The FCPA Landscape:
Key Issues in Foreign Corrupt Practices Act Enforcement

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Persistent bribery is a scourge to global commerce and good governance. It undermines the rule of law, facilitates other criminal activity, prevents businesses from identifying actual costs, and creates an unfair playing field for all competitors.

Yet paying foreign officials to secure contracts abroad was simply a part of doing business in the 1970s. Hundreds of U.S. companies paid bribes out of perceived necessity. Counting on its influence as the most world's powerful economic force, the United States decided to eliminate the practice and passed the Foreign Corrupt Practices Act (FCPA) of 1977. The FCPA outlawed bribery and imposed financial accounting requirements on all U.S. persons and certain foreign issuers of securities. Thirty-five years later, FCPA enforcement is contentious. Corruption is an extraordinarily fact-specific crime, so the government can't foresee and enumerate all of the activities that are prohibited. At the same time, businesses require clear lines and definitions to comply with the Act.

The U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) rarely enforced the law until about a decade ago. Since then, the government has accelerated enforcement, broadened its reading of the Act, tried new prosecutorial strategies, and even experimented with sting operations. Today, the SEC and DOJ investigate between 70 and 80 potential FCPA violations at any given time—this is more than at any other time in the Act's history.[1] Since 2009, the DOJ has entered into more than 40 corporate resolutions of FCPA[2] investigations, resulting in nine of the top 10 monetary settlements in FCPA history, including more than \$2 billion in fines recovered.[3] In 2012 alone, the government collected \$260,571,467 in financial penalties[4] from corporations violating the FCPA.[5]

Since companies are eager to resolve cases out of court in order to avoid damage to their reputation, there is little case law to guide company decision-making. In November 2012, the DOJ and SEC jointly published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*[6] ("Guide"), a handbook providing additional detail on how the FCPA is interpreted and applied by these agencies. The guidance encourages companies to establish internal training and compliance programs and to disclose questionable activities in order to demonstrate good faith.

Companies complain that the guidance is still not specific enough. They want clearer rules for what they can do in promoting their businesses, including being hospitable to potential clients. They want to know how to protect themselves from employees that may violate the FCPA. And there is more at stake for the companies than government enforcement, as companies facing criminal liability under the FCPA also face significant civil liability risks from shareholder suits based on allegations of misconduct and malfeasance by the company's officers and directors.

In sum, the FCPA landscape is a risky one for companies and their employees. More DOJ and SEC investigators assigned to FCPA investigations than ever before,[7] more prosecutions go to trial than used to, and prosecutors are focusing more of their efforts on individual violators. Foreign states and companies have joined in and are more engaged in inter-agency operations aimed at thwarting corruption.[8]

Key Issues in FCPA Enforcement

- Interpretation of "foreign officials" and "instrumentality"
- Acceptable gifts, entertainment, and travel
- Enforcement actions against individuals
- Compliance programs

This report reviews the FCPA enforcement landscape, noting key battlefields between government and business: the interpretation of "foreign officials" and "instrumentality"; the scope of acceptable gifts, entertainment and travel; and enforcement actions against individuals. The focal point of the landscape is corporate compliances programs. This report describes the hallmarks of these programs and provides examples of their role in mitigating enforcement.

The Definition "Foreign Official" & "Instrumentality"

The FCPA's anti-bribery provisions prohibit corrupt payments to "foreign officials," which include officers or employees of a department, agency, or an "instrumentality" of a foreign government. What constitutes an "instrumentality," however, is not precisely defined by enforcement agencies. The Guide provides some clarification on this point, explaining that the term "instrumentality" is "broad" and "requires a fact-specific analysis of an entity's ownership, control, status, and function."[9]

The Guide lists several non-exclusive factors for considering when evaluating the risk of FCPA violations and designing compliance programs. These factors include:

- The foreign state's:
  - Extent of ownership of the entity;
  - Degree of control over the entity; and
  - Characterization of the entity and its employees.
- The circumstances surrounding the entity's creation.
- The purpose of the entity's activities.
- The entity's privileges and obligations under the foreign state's law.
- The exclusive or controlling power vested in the entity to administer its designated functions.
- The level of financial support by the foreign state.
- The entity's provision of services to the jurisdiction's residents.
- Whether the governmental end or purpose sought is expressed in the policies of the foreign state.
- The general perception that the entity is performing official or governmental functions.[10]

The Guide adds that "no one factor is dispositive or necessarily more important than another, as a practical matter, [however] an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares."[11] Emphasizing that there is no hard rule, the Guide then cautions that "there are circumstances in which an entity *would* qualify as an instrumentality absent 50% or greater foreign government ownership."[12] The degree of a foreign government's control over a company is weighted heavily.

For example, Alcatel-Lucent S.A., a French telecommunications company, and three of its subsidiaries were convicted of paying bribes to employees of a Malaysian telecommunications company that was 43% owned by Malaysia's Ministry of Finance.[13] Despite the minority ownership of the company, the Ministry held the status of a special shareholder, had veto power over all major expenditures, controlled important operational decisions, and the most senior company officials were political appointees.[14] Hence, the company was held to be an instrumentality of the Malaysian government because the government had substantial control over the company.[15]

The definition of "instrumentality" is increasingly litigated by people accused of bribing foreign officials, since only officials working for "instrumentalities" are the subject of FCPA prosecutions. The accused need only demonstrate that the official's employer is not an instrumentality to escape prosecution. The Lindsey Manufacturing case is demonstrative.[16] The DOJ indicted defendants based on bribery payments made to officials at the Mexican Comisión Federal de Electricidad ("CFE"). The court answered the threshold question of whether CFE was an instrumentality by identifying a non-exhaustive list of characteristics that mirror those in the Guide above, including:

- The entity provides a service to the citizens—indeed, in many cases to all the inhabitants—of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.

- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (i.e., governmental) functions.[17]

The court concluded that CFE has all these characteristics: it was created by statute as a "decentralized public entity"; its governing Board was comprised of various high-ranking governmental officials; it described itself as a government agency; and it performed a function—the supply of electricity—that the Mexican nation has described as a quintessential government function (even noting that the Mexican Constitution even explicitly recognizes the supply of electric power as "exclusively a function of the general nation").[18] All factors considered, the court held that CFE was an instrumentality of the Mexican Government within the meaning of the FCPA.

Like other areas of the law where determinations are made based on multiple factors without clear rules for weighing them against each other, the concept of "instrumentality" will likely remain a source of contention in FCPA enforcement.

Acceptable Gifts, Entertainment, & Travel

The FCPA prohibits the corrupt "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" a foreign official for the purpose of obtaining or retaining business.[19] Giving gifts, entertainment, and travel expenses for customers, potential customers, investors, conference guests, and third-party representatives is a common practice in many industries. The Guide itself acknowledges that "a small gift or token of esteem or gratitude is often an appropriate way for business people to display respect for each other."[20] This is acceptable because items of nominal value are unlikely to influence a government official. Gifts must be:

(1) Given openly and transparently.
(2) Properly recorded in the giver's books and records.
(3) Provided only to reflect esteem or gratitude.
(4) Permitted under local law.[21]

The FCPA Guide emphasizes that it is the payor's *intent—not* a threshold monetary value—that is the critical factor in determining whether a gift, entertainment, or travel expense for a foreign official violates the FCPA.[22] To be corrupt, there must be an intent or desire to wrongfully influence the recipient.[23] The purpose of the intent requirement is to "protects companies that engage in the ordinary and legitimate promotion of their business while targeting conduct that seeks to improperly induce officials into misusing their positions."[24] Cups of coffee, taxi fare, or company promotional items of nominal value would almost never violate the FCPA. Fur coats and trips for a government official and his wife to Europe for non-business purposes are not appropriate gifts.[25] The DOJ publishes opinions to help businesses select gifts, entertainment, or travel expenditures for foreign officials.

In FCPA Opinion 11-01, the DOJ considered allowing a U.S. adoption service provider to pay for a two-day trip to the U.S. by one official from each of two foreign agencies to learn more about its services. [26] The DOJ relied on the following facts:

- Two officials would be selected by their agencies, without the involvement of the hosting company.
- The company would pay for economy class air fare, domestic lodging, local transport, and meals.
- The company would host only the officials, not their family members.
- The company would pay all costs directly to the vendors and would not provide cash directly to the officials.

- Any souvenirs would bear the company's logo and would be of nominal value.
- The company would not host or fund any side trips or entertainment.

The DOJ opined that paying for such a trip would not violate the FCPA, as the expenses contemplated are reasonable under the circumstances and directly relate to "the promotion, demonstration, or explanation of [the Requestor's] products or services" as required in 15 U.S.C. § 78dd-2(c)(2)(A).

In FCPA Opinion Release 07-01,[27] the Department issued an opinion regarding a company's plan to cover the expenses for a trip by a six-person delegation from an Asian government. The purpose of the visit was to familiarize the delegates with the nature and extent of the company's operations and to establish the business's credibility. The four-day visit was limited to domestic economy class travel to one U.S. operations site only. The company planned to pay for the domestic lodging, local transport, and meals for the six officials. The foreign government would pay the costs of the international airfare. The company averred that:

- It did not conduct operations in the foreign country or with the foreign government;
- It did not select the delegates who will participate in the visit;
- The delegates had no direct authority over decisions relating to potential contracts or licenses necessary for operating in the foreign country;
- It intends to pay all costs directly to the providers; no funds will be paid directly to the foreign government or the delegates;
- It will not pay any expenses for spouses, family, or other guests of the officials;
- Any souvenirs that the requestor may provide to the delegates would reflect the requestor's name and/or logo and would be of nominal value;
- Apart from meals and receptions connected to meetings, speakers, or events the requestor is planning for the officials, it will not fund, organize, or host any entertainment or leisure activities for the officials, nor will it provide the officials with any stipend or spending money; and

- All costs and expenses incurred by the requestor in connection with the visit will be properly and accurately recorded in the requestor's books and records.

Based upon all of the facts and circumstances the Department indicated it would not investigate or prosecute the company for any violations of the gifts, entertainment, and travel prohibitions of the FCPA.

In September 2007, the DOJ released FCPA Opinion Release 07-02,[28] issuing an opinion in response to a private insurance company in the U.S., declining to take enforcement action if the company proceeded with sponsoring domestic expenses for a trip by six officials from an Asian government for an educational program at the company's U.S. headquarters. The company planned to sponsor junior to mid-level government officials to attend an annual internship program for foreign insurance regulators sponsored by the National Association of Insurance Commissioners. The purpose of the visit was to familiarize the officials with the operation of a U.S. insurance company. The company did not select the officials who would participate, nor host families of the delegates. The costs were paid directly to providers. Any souvenirs would be modest and bear the company's logo, and the company had no non-routine business pending before the agency that employed the officials.

U.S. telecommunications firm UTStarcom, Inc.'s activities clearly fall on the other end of the spectrum.[29] The company arranged and paid for foreign officials travel to Hawaii, Las Vegas, and New York City, including cash allowances of between $800 and $3,000 per person. The trips were recorded as training expenses at UTStarcom facilities, despite UTStarcom having no facilities in these areas. In the end, UTStarcom admitted guilt for its role in corruptly spending nearly $7 million on lavish gifts and 225 all-expenses paid executive "training" trips for existing and prospective foreign government customers under the pretense of conducting legitimate training exercises in order to obtain and retain lucrative telecommunications contracts.

Law makers, and those who strive to comply with their mandates, struggle with intent requirements that cannot be proved directly but must be inferred from surrounding facts and circumstance. Couple an intent requirement with the natural variation in gift giving, hospitality, and business promotion and this area of enforcement must remain highly fact-bound and contentious.

Enforcement Actions Often Target Individuals

The FCPA is not just for businesses, and a growing number of prosecutions involve individuals. A few examples illustrate the breadth of the activities that fall under the statute.

The FCPA applies to individuals who bribe on behalf of their companies and those that bribe for personal gain. Nexus Technologies Inc. (Nexus), was a Philadelphia-based export company that identified U.S. vendors for contracts opened for bid by the Vietnamese government and Vietnamese companies. In a classic FCPA prosecution, three former executives and a partner admitted to conspiring to bribe officials of the Vietnamese government in exchange for contracts to supply equipment and technology to Vietnamese government agencies from 1999 to 2008.[30]

In a case of bribery for personal gain, former Congressman William Jefferson of Louisiana was sentenced to 13 years in prison for violations of the Foreign Corrupt Practice Act and ordered to forfeit more than $470,000.[31] Jefferson accepted bribes exchange for promoting business ventures that included telecommunications deals in Nigeria, Ghana, and elsewhere; oil concessions in Equatorial Guinea; satellite transmission contracts in Botswana, Equatorial Guinea, and the Republic of Congo; and development of different plants and facilities in Nigeria.

Prosecutions go awry in the FCPA landscape, too. After years of investigation and two mistrials, the DOJ was forced to dismiss most of the indictments against dozens of U.S. employees arrested at the SHOT Show. The SHOT Show is the world's largest shooting, hunting, and outdoor tradeshow, held each year in Las Vegas, NV. In 2010, the DOJ arrested 22 American employees throughout various military and police equipment industry companies in a large-scale undercover sting operation at the show. In the indictment, the DOJ alleged that these employees concealed roughly $4.4 million in payments to foreign officials and their agents between 2001 to 2006,[32] including payments for sales to the United Nations to supply equipment for its missions in Iraq.[33] One of the government's primary witnesses had credibility problems and the government failed to obtain guilty verdicts, but the case did result in several pleas and settlement agreement fees.[34] Despite the marginal results for prosecutors, the case should serve as a powerful deterrent for individuals considering bribery when interacting with foreign officials.

The FCPA applies to those who pay bribes, not those who receive them, [35] but the U.S. government is working to deter payees as well. Film producers Gerald and Patricia Green were charged with paying $1.8 million in bribes to the Tourism Governor of Thailand for contracts that awarded them rights to produce the Bangkok Film Festival.[36] The Greens were convicted pursuant to the FCPA in May 2011 and given light sentences (six months jail time with three years supervised release).[37] But in this case, the Government also pursued the Thai officials whom the Greens paid, a mother-daughter pair Juthamas and Jittisopa Siriwan.[38] In order to ensure criminal liability for the Siriwans, the Government charged them with allegations of laundering and conspiring to launder the proceeds of the FCPA bribery.[39]

Compliance Programs

It is clear that the best way for companies to minimize their potential liability under the FCPA is by implementing compliance programs that deter and detect FCPA violations. Businesses that violate the FCPA but that have compliance programs in place are more likely to be given reduced sentence amounts and non-prosecution agreements than those that do not have compliance programs.[40] Yet, the business community argues that the best way to demonstrate compliance is less than clear.

A company implementing new or updating an existing compliance program must consider the extent of business interaction with foreign officials, the corruption index for that country, the existing corporate culture, and current compliance policies. Even the DOJ and SEC stress that appropriate compliance measures will vary widely across individual businesses, so there is no "one-size-fits-all" compliance program model. They employ a pragmatic approach to evaluating compliance programs, asking three basic questions:

(1) Is the company's compliance program well designed?
(2) Is it being applied in good faith?
(3) Does it work?[41]

"As today's agreement reflects, we are committed to holding corporations accountable for bribing foreign officials while, at the same time, giving meaningful credit to companies that self-report and cooperate with our investigations."

DOJ Press Release, April 2011

The Guide describes the hallmarks of effective compliance programs:[42]

- **Commitment from Senior Management and a clearly articulated policy against corruption.** The board of directors and senior executives set the tone for the rest of the company. The DOJ and SEC consider whether senior management clearly articulated the company standards in unambiguous terms, adhered to them scrupulously, and passed them on throughout the company.
- **Code of Conduct and Compliance Procedures**. The most effective codes are clear, concise, and accessible to all employees and to those conducting business on the company's behalf. Moreover, the code should be in the local language. The DOJ and SEC consider whether the company has taken steps to ensure that the code remains

current and effective, including whether the company has reviewed and updated its code. The code should outline responsibilities for compliance within the company including detailed proper internal controls, auditing practices, documentation policies, and disciplinary procedures. No matter what, the code should apply to all levels of employees.

- **Oversight, Autonomy, and Resources.** The oversight and implementation of the compliance program should be assigned to one or more senior executives in the company. These individuals should have appropriate authority, adequate autonomy, and sufficient resources to ensure the company's compliance.
- **Risk Assessment.** A company should consider its specific business. A $1 billion contract in a high-risk country warrants greater scrutiny than a routine gift. The degree of appropriate due diligence depends on the country and industry sector, the business opportunity, potential business partners, the level of involvement with governments, the amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs.
- **Training and Continuing Advice.** Policies must be communicated throughout the organization to be effective, which can be done through periodic training and certification.
- **Incentives and Disciplinary Measures.** The compliance program should apply to everyone within the organization—no one should be beyond its reach. The DOJ and SEC will consider whether the company has appropriate and clear disciplinary procedures, whether those procedures are applied readily and promptly, and whether they are proportionate to the violation. DOJ and SEC encourage companies to have incentives to compliance such as promotions or rewards for improving and developing the compliance program or compliance leadership.

- **Third-Party Due Diligence**. Typically, payments to foreign officials are concealed with the use of third parties. DOJ and SEC consider the risk-based due diligence on the company's part in hiring third party agents and consultants. Three guiding principles apply:
  - Companies should understand the qualifications and associations of third-party partners, including its business reputation and relationship with foreign officials.
  - Companies should have an understanding of the business rationale for including the third party in the transaction.
  - Companies should undertake on-going monitoring of third-party relationships.
  - Additionally, third parties should be provided with information about the compliance program and commitment to ethical and lawful business practices. Where appropriate, the third party should assure (through certificates or otherwise) the company of reciprocal commitments.

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> DOJ Press Release, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA, April 25, 2012

- **Confidential Reporting and Internal Investigation.** Employees should be able to report suspected or actual misconduct without the fear of retaliation. Once an allegation is made, the company should have an effective process for investigating the allegation and documenting the company's response.
- **Continuous Improvement, Periodic Testing, and Review.** A compliance program should constantly evolve. As the compliance program is followed in practice, it can be improved as weaknesses are uncovered.

- **Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration.** Pre-acquisition due diligence demonstrates to the DOJ and SEC a company's commitment to compliance, and such diligence is taken into account when evaluating potential enforcement action. Additionally, once acquired, the acquiring company should incorporate the acquired company into all of its internal controls and its compliance program. Companies should also consider training new employees.

Morgan Stanley, Johnson & Johnson, and Noble Corporation are all examples of companies that have successfully limited their criminal liability and the fees associated with FCPA violations by virtue of robust compliance programs and extensive cooperation with enforcement agencies.

While the DOJ charged a former Morgan Stanley managing director with violating the FCPA, the company itself avoided prosecution by virtue of its robust anti-corruption compliance program**.** This appears to be the first case in which the federal government has publicly credited a company's compliance program in support of a decision not to prosecute, and stands as a prime example of the benefits of implementing effective anti-corruption compliance programs.

Garth Peterson, an American citizen and former Morgan Stanley managing director living in Singapore, pleaded guilty in April 2012 to one-count criminal information charging him with conspiring to evade internal accounting controls that Morgan Stanley was required to maintain under the FCPA.[43] According to court documents, Peterson conspired with others to circumvent Morgan Stanley's internal controls in order to transfer a multi-million dollar property interest in a Shanghai building to himself and a Chinese public official with whom he had a personal relationship. The transaction itself was in clear violation of the FCPA. It was only through Peterson's misrepresentation of the real estate sale that he was able to avoid Morgan Stanley's good faith efforts at complying with the FCPA. In total, Peterson's fraudulent representations resulted in financial gain for him and his co-conspirators in excess of $2.5 million.

Given that Peterson was a managing partner at Morgan Stanley, the DOJ and SEC might have imputed his behavior to the company and charged Morgan Stanley with corporate violations of the FCPA. However, both the DOJ and SEC declined to charge Morgan Stanley, in large part because of the strength of their existing FCPA anti-corruption compliance program. The DOJ press release stated:

> After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation. [44]

The SEC criminal complaint reveals the details of Morgan Stanley's anti-corruption compliance program and how it directly related to Peterson's activities,[45] specifying the following:

- Morgan Stanley trained Peterson on anti-corruption policies and the FCPA at least seven times between 2002 and 2008. In addition to other live and web-based training, Peterson participated in a teleconference training conducted by Morgan Stanley's Global Head of Litigation and Global Head of Morgan Stanley's Anti-Corruption Group in June 2006.
- Morgan Stanley distributed to Peterson written training materials specifically addressing the FCPA, which Peterson maintained in his office.
- A Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state operated entity, were government officials for purposes of the FCPA.
- Peterson received from Morgan Stanley at least 35 FCPA-compliance reminders. These reminders included FCPA-specific distributions; circulations and reminders of Morgan Stanley's Code of Conduct, which included policies that directly addressed the FCPA; various reminders concerning Morgan Stanley's policies on gift-giving and entertainment; the circulation of Morgan Stanley's Global Anti-Bribery Policy; guidance on the engagement of consultants; and policies addressing specific high-risk events, including the Beijing Olympics.

- Morgan Stanley required Peterson on multiple occasions to certify his compliance with the FCPA. These written certifications were maintained in Peterson's permanent employment record.
- Morgan Stanley required each of its employees, including Peterson, annually to certify adherence to Morgan Stanley's Code of Conduct, which included a portion specifically addressing corruption risks and activities that would violate the FCPA.
- Morgan Stanley required its employees, including Peterson, annually to disclose their outside business interests.
- Morgan Stanley had policies to conduct due diligence on its foreign business partners, conducted due diligence on the Chinese official and Yongye before initially conducting business with them, and generally imposed an approval process for payments made in the course of its real estate investments. Both were meant to ensure, among other things, that transactions were conducted in accordance with management's authorization and to prevent improper payments, including the transfer of things of value to officials of foreign governments.

The voluntary disclosure, cooperation, and pre-existing compliance program helped shield the company against criminal and civil charges where, as in this case, a rogue agent's corrupt actions violate the FCPA in spite of the company's best efforts to stop such behavior.

In April, 2011, Johnson & Johnson (J & J) violated the FCPA when its subsidiaries made improper payments to government officials in Greece, Poland, and Romania.[46] The payments were intended to induce the purchase of medical devices and pharmaceuticals manufactured by the subsidiaries.[47] J & J was also responsible for kickbacks paid to the former government of Iraq under the United Nations Oil for Food Program to secure contracts to provide humanitarian supplies.[48]

J & J agreed to pay $21.4 million in criminal penalties as part of a deferred prosecution agreement with the DOJ, but these are reduced penalties. [49] The company cooperated extensively with the government and helped to identify improper practices in the life sciences industry.[50] As a result of J & J's remediation, improvement of its compliance program, and enhanced compliance undertakings, J & J reached more favorable terms in its agreement with prosecutors. For example, J & J was not required to retain the requisite corporate monitor. It could self-report to the DOJ on implementation of its remediation and enhanced compliance every six months throughout the duration of the agreement.[51]

J & J's penalties were reduced because the company cooperated extensively with the government and helped to identify improper practices in the life sciences industry

Voluntary disclosure—close kin to self-reporting—is a powerful mitigating factor considered by the DOJ and SEC in determining culpability and the related penalties.[52] In November 2012, Swiss company Noble Corporation entered into a non-prosecution agreement with the DOJ which limited their criminal liability for violations of the FCPA and ensured they would not be prosecuted for these infractions. In exchange for the DOJ's commitment not to prosecute, Noble Corporation agreed to pay a $2.6 million criminal fine, and committed to providing annual written reports updating the Department of Justice on its progress in maintaining and enhancing their compliance programs.[53]

The DOJ elected not to prosecute Noble Corporation based on a number of factors, including:

1. Noble's discovery of the violations through its own internal investigation;
2. Noble's timely, voluntary, and complete disclosure;
3. Noble's extensive, thorough, and real-time cooperation with the DOJ and SEC into the criminal conduct in question;

4. Noble's voluntary investigation of the Company's business operations throughout the world;
5. The existence of Noble's pre-existing compliance program and steps taken by Noble's Audit Committee to detect and prevent improper conduct from occurring;
6. Noble's remedial efforts to enhance its compliance program and oversight that have already been undertaken;
7. Noble's agreement to continue to implement enhanced compliance measures; and
8. Noble's agreement to provide annual, written reports to the Department on its progress and experience in maintaining and, as appropriate, enhancing its compliance policies and procedures.

Corruption is an extraordinarily fact-specific crime. The FCPA legal landscape covers a numerous industries and is rife with factor-based analysis and facts-and-circumstances inquiries. It is no wonder that FCPA experts argue that counseling in this area is based primarily on accumulated wisdom and common sense, and that it is more of an art than science.

[1] *See* Thomas McSorley, *Foreign Corrupt Practices Act,* 48 Am. Crim. L. Rev. 749, 779 (Spring 2011)
[2] CRIM. DIV., U.S. DEPT. OF JUSTICE & ENFORCEMENT DIV., U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at: www.sec.gov/spotlight/fcpa/fcp**a-resource-guide**.pdf (Last viewed Feb. 12, 2013) [hereinafter "Guide"] at 22.
[3] Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act, November 16, 2012, available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html (last viewed December 28, 2012).
[4] Including: fines, DPA/NPA penalties, disgorgement, and pre-judgment interest.
[5] Shearman & Sterling LLP, FCPA Digest of Cases and Review Releases Relating to Bribes to Foreign Officials under the Foreign Corrupt Practices Act of 1977
(January 2, 2013) *available at www.shearman.com/.../**FCPA**-Digest-Jan**2013**_010213.pdf* (Last viewed February 3, 2013).
[6] CRIM. DIV., U.S. DEPT. OF JUSTICE & ENFORCEMENT DIV., U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at: www.sec.gov/spotlight/fcpa/fcp**a-resource-guide**.pdf (Last viewed Feb. 12, 2013) [hereinafter "Guide"].
[7] Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act, November 16, 2012, available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html (last viewed December 28, 2012).
[8] Thomas McSorley, *Foreign Corrupt Practices Act,* 48 Am. Crim. L. Rev. 749, 779-80 (Spring 2011); *see also* Assistant Attorney General Lanny A. Breuer Speaks at the American Conference Institute's 28th National Conference on the Foreign Corrupt Practices Act, November 16, 2012, available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html (last viewed December 28, 2012).
[9] Guide, *supra* note 1, at 20.
[10] *Id.*
[11] *Id.* at 21.
[12] *Id.*
[13] Criminal Information, *United States v. Alcatel-Lucent France, S.A., et al.,* No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), ECF No. 1.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *United States v. Aguilar*, 783 F.Supp.2d 1108, 1115 (C.D. Cali. 2011).
[18] *United States v. Aguilar*, 783 F.Supp.2d 1108, 1115 (C.D. Cali. 2011).
[19] 15 U.S.C. § 78dd-1 (a)(1)
[20] Guide, *supra* note 2, at 15.
[21] Guide, *supra* note 2, at 15.
[22] Guide, *supra* note 2, at 14.
[23] Guide, *supra* note 2, at 14.
[24] Guide, *supra* note 2, at 15.
[25] Guide, *supra* note 2, at 15.
[26] Available here: http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf
[27] Available here: http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf
[28] Available here: http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf
[29] Available here: http://www.justice.gov/criminal/pr/documents/12-31-09UTSI-%20NPA-Agreement.pdf
[30] Available here: http://www.justice.gov/opa/pr/2010/March/10-crm-270.html
[31] Available here: http://www.justice.gov/opa/pr/2009/November/09-crm-1231.html

[32] Indictment, *United States v. Gonclaves*, No. CR09-355 (D.D.C. Nov. 16, 2009). The *SHOT Show* defendants were broken into four groups to make the trials more manageable. Richard L. Cassin, *Feds Tidy Up Shot-Show Case*, FCPA BLOG (Apr. 20, 2010, 8:28 AM), http://www.fcpablog.com/blog/2010/4/20/feds-tidy-up-shot-show-case.html.
[33] *Id.*
[34] The Government has since withdrawn its indictments of the remaining *SHOT Show* defendants. Christopher M. Matthews, *Justice Dept. Drops FCPA Case Involving Security Equipment Suppliers*, WALL STREET J. BLOG (Feb. 21, 2012, 11:56 AM), http://blogs.wsj.com/law/2012/02/21/justice-dept-drops-fcpa-sting-case/.
[35] *Id.*
[36] Richard L. Cassin, *Feds Drop Green Appeal; Siriwan Facing Prosecution at Home*, FCPA BLOG (Aug. 24, 2011, 3:38 PM), http://www.fcpablog.com/blog/2011/8/24/feds-drop-green-appeal-siriwan-facing-prosecution-at-home.html.
[37] *Id.*
[38] Shearman & Sterling LLP, Recent Trends and Patterns in FCPA Enforcement 13 (2012), *available at* http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/6ec0766a-25aa-41ec-8731-041a672267a6/FCPA-Digest-Trends-and-Patterns-Jan2012.pdf (last viewed February 3, 2013).
[39] *Id.*
[40] McSorley, *Supra* note 1, at 779.
[41] *See* USAM section 9-28.800.B, excerpted from Guide, *supra* note 2, at 56.
[42] Guide, *supra* note 2, at 57-63.
[43] http://www.justice.gov/opa/pr/2012/April/12-crm-534.html ; See also *United States v. Peterson*, Cr. No. 12-224 (JBW) (E.D.N.Y. April 25, 2012); The SEC also charged Peterson with violating the FCPA and securities laws for investment advisors. *SEC v. Peterson*, No. 12-2033 (JBW) (E.D.N.Y. April 25, 2012). Peterson settled with the SEC by surrendering his $3.4 million interest in Shanghai real estate, agreeing to disgorge $250,000, and accepting a permanent bar from the securities industry.
[44] Press release: http://www.justice.gov/opa/pr/2012/April/12-crm-534.html
[45] The complaint is available here: www.**sec**.gov/litigation/**complaint**s/2012/comp-pr2012-78.pdf
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See* DOJ Press Release: http://www.justice.gov/opa/pr/2011/April/11-crm-446.html
[50] *Id.*
[51] *Id.*
[52] McSorley, *Supra* note 2, at 779.
[53] http://www.justice.gov/opa/documents/noble-npa.pdf

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Created in 2003 by the Syracuse University College of Law (and later joined by The Maxwell School of Citizenship and Public Affairs), the Institute for National Security and Counterterrorism (INSCT) is an interdisciplinary community of scholars and practitioners dynamically exploring and engaging national and international security and counterterrorism challenges.

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