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Biting the Hands That Feed: Corporate Charity and the U.S. Foreign Corrupt Practices Act

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BITING THE HANDS THAT FEED: CORPORATE CHARITY AND THE U.S. FOREIGN CORRUPT PRACTICES ACT

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"Doing what's right isn't the problem. It is knowing what's right." Lyndon B. Johnson[1]

I. INTRODUCTION: CORPORATE PHILANTHROPY AND THE FOREIGN CORRUPT PRACTICES ACT

U.S. and multinational companies operating in developing countries recognize the importance of contributing to the local communities in which they operate. The importance of donations related to corporate social responsibility ("CSR") to local

1. *Today in History: Aug. 27*, ASSOCIATED PRESS, Aug. 27, 2012, http://www.timesdispatch.com/news/today-in-history-aug/article_32314529-b544-5330-a8ae-a177e501d42c.html.

communities is growing, and today companies and shareholders alike recognize CSR contributions as important and valuable corporate goals.[2] In addition, local communities around the world where these companies operate and profit expect these companies to give back to the local communities in some way.[3]

The obligation to contribute to the local communities in which they operate covers companies working in a wide variety of industries around the developing world. Extractive industries (oil, gas, and mining) face unique pressures due to the perceived environmental impact of their operations and the political realities involved in the extraction and export of valuable natural resources,[4] but other industries face similar pressures to contribute. Pharmaceutical and medical companies are encouraged to contribute to local community health by donating products or services, and even companies operating in the retail supply chain are encouraged to contribute to, for example, occupational health and safety initiatives in manufacturing countries.[5] The collapse of a garment factory in Bangladesh in 2013 and the call thereafter for clothing retailers to contribute more funds to ensure the safety of manufacturing facilities provides a recent example of how failure to respond to local requests to give back to the community can result in damaging and unwanted

2. *See* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 57 (2004) (identifying fifty-five companies promoting CSR).

3. *See, e.g.*, *id.* at 56 (identifying the Stride Rite Company, which is praised for its corporate citizenship, opting to move its manufacturing jobs outside of low-income domestic areas to foreign countries with lower employment costs).

4. *See, e.g.*, Jedrzej George Frynas, *Corporate Social Responsibility in the Oil and Gas Sector*, 2 J. WORLD ENERGY L. & BUS. 178, 181 (2009), *available at* http://jwelb.oxfordjournals.org/content/2/3/178.full.pdf+html?sid=601a8c0a-d53e-4b04-9508-efc38f709931 (describing the Exxon-Valdez oil tanker accident, anti-Shell protests in Nigeria, and alleged BP human rights abuses in Colombia). Political forces can exploit the environmental impact of extractive operations on local populations, heightening the importance of those operations' tangible contributions to local populations. *See* David B. Spence, *Corporate Social Responsibility in the Oil and Gas Industry: The Importance of Reputational Risk*, 86 CHI.-KENT L. REV. 59, 69–70 (2011).

5. *See* Howard Husock, *The Bangladesh Disaster and Corporate Social Responsibility*, FORBES (May 2, 2013), http://www.forbes.com/sites/howardhusock/2013/05/02/the-bangladesh-fire-and-corporate-social-responsibility/ (noting that Walmart gave $1.8 million for the training of Bangladesh plant managers in safety techniques following a factory fire).

media attention.[6] Pressures to donate to local communities are further enhanced in some countries by existing xenophobic tensions between foreign companies and local governments.[7]

Actual examples of risky donation scenarios companies have recently faced include the following:

- the requirement that a company construct an orphanage in one West African country and use a specific contractor or supplier selected by a local official to do so;
- a request that a company donate several tons of concrete and trees for the paving and landscaping of a municipal square in Mexico prior to receiving an operational license;
- a request by local tribal officials in sub-Saharan Africa that a company contribute to a community fund managed by those tribal officials; and
- the requirement that a company donate to a local development fund in Asia in exchange for tangible business support.[8]

Contributions to local governments and communities are not prohibited by the U.S. Foreign Corrupt Practices Act ("FCPA").[9] Nevertheless, some such contributions can fall within the FCPA's prohibitions, and companies face practical challenges to ensure such contributions do not lead to FCPA liability. Identifying connections between recipient charities or communities and local officials can be difficult; additionally, demands that companies donate to specific projects or development funds further exacerbate uncertainty and risk. While in principle the FCPA only applies to payments made to

6. *Id.*

7. *See* Yuriy Humber, *Chalco Targeted as Mongolia Seeks to Limit State Deals*, BLOOMBERG (May 17, 2012), http://www.bloomberg.com/news/2012-05-16/chalco-targeted-as-mongolia-seeks-to-limit-state-deals.html; Devon Maylie, *World News: Mining Debate Rattles South Africa – Unions Renew Push for Nationalization as Companies Plan Cuts to Cope with Slowing Demand*, WALL ST. J., May 16, 2013, at A8.

8. Confidential client scenarios.

9. *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, U.S. DEP'T OF JUST. & SECURITIES & EXCHANGE COMM'N 16 (Nov. 14, 2013), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter *FCPA Resource Guide*]. The FCPA technically applies only to payments made to officials, not to governments. *Id.* at 20.

officials and does not apply to payments made to governments, FCPA enforcement trends show that regulators take a broad view of what constitutes a payment to a foreign official, and even intangible, non-financial benefits can be viewed as actionable under the statute.[10] Under the current enforcement regime, a fine line separates legitimate CSR contributions from "corrupt" payments, where regulators can view donations as a way to "please" local officials with potential ability to influence the company's business.[11]

Despite the uncertainty, there are practical ways for companies to manage the risk of CSR contribution regimes.[12] Nevertheless, lack of clarity on when CSR contributions can lead to FCPA liability remains, despite the publication of the U.S. Department of Justice ("DOJ") FCPA Guidance (the "Guidance" or the "DOJ's 2012 Guidance") in November 2012.[13] This article addresses the practical challenges facing companies operating in developing countries today in the corporate-philanthropy arena. Part II provides an overview of the DOJ's 2012 Guidance, DOJ opinion releases, and FCPA enforcement actions as they relate to CSR contributions and donations. Part III discusses the practical challenges companies face given the lack of clarity in the current FCPA legal and enforcement regime, and Part IV maps out practical ways companies can mitigate risk in their CSR contribution programs. Finally, Part V proposes alterations to the FCPA enforcement regime that would provide greater clarity to corporations while still maintaining robust prohibitions on corrupt payments to foreign officials.

II. DONATIONS AND THE FCPA: THE LAW

The FCPA's anti-bribery provisions[14] prohibit a corrupt offer,

10. *See* Final Judgment, SEC v. Schering-Plough, No. 04-0945 (D.D.C. 2004); *see also* Complaint, SEC v. Schering-Plough, No. 04-0945, 1 (D.D.C. 2004) [hereinafter Complaint, Schering-Plough] (prosecuting payments made to a bona fide charity founded by a foreign official).

11. Complaint, Schering-Plough, *supra* note 10, at 4.

12. *See infra* Part IV.

13. *FCPA Resource Guide*, *supra* note 9, Foreword.

14. The FCPA is comprised of two sets of provisions: (1) the anti-bribery provisions and (2) the accounting provisions. *See* The Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 (2012). The accounting provisions set broad requirements for companies to keep and maintain accurate books and records and put in place appropriate internal controls to ensure their books are accurate. *See*

promise, or payment of anything of value to a foreign (non-U.S.) official, directly or indirectly, made for the purpose of obtaining or retaining business.[15] U.S. regulators have taken a broad jurisdictional view of the anti-bribery provision of the FCPA; the law applies to U.S. persons or entities, U.S.-listed companies, agents of U.S. companies, and aiders and abettors of U.S. companies.[16] The FCPA provision further applies to non-U.S. companies that take an "act in furtherance" of a violation in the U.S.[17]

The FCPA itself does not specifically address the question of CSR contributions or donations. However, the DOJ's 2012 Guidance does touch upon the topic, as do several DOJ Opinion Releases from the past eight years. In addition, two FCPA settlements (including one from 2013) have included CSR contributions or donations as conduct charged under the FCPA donations to charities.

A. DOJ'S 2012 GUIDANCE

The DOJ's Guidance on the FCPA, published in November 2012, briefly addresses donations as well as whether CSR contributions could fall within the statute's ambit.[18] There, the DOJ notes that "[t]he FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens."[19] The DOJ further emphasizes that "[t]he FCPA prohibits payments to foreign *officials*, not to foreign *governments*."[20] However, the Guidance cautions that, despite the fact that the FCPA does not technically apply to payments made to governments or governmental entities,

FCPA Resource Guide, *supra* note 9, at 38–39 (focusing primarily on the anti-bribery provision, which is the provision that regulates the giving of improper payments to foreign officials).

15. *See* 15 U.S.C. § 78dd-1; Reagan R. Demas, *Moment of Truth: Development in Sub-Saharan Africa and Critical Altercations Needed in Application of the Foreign Corrupt Practices Act and Other Anti-Corruption Initiatives*, 26 AM. U. INT'L L. REV. 315, 330 (2011) [hereinafter Demas, *Moment of Truth*] (giving a more detailed overview of the specific provisions of the FCPA); *Foreign Corrupt Practices Act: An Overview*, U.S. DEP'T OF JUST., http://www.justice.gov/criminal/fraud/fcpa/ (last visited Nov. 18, 2013) [hereinafter *FCPA Overview*].

16. *See* 15 U.S.C. § 78dd-3(a) (defining jurisdictional view of anti-bribery provision in Foreign Corrupt Practices Act).

17. *FCPA Resource Guide*, *supra* note 9, at 4.

18. *Id.* at 19.

19. *Id.* at 16.

20. *Id.* at 20.

"companies contemplating contributions or donations to foreign governments should take steps to ensure that no monies are used for corrupt purposes, such as the personal benefit of individual foreign officials."[21]

The Guidance fails to provide additional detail on whether such a personal benefit in the context of donations must be tangible, or if other non-financial benefits could qualify. For example, could the donation and construction of a school in a key voting district, requested by a politician running for reelection, qualify as something of "value" given for a corrupt purpose? In this hypothetical, the politician would receive no direct financial or in-kind benefit from the school construction, but any politician would tell you that votes in a key swing district are certainly something of "value."[22] Something of "value" normally refers to tangible financial or in-kind benefits.[23] However, U.S. courts have broadly construed the concept of a "thing of value" when analyzing other criminal statutes to include intangible things.[24]

After discussing several cases and opinion releases that have touched upon charitable giving and the FCPA,[25] the Guidance concludes that "[l]egitimate charitable giving does not violate the FCPA."[26] Unfortunately, the Guidance does not provide significant guidance or detail as to when a contribution is or is not "legitimate." Instead, it concludes that avoiding FCPA liability in this context "merely requires that charitable giving not be used as a vehicle to conceal payments made to corruptly influence foreign officials."[27]

In short, the DOJ's 2012 Guidance alerts companies operating in

21. *Id.*

22. Whether this hypothetical would be viewed by U.S. regulators as a potential violation of the FCPA would likely hinge on whether the official had the authority and ability to benefit the business of the contributing company, and whether the official actually provided or promised a business advantage to the company in exchange for the school contribution.

23. Justin Serafini, *Foreign Corrupt Practices Act*, 41 AM. CRIM. L. REV. 721, 731 n.60 (2004).

24. *See* John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAWYER 135, 152 n.143 (2005) (citing United States v. Sheker, 618 F.2d 607, 609 (9th Cir. 1980)).

25. *See infra* Parts II.B–C.

26. *FCPA Resource Guide*, *supra* note 9, at 19.

27. *Id.*

developing jurisdictions that, while donations themselves are not prohibited by the FCPA and payments to governmental entities (as opposed to officials) are not covered by the FCPA, such payments can be diverted and end up accruing to the personal benefit of an official. Such diversion could lead to FCPA liability for the contributing company. Companies should therefore take tangible steps to look beyond the recipient of donations and CSR contributions and confirm that such contributions do not end up lining the pockets of individual officials. Fortunately, some of these steps have been specifically delineated in DOJ FCPA Opinion Releases.

B. DOJ OPINION RELEASES[28]

While the DOJ's 2012 Guidance does not address donations or charitable contributions in great detail, approximately one out of seven of the DOJ FCPA Opinion Releases since 1993 have related to the subject of CSR contributions.[29] Opinions released in 1995, 1997, 2006, 2009, and 2010 all involved companies seeking a commitment from the DOJ that proposed donations or charitable contributions would not be actionable under the FCPA.

1. 1995 Opinion Release

In 1995, the DOJ approved a proposed $10 million contribution for construction of a medical facility in South Asia.[30] The donation was to be made "through a charitable organization incorporated in

28. DOJ Opinion Releases are mechanisms by which companies or individuals can disclose proposed transactions or payments to the Department and request that the DOJ confirm in advance that such payments will not be viewed as a violation of the FCPA. The Opinions are narrowly tailored, apply only to the specific facts presented by the requesting company, and are typically conservative in their approach, requiring companies to take significant protective measures in exchange for the DOJ's commitment that such transactions will be immune from later prosecution. *See Foreign Corrupt Practices Act Opinion Procedure*, U.S. DEP'T OF JUST. (July 1, 1999), http://www.justice.gov/criminal/fraud/fcpa/docs/frgncrpt.pdf (last visited Nov. 25, 2013) [hereinafter *FCPA Opinion Procedure*].

29. Approximately thirty-four FCPA Opinion Releases, five of which related to charitable contributions. *Fraud Section Home Index to Releases*, U.S. DEP'T OF JUST., http://www.justice.gov/criminal/fraud/fcpa/index/ (last visited Nov. 25, 2013).

30. Foreign Corrupt Practices Act Review, No. 95-01 (Dep't of Justice Jan. 11, 1995) [hereinafter FCPA 1995 Review].

the United States" and thereafter be passed on to a public company in the South Asian nation.[31] The DOJ confirmed that it would not "take any enforcement action with respect to the prospective donation" based on three key factors. First, the company planned to require all officers of the recipient U.S. charity and the South Asian public company to sign certifications confirming the funds would not be used in violation of the FCPA.[32] Second, the company represented that no individuals affiliated with the charity and South Asian recipient company would be "affiliated with the foreign government."[33] Finally, the company represented that it would "require audited financial reports from the U.S. charitable organization, accurately detailing the disposition of the donated funds."[34]

While the 1995 DOJ Opinion confirms that "implementing safeguards and conducting due diligence on a donee organization are good ways of minimizing the risk of FCPA violations,"[35] extrapolation of the 1995 Opinion to other scenarios is limited because the donation in that case was made via a U.S. charity, not commonly an option for companies making CSR contributions in the field.[36] Moreover, depending on the amount of the contribution, obtaining audited financial reports detailing the disposition of donated funds can be impractical for companies donating to charitable causes in developing nations.

2. 1997 Opinion Release

In a 1997 release, the DOJ stated it would not take enforcement action against a planned $100,000 donation by a U.S.-based utility company.[37] The donation, which was to be made towards the construction of a school in an Asian country, would not cover the full

31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. Keith M. Korenchuk et al., *Guarding Against Anti-Corruption Problems in Overseas Philanthropic Activities*, TAXATION OF EXEMPTS 19, 22 (2011), *available at* http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_TaxationOfExempts_November-December2011.pdf.
36. *See* FCPA 1995 Review, supra note 30, at 1.
37. *See* Foreign Corrupt Practices Act Review, No. 97-02 (Dep't of Justice Nov. 5, 1997) [hereinafter FCPA 1997 Review].

cost of the school and was to be made "directly to the government entity responsible for the construction and supply of the proposed elementary school."[38] The company confirmed that it would require a written agreement with the government certifying that the funds would be used only for the school construction and setting other conditions to ensure the school would be built, staffed, and appropriately utilized.[39] Nevertheless, the DOJ made clear that its approval of the donation was based on the fact that the contribution was to be made "directly to a government entity—and not to any foreign government official," and therefore "the provisions of the FCPA do not appear to apply to this prospective transaction."[40] The basis for this 1997 Opinion is not fully consistent with the DOJ's 2012 Guidance, which makes clear that contributions to a government entity could lead to liability under the FCPA where insufficient diligence and monitoring is conducted by the contributing party, and some or all of the contributed funds are passed on to an official.[41]

3. 2006 Opinion Release

In 2006, a U.S. corporation (headquartered in Switzerland) asked the DOJ to bestow its blessing on the corporation's proposed plan to donate to a fund to reward officials who vigorously enforced anti-counterfeiting laws in an African country.[42] The proposed $25,000 donation would be distributed by the African state government as financial incentives for customs officials who catch and turn away counterfeit products, many of which were counterfeits of products made or distributed by the company requesting the DOJ opinion.[43]

In deciding that it would not take enforcement action relating to

38. *Id.*
39. *Id.*
40. *Id.*
41. *Compare id.* (arguing that the FCPA did not apply because the donation went to a government entity, not an official), *with FCPA Resource Guide*, *supra* note 9, at 19 (expanding possible FCPA liability if funds can be misused, regardless of the recipient of the donation, and highlighting the number of due diligence and monitoring measures required to lessen the likelihood of an FCPA violation).
42. *See* Foreign Corrupt Practices Act Review, No. 06-01, 1 (Dep't of Justice Oct. 16, 2006).
43. *Id.*

the proposed donation, the DOJ noted "a number of procedural safeguards" the requestor planned to implement, including (but not limited to):

- payment of the funds by electronic transfer;
- written confirmation from the African state that the funds were received in a legitimate account;
- the requesting company would have no part in choosing agents who receive a financial award from the fund, but would ensure that the funds were used only for the designated purpose and only received by agents who were eligible according to predetermined criteria;
- the requesting company would "monitor the efficacy of the incentive program" and discuss periodic refinements with the African state;
- the African state would retain records for five years relating to distributed funds and would permit the requesting company full access to those records.[44]

In addition, the DOJ noted that the requesting company agreed that all items deemed counterfeit by customs agents in the country would be examined by the company to confirm they were, in fact, counterfeit.[45] While the opinion did not label this safeguard as a necessary requirement for DOJ approval, it would seem impractical in most company donation scenarios for the donating party to monitor every activity performed by a receiving charity to ensure funds were appropriately spent.

Given the unique nature of the proposed donation outlined in the 2006 request,[46] applying the terms of its approval to other donations or charitable gifts provides limited assistance to companies seeking clear guidance regarding CSR contributions under the FCPA.

4. 2009 Opinion Release

In 2009, a U.S. company requested and received DOJ approval for

44. *Id.* at 1–2.
45. *Id.* at 2.
46. *Id.* at 1–2.

the donation of medical devices valued at $1.9 million to the government of a foreign country.[47] The foreign government asked the requesting company to donate sample devices to government health centers because the government was unfamiliar with the specific devices and would need to be familiar with any devices that the government might purchase in the future for subsidized sales to patients.[48] The DOJ cited a number of controls the U.S. company had in place to ensure the donated devices would be provided to eligible candidates via a predetermined, subsidized medical device program.[49] The DOJ also noted that there was "no reason to believe that [a foreign official] will personally benefit from the donation."[50]

In the end, the DOJ sanctioned the proposed donation because it would "fall outside the scope of the FCPA in that the donated products [would] be provided to the foreign government, as opposed to individual government officials."[51] The DOJ's reasoning here was more consistent with its 2012 Guidance than was its 1997 opinion, in that the DOJ noted there were assurances that the devices would ultimately be given to "patient recipients selected in accordance with specific guidelines."[52] The 2009 opinion does not, however, advise what assurances would have been sufficient in this case, or the minimum controls that would be expected for typical corporate donations where the organized, predetermined guidelines that existed in the medical device program are absent.

5. 2010 Opinion Release

In its most recent opinion release on the subject in 2010, the DOJ sanctioned the proposed $1.42 million grant from a U.S.-based nonprofit to a recipient local microfinance institution in a Eurasian country.[53] Local authorities compelled the grant as part of the nonprofit's attempt to reorganize its local subsidiary into a local

47. Foreign Corrupt Practices Act Review, No. 09-01, 2 (Dep't of Justice Aug. 3, 2009) [hereinafter FCPA 2009 Review].
48. *Id.* at 1.
49. *Id.* at 2.
50. *Id.* at 3.
51. *Id.*
52. *Id.*
53. Foreign Corrupt Practices Act Review, No. 10-02, 2, 7 (Dep't of Justice July 16, 2010) [hereinafter FCPA 2010 Review].

financial institution, and the recipient was to be chosen from a "short list of institutions" provided by local regulators.[54] In addition, a foreign official sat on the Board of the local entity that was ultimately selected as recipient of the funds.[55]

Despite the fact that regulators were compelling the local grants and proposing the shortlisted recipient candidates, and despite the fact that a foreign official was involved in the entity finally selected for the grant, the DOJ endorsed the proposal.[56] It did so citing a number of significant (and onerous) controls that the requesting nonprofit had put in place to ensure the granted funds were appropriately received and utilized; these included prohibition on compensation of local board members, institution of an anti-corruption compliance program by the recipient, the staggered payment of grant funds, and retention of an independent monitor to audit the use of donated funds on an ongoing basis.[57] The DOJ primarily approved of the proposal because of the fact that the nonprofit performed thorough due diligence on the shortlisted recipients and put controls in place on the donated funds.[58]

The 2010 DOJ opinion cited several of its prior opinions relating to charitable contributions,[59] and suggested that those combined opinions proposed reasonable and perhaps necessary due diligence requirements in the charitable contribution context.[60] The cited steps included the following:

- FCPA certification by the recipient;
- due diligence on the recipient;
- audited financial statements provided by the recipient;
- a written agreement restricting the use of funds;

54. *Id.* at 2.
55. *Id.* at 3.
56. *Id.* at 2–3, 7.
57. *Id.* at 3–4, 6.
58. *Id.* at 5 ("Based on the due diligence that has been done and with the benefit of the controls that will be put into place, it appears unlikely that the payment will result in the corrupt giving of anything of value to such officials.").
59. *Id.* at 6.
60. *Id.* at 7.

- due diligence on the recipient's bank account;
- confirmation that activities already funded were actually completed before additional funds were donated; and
- ongoing monitoring of the program.[61]

Thus, the DOJ's opinion provided clear and concise steps for donating companies to consider. However, some of these steps would be impractical in the typical CSR donation scenario for companies operating in developing jurisdictions. For example, obtaining audited financial statements from a Burmese community development fund or an Equatorial Guinean local orphanage is not likely, and rigorous monitoring of a recipient's use of donated funds is a time-intensive practice to which a smaller donating company may be unable to commit. In such a scenario the company may rationally choose not to donate at all rather than donate and assume the responsibility of ongoing monitoring of the recipient's activities.

C. CASES

Only two FCPA settlements have involved charitable contributions, and both related to donations given to the same charity in Poland.[62] In 2004, Schering-Plough was charged with violating the FCPA by the U.S. Securities and Exchange Commission ("SEC") and paid a $500,000 penalty for contributions it made to a Polish castle restoration charity.[63] The SEC alleged that the $76,000 in payments were made to influence the purchase of Schering-Plough's products in Poland, as the head of the charity was a Polish official

61. *Id.* at 6.

62. *See* Litigation Release No. 18740, SEC v. Schering-Plough Corp., No. 04-0945, June 9, 2004, *available at* http://www.sec.gov/litigation/litreleases/lr18740.htm [hereinafter Litigation Release, Schering-Plough]; Litigation Release No. 22576, SEC v. Eli Lilly and Co., No. 1:12-cv-02045, Dec. 20, 2012, *available at* http://www.sec.gov/litigation/litreleases/2012/lr22576.htm. While only two FCPA settlements related to charitable contributions have been publicly settled, many FCPA-related matters and cases are not made public, either because they were never reported to U.S. regulators or because they were reported and regulators declined to take action based on the reported facts. Therefore there may have been—indeed, likely have been—other cases relating to charitable contributions that have not been publicly disclosed through public filings or via a public settlement with the DOJ or SEC.

63. SEC Litigation Release, Schering-Plough, *supra* note 62, at 1.

who had the ability to approve the purchase of Schering-Plough's product. Although the recipient was a bona fide charity and there was no allegation that the contributions were personally taken by the official, U.S. regulators viewed the contributions as payments made in exchange for "assistance from the government official."[64] Also significant to regulators was the fact that the donations consumed most of Schering-Plough's donations budget "and were structured to allow the [Schering-Plough] subsidiary to exceed its authorized limits."[65] The SEC charged Schering-Plough with violations of the internal controls and books and records provisions of the FCPA.[66]

In December 2012, the SEC charged Eli Lilly for, inter alia, $39,000 in contributions made during the same time period to the same Polish castle charity.[67] The SEC allegations were virtually identical to those against Schering-Plough, noting that Eli Lilly made the donations in exchange for the same foreign official's assistance in encouraging the purchase of Eli Lilly products.[68]

The Schering-Plough and Eli Lilly cases were significant because the recipient charity was bona fide, so standard due diligence alone would not have cautioned against the donations. In addition, there was no allegation that a foreign official personally received any donated funds, which suggests that a foreign official need not personally receive any portion of a payment where the payment to a bona fide recipient is made "corruptly" for a "business purpose." While it seems clear the donations were made by Schering-Plough and Eli Lilly as *quid pro quo* in exchange for the purchase of their products,[69] the only benefit apparently received by the official in this case was the joy of knowing his charity was benefiting and the

64. *FCPA Resource Guide*, *supra* note 9, at 17.

65. *Id.*

66. SEC Litigation Release, Schering-Plough, *supra* note 62, at 1.

67. *See* Complaint at 1, SEC v. Eli Lilly, No. 12-2045 (D.D.C. 2012) [hereinafter Complaint, Eli Lilly].

68. *Id.* at 1–2 (explaining that the government official was in charge of healthcare in the region and that Eli Lily was hoping that the government would reimburse people who purchased its products).

69. *See id.* at 5 (describing how the government official concerned allocated funds to publish healthcare institutions and then billed Eli Lilly for the transaction); Complaint, Schering-Plough, *supra* note 10, at 4 (showing that the Manager of the local Eli Lilly viewed payments to the charity not as donations, "but as 'dues'").

pleasure of knowing more Polish historic sites were being restored.[70] As the SEC noted in its Eli Lilly complaint, Eli Lilly donated to the charity knowing that it "was a project to which [the foreign official] was devoted and lent much effort."[71]

III.PRACTICAL APPLICATION: WHEN IS A DONATION IMPROPER?

In light of the DOJ's 2012 Guidance and relevant Opinion Releases, as well as the SEC's prosecution of charity cases against Schering-Plough and Eli Lilly, companies creating CSR contribution programs in developing countries want clear guidance on how those programs should be set up to avoid potential federal criminal or civil liability under the FCPA, as well as guidance on what makes a donation improper under the FCPA. Although U.S. regulator guidance has not been entirely consistent on the subject, we can draw several clear conclusions from the guidance, while pointing out areas of uncertainty.

A. DONATIONS TO UNKNOWN CHARITIES OR DONATIONS MADE IN THE FACE OF "RED FLAGS"

It seems evident that donations to unknown charities, donations made where no due diligence is performed on the recipient, and donations made in spite of the presence of red flags regarding connections with foreign officials, risk violating the FCPA in the current enforcement environment due to the prosecutorial interpretation of the act's "knowledge" element. Payments made

70. The SEC charged Schering-Plough with violations of the accounting provisions of the FCPA and not the anti-bribery provisions. Complaint, Schering-Plough, *supra* note 10, at 5 (alleging that Schering-Plough violated Sections 13(b)(2)(A) and (B) of the Securities Exchange Act of 1934). These accounting provisions require U.S. listed companies to accurately record all transactions in their books and records, and the SEC alleged that Schering-Plough improperly recorded the Polish castle charity contributions in its books. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd (amended 1998). Unlike the anti-bribery provisions, prosecution under the accounting provisions does not require an allegation that a payment was made to a foreign official. Nevertheless, the Schering-Plough case is of interest because it illustrates how U.S. regulators can use the FCPA to prosecute charitable contributions that might not otherwise meet the requirements of a more traditional anti-bribery violation.

71. Complaint, Eli Lilly, *supra* note 67, at 4.

with "willful blindness" can result in liability where little or no due diligence is performed or the payer had reason to believe the funds might be routed to a foreign official personally.[72] Additionally, where a financial or in-kind benefit accrues to the foreign official (or the official's relative), directly or indirectly, the payment is clearly covered by the FCPA anti-bribery provision.[73] For example, where funds are given to a bona fide charity but diverted to the foreign official, the payment could implicate the FCPA in the absence of appropriate due diligence and controls.

B. DONATIONS TO BONA FIDE CHARITIES

Less clear is the scenario where no financial or in-kind benefit is given to a foreign official. Under what circumstances can a donation to a bona fide charity that does not accrue to a foreign official trigger liability under the FCPA? A plain reading of the anti-bribery provisions of the FCPA suggests that such payments do not implicate the FCPA.[74] The FCPA requires that something "of value" be paid to a foreign official, which "would seem to require that the foreign official actually personally receive something," and therefore payments to "legitimate charities, where no portion of the payments ends up in the hands of the foreign official, directly or indirectly, should not meet this requirement."[75] Another commentator noted that "[l]egitimate donations to recognized charitable organizations appear to be exempt from the prohibitions of the FCPA, although they may nevertheless secure the contract or business as effectively as do corrupt payments."[76]

72. *See FCPA Resource Guide*, *supra* note 9, at 22 (instructing readers that in enacting the FCPA, Congress meant to charge those who "purposefully avoid actual knowledge" of such behavior).

73. *See* Foreign Corrupt Practices Act of 1977 § (a)(1)(A)(i), 15 U.S.C. § 78dd-3, (amended 1998).

74. Robert J. Meyer, *Charitable Donations Under the Foreign Corrupt Practices Act*, *in* FOREIGN CORRUPT PRACTICES ACT REPORTER 13.2 (2013) ("[A] potential FCPA violation arises only where the alleged unlawful payment or other thing of value is given to, or at least inures to the personal financial benefit of, the foreign official himself.").

75. Barry A. Sanders, *The FCPA and Charitable Donations*, *in* THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 18:14 (Ved P. Nanda & Ralph B. Lake eds., 2013).

76. David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT'L & COMP. L. 97, 110 (1997).

Nevertheless, FCPA settlements and the DOJ's 2012 Guidance suggest that a donation to a bona fide foreign charity, even if made in part to build good will for the donating company, could result in FCPA liability in the following scenarios.

1. When There Is a "Special Connection" Between a Foreign Official and the Recipient Entity[77]

This connection could include, for example, a foreign official sitting on the Board of the charity. Presumably this same official with the charity connection would have to be in a position to provide a "business advantage" to the donating company to meet the elements of an FCPA anti-bribery violation.

2. When a Foreign Official Has a "Special Interest" in the Recipient Entity[78]

The SEC noted in the Schering-Plough case that it was relevant that the foreign official had a special interest in the success of the Polish castle restoration charity as founder of the charity. [79] This line of reasoning clings precariously to a slippery slope: what if a company donation increases a foreign official's popularity in a particular district in advance of a national election (for example, the company agrees to fund the construction of a new hospital and the local official makes the new hospital the foundation of his election campaign)? Is this a "special interest" or "something of value" sufficient to result in FCPA liability? In the current enforcement environment, the answer is likely that it could be if the donating company made the contribution expecting to receive a business advantage from the official with an interest in the charity.

77. Sanders, *supra* note 75, § 18:14 (specifying that such a relationship is questionable if the foreign official founded the charity, the donation is made "in honor of" the government official, or the gift is to be donated through the government official).

78. Korenchuk, *supra* note 35, at 21 ("Issues can arise, for example, if the charitable entity is connected to a government official (e.g., through a family member) or is of particular personal interest to the official.").

79. Complaint, Schering-Plough, *supra* note 10, at 4 (listing the official's status as the manager of the charity as something that should have alerted Schering-Plough to the possible violation of the FCPA through its donations).

3. When the Donation Is "Made at the Request of" a Foreign Official[80]

While one can see how an official requesting a particular donation would raise an FCPA "red flag," it is not clear why the fact that an official requested the donation would, in and of itself, implicate the FCPA. Presumably such a request is more likely to result in a finding of "something of value" being received by the requesting official, but such an additional finding would be required before FCPA liability might attach.

4. When the Donation Is Made "in Honor of" a Foreign Official[81]

At least one commentator thinks that donations made "in honor of" officials should not only fall outside the FCPA, but in fact be encouraged, as a way to satisfy "corrupt officials' need for personal inducements while still avoiding direct bribery."[82] Without discussing the merits of encouraging such "in honor of" payments, under the current enforcement regime such payments could result in liability if the honored official was found to have provided a "business advantage" for the donating company and prosecutors found that the payment was made with "corrupt intent."

5. When the Donation Is "Made to Influence" a Foreign Official with Regard to a Business Matter[83]

This is the scenario present in the Schering-Plough and Eli Lilly cases,[84] and is perhaps one of the defining characteristics of a bona

80. Meyer, *supra* note 74, at 13.1 ("[SEC] staff, as well as prosecutors at the DOJ, have . . . argued that a bona fide charitable donation made at the behest of a government official can give rise to an antibribery charge under the Act.").

81. Sanders, *supra* note 75, § 18:14 (specifying that such a relationship is questionable if the foreign official founded the charity, or the donation is made "in honor of" the government official).

82. Rachel Ehrenfeld, *To Fight Foreign Bribery, Try Charity*, N.Y. TIMES, Nov. 13, 1994, at F13 (reasoning that if American companies did not find such "loopholes" through the FCPA, the companies would lose competitiveness in the global market and many Americans would lose their jobs).

83. Order Instituting Proceedings, SEC v. Schering-Plough, No. 04-0945 (D.D.C. 2004), File No. 3-11517 (specifying the attempt at influencing the foreign official as a reason for the proceedings, despite the status of the charity as bona fide).

84. Complaint, Schering-Plough, *supra* note 10, at 4 (specifying that the attempt at influencing the foreign official violated the FCPA despite the donation

fide donation that is likely improper under the FCPA. A donation made to influence a foreign official in a business matter—even if the donation is made to a bona fide charity—would seem to satisfy the corrupt intent and business purpose elements of the statute. The FCPA defines a violation as, inter alia, a payment made to influence "any act or decision of [a] foreign official in his official capacity."[85] As the SEC noted in the Schering-Plough case, "while the payments in fact were made to a bona fide charity, they were made to influence [the foreign official] with respect to the purchase of Schering-Plough's products."[86]

C. DEFINING CHARACTERISTICS OF A PROBLEMATIC DONATION

Donations that could result in FCPA anti-bribery liability typically have one or more of the following characteristics:

1. Quid Pro Quo

Similar to donations "made to influence," noted above, donations specifically made in exchange for some foreign official action or inaction fall squarely within the FCPA's anti-bribery provision and could result in liability.[87] The Act prohibits payments to a party or official made for the purpose of

> (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage.[88]

being made to a bona fide charity); Complaint, Eli Lilly, *supra* note 67, at 1 (showing that Eli Lilly made the contributions to a charity founded and administered by a foreign government official at the same time that Eli Lilly sought to be added to the government's list of drugs that the government would reimburse).

85. 15 U.S.C. § 78dd-1 (2012).

86. Complaint, Schering-Plough, *supra* note 10, at 4.

87. *Compare* United States v. Sun-Diamond Growers of California, 526 U.S. 398, 404–05 (1999) (noting that, for a finding of bribery under the domestic bribery statute, "there must be a *quid pro quo* – a specific intent to give or receive something of value in exchange for an official act"), *with* United States v. Bahel, 662 F.3d 610, 638 (2d Cir. 2011) (holding that under the gratuity theory of liability, there need not be a previous agreement to receive benefits in exchange for a bribe).

88. 15 U.S.C. § 78dd-3.

Though not necessary to find an FCPA violation in the current enforcement environment, specific *quid pro quo* appears sufficient for a finding of liability based on regulator guidance and recent cases, even where no personal financial benefit accrues to the foreign official.[89] Companies that make otherwise bona fide donations in exchange for, or contingent on, specific action by a foreign official should anticipate that such payments will be viewed as violations of the FCPA.

2. Payment Accruing to Foreign Official vs. Other Benefit

As noted above, where an improper payment is made directly or indirectly to a foreign official, the statute is likely implicated unless a company can establish a lack of corrupt intent or business purpose.[90] However, it seems clear from FCPA cases and the DOJ's 2012 Guidance that it is not necessary for the payment itself to reach the foreign official where other circumstances creating a violation are present—in particular, *quid pro quo*.[91] Some FCPA commentators have criticized the DOJ's and SEC's perceived scope of prosecutorial authority, analyzing the Act and noting that without a pecuniary benefit reaching the foreign official personally no violation can be found. As one commentator notes, "a bona fide charitable donation will in no way inure to a foreign official's personal benefit, and that is the *sine qua non* of a potential violation. Absent such a personal benefit, no violation is made out."[92] These critics point in part to the U.S. domestic bribery statute which, unlike the FCPA, expressly prohibits "offers or promises [to public officials] to give anything of value to any other person or entity."[93]

89. This is represented by the Schering-Plough and Eli Lilly cases—payments made to bona fide charities in exchange for the purchase of company products by the government, even though there was no allegation that the foreign official in those cases received any personal financial benefit from the donations, constituted FCPA violations. In those cases, there was an "incriminating coincidence between the donations to the charity and the increase in sales obtained" by the companies. *See* Giraudo, *supra* note 24, at 151 (mentioning further that the descriptions of payments in the charity's books were suspicious, as were the Manager's efforts to keep payments below his authorized level of expenditures).

90. 15 U.S.C. §§ 78dd-3(a)(3), (c)(2).

91. Complaint, Schering-Plough, *supra* note 10, at 4; Complaint, Eli Lilly, *supra* note 67, at 1.

92. Meyer, *supra* note 74, at 13:2.

93. 18 U.S.C. § 201(b)(1) (2012).

The argument is that if Congress had intended to include payments to third parties meant to influence foreign officials as violations of the FCPA, it would have included similarly explicit language as that included in the domestic bribery statute.[94] This distinction is also reflected in the sections of the U.S. Attorney Criminal Resource Manual relating to the domestic bribery statute and the FCPA. When discussing the domestic bribery statute, the prosecutors' manual notes that "with a 'bribe' the payment may go to anyone or to anything and may include campaign contributions."[95] When discussing the FCPA, the manual states that "[t]he prohibition extends only to corrupt payments made, directly or indirectly, to a foreign official, a foreign political party or party official, or any candidate for foreign public office."[96]

The DOJ's 2012 Guidance notes that payments to governments (for example, donations to state-managed development funds) are not covered by the FCPA's anti-bribery provision, though can be prosecuted by other federal statutes, including wire fraud and money laundering.[97] The same principle—that payments to governments are not covered by the anti-bribery provisions—is noted in DOJ's 2009 Opinion release.[98] This guidance seems inconsistent with the SEC's positions in Schering-Plough and Eli Lilly where, although only FCPA accounting violations were charged, the SEC made clear its view that the payments were improper under the FCPA despite the fact that they were not made to the foreign official himself.[99] There

94. *See* Meyer, *supra* note 74, at 13.2 ("Congress's failure to include a similar provision in the FCPA can only be construed as a deliberate determination not to prohibit such conduct."); *see also* U.S. Attorney's Manual, Title 9 Criminal Resource Manual § 2041 (Dep't of Justice 1997) [hereinafter USAM] (finding that the payment must inure to the personal benefit of the official and does not include campaign contributions).

95. USAM, *supra* note 94, § 2041.

96. *Id.*

97. *FCPA Resource Guide*, *supra* note 9, at 20.

98. *See* FCPA 2009 Review, *supra* note 47 (noting that "the proposed provision of 100 medical devices and related items and services fall outside the scope of the FCPA in that the donated products will be provided to the foreign government, as opposed to individual government officials").

99. *See* Complaint, Schering-Plough, *supra* note 10, at 4 ("[W]hile the payments in fact were made to a bona fide charity, they were made to influence the Director with respect to the purchase of Schering-Plough's products. In fact, [Schering-Plough] did not view the payments to the Foundation as charitable, but as 'dues' that were required to be paid for assistance from the Director."); *see also*

seems to be no distinction between a payment made to a legitimate government entity or government-administered development fund and a payment made to a bona fide charity as was done in Schering-Plough and Eli Lilly.[100]

Arguments that the FCPA should not cover donations unless a payment directly or indirectly reaches a foreign official are legally compelling. Nevertheless, and despite the inconsistent guidance on the topic, in the current enforcement environment regulators read the FCPA as potentially criminalizing payments made to bona fide charities or government funds where they are made in exchange for a business advantage.[101] With limited federal judicial oversight over FCPA prosecutions and settlements,[102] this broader view of the Act's coverage remains the state of play today and companies should set up corporate philanthropy programs with this reality in mind.

3. Corrupt Intent

In order for any payment to violate the FCPA's anti-bribery provision, the payment must be made "corruptly."[103] Corrupt intent requires that the payer seeks to influence the recipient to abuse a governmental role to the benefit of the payer.[104] Specifically, the FCPA legislative history notes that corrupt intent requires that a payment "must be intended to induce the recipient to misuse his

Complaint, Eli Lilly, *supra* note 67, at 5 ("[Eli Lilly] requested the approval of the payments to the Polish Castle Charity with the intent of inducting the Health-Fund Director to allocate public monies to hospitals and other healthcare providers in the Health Fund for the purpose of purchasing [Eli Lilly product].").

100. Complaint, Schering-Plough, *supra* note 10, at 4; Complaint, Eli Lilly, *supra* note 67, at 5.

101. *See* Complaint, Schering-Plough, *supra* note 10, at 4; Complaint, Eli Lilly, *supra* note 67, at 1.

102. Corporations rarely take FCPA prosecutions to trial due to the perceived severe negative impact that fighting such a charge would have on the business. Because a company can be liable for the FCPA violations of its agents, affiliates, or partner entities, companies subject to prosecution are often spurned during investigations and any perception that a company is resisting to implement holistic remedial measures could impact the business longer term. FCPA prosecutions are public relations nightmares for companies subject to enforcement, and the goal is typically to wrap up the case as quickly as possible, implement appropriate remedial measures, and move on.

103. *See FCPA Resource Guide*, *supra* note 9, at 14.

104. H.R. REP. NO. 95-640, at 8 (1977) (stressing that the payment must be shown to intend to influence the government official to abuse his or her position).

official position; for example, wrongfully to direct business to the payer or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function."[105] By this definition, corrupt intent essentially requires something like *quid pro quo*—a payment made in exchange for, or in hope or anticipation of, some business advantage by the official. But arrangements short of *quid pro quo* can still meet the corrupt intent requirement; for example, a donation made without assurance of an action by the official but in an attempt to sway the official to act on the payer's behalf would not qualify as *quid pro quo* but could evidence corrupt intent.[106]

A donation to a bona fide charity, motivated by goodwill intent, would not satisfy the corrupt intent element of the FCPA and therefore would not be actionable under the Act.[107] In the current enforcement environment, there is a fine line between legitimate corporate political and charitable contributions aimed at building generalized goodwill with local officials and contributions made to corruptly influence an official to provide an improper business advantage.[108] Because of this fine line, many companies operating in developing markets are prohibiting political contributions altogether and carefully monitoring charitable contributions to ensure that line is not crossed.[109] In the end, the best protection is to set a charitable

105. *Id.*

106. Neither the Schering-Plough nor Eli Lilly case alleged that the Polish castle charity donations were made pursuant to pre-arranged *quid pro quo* agreements. Instead, it was alleged that both companies made the donations in an (ultimately successful) attempt to induce the official to use his influence to increase the purchase of their products. *See* Complaint, Schering-Plough, *supra* note 10, at 4 ("[W]hile the payments in fact were made to a bona fide charity, they were made to influence the Director with respect to the purchase of Schering-Plough's products."); *see also* Complaint, Eli Lilly, *supra* note 67, at 5 ("[Eli Lilly] requested the approval of the payments to the Polish Castle Charity with the intent of inducing the Health-Fund Director to allocate public monies to hospitals and other healthcare providers in the Health Fund for the purpose of purchasing [Eli Lilly products].").

107. *See FCPA Resource Guide*, *supra* note 9, at 16, 19 ("The FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens . . . . Legitimate charitable giving does not violate the FCPA.").

108. *See, e.g.*, United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999) (finding that intent can easily transform an official act into bribery and illegal gratuities).

109. Confidential client information regarding ongoing cases.

giving plan in advance and avoid contributions tied to, or in any way related to, specific official action.

IV. AVOIDING PROBLEMATIC DONATIONS: PRACTICAL POINTS FOR COMPANIES TO CONSIDER IN CORPORATE PHILANTHROPY PROGRAMS

Understanding the hallmarks of improper donations can allow companies to formulate giving programs that minimize risk while maximizing the goodwill that comes with being a good corporate citizen. Based on FCPA regulator guidance and settlements, avoiding problematic donations requires an organized CSR donations program with the following pillars:

- Due diligence. Conducting due diligence on donation recipients is the lynchpin of responsible corporate giving. In the absence of due diligence, any contribution could subject the payer to FCPA liability.[110]

- A pre-approved advance giving plan. Setting contribution plans (including recipients and amounts) in annual plans well in advance helps ensure donations are not viewed as reactive or designed to induce specific governmental action.

- No *quid pro quo*. Donations made in exchange for official action or inaction should be avoided at all times.[111]

- Careful documentation and monitoring. The purpose of the contribution, diligence process and findings, and payment itself should be carefully documented. Companies should undertake reasonable monitoring of the contribution and its use.[112] The

110. FCPA 1995 Review, *supra* note 30 (recounting that the requestor pledged to do its due diligence to ensure none of the donations would violate the FCPA); FCPA 2010 Review, *supra* note 53, at 6 (describing the requestor's due diligence and controls concerning potential violations of the FCPA); *FCPA Resource Guide*, *supra* note 9, at 19.

111. *FCPA Resource Guide*, *supra* note 9, at 19 (noting that companies should ask, "Is the payment conditioned upon receiving business or other benefits?").

112. FCPA 2010 Review, *supra* note 53, at 6; *FCPA Resource Guide*, *supra* note 9, at 19 (instructing companies to consider whether payments are conditioned upon receiving business benefits before making charitable contributions in foreign countries).

> appropriate level of monitoring will depend on several factors, including the size of the donation, the nature of the project donated to, and the risk environment.

In addition to the above, companies should consider incorporating into their existing compliance protocols the following practical steps taken from regulator guidance to minimize the FCPA risk of corporate donations:

- Ensure no connection between the recipient and a foreign official with the ability to influence the payer's business.[113]
- Ensure the contribution is consistent with the payer's company policies and giving history.[114]
- Ensure the contribution is transparently given and appropriately booked in company records. Where possible avoid anonymous gifts.[115]
- Ensure the specific donation request and recipient did not originate from a foreign official.[116]
- Ensure contributions are not structured to avoid company giving limits.[117]
- Obtain certifications or written agreements from the recipients regarding use of funds, as appropriate based on the size of the donation and other factors.[118]

113. *FCPA Resource Guide*, *supra* note 9, at 19 (stating that the DOJ approved various charitable contributions in foreign countries based on such due diligence).

114. *Id.* at 19.

115. In both *Schering-Plough* and *Eli Lilly*, the court noted that donations to the Polish castle charity were improperly characterized in the books and records of the companies as, for example, rentals of castle space for conferences that never took place. Complaint, Schering-Plough, *supra* note 10, at 4; Complaint, Eli Lilly, *supra* note 67, at 5.

116. *FCPA Resource Guide*, *supra* note 9, at 19 (instructing the reader to ask him or herself if the request for payment has been made by a foreign official before making a charitable contribution on the part of the donating company).

117. *Id.* at 17 (using the example of a company that structured its donations as a violation of the FCPA).

118. FCPA 1997 Review, *supra* note 37, at 6 (noting the requestor's due diligence in managing donating funds as evidence of no violation of FCPA); *FCPA Resource Guide*, *supra* note 9, at 19 (reciting DOJ guidelines that recommend

While incorporating these protocols can substantially mitigate the FCPA risk of CSR contributions, they can be costly and time-consuming to implement, especially for smaller companies. And in the current enforcement environment, no protocols can provide complete protection against a potential violation. For this reason, several possible alterations in the FCPA enforcement regime are listed below that would better protect companies making good faith donations and would result in more total contributions reaching bona fide charities in developing countries.

V. SUGGESTED CHANGES IN U.S. FCPA ENFORCEMENT REGIME VIS-À-VIS CHARITABLE CONTRIBUTIONS AND DONATIONS

Countries with higher levels of corruption, and therefore higher risk of FCPA liability for companies operating therein, are typically also countries with lower GDP per capita and higher poverty rates.[119] Countries with higher levels of corruption can therefore be said to be in greatest need of charitable assistance. As a result, some argue that the current aggressive FCPA enforcement environment, and particularly the lack of clarity on when donations (even to bona fide charities) may lead to liability, discourages corporate philanthropy in the countries where those contributions are needed most.[120]

financial controls and management on the part of the donor to prevent financial mishandling).

119. *See, e.g.*, Reagan R. Demas, *All Hands on Deck: Collaborative Global Strategies in the Battle Against Corruption and Human Trafficking in Africa*, 6 U. ST. THOMAS L.J. 204 (2009) (noting the connection between corruption and development); Demas, *Moment of Truth*, *supra* note 15, at 324 (citing Gbenga Lawal, *Corruption and Development in Africa: Challenges for Political and Economic Change*, 2 HUMAN. & SOC. SCI. J. 1, 4 (2007) (indicating bribery and corrupt practices as some of the causes of such poverty)).

120. *See, e.g.*, Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351 (2010); Francesca M. Pisano, *The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations*, 62 EMORY L.J. 607 (2013) ("By discouraging corporate aid, the United States risks not only exacerbating poverty, but also squandering the opportunity for global leadership."); William Nelson, *No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act*, 11 DEPAUL BUS. & COM. L.J. 331 (2013) (describing the discouragement of giving as a result of the wide application of the FCPA as the "chilling effect").

The need for regulators to ensure that charitable contributions are not used as conduits for improper payments must be balanced against the goal of encouraging (or at least not discouraging) corporate charity in developing countries. Uncertainty in enforcement today results in increased cost of giving as companies factor in both the cost of diligence and monitoring as well as the risk of FCPA liability, which likely reduces the overall volume of legitimate, non-corrupt corporate giving in the developing world.[121] This is surely not the goal of U.S. regulators, although perhaps an acceptable collateral consequence for regulators in their fight against corruption.

Certain costs of giving designed to prevent the use of donations for corrupt purposes are and should be essential, including the cost of reasonable diligence on, and monitoring of, donation recipients. However, some revisions in the FCPA or its enforcement are necessary to provide the clarity companies need to confidently create generous (and much needed) CSR contribution regimes in developing countries. This paper suggests four possible changes to more effectively balance these goals.

A. SAFE HARBOR FOR DONATIONS MADE IN GOOD FAITH

One option is to create a safe harbor for companies that make donations in good faith to bona fide charities. Donations made to legitimate charities—authentically recorded in the company's records and made in a good faith belief that no specific business advantage was being received in exchange for the donation—would be exempt from FCPA prosecution. This safe harbor would allow companies to give freely and generously to bona fide charities while still investing appropriate resources into due diligence on recipients to ensure no *quid pro quo* was contemplated in the transaction.

At least one commentator has proposed a form of this solution that would require companies making such donations to disclose the donation publicly.[122] Under that scenario, only donations publicly disclosed would fall under the safe harbor and be exempt from any

121. Demas, *Moment of Truth*, *supra* note 15, at 366 (noting that the FCPA has resulted in the expenditure of millions of dollars by companies doing due diligence on donations as well as properly training their staff).

122. *See* Pisano, *supra* note 120, at 622 (specifying that such disclosures would be made to a neutral third party or government entity).

FCPA liability.[123] The idea is that transparency encourages self-policing and compliance, and if donations are transparently and publicly disclosed they are unlikely to be problematic payments that would give rise to FCPA liability.[124] The SEC has pursued this tactic in other ways, most recently in its rule requiring U.S. issuer companies involved in resource extraction to disclose certain payments made to foreign governments.[125] However, that rule specifically excludes "social payments" from those that must be disclosed,[126] presumably because regulators had minimal concern about the potential for such payments to be used as conduits for corruption.

The requirement that donations be publicly disclosed in order to fall within the safe harbor could add additional incentives for companies to conduct appropriate diligence in advance of making contributions, but would also create significant additional work for contributing companies and regulators alike. This work would come in the form of preparing and vetting public filings and, per one commentator's suggestion, the creation of a "monitoring board" within a neutral organization or government entity to review publicly disclosed donations and forward transactions it found to be illegitimate to the DOJ or other appropriate regulator for "traditional investigation or enforcement."[127] In our view, the risk that an independent board (potentially itself connected to the government) might determine on its own that a disclosed contribution was problematic and refer the same to U.S. regulators would serve as a significant deterrent for companies to publicly disclose contributions and could prevent many or most companies from taking part in such an optional safe harbor program.[128] Moreover, in a time of belt-

123. *Id.* (stating that such a program would encourage transparency and decrease corruption).

124. *Id.*

125. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56365 (Sept. 12, 2012).

126. *Id.* at 56379 (finding that such payments are not part of the local revenue scheme).

127. Pisano, *supra* note 120, at 624.

128. If the monitoring board referred a payment to the DOJ, it is not clear that the company would be awarded the traditional voluntary disclosure and cooperation credit afforded companies that disclose such payments directly to U.S. regulators.

tightening in both the public and private sector, a proposal that would require companies to expend resources not only on traditional diligence and monitoring of charitable contributions but also on publication and interaction with a newly-created regulatory entity is likely to be met with skepticism by companies considering voluntary participation.

Nevertheless, a safe harbor that gives contributing companies exemption from FCPA prosecution where those contributions are made in good faith and in the absence of *quid pro quo* can work to encourage contributions while giving regulators the ability to prosecute payments that clearly violate the express terms of the FCPA. In a way, such a safe harbor should already exist under traditional FCPA liability analysis—DOJ guidance makes clear that bona fide donations are not problematic unless they are "used as a vehicle to conceal payments made to corruptly influence foreign officials"[129]—so a firm commitment by regulators to this principle should not limit the scope of cases the DOJ and SEC would wish to pursue. It would, however, provide valuable clarity to companies seeking to become better corporate citizens in the developing world.

B. IMMUNITY FOR DONATIONS TO RECIPIENTS ON EMBASSY LISTS

Another possible approach to encourage companies operating in high-risk markets to provide charitable contributions to bona fide recipients would involve facilitation of donations by local embassies in those countries. Under this scenario, the U.S. embassy would agree to maintain a list of bona fide recipient charitable organizations that it has vetted and approved based on its experience in the country and insight it can readily obtain from local sources.[130] U.S. companies seeking to donate to bona fide recipients, but also looking to limit the risk of FCPA liability in those donations would request the approved list of recipients from the U.S. embassy and choose to donate to a recipient on that list. These donations could even be given through the embassy, which would pass the contribution on to

129. *FCPA Resource Guide*, *supra* note 9, at 19 (asserting that the DOJ does not seek to outlaw charitable giving, but charitable giving is often used as a vehicle for bribery).

130. U.S. embassies around the world often compile and maintain lists of this nature—for example, lists of reputable local law firms—that they make freely available to U.S. companies and individuals.

the bona fide recipient, although the logistics of the embassy serving as a financial intermediary to the transaction might overly complicate the scenario and require difficult-to-obtain U.S. government approvals.

Companies that wish to donate to a recipient not on the U.S. embassy list could submit the name of the proposed recipient to the embassy, which would either confirm the bona fide nature of the recipient and add it to the list, or reject the proposed recipient based on information it has or could readily obtain. Donations made to recipients on the embassy list would be presumptively bona fide and therefore not subject to FCPA liability in the absence of clear and convincing evidence that the donation was given as *quid pro quo*—in exchange for specific action or inaction by a government official. Donations given to one of the embassy list recipients with the intent to build goodwill, and even donations made at the request of officials, would be presumptively proper and therefore not subject to FCPA liability. Companies could choose to contribute to entities not on the list, but those contributions would not be covered by the presumption of appropriateness and would be subject to review by U.S. regulators in the same way as are donations made today.

Resources within each U.S. embassy would need to be dedicated to vetting potential recipients and maintaining the recipient lists. Other non-U.S. embassies approved by the U.S. government could either maintain separate lists or contribute to the U.S. embassy list in a given country, which would have the additional benefit of encouraging discussion and interaction between country stations regarding the impact of and interplay between charitable contributions and corruption.

C. EXCEPTION FOR INDUSTRY POOLING OF CHARITABLE CONTRIBUTIONS

A third option would involve the creation of a safe harbor for donations made pursuant to industry pooling agreements. In many circumstances, companies already work with partners and even competitors in their industry to confirm local charitable requirements and conduct due diligence on donation recipients.[131] Under this

131. Confidential client information regarding ongoing cases.

proposal, U.S. regulators would encourage more formal charitable cooperation regimes within industries by agreeing to provide immunity from FCPA prosecution for contributions made pursuant to transparent industry pooling agreements. Such pooling arrangements would require a certain number of committed industry participants, publication of donation recipients, and appropriate diligence conducted on ultimate recipients. Companies would contribute to a joint fund that was then distributed to the approved recipients, according to a pre-approved contribution plan, by a committee comprised of representatives of participating companies. Recipients would be publicized, although details on contribution amounts would not need to be.

This arrangement would significantly reduce the likelihood that contributions made would be corrupt under the FCPA, since no individual company could be receiving an improper advantage over competitors if their donations were being made jointly with some or all of their competitors and other market participants. Recognizing the importance companies place on goodwill that results from donations, companies would have the right to publicize the nature and amount of their individual contributions to the overall donation. Contributing companies would of course still be required to appropriately book contributions made via pooling agreements in their own records and, as with the other proposals above, evidence of specific *quid pro quo* (payments made in exchange for specific business advantage) would pull even pooled contributions outside of the safe harbor and subject them to traditional FCPA scrutiny by regulators.

D. SUPPLEMENTAL PUBLISHED GUIDANCE FROM REGULATORS

Finally, in the absence of a clearly defined safe harbor as proposed above, companies operating in high-risk countries who wish to design risk-mitigating CSR contribution programs need supplemental direction from U.S. regulators that clarifies key issues that remain unresolved in the wake of the DOJ's 2012 Guidance. Published supplemental guidance that clarifies, for example, that donations to bona fide entities, where a foreign official receives no tangible (financial or in-kind) benefit and no clear *quid pro quo* exists, will not be subject to FCPA liability would help temper fears that bona fide charitable contributions can still lead to enforcement action.

Another area where supplemental guidance is necessary relates to the depth of diligence U.S. regulators expect companies to conduct on donations made to government entities or government-run charities. In at least two recent non-public scenarios from two separate continents, companies were asked to make donations to a local government and municipal development fund (either in-kind or monetary) and expressed uncertainty regarding the level of diligence they were expected to conduct on the government entity recipient.[132] Once given to a government or government-managed development fund, must contributing companies monitor how donated funds are distributed by the government? The DOJ's 2012 Guidance and several of its Opinion Releases state clearly that payments to governments are not covered by the FCPA,[133] but under current enforcement trends a payment to a local development fund that was later plundered by a foreign official or even spent on a project specifically designed to benefit that official could lead to FCPA liability, depending on how regulators gauged the level of diligence and monitoring undertaken by the company. Greater guidance as to this expected level of diligence and monitoring is precisely what contributing companies are looking for.

As a final example, companies also need clear guidance on when compelled giving can constitute an FCPA violation. Compelled giving—when a company is required by applicable local law to make a donation or contribution to a particular recipient—is common in the developing world. For example, companies operating in Equatorial Guinea are required to donate annually to community projects and the Equatorial Guinean government has been known to provide a list of donation recipients from which companies must choose.[134] Companies in many West African nations, including Nigeria and Angola, are required to enter into joint ventures with local partners to operate in the oil and gas sector.[135] In its 2010 Opinion Release, the DOJ noted that the requesting company was being compelled to make the proposed grant to a local entity by

132. Confidential client information regarding ongoing cases.
133. *FCPA Resource Guide*, *supra* note 9, at 19.
134. Confidential client information regarding ongoing cases.
135. Confidential client information regarding ongoing cases; *see* Nelson, *supra* note 120, at 358–59.

regulators in that country.[136] While it is clear from DOJ guidance and cases that economic coercion is not a defense under the FCPA,[137] it seems reasonable for regulators to clarify that legally-compelled giving, in the absence of clear *quid pro quo*, will not be viewed as problematic under the Act.

To ensure that additional questions regarding FCPA enforcement in the context of CSR contributions are answered, the DOJ and SEC could open the Guidance up to public comment in the same way that regulators do for SEC Proposed Rules.[138] This would allow companies to submit concerns and clarifying questions and ensure the finished product provided clarity on most, if not all, issues that remain uncertain for Compliance and Legal Officers overseeing operations in high-risk countries.

VI. CONCLUSION

Despite the DOJ's 2012 Guidance on the FCPA, uncertainty remains. One of the areas of continuing ambiguity relates to CSR contributions and donations. Those corporations seeking to contribute to charitable causes while operating in the developing world are not sure which contributions could lead to liability under the FCPA. While corporations have been provided certain steps to minimize risk, more should be done to ensure that the use of charitable contributions as conduits for corruption is deterred while fully encouraging bona fide corporate philanthropy. Certain refinements in application and enforcement of the FCPA can accomplish just that.

136. *See* FCPA 2010 Review, *supra* note 53 (explaining that the investor was forced to make a donation to an institution on a short list of institutions).

137. *See FCPA Resource Guide*, *supra* note 9, at 27 ("Mere economic coercion, however, does not amount to extortion. As Congress noted when it enacted the FCPA: 'The defense that the payment was demanded on the part of a government official as a price for gaining entry into a market or to obtain a contract would not suffice since at some point the U.S. company would make a conscious decision whether or not to pay a bribe.'").

138. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56366–67 (Sept. 12, 2012).