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Greta L.H. Lichtenbaum & Elizabeth France[1]

I. INTRODUCTION

On November 14, 2012, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") released *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* ("the Guide").[2] After many months in the making, these agencies' joint efforts to release such guidance have produced a compendium of past precedents, enforcement principles, and explanatory hypotheticals. Of the many significant issues covered in the Guide, this article addresses the positions the Guide takes regarding the critical issue of the FCPA's extraterritorial reach, focusing in particular on how the Guide interprets the scope of the statutes' jurisdiction over foreign persons as well as U.S. parent company liability for acts of foreign subsidiaries. The government's positions on these two issues signal a willingness to stretch the extraterritorial reach of the FCPA.

On many fronts, the Guide reiterates guidance previously reflected in FCPA non-prosecution and deferred prosecution agreements ("NPAs" and "DPAs") and voluntary civil settlements. By their natures, however, such agreements are case-specific, and the publicly available information related to them never tells the whole story. Accordingly, over the years, FCPA experts have crafted their own guidance for FCPA compliance by examining the facts and legal theories included in criminal and civil settlement agreements, looking for patterns in those settlement agreements, and using those patterns to predict how the DOJ and the SEC may respond to other companies and situations. The Guide's greatest value may well be that it confirms that many of the DOJ's and the SEC's positions in specific cases are considered to be generally applicable.

The Guide's observations regarding compliance programs may provide comfort to companies operating internationally and, as such, are priority reading for those on the front lines of company compliance. The DOJ and the SEC identify several measures that companies can take

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[2] U.S. DEP'T OF JUSTICE & SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

to avoid violations or—if violations occur—to encourage settlements and mitigate penalties. For example, the Guide observes that having a robust compliance program favors resolution of enforcement cases by a negotiated settlement, as well as mitigation of related penalties. It also notes that an appropriate compliance system will vary by company and that policies and procedures should be tailored to the actual risks of FCPA violations that an individual company faces. Taken together, these portions of the Guide should reassure companies that these agencies' approach to the Act is not rigid or zero-tolerance but involves a practical assessment of the circumstances surrounding potential violations.

Along with some comfort, the Guide provides warning signs for companies operating internationally. The DOJ and the SEC have shown that they are not reluctant to pursue actions against foreign companies and have achieved major settlements with such foreign companies—indeed, nearly all of the largest FCPA settlements have been with foreign-based issuers. The Guide is consistent with this posture, giving companies cause for continued vigilance over all of their foreign operations, as it signals that the government continues to take a broad view of the scope of its enforcement powers, particularly in the areas of jurisdiction over foreign persons and parent liability for actions of a subsidiary.

It is important to recognize at the outset that the Guide's positions on these two issues are not—for the most part—drawn from court precedent, and when they are, the precedent may not be specific to the FCPA. Most FCPA cases are resolved through some form of settlement, and resolution through settlement does not require the DOJ and the SEC to clarify their precise jurisdictional theories or to defend those theories in court. Some defendants, however, have recently chosen to proceed to court rather than accept a settlement, and a few of these pending court cases include challenges to the government's jurisdictional theories.

Despite these courtroom challenges, however, the Guide does not suggest that the DOJ and the SEC have abandoned broad interpretations of what constitutes acts "while in the territory of the United States" and parent liability for actions of subsidiaries, both of which bring conduct with sometimes tenuous connections to the United States into the ambit of FCPA enforcement.

II. JURISDICTION OVER FOREIGN INDIVIDUALS AND ENTITIES

The FCPA has always applied to issuers, domestic concerns, and their officers, directors, employees, agents, or stockholders when they use the U.S. mails or wires or other instrumentalities of interstate commerce in furtherance of payments to a foreign official. Under the "nationality jurisdiction" theory, these parties are also liable for acts taken outside of the United States, if those acts are in furtherance of a corrupt act, regardless of any nexus with U.S. commerce.

In 1998, amendments to the FCPA expanded its reach to include foreign individuals and companies who corruptly make use of an instrumentality of interstate commerce (including the mails) in furtherance of payment (or offer of payment) *while in the territory of the United States*.[3] The 1998 amendments accordingly opened new avenues of enforcement to the DOJ, allowing it

[3] 15 U.S.C. 78dd-3(a).

to reach non-U.S. persons for FCPA violations so long as they or their agents committed at least one act "while in the territory of the United States."

Since 1998, the government has floated broad interpretations of what constitutes an act while in the territory of the United States. In 2001, the DOJ released the *Lay-Person's Guide to the FCPA Statute*[4] in which it held that jurisdiction would exist if a person indirectly or directly *caused* an act to occur in the United States in furtherance of a corrupt payment made elsewhere, even though the statutory language apparently only prohibits a person from using the mails or another instrumentality of interstate commerce or doing another act in furtherance of a corrupt payment *while that person is in the territory of the United States*.

Accordingly, the government has long taken the position that FCPA jurisdiction over foreign persons does not require their physical presence in the United States but instead extends not only to acts within the United States but also to certain acts undertaken abroad that *cause* an act to occur within the United States.

In several enforcement actions, the government has relied on a theory that physical presence in the United States is not required provided that a foreign act has direct effects that occur within the United States. For example, the DOJ and SEC brought a joint civil complaint against KPMG Siddharta Siddharta & Harsono, a foreign accounting firm, alleging violations of the FCPA's anti-bribery provisions, even though the company had not engaged in any acts while physically in the United States and all communications with persons inside the United States were made by an employee of the firm's client.[5]

In another case, the DOJ charged SSI International Far East, Ltd.—a foreign subsidiary of an issuer—with violations of FCPA's anti-bribery provisions based on allegations that the subsidiary had acted as the issuer's agent and had "transmitted requests to the United States for approval of funds" for corrupt payments.[6] The DOJ stated that these were acts "within the territorial jurisdiction of the United States" in that the subsidiary "caused payments to be made from" bank accounts in the United States.[7]

In an action against DaimlerChrysler Automotive Russia SAO—a foreign person under the FCPA—the DOJ charged both a conspiracy count and a separate FCPA count.[8] The FCPA count was based on the company's wire transfers from Germany to the United States and payments to shell companies within the United States.[9] The criminal information did not allege that the company or any individuals associated with it undertook any of these acts while physically in the United States.

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[4] U.S. DEPT OF JUSTICE & SEC. & EXCHANGE COMM'N, LAY-PERSON'S GUIDE TO THE FCPA STATUTE, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf.

[5] Complaint, United States v. KMPG Siddharta Siddharta & Harsano, (S.D. Tex. 2001).

[6] Information, United States v. SSI International Far East, Ltd., No. CR 06-398, ¶ 5 (D. Or. Oct. 10, 2006), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/ssi-intl/10-10-06ssi-information.pdf.

[7] *Id.* ¶ 14.

[8] Information, United States v. DaimlerChrysler Automotive Russia, SAO, No. 1:10-cr-00064-RJL (D.D.C. Mar. 22, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerrussia-info.pdf.

[9] *Id.* at ¶ 23.

As is often the case, these theories have been advanced primarily in cases resolved by negotiated settlements and have received limited or no judicial review. Recently, however, some individual defendants have opted to proceed to court instead of accepting settlements, presenting new opportunities for the courts to consider whether the FCPA requires a foreign person to have been physically present in the United States.

In the so-called "Africa Sting Cases," a judge in the U.S. District Court for the District of Columbia considered and rejected a broad reading of jurisdiction over foreign persons.[10] There, two of the defendant's acts were at issue. First, he attended a meeting in the United States to discuss an allegedly corrupt deal—a clear jurisdictional hook under the FCPA. Second, he sent a purchase agreement in connection with that deal from the United Kingdom to the United States. The government charged him with separate substantive counts for each of these two acts. The government argued that as long as the defendant had engaged in at least one act in the United States (attending the meeting), then it could charge multiple substantive violations for other acts outside the United States. The defense responded that the statute requires that each act charged must occur while the defendant is in the territory of the United States and stressed that the defendant was in the United Kingdom when he sent the package. The judge dismissed the substantive count based on the DHL package but did so without a written opinion explaining his reasoning.

Other challenges involving jurisdiction over foreign nationals in SEC FCPA cases are currently pending in court. These challenges do not focus on the meaning of "while within the territory of the United States" under the FCPA but instead allege that enforcement against foreign persons with tenuous connections to the United States violates constitutional requirements for personal jurisdiction. Indeed, former executives of Magyar Telekom (which itself settled with the SEC) are challenging the SEC's theory that emails transmitted to and stored on U.S. servers are adequate to confer jurisdiction over foreign persons. A former Siemens executive is also challenging the SEC's purported jurisdiction based on phone calls with someone in the United States, even though the defendant himself never entered the United States during the time alleged in the complaint.[11]

If these challenges are successful, they may make enforcement against foreign persons more difficult where the conduct at issue falls within the scope of the FCPA but the defendant did not engage in sufficiently substantial U.S.-oriented conduct to satisfy constitutional standards.

Although the Africa sting cases have suggested some potential limits on jurisdictional theories and pending cases may impose additional ones, the Guide suggests that neither the DOJ nor the SEC has abandoned these expansive interpretations. For example, the Guide provides only one hypothetical related to acts "while in the territory of the United States," and that example involves a foreign person who attended a meeting in the United States to advance a

[10] *See Charges Dismissed Against 16 Accused of Bribing Foreign Official in Sting*, WASH. POST (Feb. 21, 2012), http://www.washingtonpost.com/local/crime/charges-dismissed-against-16-accused-of-bribing-foreign-official-in-sting/2012/02/21/gIQAOhU5RR_story.html.

[11] *See* Mem. of Law In Supp. of Def. Steffen's Mot. to Dismiss the Compl., SEC v. Sharef, No. 11 Civ. 9073 (S.D.N.Y. Oct. 12, 2012).

bribery scheme. The basis for jurisdiction in that scenario is uncontroversial and provides little insight into what limiting principles cabin interpretation of "while in the territory of the United States."

The Guide does not address hypotheticals involving acts with more tenuous connections to the United States. Although the Guide does not restate the DOJ's earlier *Layperson's Guide* assertion that jurisdiction over foreign persons may arise merely if such a person were to "cause an act in furtherance of a corrupt payment," it also does not acknowledge the Africa Sting court's ruling that mailing a package into the United States was insufficient, suggesting that the government has not abandoned the position it took in that case. The Guide's silence on whether such acts could also confer jurisdiction over foreign persons for substantive violations contrasts with the government's positions in individual settlements described above.

Those who hope that courts will ultimately rule definitively that physical presence by a foreign person in the United States is required for direct liability should be mindful that the government still has several tools to enforce the FCPA against foreign persons. For example, the Guide reiterates that foreign nationals and companies may be liable under the FCPA under aiding and abetting, conspiracy, or agency theories even if such foreign person did not take any action within the United States.[12] *Pinkerton* liability also allows the government to hold members of a conspiracy liable for any foreseeable overt act of any member in furtherance of that conspiracy, meaning that a foreign person could be held liable for acts of foreign co-conspirator while in the United States or for acts of a U.S. co-conspirator, even if the foreign person never entered the United States.[13]

III. PARENT LIABILITY FOR CONDUCT OF SUBSIDIARIES

Foreign subsidiaries are not directly subject to the FCPA for conduct that occurs outside of the United States or when they act as agents for an issuer or domestic concern. The Guide, however, states that parent companies can be held liable for subsidiaries' anti-bribery violations not only when a subsidiary acted as an agent because its parent actually directed or participated in its illegal conduct, but also under "traditional agency principles." It further explains that if a subsidiary is an agent of the parent, then the parent is liable for actions of the subsidiary's employees if those actions were undertaken within the scope of their employment and with intent to benefit the company.

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[12] In a case against Siemens Argentina, for example, the government alleged that the foreign subsidiary and several other foreign persons had engaged in a conspiracy to falsify the books and records of Siemens AG, an issuer. Information, United States v. Siemens S.A. (Argentina), No. 08-368-RJL (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-12-08siemensargen-info.pdf. Although an act while within the United States was not required for these charges, the DOJ specifically alleged two meetings in the United States and that wire transfers between foreign banks had cleared through U.S. correspondent accounts. DOJ may have included these facts only as part of a general narrative of the violation, but it may also have included them to test the waters on the correspondent bank theory. If so, the government may assert in future cases that foreign persons who clear wire transfers through correspondent banks in the United States are directly liable for substantive FCPA violations.

[13] Pinkerton v. United States, 328 U.S. 640 (1946).

Parent liability is not a new concept in FCPA enforcement, but previous cases typically imposed liability only where the parent approved or participated in the subsidiary's acts. The Guide's reference to broader agency principles suggests additional hooks for parent liability.

For example, the Guide explains that the DOJ and the SEC will impute a subsidiary's bribery activity to the parent under an agency theory if the parent exercises sufficient "control" over the subsidiary. Ownership alone does not determine control. According to the Guide, the DOJ and the SEC "evaluate the parent's control—including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction—when evaluating whether a subsidiary is an agent of the parent."[14] This analysis is not limited to the "formal relationship between the parent and subsidiary" but also includes the "practical realities of how the parent and subsidiary actually interact."[15]

The Guide describes a case in which a subsidiary's president reported directly to the parent's CEO, the parent's SEC filings routinely identified the subsidiary's president as a member of its senior management, and the parent's legal department approved the use of the third-party agent through whom bribes were channeled (despite an inappropriate agency agreement and lack of documented due diligence). Finally, an official of the parent approved one of the subsidiary's payments. The Guide notes that, under these facts, the parent's level of knowledge and control over the subsidiary's actions subjected it to liability under the FCPA.

The Guide does not, however, elaborate on which of these facts or combinations of facts were necessary for that conclusion. For example, the Guide does not say whether parent liability would exist if the corporate structure had been the same, but no official or employee of the parent had approved the corrupt payments. Likewise, the Guide does not address whether the overlap in the management structures of the entities alone would have been sufficient to show control even if the parent's legal department had required documented due diligence and a valid agency agreement, but had nonetheless failed to prevent such payments.[16]

The answers to these questions are critical. If mere ownership or control is sufficient to hold parents liable on an agency theory, then the Guide signals a significant expansion of the FCPA's scope. Moreover, without further guidance, it is not obvious that companies who own less than a controlling share or hold less than a majority of board seats are immune to such liability. Instead, the Guide suggests that they may be liable if they have sufficient knowledge or direction in the subsidiary's actions—generally or in the context of the alleged violation—but does not clarify what constitutes such direction or knowledge.

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[14] U.S. DEP'T OF JUSTICE & SEC, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 27 (2012).

[15] *Id.*

[16] In SEC v. Tyco Int'l Ltd., No. 1:12-cv-01538, Compl. at ¶ 25 (D.D.C. Sept. 24, 2012), the SEC asserted that a parent had exerted sufficient control by utilizing "dual roles," including overlap in high level officers and board membership. The Guide does not address this case. Interestingly, the DOJ did not proceed on a broad agency theory, instead asserting that the parent had exhibited willful blindness to known problems with the subsidiary's internal controls and books and records. Tyco Int'l Ltd., DOJ Non-Prosecution Agreement (Sept. 20, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/tyco-intl/2012-09-20-tyco-intl-npa-sof.pdf.

This ambiguity creates a potentially greater risk for public companies, to which the FCPA's books and records and internal controls provisions apply. Issuers are responsible for ensuring that subsidiaries and affiliates under its control comply with the FCPA's accounting requirements. The Guide does not say whether its correlation of "control" with "agency" means that the internal controls that public companies are required to implement in this context are *per se* evidence of "control" for purposes of deeming the subsidiary to be an agent of the parent. If it does, issuers would essentially be liable for subsidiary's anti-bribery violations to the same extent they would be liable for their books and records violations.

Although privately held companies do not face the potential challenges arising from the books and records and internal controls provisions, they may still face a similar dilemma. The Guide advocates adoption of comprehensive, risk-based anti-bribery compliance programs designed to detect and deter FCPA violations. Consistent with this guidance, companies with extensive networks of foreign subsidiaries and affiliates often adopt global compliance policies. A parent's ability to direct subsidiaries or affiliates to adopt such measures may itself be an indication that the parent is exercising sufficient control over the subsidiary to trigger liability under agency principles. In that case, asserting that control to reduce the risk of violations would clearly be prudent.

But it is also possible that the very act of setting up policies, approval and disciplinary structures, and other measures could provide the government with additional bases for finding that a subsidiary is an agent and holding the parent liable for violations that occur despite such controls. It is possible that by taking on responsibility for approving the subsidiary's acts, a parent draws a double-edged sword: reducing the risk of a violation but increasing that risk that it would be seen as a liable "controlling" party if a violation occurred.

IV. CONCLUSION

The Guide is a valuable resource for companies seeking to understand and comply with the FCPA. It provides clear descriptions of the law's key provisions and hypotheticals to illustrate their application but also recommends steps that companies can take to increase their odds of preventing violations and to mitigate their liability if violations occur. Perhaps most importantly, the Guide reaffirms that the DOJ and the SEC take a practical approach to FCPA enforcement, declining to pursue minor violations and considering the relative strength of a company's preventive measures in light of its foreseeable risks.

Yet the Guide signals that the government's view of U.S. jurisdiction under the FCPA is quite broad, potentially extending to foreign individuals or entities who merely take phone calls from the United States or to parent companies with no knowledge of their subsidiaries' actions. The government has begun using these theories in enforcement actions, but because such matters typically settle, they remain untested in court. Although court challenges to these jurisdictional theories are now on the rise (and one judge has rejected one such theory), the Guide reflects no move to moderate these positions.