



JONES DAY  
**WHITE PAPER**

**DOJ/SEC'S RESOURCE GUIDE TO THE U.S. FOREIGN  
CORRUPT PRACTICES ACT:  
JONES DAY CRIB SHEET**

## FCPA RESOURCE GUIDE: WHAT IS IT?

On November 14, 2012, the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) released their long-awaited guidance on enforcement of the U.S. Foreign Corrupt Practices Act (“FCPA”). At 120 pages, the *Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Guide”) is designed, in the words of the SEC Director of Enforcement, so that “[p]ublic company officers can put this on their desk ... and understand what it is we’re doing in this space, and run their companies accordingly.”

The Guide is nonbinding, informal guidance designed to summarize the FCPA’s provisions and to provide insight into DOJ and SEC enforcement practices.

### ANTI-BRIBERY PROVISIONS (PAGES 10–35)

#### Jurisdiction (pages 10–12)

- The FCPA anti-bribery provisions prohibit U.S. persons and businesses and U.S. and foreign public companies listed on U.S. exchanges or who are required to file periodic reports with the SEC from making corrupt payments to foreign officials to obtain or retain business.
- Foreign persons and businesses may be liable under the FCPA for acts in furtherance of a corrupt payment while in the territory of the United States.

#### The Business Purpose Test (pages 12–14)

- The FCPA applies to payments intended to induce or influence a foreign official to use his or her position to assist in obtaining or retaining business for or with, or directing any business to, any person.
- This provision is broadly interpreted to include (a) winning a contract; (b) influencing the procurement process; (c) circumventing the rules for importation of products; (d) gaining access to non-public bid tender information; (e) evading taxes or penalties; (f) influencing the adjudication of lawsuits or enforcement actions; (g) obtaining exceptions to regulation; and (h) avoiding contract termination.

#### “Anything of Value” (pages 14–19)

- The FCPA prohibits bribes in the form of a corrupt offer, payment, promise to pay, or authorization of the giving of anything of value to a foreign official.
- In addition to cash, the FCPA prohibits gifts, travel, entertainment, and other things of value.
- Corruptly given charitable contributions are also prohibited.
- Gifts and contributions should only be made where (a) given openly and transparently; (b) properly recorded in the giver’s books and records; (c) provided only to reflect esteem or gratitude; and (d) permitted under local law.

#### Foreign Officials (pages 19–21)

- The FCPA broadly applies to corrupt payments to “any” officer or employee of a foreign government and to those acting on the foreign government’s behalf, including both high ranking officials and low-level employees.
- Payments to foreign governments are not prohibited, but companies should take steps to ensure that no monies are used for corrupt purposes or for the personal benefit of foreign officials.
- The FCPA also prohibits payments to officers or employees of instrumentalities of foreign governments, which includes state-owned or state-controlled entities.
  - Case law interpreting “instrumentality” is only beginning to develop, but the clear trend thus far is for courts to reject arguments that Congress did not intend “instrumentality” to cover state-owned commercial entities.

#### Payments to Third Parties (pages 21–23)

- The FCPA expressly prohibits corrupt payments knowingly made through third parties or intermediaries, and companies cannot avoid liability by remaining deliberately ignorant of the actions of third parties.
- Companies can reduce FCPA risks associated with third parties by implementing effective compliance programs that include due diligence of prospective foreign agents.
- Facilitating or Expediting Payments.

### **Facilitating Payments (pages 25–26)**

- The FCPA contains a narrow exception for facilitating or expediting payments made in furtherance of routine governmental action involving nondiscretionary acts.
- If the payment's purpose is to make an official exercise discretion in favor of the company making the payment, then the facilitating payments exception cannot apply.

### **Principles of Corporate Liability for Anti-Bribery Violations (pages 27–33)**

- Parents may be liable for bribes paid by their subsidiary through traditional agency principles if the parent exercise control over the subsidiary. In addition, a parent may be liable for the actions of its subsidiary if the parent participated in the activity.
- The Guide notes that in a significant number of instances, DOJ and SEC have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context. Successor companies have been held liable in situations where the violations were egregious and sustained or where the successor directly participated in or failed to stop the misconduct.
- Successor liability does not create liability where none previously existed. An issuer's acquisition of a foreign company does not retroactively create FCPA jurisdiction for the acquiring issuer.

### **Statute of Limitations (pages 34–35)**

- In both criminal and civil FCPA enforcement actions, the statute of limitations is five years.
- In cases involving conspiracies, the government may be able to reach conduct occurring before the five-year limitations period if an act in furtherance of the conspiracy occurred within the five-year limitations period.

### **ACCOUNTING PROVISIONS—BOOKS AND RECORDS (pages 38–45)**

The FCPA's accounting provisions apply to every issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act or that is required to file annual or other

periodic reports pursuant to Section 15(d) of the Exchange Act. Individuals may also face liability for aiding and abetting or causing an issuer's violation of the accounting provisions.

### **Covered Conduct (pages 39–41)**

- Issuers are required to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. Companies must never mischaracterize transactions in their books and records.
- Issuers must also devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances regarding the reliability of financial reporting and preparation of financial statements. The FCPA does not specify a particular set of controls companies are required to implement
- An effective compliance program is a critical component of an issuer's internal controls.

### **GUIDING PRINCIPLES OF ENFORCEMENT (pages 52–65)**

DOJ's decision whether to pursue an FCPA investigation is guided by *Principles of Federal Prosecution* and *Principles of Federal Prosecution of Business Organizations* published in the U.S. Attorney's Manual. (pages 52–53)

SEC's decision is guided by the SEC's *Enforcement Manual* published by the SEC's Enforcement Division. (pages 53–54)

### **The Effect of Self-Reporting (pages 54–56)**

- DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts.
- In criminal matters, DOJ considers the voluntariness and timeliness of a company's disclosure, as well as whether a company's remedial measures were both meaningful and sufficient to illustrate the company's recognition of the seriousness of the misconduct.
- In civil cases, the SEC considers four broad measures of a company's cooperation: (a) self-policing prior to the discovery of the misconduct; (b) prompt self-reporting upon discovery of the misconduct; (c) remediation, including appropriately compensating those adversely affected; and (d) cooperation with law enforcement.

## Effective Compliance Programs (pages 56–62)

- Role of Compliance Programs in DOJ and SEC enforcement decisions (page 56)
  - DOJ and SEC both view an effective compliance program as a critical component of a company's internal controls and as vital to detecting and preventing FCPA violations.
  - Compliance programs should be tailored to each company's specific business and the risks associated with that business.
  - The adequacy of a company's compliance program is a key consideration assessed by DOJ and SEC when deciding what, if any, enforcement action to take.
  - DOJ and SEC will analyze a company's compliance program by asking (a) Is the program well designed? (b) Is it applied in good faith? and (c) Does it work?
- Hallmarks of an Effective Compliance Program (pages 57–62)
  - Commitment from senior management and a clearly articulated policy against corruption
  - Code of conduct and compliance policies
  - Oversight, autonomy and resources
  - Risk assessment
  - Training and continuing advice
  - Incentives and disciplinary measures
  - Third-party due diligence and payments
  - Confidential Reporting and Internal Investigations
  - Continuous Improvement

## FCPA PENALTIES, SANCTIONS, AND REMEDIES (pages 68–72)

For violations of the anti-bribery provisions, the FCPA provides that corporations and business entities are subject to a fine up to \$2 million. Individuals are subject to a fine of up to \$100,000 and imprisonment up to 5 years. (page 68)

For violations of the accounting provisions, the FCPA provides that corporations are subject to a fine of up to \$25 million. Individuals are subject to a fine of up to \$5 million and imprisonment up to 20 years. (page 68)

Corporations, business entities, and individuals may also be subject to a civil penalties of up to \$16,000 per violation pursued by DOJ, and civil penalties up to \$500,000 or the gain obtained as a result of the violation if pursued by SEC. 69)

## RESOLUTIONS (pages 74–79)

DOJ enforcement actions can be resolved by plea agreements; deferred prosecution agreements; non-prosecution agreements; and declinations. (pages 74–75)

SEC enforcement actions can be resolved by injunctive actions and remedies; administrative actions and remedies; deferred prosecution agreements; non-prosecution agreements; and termination letters and declinations. (pages 76–77)

While DOJ and SEC generally do not publicize declinations, the Guide provides six examples of recent declination decisions. (pages 77–79)

## WHISTLEBLOWER PROVISIONS AND PROTECTIONS (pages 82–83)

Companies need to be aware that both the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 contain provisions that incentivize and protect whistleblowers who report possible securities law violations.

## DOJ OPINION PROCEDURE (pages 86–87)

DOJ continues to encourage companies to use the DOJ opinion procedure to determine whether proposed conduct would be prosecuted by DOJ under the FCPA.

Companies should note that DOJ FCPA opinions relate *only* to the anti-bribery provisions.

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