977 until 2007, the United States Department of Justice ("DOJ") and the United States Securities and Exchange Commission ("SEC"),[3] the agencies that are delegated the duty to enforce the FCPA, primarily collected civil and criminal fines against corporate defendants for FCPA violations. While the fines—many times in excess of one hundred million U.S. dollars—were a deterrent, the DOJ and SEC were not necessarily focused on FCPA enforcement. As a result, lawmakers, corporations, and practitioners alike operated in an environment of uncertainty regarding how to comply with the various sections of the FCPA or whether it was worth it to do so, given the lack of enforcement in the area.

After 9/11, the United States government ramped up its efforts to monitor and enforce international transactions. For instance, many anti-money laundering laws and regulations were enacted or began to be enforced based on the premise that the United States should identify money being laundered due to terrorist activities. Part of this increased enforcement effort included an increased emphasis on enforcing the FCPA, particularly against individuals. The DOJ, for instance, increased the number of individuals it charged with FCPA violations by 700% since 2002.[4] The FCPA, therefore, is no longer a corporate problem—it should be a concern for every director, officer, and employee of any business working with foreign governments, which, as explained in further detail below, include foreign government owned or controlled entities.

The DOJ and SEC drew more attention to the FCPA when they began seeking large fines against corporations and prosecuting cases against individuals. However, as in most litigation, settlements were commonplace. Therefore, there was very little case law interpreting the statute. Many U.S. companies doing business with international companies and international companies doing business in the United States scrambled to attempt to understand the nebulous meaning of the FCPA. Because there was little to no guidance on the FCPA, companies were compelled to adopt the DOJ and SEC's interpretation as alleged in their charging documents.

Then, in 2011 and 2012, individual defendants in three key cases decided to take their chances at trial, and their risk paid off. The DOJ's prosecutions resulted in several vacated judgments, dismissals, and mistrials due to investigative and prosecutorial misconduct.[5] Many practitioners were hoping that substantive case law would develop from the trials. However, because such dismissals were procedural in nature, the case law did not divulge any significantly new interpretations of the FCPA.

The DOJ and SEC also apparently perceived the dismissals of these three key cases as mere procedural follies. They are continuing to aggressively enforce the FCPA, reporting in excess of 20 formal enforcement actions in 2012 and collecting more than $135 million in civil and criminal penalties. Additionally, it is believed that the agencies have more than 150 investigations pending, including the high profile investigation into Wal-Mart's Mexican subsidiary that "had paid bribes to obtain [construction] permits in virtually every corner of the country," according to the *New York Times*.[6] Assistant Attorney General Breuer of the DOJ's Criminal Division reinforced the government's intent to continue aggressive prosecutions: "The fight against corruption is a law enforcement priority of the United States…Our FCPA enforcement is critical to protecting the integrity of markets for American companies doing business abroad, and we will continue to make clear that bribing foreign officials is not an acceptable shortcut."[7]

Finally, at the end of 2012, the DOJ and SEC published long-awaited guidance on their interpretation of the law ("FCPA Resource Guide"), giving hope of clarification to those companies at risk for FCPA violation.[8] The FCPA Resource Guide, however, did not live up to expectation. First of all, it is not binding. Secondly, while some portions of the FCPA Resource Guide are helpful in shedding new light on the DOJ and SEC's interpretation of the law, for many, it merely confirmed that the DOJ and SEC will continue to attempt to enforce the law as it has

since 2002—attempting to bring in as many persons and as much conduct into the scope of the law as possible. While the DOJ and SEC have departed from some of their prior enforcement action positions, the majority of the FCPA Resource Guide reinforces that companies must develop, implement, and enforce conservative compliance policies.

II. The FCPA's Potentially Far-Reaching Jurisdiction

The FCPA applies to (1) U.S. companies and their subsidiaries and U.S. citizens ("Domestic Concerns")[9] and (2) U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission ("Issuers").[10] The DOJ and SEC interpret these provisions of the FCPA to mean that they can prosecute Domestic Concerns and Issuers even where they committed the alleged violations having little or no contact with the United States. By way of example, in 2012, Pfizer, Inc. ("Pfizer") paid $60 million in settlement funds to the DOJ and SEC resulting from $2 million of alleged bribes to foreign government officials and foreign healthcare practitioners at government owned hospitals.[11] Neither the DOJ nor the SEC alleged any of the alleged corrupt conduct occurred in the United States or was committed through the use of the mails or interstate commerce in the United States, illustrating the widespread impact the FCPA has on Domestic Concerns and Issuers.[12]

The FCPA also applies to foreign persons and businesses acting while in the United States ("U.S. Actors").[13] Again, the DOJ and SEC interpret this provision of the FCPA to require very little territorial nexus to the United States. For instance, in late December 2011, the DOJ filed a criminal FCPA action and the SEC filed a civil FCPA action against eight former foreign national Siemens executives for conducting meetings in the U.S., which ultimately led to bribes paid to Argentine officials in exchange for a contract.[14] The DOJ and SEC decided to criminally prosecute the executives despite having received $800 million in fines from the corporation in 2008.[15]

III. Limitations

Until recently, there was little to no guidance on the limitations period related to FCPA violations. Although limitations specific to FCPA violations is still unclear, some believe that a recent SEC case relating to violations of the Investment Advisors Act sheds some light on the topic. In February 2013, the U.S. Supreme Court unanimously held that the SEC, when seeking a penalty or fine in connection with a civil enforcement action pursuant to 28 U.S.C. §2462—the statute of limitations that also applies to civil FCPA enforcement actions—cannot rely upon the discovery rule to extend the five year limitations period.[16] Prior to this ruling, the SEC often held investigations for years prior to filing enforcement actions. This new U.S. Supreme Court case is likely to lead the SEC to investigate less and file more or seek agreements with those under investigation to toll the statute of limitations.

IV. Who Are You Prohibited From Bribing?

A. *Definition of Foreign Official*

The FCPA prohibits Domestic Concerns, Issuers, and U.S. Actors from making payments to foreign officials.[17] But who is considered a "Foreign Official"? A Foreign Official includes any person who represents or is employed by (i) a foreign political party, (ii) an official or representative of that party, (iii) foreign candidates for political office, and (iv) a foreign government.[18]

B. *Definition of Foreign Government*

The question then becomes – How is foreign government defined? The FCPA applies to any agency and subdivision or other body of any national, state or local government including regulatory agencies.[19] It also prohibits payments to those representatives and employees of "instrumentalities of the government," including government owned or controlled businesses, corporations, companies or societies.[20] Many foreign governments own and operate hospitals and other health facilities, oil and gas companies, and utility companies, among others. As a result, officers and employees of foreign government owned or controlled companies could arguably be considered "Foreign Officials," making marketing and business development targeted at these entities fairly tricky.[21]

Until recently, the DOJ and SEC provided very little guidance as to the FCPA's definition of "an agency, or instrumentality of a foreign government." In November 2012, the DOJ and SEC's FCPA Resource Guide explained:

> "[w]hile no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its

> shares. However, there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership. . . .[depending on factors that indicate the foreign government maintains significant control of the entity or the entity provides citizens essential official or governmental functions or services]."[22]

This statement is a significant departure from the utter lack of guidance on this issue provided by the DOJ and the SEC in the past. In fact, in at least two cases, the SEC and DOJ charged individuals with violations of the FCPA for allegedly bribing employees of companies in which governments had a minority interest in the outstanding stock of the company.[23] In both cases, the defendants settled and the Court never determined the issue of whether these entities were instrumentalities of a foreign government. As a result, practitioners and compliance officers have been operating under the assumption that even payments to employees of companies that had governments as minority interest holders were subject to the FCPA. While the Guidance cannot be used as a "safe harbor," the DOJ and SEC have, fortunately, shed some light on this issue.

C. <u>Public International Organizations</u>

Notably, the definition of "Foreign Official" also includes employees, representatives, and officials of public international organizations, such as the Red Cross and World Bank, in the definition of "foreign official."[24] Accordingly, business advantage cannot be gained by making or offering to make payments to international organizations, charitable or otherwise.

V. A Compliance Policy is Necessary; Turning a Blind Eye is NOT an Option

A. <u>Standard of Care</u>

"In order for an individual defendant to be criminally liable under the FCPA, he or she must act 'willfully.'"[25] Proof of willfulness is not required to establish corporate criminal or civil liability, though proof of corrupt intent is."[26]

In both cases, specific knowledge and intent, however, are not required. According to the DOJ and SEC, a willful violation occurs if there is general awareness that (1) an improper payment is being or has been made, (2) the circumstances for an improper payment exist, or (3) the improper payment is substantially certain to be made or has already been made.[27] As a result, companies and individuals are deemed to have sufficient "knowledge" of and "willfulness" to commit a FCPA violation if they deliberately insulate themselves through willful blindness, deliberate ignorance of, or a conscious disregard of suspicious actions on the part of the company's agents or intermediaries. The United States government's position on standard of care is most succinctly stated in a recent SEC press release regarding the prosecution of Eli Lilly for FCPA violations:

> "Transactions with offshore or government-affiliated entities did not receive specialized or closer review for possible FCPA violations. Paperwork was accepted at face value and little was done to assess whether the terms or circumstances surrounding a transaction suggested the possibility of foreign bribery.
> 'We strongly caution company officials from averting their eyes from what they do not wish to see.' Kara Novaco Brockmeyer, Chief of the SEC Enforcement Division's Foreign Corrupt Practices Unit, added…'Companies can't simply rely on paper-thin assurances by employees, distributors, or customers. They need to look at the surrounding circumstances of any payment to adequately assess whether it could wind up in a government official's pocket.'[28]

The bottom line is that the DOJ and SEC interpret the FCPA to mean that if there is a possibility that a Domestic Concern or U.S. Issuer is going to conduct transactions with offshore or government-affiliated entities, then it must give such high FCPA risk areas of its business specialized or closer review for possible FCPA violations.[29]

B. <u>The Importance of a FCPA Compliance Program</u>

Knowing that the DOJ and SEC require companies and their directors, officers, and employees to take proactive steps to ensure FCPA violations do not occur, it is essential that companies develop, implement, and enforce a FCPA compliance policy and procedure program. Indeed, a major factor in determining the severity of the penalty for a FCPA violation is whether the company has implemented and enforced an effective compliance program[30] "The DOJ and SEC understand that 'no compliance program can ever prevent all criminal activity by a corporation's employees,'" but the agencies look favorably upon those companies whose senior

management is committed to anti-corruption policies and who articulate, implement, and oversee a code of conduct from "the board room to the supply room."[31]

The importance of a robust compliance program is highlighted in the recent 2012 prosecution of Garth Peterson, a former Morgan Stanley managing director, who pled guilty to paying a Chinese government official over $2 million in corrupt payments. Although the DOJ and SEC have increased prosecutions of individual FCPA violators, the agencies have not ceased their efforts to recover large settlements from the companies who employ such individuals. However, the DOJ and SEC did not go after Morgan Stanley due to the extensive internal controls the company put in place and implemented to prevent FCPA violations. In a press release, the DOJ explained that it did not indict Morgan Stanley because it:

- Maintained and regularly updated internal policies to reflect specific risks;
- Prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment.
- Frequently trained its employees, including Peterson, on its internal policies, the FCPA and other anti-corruption laws;
- Regularly monitored transactions;
- Randomly audited particular employees, transactions and business units, and tested to identify illicit payments;
- Conducted extensive due diligence on all new business partners; and
- Imposed stringent controls on payments made to business partners.[32]

C. Developing a Compliance Policy

Like any company-wide policy, typically senior management, with the help of legal counsel, develops a FCPA compliance program, which is adopted by the board of directors. In order to develop a compliance program that is appropriate and tailored to each company's need, senior management, with the help of legal counsel, should conduct an independent assessment of FCPA risk areas within the organization. Senior management should also create an appropriate chain of command for employees to ask questions and address FCPA concerns. This typically translates into the appointment of a compliance officer and/or a compliance administrator to be responsible for the development, implementation, and enforcement of the compliance program.

The compliance program should involve the adoption of a policy manual, which, at minimum, should identify the compliance administrator and officer, explain their responsibilities, communicate the importance of complying with the FCPA, provide practical guidance to management and employees that helps employees identify potential violations, clearly communicate the payments that are absolutely prohibited, identify the types of payments that require management preapproval, and facilitate open communication to inquire about gray areas and report potential violations. Additionally, an effective FCPA compliance program requires management and employees conducting business in foreign countries and with foreign government owned or controlled entities to undergo FCPA training. Although training is essential at the outset of the adoption of the compliance program, companies should also conduct ongoing compliance reviews, audits, and training.

D. Accounting & Recordkeeping

The FCPA requires Issuers and their subsidiaries and affiliates to keep accurate and complete books and records and maintain proper internal accounting controls.[33] These recordkeeping requirements prohibit employees from hiding payments that would violate the FCPA by characterizing the payments as lawful expense items. Any attempt to characterize a payment or a transaction as a legitimate transaction for the purposes of making an improper payment or entering into an improper transaction with a foreign official is a separate violation of the FCPA and aggravates the offense and the potential penalty. Although such requirements technically only apply to Issuers, a Domestic Concern or U.S. Actor's lack of documentation relating to the company's implementation and enforcement of internal controls will likely lead to further investigation and potential indictment. For that reason, the recommended policies listed below often include advice to document, document, document.

E. The Prohibited Payments Policy

Although "the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value[34] to a foreign official,"[35] the FCPA does not prohibit all payments to

or on behalf of foreign officials. The FCPA permits the payment if:

(1) it is lawful under the foreign country's laws and regulations, or

(2) the expenses were reasonable or bona fide and directly related to the promotion or demonstration of the company's products or services, or the performance of a particular contract with a foreign government or instrumentality.[36]

The DOJ and SEC interpret the permitted payments exceptions narrowly. Combining expenses for business marketing and pleasure can be risky. For instance, the DOJ and SEC prosecuted a U.S. company that paid for executives of a Chinese owned telecommunications company to go to Disneyland, Las Vegas, and other tourist sites while in the United States to attend seminars and training sessions, and conduct inspections of the company's facilities.[37]

As a result, a compliance program should provide employees with specific guidelines to navigate the SEC and DOJ's interpretation of reasonable and bona fide marketing expenditures and should include requirements that any such payments need to be fully documented, supported by original receipts, accurately recorded in the company's books and records, and properly approved in advance by management. Suggestions for specific policies and procedures in this area include:

- requiring employees to obtain management pre-approval of travel, lodging, and entertainment purchases to be given to a foreign official,
- providing cost per person limits for meals with foreign officials, and
- setting a limit on the number of times in a calendar year that the company can treat a foreign official to a meal.

The company should generally not pay for (1) the foreign official to extend his stay beyond the business related activity period, (2) any entertainment unrelated to the promotion of the business (e.g., side trips to amusement parks, sightseeing, etc.), or (3) for the travel, lodging, or entertainment of the foreign official's family and friends.[38]

F. <u>"Choosing Intermediaries Wisely"</u>

The FCPA prohibits payments whether they are made directly or indirectly through third parties, such as consultants, agents, and joint venture partners ("intermediaries").[39] Essentially, you cannot do indirectly through an intermediary what you would be prohibited from doing directly. In fact, the SEC's allegations against Eli Lilly in 2012, discussed above, involved Eli Lilly's lack of due diligence when it came to hiring third parties abroad. The SEC alleged:

> "[T]he Indianapolis-based pharmaceutical company's subsidiary in Russia used offshore 'marketing agreements' to pay millions of dollars to third parties chosen by government customers or distributors, despite knowing little or nothing about the third parties beyond their offshore address and bank account information. These offshore entities rarely provided any services and in some instances were used to funnel money to government officials in order to obtain business for the subsidiary."[40]

The Eli Lilly prosecution demonstrates, then, that companies must take measures to reduce the likelihood of a FCPA violation through intermediaries, particularly when intermediaries are acclimated to another culture in a country where illicit payments may be prevalent.

Any compliance program, therefore, should require the company to perform a thorough business and background check on the intermediary's experience in the business and reputation for integrity in the intermediary's home country.[41] The background check should include at least two components: (1) information collected directly from the intermediary, and (2) a private investigation of the intermediary.[42] In order to demonstrate to the SEC and DOJ that you conducted such due diligence, it is essential that you obtain a written report on the results of the background check that contains the documentation supporting the results.

The compliance program should also require a written contract with each intermediary that specifies the scope of work and authority and the type of compensation as well as require the intermediary's compliance with the FCPA, prohibit the employment sub-agents without prior written approval, prohibit the receipt of any kickbacks, and provide for audit rights. Perhaps, most importantly, the intermediary must provide a service or a product to the company, and such service cannot merely be a connection to a foreign official, foreign government, or foreign government instrumentality.

G. Policy on Donating to Foreign Charities

Many companies contribute to the communities where they conduct business. The FCPA prohibits, however, donations to foreign-based charities and other recipients to disguise illegal payments to foreign officials.[43] In the 2012 Eli Lilly case, charitable contributions made to a Polish charity headed by the Polish government official were among the alleged improper payments.[44] As a result, a compliance policy should require that employees obtain preapproval prior to making any donation to a foreign charity on behalf of the company. Prior to approving the donation, the company should confirm that the charity is a bona fide organization and not an entity controlled by or for the benefit of a foreign official.

H. Internal Audits and Investigations

An organization seeking to reduce the likelihood of FCPA violations and the severity of the consequences of a violation if it occurs should conduct regular internal audits of its own books and records to identify any potential FCPA violations and FCPA risk areas.[45] The internal audit should ensure that any payments that require preapproval were in fact preapproved and that no prohibited payments were made. The internal audit should also confirm that any payments to foreign officials are properly documented in the company's books and records and supported by the appropriate receipts and invoices. Additionally, an internal auditor should focus efforts on departments that conduct business with government owned or controlled entities.

The FCPA compliance officer should also investigate any report of a potential FCPA violation, whether such a report is made by a manager, employee, auditor or third party. Such an investigation should not be limited to the specific instance of potential misconduct but should also identify the circumstances that might lead to other potential misconduct. After investigating the facts, the compliance officer, with help of legal counsel, should evaluate whether a violation has actually occurred. If a violation has actually occurred, the company should, at the very least, correct the specific potential violation and if possible, take disciplinary action against all employees involved, and evaluate whether it should self-disclose the violation to the SEC and DOJ.[46] However, even if the FCPA has not been violated, the company should probably (1) correct the circumstances that created the potential violation, (2) possibly discipline the employees involved, depending on the degree of culpability and the severity of the potential violation, and (3) take action to prevent any future violations.[47]

I. Self-Reporting

As seen in the Morgan Stanley case, robust internal controls cannot preclude every violation. FCPA violations can occur even with the most exhaustive FCPA compliance program in place. The DOJ and SEC provide great leniency, however, to those parties who come forward and disclose the existence of an FCPA violation.[48] As a result, a compliance program should encourage employees to report to the compliance administrator and officer any potential or actual FCPA violation or any risky circumstance immediately after it is discovered. The company should then evaluate whether it should self-disclose the violation.

VI. Successor Liability

A successor company can be responsible for its predecessors liabilities under the FCPA.[49] Although a merger or acquisition cannot create FCPA jurisdiction that did not exist prior to the succession, the acquiring company can be held liable for the target company's pre-acquisition conduct when it allows the improper payments to continue by turning a blind eye to the corrupt culture in the pre- and post- acquisition.

At least two FCPA cases in 2012 related to a successor company paying settlements for its predecessor's prior FCPA violations or continued corrupt culture. Pfizer settled with the DOJ and SEC, in part due to improper payments by Pharmacia Corporation, acquired by Pfizer in 2003.[50] Additionally, Orthofix International N.V., a Texas-based orthopedic products-maker, settled FCPA violations with the DOJ and SEC for $7.4 million. The DOJ alleged that Orthofix failed to engage in any serious form of corruption-related diligence before it purchased Promeca, S.A. de C.V., its Mexican subsidiary that paid of $300,000.00 to Mexican officials in order to secure agreements from Mexican hospitals and Mexico's social service agency for millions of dollars in Orthofix products.[51]

Acquisitions of companies in high FCPA risk companies can have other practical implications as well. Business obtained illegally under the predecessor company may be lost when bribe payments are stopped, the prior corruption may harm the successor's reputation and future business prospects, and it will likely be difficult to change the culture of an acquired company that is accustomed to operating in a corrupt environment.[52]

As a result, prior to merging with or acquiring another organization, a company should conduct pre-acquisition anti-corruption due diligence of the company to be acquired. Any unidentified commissions, payments unrelated to specific tangible services, the use of vendors owned or associated with foreign officials or their family members and expenses that are not supported by a credible invoice should, for example, raise red flags to the acquiring company. Additionally, the acquiring company should be wary of extraordinary benefits that the target company is receiving such as reduced tax liability, receipt of expedited permits, or the lack of proper permits to conduct its business. The parties should negotiate the costs and responsibilities for the investigation and remediation, discuss the necessity of self-disclosing, and develop an effective transition plan to integrate the target company into the acquiring company's anti-corruption culture.[53]

VII. Closing Thoughts

As we all know, there is a tremendous cost—in time and money—to be involved in an investigation, internally evaluate liability, or take a case to trial. Even if the target of the prosecution ultimately prevails, the reputation and goodwill of the company and individuals involved is on the line because an FCPA allegation is an attack against the defendants' integrity and ethical values. Knowing, then, that FCPA enforcement is a priority for the United States government, companies doing business with non-U.S. governments or non-U.S. government owned or controlled entities—whether in the United States or abroad—should be proactive in putting their ethical business practices in writing and implementing and enforcing those policies.

Further, although some FCPA defendants have successfully obtained dismissals of their cases, it is important to note that such dismissals have often been the result of procedural mishaps rather than a win on the merits. Because FCPA investigations can lead to litigation against the government and litigation against the employees who were involved in FCPA violations, any hint of corrupt conduct can be expensive, time consuming, and damaging to a company's goodwill and reputation. The key word, therefore, is COMPLIANCE.

Endnotes

[1] 15 U.S.C §§ 78dd-1, 78dd-2, 78dd-3, 78m, and 78ff.
[2] *Id.*
[3] The DOJ has criminal enforcement authority and the SEC has civil enforcement authority over Issuers. 15 U.S.C. §78dd-1. The DOJ also criminally and civilly enforces the FCPA against Domestic Concerns and U.S. Actors. 15 U.S.C. §§ 78dd-2 and 78dd3.
[4]

[5] *See, e.g., United States v. Aguilar, et al,* No. CR 10-1031 (C.D. Ca. 2010), *United States v. O'Shea,* No. 09-CR-00629 (S.D. Tex. 2009), and *United States v. Goncalves, et al,* No. 09-CR-00335 (D.D.C. 2009); Robert L. Soza, Jr., Elena Villaseñor, and Orlando Segura, "DOJ and SEC Continue to Aggressively Enforce FCPA Despite Recent Setbacks," February 29, 2012, *available at* www.jw.com/publications/article/1718.
[6] David Barstow,
[7] U.S. Securities and Exchange Commission Press Release No. 2012-225: SEC and Justice Department Release FCPA Guide (Nov. 14, 2012).
[8] The Criminal Division of the United States Dept. of Justice and the Enforcement Division of the United States Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, November 14, 2012, *available at* www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml. (hereinafter "*Resource Guide to FCPA*").
[9] 15 U.S.C § 78dd-2.
[10] 15 U.S.C § 78dd-1.
[11] *SEC v. Pfizer*, Inc., No. 12-CV-1303 (D.D.C. Aug. 7, 2012); U.S. Department of Justice Press Release No. 12-980: Pfizer H.C.P. Corp. Agrees to Pay $15 Million Penalty to Resolve Foreign Bribery Investigation (Aug. 7, 2012); U.S. Securities and Exchange Commission Press Release No. 2012-152: SEC Charges Pfizer with FCPA Violations (Aug. 7, 2012).
[12] *Supra*, note 11.
[13] 15 U.S.C § 78dd-3.
[14] *United States v. Sharef, et al*, No. 11-CR.1056 (S.D.N.Y. 2011); *United States Securities and Exchange Commission v. Sharef, et al,* No. 11-CV-9073 (S.D.N.Y. 2011); *United States Securities and Exchange Commission*, *Press Release 2011-263: SEC Charges Seven Former Siemens Executives with Bribing Leaders in Argentina*, December 13, 2011, available at www.sec.gov/news/press/2011/2011-263.htm.
[15] *United States Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Civil Action No. 08 CV 02167 (D.D.C.); *United States Securities and Exchange Commission*, Litigation Release 20829, *SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over $1.6 Billion,* December 11, 2008, available at www.sec.gov/litigation/litreleases/2008/lr20829.htm.
[16] *Gabelli, et al. v. Securities and Exchange Commission,* No. 11-1274, which was argued on January 8, 2013 and decided on February 27, 2013.
[17] 15 U.S.C §§ 78dd-1(a)1-3, 78dd-2(a)1-3, and 78dd-3(a)1-3.
[18] *Id.*
[19] 15 U.S.C §§ 78dd-1(f)(1), 78dd-2(h)(2), and 78dd-3(f)(2).
[20] *Id.*
[21] *Id.*
[22] Resource Guide, p. 21
[23] Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act*, § 4:4.2 at p. 4-25 – 4:31 at notes 77.1 and 78.2 (commenting on *Securities and Exchange Commission v. Ott*, No. 06-4195 (D.N.J.) and *United States v. Kellogg, Brown, &Root, LLC*, No. H-09-071 (S.D. Tex. Feb. 6, 2009).
[24] *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366 § 2, 112 Stat. 3302, 3303, 3305, 3308 (1998).
[25] Resource Guide to FCPA, p. 14 (citing 15 U.S.C. §§ 78dd-1(c)(2)(A), 78dd-2(g)(2)(A) and 78dd-3(3)(2) (A)).
[26] *Id.* (citing 15 U.S.C. § 78ff(c)(1)(A) (corporate criminal liability under issuer provision), § 78ff(c)(2)(A) (individual criminal liability under issuer provision), 15 U.S.C. § 78dd-2(g)(1)(A) (corporate criminal liability under domestic concern provision), § 78dd-2(g) (2)(A) (individual criminal liability under issuer provision, 15 U.S.C. § 78dd-3(e)(1)(A) (corporate criminal liability for territorial provision), § 78dd-3(e)(2)(A) (individual criminal liability for territorial provision), and Section 30A(a), 15 U.S.C. § 78dd-1(a); 15 U.S.C. §§ 78dd-2(a), 78dd-3(a)).
[27] *Id. (citing Bryan v. United States, 524 U.S. 184, 191-92 (1998)); see United States v. Kay, 513 F.3d 432, 447-48 (5th Cir. 2007); see also Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2nd Cir. 2003).
[28] U.S. Securities and Exchange Commission Press Release No. 2012-273: SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012).

[29] *Id.*
[30] *Resource Guide to FCPA*, p. 56 (citing U.S. Sentencing Guidelines at § 8B2.1).
[31] *Id.* at p. 56-59 (internal citations omitted).
[32] U.S. Department of Justice Press Release No. 12-534: Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012).
[33] 15 U.S.C. § 78m(b)(2)(A).
[34] "Payment" includes the transfer of stock, bonds or any other property, the payment of expenses, the providing of services of any type, the assumption or forgiveness of any indebtedness, or any other transfer of goods, services, tangibles or intangibles (*e.g.* gifts, travel, entertainment) that accrue to the benefit of the ultimate recipient or promotes his or her interest. *Resource Guide to FCPA*, p. 10 (citing *United States v. Moore*, 525 F.3d 1033, 1048 (11th Cir. 2008); *United States v. Gorman*, 807 F.2d 1299, 1304-05 (6th Cir. 1986); *United States v. Williams*, 705 F.2d 603, 622-23 (2nd Cir. 1983)).
[35] *Resource Guide to FCPA*, p. 10 (emphasis added); 15 U.S.C §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a).
[36] 15 U.S.C §§ 78dd-1(c), 78dd-2(c), and 78dd-3(c).
[37] Complaint, *United States Securities Exchange Commission v. Lucent Technologies Inc*., No. 07-cv-2301 (D.D.C. Dec. 21, 2007), ECF No.1 [hereinafter *SEC v. Lucent*], *available at* http://www.sec.gov/litigation/complaints/2007/comp20414.pdf; Non-Pros. Agreement, *In re Lucent Technologies* (Nov. 14, 2007) (hereinafter "*In re Lucent*"), *available at* http://www.justice.gov/criminal/fraud/fcpa/ cases/lucent-tech/11-14-07lucent-agree.pdf.
[38] *See SEC v. Lucent*, supra note 37; *see United States v. Liebo*, NO. 89-cr-76 (8th Cir. 1991); *see Resource Guide to FCPA*, pp. 15 – 16.
[39] The FCPA prohibits payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly." 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), and 78dd-3(a)(3).
[40] *U.S. Securities and Exchange Commission Press Release No. 2012-273:* SEC Charges Eli Lilly and Company with FCPA Violations (Dec. 20, 2012).
[41] *See Resource Guide to FCPA*, p. 60.
[42] The U.S. embassies in foreign countries can provide this service.
[43] *See, e.g.,* U.S. DEPT. OF JUSTICE, FCPA OP. RELEASE 06-01 (Oct. 16, 2006), *available at* www.justice.gov/criminal/fraud/fcpa/opinion/2006/0601.pdf, FCPA OP. RELEASE 95-01 (Jan. 11, 1995), *available at* www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf, and FCPA OP. RELEASE 97-02 (Nov. 5, 2007), *available at* www.justice.gov/criminal/fraud/fcpa/opinion/1997/9702.pdf.
[44] *Supra*, note 40.
[45] *See* U.S. Sentencing Guidelines, § 8B2.1(b)(5)(B).
[46] *Resource Guide to FCPA*, pp. 59-60.
[47] *See* U.S. Sentencing Guidelines, § 8B2.1(b)(7); *see also* U.S. SEC. AND EXCHANGE COMM., REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, SEC Rel. Nos. 34-44969 and AAER-1470 (Oct. 23, 2001) [hereinafter *Seaboard* Report], *available at* www.sec.gov/litigation/investreport/34-44969.htm; *see also* U.S. SEC. AND EXCHANGE COMM., POLICY STATEMENT CONCERNING COOPERATION BY INDIVIDUALS IN ITS INVESTIGATION AND RELATED ENFORCEMENT ACTIONS, 17 C.F.R. § 202.12 (Jan. 10, 2010) [hereinafter Policy Statement], *available at* www.sec.gov/rules/policy/2010/34-61340.pdf.
[48] *See* U.S. Sentencing Guidelines, § 8C2.5(g); *see Seaboard* Report, supra note 43; *see* Policy Statement, supra note 43.
[49] *Resource Guide to FCPA*, pp. 28-32 and 62.
[50] *Supra*, note 11.
[51] *SEC v. Orthofix Int'l*, N.V., No. 12-CV-419 (E.D. Tex. July 10, 2012); *see also United States v. Orthofix Int'l*, N.V., No. 12-CR-150 (E.D. Tex. July 10, 2012).
[52] *Supra*, note 49.
[53] *Supra*, note 49.