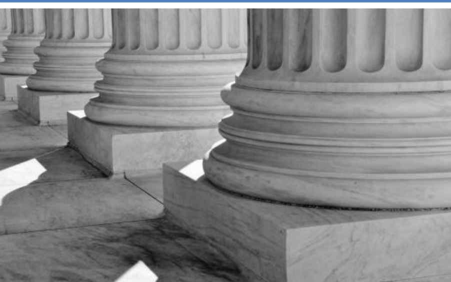

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NEW GUIDANCE ON THE FOREIGN CORRUPT PRACTICES ACT

A SPECIAL REPORT ON:

THE RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT

AS ISSUED ON NOVEMBER 14, 2012 BY THE U.S. DEPARTMENT OF JUSTICE AND THE U.S. SECURITIES AND EXCHANGE COMMISSION

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I. INTRODUCTION

On November 14, 2012, the Department of Justice and the Securities and Exchange Commission issued much-anticipated regulatory guidance on the Foreign Corrupt Practices Act. The report entitled, "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the "Guide"), is a comprehensive overview of the Act, and, as importantly, the DOJ's and the SEC's enforcement approach and priorities in relation to the FCPA. As such, the Guide provides critically important insight as to how these regulatory and law enforcement organizations will assess wrongful conduct within corporate organizations and how they will determine whether to hold the employer organization responsible for the misdeeds of its employees or agents.

While the Guide references that each investigation requires fact-specific review and analysis, the Guide also points to a common determinant in relation to whether there ultimately will be organizational liability. This common determinant is all about compliance programs. Indeed, the Guide makes clear that corporate compliance programs are at the core of the basic determination of whether the organization will be subject to prosecution, regulatory fines, or shielded from responsibility.

The Guide explains that, in the wake of an established FCPA violation and a pending determination of whether to take action against the organization, the DOJ and SEC take a "common-sense and pragmatic approach" to evaluating an organization's compliance program by asking three fairly simple, albeit broad, questions:

(1) Is the Company's compliance program well-designed?
(2) Is it being applied in good faith? and
(3) Does it work?

This **Special Report**, published by the **Corporate Governance and Internal Investigations Practice Group of Jackson Lewis LLP**, provides a summary of the Guide. We aim to further explain the key elements of an effective compliance program; why it is imperative for organizations to take immediate action to review, design and/or upgrade their compliance programs; and why organizations must be ready to persuade the government that the answer to the questions above is a clear "yes" in relation to their organization.

Notably, in the name of protecting the investing public, the Sarbanes-Oxley Act of 2002 mandated effective compliance programs. In the name of protecting taxpayer dollars, the Federal Acquisition Regulations were amended to require that federal contractor organizations have effective compliance programs. This Guide now makes abundantly clear that effective compliance programs are not only a requirement, but an essential tool for an organization's survival. Company boards, senior management teams, and corporate officers are unequivocally on notice that mediocre compliance programs represent a dereliction of duty. The time is now to develop, update, and re-invest in your corporate compliance programs. Just as important as

any capital asset, a best practice corporate compliance program can literally mean the difference between an organization that prospers – notwithstanding the misdeeds of wayward employees – and the beginning of corporate demise as an FCPA crisis reveals the organization to be a negligent manager of corporate compliance.

Jackson Lewis attorneys assist clients with the design of effective compliance programs and with the defense of ensuing litigation, as well as regulatory and law enforcement matters. The *AmLaw* 100 firm is a recognized and highly regarded leader of workplace law. We hope you will find this Special Report useful in developing your organization's compliance program and in minimizing your FCPA and other risks present in today's global business environment. We are here to assist your organization with effectively managing these workplace threats.

II. OVERVIEW OF THE FOREIGN CORRUPT PRACTICES ACT

The Guide begins with a substantive overview of the FCPA elements, including its bribery prohibitions, statutory elements, jurisdictional reach, affirmative defenses to liability, and its application to corporate liability, as well as a summary of the accounting requirements of the FCPA. These thirty-five pages of the Guide are enhanced with detailed hypotheticals and are heavily supported through endnote citations and an appendix that contains the full text of the FCPA statute itself. For practitioners, this section of the Guide serves as an excellent resource for assessing how the DOJ and SEC will analyze particular fact patterns against the FCPA framework.

A. FCPA ELEMENTS

1. Bribery Prohibitions

The anti-bribery portions of the FCPA prohibit U.S. companies, public and private, individuals and foreign subsidiaries of U.S companies, and others, including the officers, directors, employees, agents and shareholders of U.S. companies (or foreign companies doing business in the United States), from bribing foreign officials in return for business. Specifically, the FCPA prohibits the offer or authorization of anything of value, directly or indirectly, with a corrupt intent, to a foreign official, political party or candidate, knowing that some or all of the payment or value will go to the foreign official for the purpose of influencing any official act or to obtain or retain business.

2. Domestic and Global Application

The FCPA's anti-bribery provisions apply to conduct inside and outside the United States and prosecution by the U.S. DOJ may result from a bribe provided through the use of mail, telephone, email, text, fax or any communication that touches interstate commerce. Companies or their agents may be prosecuted under the FCPA if they engage in *any*

act in furtherance of a corrupt payment regardless of whether the agent was in the United States. Thus, as an example, the Guide explains that FCPA liability attaches to both a U.S. company that provides payments and its European intermediary that funnels such funds to a foreign country official for the purpose of advancing the U.S. company's ability to procure a contract. This is an FCPA violation for both, notwithstanding that the intermediary never set foot in the United States.

A brief list of other conduct triggering potential FCPA violations includes: winning a contract through bribe payments; influencing a procurement process; paying bribes to customs officials; and making payments to obtain favorable tax treatment. The FCPA's broad prohibitions on bribery can be difficult to track. According to a 2010 EIRIS (Experts in Responsible Investment Solutions) study on bribery, approximately one-half of U.S. companies with an intermediate risk of bribery issues in their businesses have inadequate compliance policies and controls to prevent bribery.

3. Key Elements of an FCPA Claim

As referenced above, the FCPA prohibits bribery of foreign officials. Essentially the FCPA prohibits an "issuer" – a U.S. company that issues securities – or any of its officers, directors, employees, agents, or stockholders to: (1) make use of interstate commerce (mail or any means or instrumentality of interstate commerce); (2) corruptly; (3) in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to; (4) a foreign official – directly or indirectly; (5) for the purpose of influencing that foreign official. (*See* Guide Appendix for a complete statement of the FCPA statutory language.)

Thus, the FCPA prohibits a payment made "corruptly." This means with an intent or desire to wrongly influence the recipient and, therefore, an intent to induce the recipient to misuse his/her official position. The FCPA does not require that a corrupt act succeed in its purpose. Indeed, for purposes of FCPA violation, the recipient of a "corrupt" payment need not have received it, accepted it or solicited it — it is enough that there was an intent to make a corrupt payment. Thus, an executive who directs a manager to "pay whoever you need to" in a foreign government will have violated the FCPA even if no payment was ever offered or made.

Complicating the efforts of U.S. companies to comply with the FCPA are government enforcement agencies' broad interpretations of the terms of the Act. For example, the FCPA prohibition on giving foreign officials "anything of value" in return for business raises many enforcement issues. First, it may matter little to the agencies that the U.S. parent company is unaware that its subsidiary is engaging in conduct that may violate the FCPA. Moreover, a "foreign official" as defined by the FCPA includes any employee of a foreign government or instrumentality, even one merely employed by any state-operated enterprise. Finally, "anything of value" goes well beyond cash payments and has been interpreted to include vacations, airfare, gifts, personal favors, disproportionate entertainment expenses, and compensation for disproportionate amounts of time spent on non-business matters.

The FCPA does not contain a minimum threshold amount for corrupt gifts or payments, but the Guide is quick to note that neither the DOJ nor the SEC have ever investigated conduct such as providing a cup of coffee, taxi fare or company promotional items of "nominal value." When such actions are part of a systemic pattern or course of conduct, however, the DOJ and/or SEC may become interested. Gifts or payments can come in many forms: cash (the most common), sports cars, fur coats, country club membership fees, household maintenance expenses, payment of cell phone bills, expensive dinners, travel disguised as training trips for employees, or the use of charitable contributions as a way to funnel bribes to government officials.

In several examples provided in the Guide, the extent to which the FCPA is triggered will be measured primarily by the value of a gift or payment provided to a foreign official. For example, company materials provided to foreign officials who visit a company's trade show booth will not be deemed to violate the FCPA because of an objective lack of corrupt intent. Nor would FCPA liability arise, in most circumstances, for payment of a plane ticket and lodging for a foreign official to a company's U.S. operations. If, however, the plane tickets were first class, included tickets for spouses, and included an all-expenses-paid week trip to Las Vegas where the company had no facilities, it would be a potential FCPA violation because it evinces corrupt intent.

4. Affirmative Defenses to Liability

Companies faced with FCPA liability can avail themselves of two affirmative defenses if applicable. They must be able to prove that: (1) the payment was lawful under the local laws of the country in which it was made (the "local law defense"); or (2) the payment was made due to a contractual obligation or demonstration of a product, i.e., a "bona fide business expenditure."

As to the first defense, the fact that the alleged bribery does not rise to the level necessary for prosecution under the foreign country's local laws is insufficient to establish the defense. The burden is on the company to establish that the payment was in fact lawful.

With respect to the second defense, while travel costs for the promotion, explanation or demonstration of a company's product are legitimate bona fide business expenses, payments for trips for personal entertainment purposes or trips mischaracterized on company reports are not, and no affirmative defense will be available for such payments. Additionally, the Guide offers a non-exhaustive list of pre-emptive actions companies can employ to assure the availability of the bona fide business expenditure defense. These include: paying all costs directly to travel and lodging vendors and reimbursing upon presentation of a receipt only; not advancing any funds for reimbursements in cash; ensuring that costs and expenditures are transparent; obtaining written confirmation that the payment of expenses is not contrary to local law; and accurately ensuring that costs and expenses on behalf of foreign officials are accurately recorded in company books.

Another exception to FCPA liability are payments made to further "routine governmental action" that involve non-discretionary acts. Examples of this include visa processing or

supplying utilities such as phone, mail or power. Routine government action does not include a decision to award business or any acts where a decision on the part of the foreign official is to be made. The Guide recommends, however, that companies not make facilitating or expediting payments such as those that result in routine government action because of the vagueness of how such payments are recorded and the potential for violation of local law.

5. Corporate Liability

Corporate liability under the FCPA can arise through parent-subsidiary relationships under traditional agency theories of liability focusing on parental control of the subsidiary's action. Liability can further arise through successor liability in the case of mergers and acquisitions. The Guide recommends that acquiring corporations employ strict due diligence and compliance review of the target organization. The DOJ and SEC have declined to enforce the FCPA against corporations that have voluntarily disclosed and remediated conduct in the pre-acquisition phase of mergers. The Guide highlights the options of seeking the DOJ's opinion regarding potential acquisitions or seeking credit (in the form of reduced liability) from the DOJ or SEC by conducting thorough due diligence, training and updating codes of conduct as quickly as practicable following a merger.

Corporate liability, as well as that of individuals, can also arise through the aiding and abetting of, or conspiracy to commit, FCPA violations. Those who aid or abet are as guilty as direct violators. Those who agree to commit an FCPA violation can also be held liable for conspiracy, which, due to the exterritorial jurisdiction of United States conspiracy laws, may implicate foreign companies.

The FCPA does not contain a statute of limitations. Therefore, the general United States Code five-year limitation period for DOJ criminal actions applies. This period can be extended in cases of conspiracy. There is a similar five-year statute of limitations that applies to SEC's civil enforcement actions.

B. FCPA ACCOUNTING PROVISIONS

Beyond the FCPA's bribery prohibitions, the Guide highlights the practical implications of the FCPA accounting and control provisions and discusses other related statutory requirements. These accounting provisions of the FCPA are applicable to publicly traded companies and include two primary components. First, under the ***books and records*** provisions, accounting records must accurately reflect transactions and disposition of assets. Second, under the ***internal control provisions***, companies are obligated to "devise and maintain a system of internal accounting controls" sufficient to provide reasonable assurances that "transactions are executed in accordance with management's general or specific authorization" and that, "access to assets is permitted only in accordance with management's general or specific authorization;" and "transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles." (*See* Guide at 40.) Failure to comply with these obligations can subject a company (and potentially its executives) to criminal and civil liability.

The accounting provisions of the FCPA are often used as the basis for enforcement actions by the SEC even in the absence of traditional FCPA issues. The Congressional requirement within the FCPA for accurate accounting, however, was intended to focus on the use of inaccurate accounting to hide international bribery. Specifically, the Guide notes it is "never appropriate to mischaracterize transactions" or to conceal bribes "under the guise of legitimate payments, such as commissions or accounting fees." Further, the Guide states the DOJ/SEC position is that there is no "materiality threshold" under the accounting provisions and companies may be criminally or civilly liable regardless of whether the international or interstate elements of the anti-bribery provisions are met.

The Guide also notes the importance of internal controls under the FCPA. While the language of the internal controls provision of the FCPA is focused on "internal accounting controls," the Guide makes clear the DOJ and SEC's expectations on accounting controls extend well beyond accounting and finance. Indeed, the DOJ and SEC use the Guide to stress that the FCPA's accounting controls provision requires controls that cover the "tone set by the organization regarding integrity and ethics" covering policies and procedures designed to ensure management directives are complied with, as well as monitoring compliance. In other words, internal controls require that a company establish an effective system that includes supporting audits and investigations.

The Guide further notes that the FCPA's mandated controls are not specific, but must be appropriate to a company's particular needs and circumstances. The controls must take into account a number of factors including:

- Operational realities and risks attendant to the company's business;
- How products or services get to market;
- Nature of work force;
- Degree of regulation;
- Extent of government interaction; and
- Degree of operations in countries with a high risk of corruption.

(*See* Guide at 40.) The Guide notes enforcement examples where companies maintained misleading ledger accounts, inappropriate third-party intermediaries and obscured documentation.

The Guide reminds companies that violations of the FCPA's accounting provisions may also violate other statutes. For example, failure to maintain accurate accounting records under the FCPA may also implicate Sarbanes-Oxley's accounting and officer certification requirements. Further, Sarbanes-Oxley also requires a company to disclose the effectiveness of its internal controls over financial reporting. Of course, the Guide highlights the view of the DOJ and SEC that the FCPA's internal controls requirements applies throughout a public company – not just the accounting department. Similarly, violations of the FCPA may also implicate the Travel Act, 18 U.S.C. 1952, prohibiting travel in interstate or international commerce with the intent to

carry on unlawful activity. Additionally, violations of the FCPA may also violate money laundering statutes, constitute tax law violations or involve mail or wire fraud.

The FCPA's accounting provisions apply to issuers that have a class of securities registered under Section 12 of the Exchange Act or that are required to file annual or other periodic reports. These provisions include foreign corporations that trade on U.S. exchanges through American Depository Receipts. The DOJ and SEC take the position that these provisions extend to subsidiaries or affiliates under the control of the public corporation, including joint venture partners and foreign subsidiaries. For example, the Guide notes an enforcement action relating to a Chinese joint venture that reportedly paid $400,000 in bribes that were recorded as business fees or travel and entertainment expenses.

While the DOL and SEC may apply the FCPA's accounting provisions to subsidiaries, affiliates, and joint ventures, the Guide recognizes that companies may not exercise the same control when they own a minority interest in an entity. If a public company owns a minority interest, it must use its best efforts to cause the minority-owned subsidiary or affiliate to maintain proper accounting controls. The DOJ will evaluate these best efforts, taking into account all the circumstances.

Companies and individuals may also face civil liability under the FCPA for aiding and abetting or causing a violation of the accounting provisions. For example, the SEC brought actions against executives of subsidiaries that allegedly paid bribes and then disguised payments as sales commissions on the books of the subsidiaries. The SEC deemed the subsidiaries' inaccurate records caused the U.S. company's records to be inaccurate. Additionally, the Guide provides an example of an SEC enforcement action against a CEO under the accounting provisions of the FCPA, as well as Sarbanes-Oxley, relating to the use of false invoices and the CEO's inaccurate certifications that the financial statements were correct.

Additionally, willful violations of the FCPA's accounting provisions can subject companies and individuals to criminal liability. The Guide provides a number of examples of criminal prosecutions of individuals in U.S. companies may apply despite whether the individual is and foreign affiliates that were criminally prosecuted for falsely characterizing bribes on company records. Such prosecutions can be pursued as direct violations of the FCPA as well as under theories of conspiracy or aiding and abetting, which employed by a U.S. public company or affiliate.

Ultimately, while the Guide focuses on the potential criminal and civil liability of U.S. publicly traded companies and their employees, of particular interest may be the discussion relating to the internal controls provisions of the FCPA. Effective internal controls that extend throughout a company will minimize risk of inaccurate accounting records. Internal controls that include an effective compliance program will also minimize the risk that the DOJ or SEC will pursue enforcement actions or seek to establish criminal liability.

III. THE GUIDE'S PRINCIPLES OF ENFORCEMENT

A. THE DOJ/SEC PRINCIPLES BEHIND ENFORCEMENT PHILOSOPHY

The Guide introduces its discussion on the DOJ's enforcement philosophy by providing a review of the U.S. Attorney Manual's "Principles of Federal Prosecution" and "Principles of Federal Prosecution of Business Organizations." As to organizations, there are nine factors to be considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements. These factors are:

(1) *The nature and seriousness of the offense, including the risk of harm to the public;*

(2) *The pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management;*

(3) *The corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it;*

(4) *The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;*

(5) *The existence and effectiveness of the corporation's pre-existing compliance programs;*

(6) *The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with the relevant government agencies;*

(7) *Collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proved personally culpable, as well as impact on the public arising from the prosecution;*

(8) *The adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and*

(9) *The adequacy of remedies such as civil or regulatory enforcement actions.*

(*See* Guide at 53.) Notably, the Guide also reaffirms an issue of recent debate in relation to an organization's attorney-client privileged information. The Guide states that in assessing a corporation's cooperation, "prosecutors are prohibited from requesting attorney-client privileged materials with two exceptions – when a corporation or its employee asserts an advice of counsel defense and when the attorney-client communications were in furtherance of a crime or fraud. Otherwise an organization's cooperation may only be assessed on the basis of whether it disclosed the relevant facts underlying an investigation – and not on the basis of whether it has waived its attorney-client privilege or work product protection." (*See* Guide at 53.)

In relation to the SEC, the Guide provides a review of the "guiding principles" in the SEC's Enforcement Manual, which directs what SEC staff should consider when determining whether to open or close an investigation and whether civil charges are merited. These factors include: (1) the statutes or rules potentially violated; (2) the egregiousness of the potential violation; (3) the potential magnitude of the violation; (4) whether the potentially harmed group is particularly vulnerable or at risk; (5) whether the conduct is ongoing; (6) whether the conduct can be investigated efficiently and within the statute of limitations period; (7) whether other authorities are better suited to investigate the matter; and (8) other considerations including whether the matter pertains to a widespread industry issue, whether the case involves recidivist, and whether the matter gives SEC visibility on a particular issue.

In sum, the Guide makes clear that DOJ and SEC officials, in determining whether to proceed on a given matter, will take into account a host of considerations that are specific to the particular facts of each case, are cognizant of the organization's characteristics, and that consider external consequences triggered by an enforcement action.

Moreover, the Guide highlights the importance of self-reporting, cooperation and remedial efforts. Whether in the context of a criminal (DOJ) investigation, or a civil (SEC) investigation, the Guide highlights the important role that these after-the-fact corporate activities will have on any given investigation. In the criminal context, the *U.S. Sentencing Guidelines* provide for reduced culpability for the organization. Notably, these guidelines reference the need for an "effective compliance and ethics program" and set forth the seven elements of such a program. (*See* Guide at 54.)

Similarly, in the context of civil enforcement actions, the SEC's tool for evaluating the cooperation by an organization is the 2001 *Report on 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* (commonly known as the "***Seaboard Report"***). The Seaboard Report sets forth four measures for assessing the company's cooperation – the first of which is: self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate "tone at the top" levels of the organization. The remaining three are timely self-reporting, remediation, and cooperation with law enforcement. (*See* Guide at 55.)

The Guide is clear therefore that the government's enforcement approach to the FCPA is influenced by the specifics of the organization and that at the heart of the analysis (whether by way of the DOJ's reference to the U.S. Sentencing Guidelines or by way of the SEC's Seaboard Report) is the organization's compliance and ethics program. The message could not be clearer: an organization's compliance and ethics program will be a central issue, if not the determining one, in evaluating the organization's culpability for the FCPA violations of its employees or agents. What should an organization include within its compliance program in order to have the greatest degree of "insulation" from the misdeeds of rogue employees and agents? Fortunately, the Guide offers clear guidance.

B. THE HALLMARKS OF AN EFFECTIVE COMPLIANCE PROGRAM

In its section dedicated to Corporate Compliance Programs, the Guide re-emphasizes the key point:

> ***An assessment of a company's compliance program, including its design and good faith implementation and enforcement, is an important part of the government's assessment of whether a violation occurred, and if so, what action should be taken. In appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.***

(*See* Guide at 56, emphasis added.) Hence, the compliance program matters and, in some instance, may be the difference between a company's demise by way of a major criminal or civil conviction or its ability to flourish irrespective of the activities of any wayward employees and agents abroad.

As stated at the outset of this Special Report, the Guide distills the government's review of a compliance program to three basic questions:

(1) Is the company's compliance program well-designed?
(2) Is it being applied in good faith? and
(3) Does it work?

(*See* Guide at 56.) These questions emphasize the need for a compliance program to be thoughtfully designed, implemented and continuously improved.

The Guide includes a section outlining the "Hallmarks of Effective Compliance Programs." The Guide is careful to stress compliance programs must be tailored to the needs of the organization and there "is no one size fits all program." (*See* Guide at 57.) Moreover, superficial programs, often dubbed a "check-the-box" approach, are deemed likely ineffective by the Guide. The key outcomes of an effective compliance program are that they: "allow the company generally to prevent violations, detect those that do occur, and remediate them promptly and appropriately." (*See* Guide at 57.) With that, the Guide identifies the key attributes of an effective program, most of which have been identified in prior guidance, including the seven elements identified in the U.S. Sentencing Guidelines for Organizations. The Guide, however, provides further insight from the regulatory and law enforcement perspective by organizing the elements of an effective program as follows:

(1) Commitment from senior management and a clearly articulated policy against corruption. The Guide references this key point as follows: "DOJ and SEC evaluate whether senior management has clearly articulated company

standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organization."

(2) ***Code of conduct and compliance policies and procedures.*** The company's code of conduct is the foundation of the compliance program and the Guide makes clear that the DOJ/SEC will evaluate whether the company has taken steps to keep and maintain the code (current and effective) and whether the company periodically reviews and updates the code. The policies and procedures should reflect and be tailored to the company's business model, products and services, third-party agents, customers, government interactions, and industry and geographic risks.

(3) ***Oversight, autonomy, and resources.*** The DOJ and SEC will assess whether compliance responsibility is assigned to specific senior executives who have access to an organization's governing authority, including the board of directors and specifically the audit committee. The DOJ and SEC acknowledge that the staff and resources will vary depending on the company's size, complexity, industry, geographical reach and risks associated with the business.

(4) ***Risk assessment.*** The Guide explains that the DOJ and SEC will consider whether the company has thoughtfully implemented its code and related controls in a way that dedicates greater resources to high-risk matters, and lesser resources to lower-risk matters. For example, a $50 million contract with a government agency in a high-risk country warrants greater scrutiny than modest and routine gifts and entertainment.

(5) ***Training and continuing advice.*** The Guide references the need for ongoing training and certification of all directors, officers, employees, agents and business partners, where appropriate. Both web-based and in-person training are pointed out as important. The use of real-world examples that are relevant to the employee-group trained is also important.

(6) ***Incentives and disciplinary measures.*** The Guide emphasizes the importance of consistent enforcement. A company should have appropriate and clear disciplinary procedures, applied reliably and promptly, commensurate with the violation. Incentives, promotions, and personnel evaluations are also tools a company can use to reward positive behaviors.

(7) ***Third-party due diligence and payments.*** Recognizing that DOJ and SEC FCPA enforcement actions often include third parties (agents, consultants, and distributors) who commonly conceal bribes to foreign officials in international transactions, the Guide places significant responsibility on the company to have appropriate due diligence of third parties. This includes background check information, clear oversight and monitoring of the third-party's role in the

transaction, and dissemination of the company's compliance expectations to the third-party.

(8) ***Confidential reporting and internal investigations.*** The Guide references the importance of reporting mechanisms or "hotlines" and the need for companies to have a "properly funded process" for investigating the allegations received. Additionally, these reporting mechanisms should allow for confidential reporting without fear of retaliation.

(9) ***Continuous Improvement: Periodic testing and review.*** The Guide stresses the need for continuous improvement of a compliance program citing changing business environments, developing laws, and evolving standards of industry as prime reasons. Regular review, auditing, and employee surveys are cited as possible ways to improve compliance programs.

(10) ***Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.*** The Guide discusses the opportunities and risks in the context of an acquisition. The DOJ and SEC expect that the acquirer will complete a pre-acquisition due diligence review of the target and promptly address and disclose FCPA violations, while, at the same time, incorporating the target into the acquirer's compliance program. If that is not possible prior to the acquisition, the acquiring entity is expected to complete a prompt post-acquisition due diligence review.

Notwithstanding the repeated theme that a compliance program must be tailored to the organization, the ten "Hallmarks" discussed by the Guide do indeed provide a more crisp and focused road map as to what the DOJ and SEC expect to see when appraising a compliance program. With this clarity, it behooves organizations to move forward with their internal review efforts.

IV. THE FCPA GUIDE'S REMAINING SECTIONS

A. FCPA PENALTIES & RESOLUTIONS

Conduct that violates the FCPA gives rise to a number of criminal and civil penalties, as well as collateral consequences, all of which can have a potentially devastating impact on the individuals and corporations who find themselves in the sights of a governmental investigation. The Guide provides a comprehensive overview of the penalties, sanctions and remedies that may be imposed for violations. It also discusses the range of resolutions that may be available, depending on the facts and circumstances of specific offending conduct. The consistent theme

that emerges (both with respect to potential penalties and agency decisions on resolution) is the mitigating effect that a robust and effectively implemented compliance plan can provide.

1. Criminal Penalties

Individuals are subject to penalties of up to a $100,000 fine and imprisonment for up to five years for each violation of the FCPA's anti-bribery provisions. Corporations can be liable for a fine of up to $2 million for each such violation. With respect to the accounting violations, corporations can be liable for fines up to $25 million under the statute, while individuals are subject to fines up to $5 million and imprisonment for up to 20 years. Under the Alternative Fines Act, 18 U.S.C. §3571(d), a corporation's maximum exposure to fines may be increased considerably – up to twice the benefit the organization sought to obtain by making a corrupt payment.

Potential fines and imprisonment are calculated in the first instance under the U.S. Sentencing Guidelines, and the DOJ will base its penalty calculations on the guideline range for all of its resolutions, including guilty pleas, deferred prosecution agreements, and non-prosecution agreements. The guidelines are governed principally by examining the severity of the violation and facts specific to it. Significantly, the guidelines provide for reductions to the offense level calculations for cooperation, acceptance of responsibility, voluntary disclosure, pre-existing compliance programs, and remediation efforts.

For corporations, the fine calculation is based on the greater of the amount corresponding to the offending conduct, or the pecuniary gain or loss from the offense. Chapter 8 of the Sentencing Guidelines contains an additional provision that can either increase or reduce the potential fines (sometimes dramatically) based on an assessment of culpability. A culpability score, under §8C2.5, can be increased by such factors as the involvement in or tolerance of criminal activities by high-level personnel, or prior misconduct or obstructive behavior. Conversely, the culpability score can be reduced if an organization had an effective pre-existing compliance program to prevent violations, and it voluntarily disclosed the offense, cooperated in the investigation and accepted responsibility for the conduct.

2. Civil Penalties

Both the DOJ and SEC were given civil enforcement authority under the FCPA. The DOJ may pursue civil actions for the anti-bribery provisions, with penalties up to $16,000 per violation by either business organizations or individuals. The SEC may obtain civil penalties, for both anti-bribery and accounting provisions, not to exceed the greater of: (a) the gross amount of the pecuniary gain to the defendant as a result of the violations; or (b) specific dollar limitations based on the egregiousness of the violation, ranging from $7500-$250,000 for individuals and $75,000-$725,000 for a company.

3. Collateral Consequences

The collateral consequences for offenses can often have long-lasting implications for businesses, both in the defense costs and in the ability of the organization to continue its business. Consequences may include suspension or debarment from contracting with federal, state or local governments, cross-debarment by Multilateral Development Banks, and the suspension or revocation of certain export privileges. For businesses that contract with more than one federal agency, debarment or suspension by one agency results in the same penalty across the executive branch of government, absent a compelling reason shown by a particular department or agency not to impose the action across the board.

The DOJ is specifically barred from negotiating away an agency's right to debar or suspend business for violations of the FCPA, although federal agencies can consult with the DOJ on potential resolutions. Similar to the decision-making process with the DOJ and SEC, however, government agencies can take into account a range of factors concerning an organization. These include whether the organization has an effective internal control system, timely self-reported the misconduct, or has taken remedial measures.

4. Monitoring

While the criminal and civil penalties are punitive in nature, and are intended to deter similar conduct, the focus of collateral agency action and the goal of negotiated resolutions with the DOJ and SEC is the prevention of future violations by the offender. Thus, a typical agreement will include a provision for monitoring, and the type of monitoring required is directly tied, in part, to the quality and effectiveness of a corporation's compliance program.

Companies with weaker compliance protocols or long-standing patterns of misconduct may be subjected to the appointment of an independent corporate monitor, or may be required to retain independent consultants or auditors. On the other hand, companies that have demonstrated a strong commitment to compliance before the violation occurred, and that have taken remedial action after discovering the misconduct, may be allowed to self-monitor – a significant quantifiable benefit in terms of reduced expenses, time commitments and intrusiveness.

B. THE RANGE OF RESOLUTIONS WITH THE DOJ AND SEC

Both the DOJ and the SEC may agree to resolve FCPA violations in a number of ways, depending on the facts and circumstance of the conduct, and the actions of individuals and corporations before and after the misconduct was discovered. The Guide provides an explanation of the range of options, and the factors that are considered in selecting the appropriate one.

The DOJ may decide to proceed through the courts, in which case it will file charges against an individual or corporation by means of a criminal complaint, information or indictment. It may

offer to resolve the charges short of trial by means of a plea agreement or a Deferred Prosecution Agreement (DPA), both of which are publicly accessible.

Under a plea agreement, a defendant will admit to facts establishing guilt, and the court will impose a sentence, taking into account the federal sentencing guidelines. The plea results in a criminal conviction. A DPA differs in that after the charges are filed, the DOJ requests that the prosecution be deferred for a specific period of time so the defendant can fulfill the conditions of an agreement negotiated by the parties. If the defendant complies with the conditions, the charges are then dismissed without entry of a criminal conviction.

The Department may also agree to resolve matters without going to court, with either a Non-Prosecution Agreement (NPA) or a declination of charges. An NPA is similar to a DPA in terms of the conditions imposed. However, successful completion of the agreement means that the DOJ will not file charges with the court as it does with a DPA. Although a court record is not generated, the DOJ still publishes the NPAs on its website, so they are publicly available.

The SEC has a similar range of options available in its enforcement actions. If it elects to proceed in court, it can seek a variety of remedies, including civil injunctions to compel the defendant to obey the law, civil contempt sanctions, disgorgement of ill-gotten gains, and civil money penalties. Alternatively, the SEC can institute administrative proceedings before an administrative law judge, enter into DPA or NPA, or issue termination letters and declinations.

The Guide offers valuable insight into the factors that the DOJ and SEC use in evaluating potential resolutions. Particularly helpful are the explanations and examples of matters resulting in declinations. Unlike the other categories of resolutions, information regarding matters in which there was a declination, with only rare exceptions, is nonpublic and confidential. As a result, it appeared from the publicly available sources that even situations in which an organization promptly reported misconduct and took remedial measures have resulted in the imposition of a stringent corrective plan and a significant probability of a substantial financial penalty. Therefore, companies that had actively tried to prevent and catch violations of the FCPA may hesitate to self-report violations.

The Guide provides a number of examples in which the DOJ and SEC declined prosecution or further enforcement actions. Predictably, common themes emerge from the descriptions provided. In nearly all of the cases, a robust compliance program allowed the early detection of the misconduct and led to thorough internal investigations, immediate corrective actions, early self-reporting to the government, steps to provide further training to employees, and further tightening of compliance controls. The government will also take into account factors including the nature and seriousness of the offense, the pervasiveness of the wrongdoing in the company, prior conduct, and the adequacy of alternative remedies or corrective measures.

The implication of the Guide is clear. Corporations must make serious efforts to have an effective compliance plan and systems of internal controls in order to prevent and detect potential violations of the FCPA. If a violation is discovered, there must be real and swift

corrective action, as well as a critical re-examination of internal controls and a substantial effort to provide effective training to employees, in order to deter any further violations. An organization that is taking these steps is in the best position to prevent misconduct in the first instance, and is also placed in the best position to vigorously argue that it should not be subjected to any further enforcement activity in the event that a violation occurs. The Guide makes clear that proactive steps taken by organizations can translate into tangible benefits having a significant impact on the corporation's reputation and bottom-line.

C. WHISTLEBLOWERS IN THE FCPA CONTEXT

The Guide reminds readers that the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 both include provisions affecting employee whistleblowers who report, among other things, FCPA violations. SOX whistleblowers are protected from retaliation and may assert claims before the Department of Labor. The Dodd-Frank Act provides the means for employee whistleblowers to make reports to the SEC and potentially qualify for a "bounty" of up to one-third of a fine that is ultimately assessed the company. The Guide provides a useful reminder that such whistleblowers are "among the most powerful weapons in the law enforcement arsenal." (*See* Guide at 82.)

V. CONCLUSION

By serving an increasing need for perspective, clarity and direction in today's global business environment, the DOJ and SEC's Guide on the FCPA is a tremendous resource to organizations. It provides a substantive compilation and resource on the law's developments, includes an instructional "how to" guide for applying the law to common fact patterns, and – perhaps most importantly – sounds an alarm to organizations that the time is now to develop thoughtful, tailored and effective compliance programs. The minimum benefits of an effective compliance program are twofold: reducing the risk of FCPA prohibited conduct, and protecting the organization from those instances in which no program can stop the intentional, and perhaps criminal, misconduct of a person. For company directors, officers, executives, and senior managers, the directive to take action has probably never been as clear from law enforcement and regulators. Jackson Lewis LLP is pleased to provide this Special Report and stands ready to assist your organization with developing the appropriate action plan.

VI. THE JACKON LEWIS CORPORATE GOVERNANCE & INTERNAL INVESTIGATIONS PRACTICE GROUP

The Jackson Lewis Corporate Governance and Internal Investigations Practice Group, led by partners Rich Cino (Morristown, NJ) and David Jimenez (Hartford, CT), provides advice and counsel on the development, design, and implementation of organizational and corporate compliance programs including codes of conduct, internal reporting mechanisms, internal controls, and corporate investigations that correspond to Foreign Corrupt Practices Act and U.K. Bribery Act requirements. Should litigation ensue, we also defend employers on all types of related civil litigation including whistleblower claims arising from the Sarbanes-Oxley Act, the False Claims Act, and more recently, the Dodd-Frank Act of 2010. Additionally, we advise and defend organizations faced with high-stakes regulatory investigations and enforcement actions. In cross-border investigations and other matters, the Group works closely with our International Employment Law Group, which includes attorneys with substantial in-house experience for major global employers managing workplace and compliance issues in more than 60 countries. To the extent local labor/employment law matters arise outside the U.S., we work in tandem with our international alliance L&E Global, the only global alliance comprised of labor and employment law boutiques, as well as other top law practices throughout the world.

The firm's Corporate Governance and Internal Investigations Practice Group has a sub-team of experts with substantive experience handling FCPA matters from their inception through final conclusion. Our team includes FCPA compliance experts with prior *Fortune* 100 company experience, former federal prosecutors and white collar crime practitioners, experienced trial attorneys and international employment law experts. **The Foreign Corrupt Practices Act team is comprised of:**

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