



What You Should Know About Individual Liability Under the Foreign Corrupt Practices Act

Introduction

The number of individual prosecutions has risen—and that’s not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.¹

– Mark Mendelsohn, Former Deputy Chief of the Fraud Section of the U.S. Department of Justice (“DOJ”) Criminal Division.

With this statement, the DOJ made clear to the world that the United States’ largest law enforcement agency considers the prosecution of individuals in corruption cases to be a priority. Over the past eight years, the DOJ has reinforced this commitment by charging dozens of individuals with the violation of bribery-related statutes, including the Foreign Corrupt Practices Act (“FCPA”). In September 2015, the DOJ formalized its policies regarding the prosecution of individuals with the release of the “Yates Memo,” which targets individuals who engage in corporate wrongdoing.²

Although the greatest share of FCPA enforcement activity continues to be directed against corporations, individuals must remain vigilant about their personal compliance with the statute. For individuals that work in companies that do business abroad, the risk of liability has increased significantly over the past decade. Certain individuals—executives, directors, sales and marketing managers, agents—face increased risks given the nature of their work, interactions with government officials and supervisory responsibilities. This risk increases dramatically for individuals working on high value projects in developing countries where corruption is more prevalent and the pressure to “make a deal” is higher.

Despite the fact that the policies behind the FCPA are fairly straightforward, the statute’s legal framework is complex. This TRACE White Paper decodes the unique provisions of the FCPA related to the prosecution of individuals and focuses on the practical implications of recent enforcement policies and actions.

Individual Liability Under the FCPA’s Anti-Bribery Prohibitions

In general, the FCPA prohibits the payment of money or anything of value to a foreign official to influence an act or decision or secure an improper advantage in order to obtain or retain business.³ It also requires the maintenance of accurate books and records and robust internal controls.⁴ These two provisions often work in tandem, prohibiting bribery as well as the concealment of bribes in off-book accounts and slush funds.

¹ “Mendelsohn Says Criminal Bribery Prosecutions Doubled in 2007,” *22 Corporate Crime Reporter* 36(1) (September 16, 2008).

² Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, September 9, 2015, available at <http://bit.ly/justice-dag>.

³ 15 U.S.C. §§ 78dd-1, et seq; *A Resource Guide to the U.S. Foreign Corrupt Practices Act* [hereinafter “FCPA Guide”] at 10, available at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>.

⁴ 15 U.S.C. § 78m.

The FCPA provides several jurisdictional categories of individuals that may be prosecuted for violating the FCPA:

1. Officers, directors, employees or agents of an issuer⁵ or domestic concern⁶ if they make “use of the mails or any means or instrumentality of interstate commerce” in furtherance of an improper payment to a foreign official.⁷
2. Citizens, nationals, or residents of the United States, even if their misconduct occurs entirely outside the United States.⁸
3. Any other person other than an issuer or domestic concern (i.e., foreign nationals) if that person engages in any act in furtherance of a bribe while in the territory of the United States.⁹



The government has construed the prohibition against providing “anything of value” to a foreign official very broadly and does not impose a minimum dollar threshold on the improper gift or payment.¹⁰ There must also be a “business purpose” behind the improper payment. In other words, the payment must be given in order to obtain or retain a business advantage.¹¹ This doesn’t just mean paying a government official to secure a contract. It also encompasses payments provided to, among other things, reduce customs duties, circumvent licensing or zoning approval processes, or reduce tax liabilities.¹²

To violate the statute’s anti-bribery prohibitions, “an offer, promise, or authorization of a payment, or a payment, to a government official must be made ‘corruptly.’”¹³ An act is considered “corrupt” if it is “done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.”¹⁴ This standard is met if, among other things, the payment (or offer, promise or authorization of the payment) is made for any one of the following four reasons: (1) to influence any act or decision of the foreign official in his official capacity, (2) to induce the foreign official to do or omit to do any act in violation of the official’s lawful duty, (3) to induce the foreign official to use his influence with a foreign government or instrumentality to affect or influence any act or decision of such government or instrumentality, or (4) to secure any improper advantage.¹⁵

In *United States v. Liebo*, the U.S. Court of Appeals for the Eighth Circuit squarely addressed the meaning of “corruptly.”¹⁶ In *Liebo*, the vice president of a large aerospace firm had bought plane tickets for the honeymoon of a family member of a government official from Niger. Liebo’s company sought contracts

⁵ “A company is an ‘issuer’ under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file periodic and other reports with SEC under Section 15(d) of the Exchange Act.” *FCPA Guide at 11*.

⁶ The definition of “domestic concern” includes citizens, nationals, or residents of the United States. 15 U.S.C. § 78dd-2.

⁷ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

⁸ 15 U.S.C. § 78dd-1(g).

⁹ 15 U.S.C. § 78dd-3.

¹⁰ *FCPA Guide at 15*.

¹¹ *Id.* at 12.

¹² *Id.* at 13.

¹³ *Id.* at 14.

¹⁴ *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991) .

¹⁵ 15 U.S.C. § 78dd-1.

¹⁶ *Liebo*, 923 F.2d at 1312.

with the Ministry of Defense and the tickets were given to the cousin of a government official who could (and eventually did) influence the contract award. Liebo argued that the tickets were merely a personal gift and claimed that this negated a finding that he was acting corruptly when buying the tickets. The Eighth Circuit rejected this argument, explaining that there was sufficient evidence of corrupt intent where, among other factors, the tickets were given to the cousin of an official involved in the contract approval process shortly before the contract was approved. Liebo also improperly recorded the tickets in the company's books and records as "commission payments."¹⁷

Notably, FCPA liability may attach even if the corrupt act does not succeed in its purpose. As the DOJ has explained:

[A]s long as the offer, promise, authorization, or payment is made corruptly, the actor need not know the identity of the recipient; the attempt is sufficient. Thus, an executive who authorizes others to pay "whoever you need to" in a foreign government to obtain a contract has violated the FCPA—even if no bribe is ultimately offered or paid.¹⁸

In addition to possessing corrupt intent, an individual must have knowledge of the wrongdoing. The FCPA covers payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official."¹⁹ Liability may be imposed on any person with actual knowledge, an awareness or firm belief that an event is likely to occur, or any person who avoids knowledge of corrupt acts through "willful blindness."²⁰ Thus, the statute imposes liability "not only on those with actual knowledge of wrongdoing, but also on those who purposefully avoid actual knowledge."²¹

The FCPA's broad knowledge standard (coupled with its prohibition against both direct and indirect payments) empowers the government to prosecute individuals that try to conceal payments through the use of third parties or other intermediaries (i.e., consultants, agents, distributors, joint venture partners, etc.). For example, in *United States v. Kozeny*,²² the U.S. Court of Appeals for the Second Circuit upheld the conviction of Frederic Bourke for his role in a conspiracy to violate the FCPA's anti-bribery provisions by approving payments to government officials in Azerbaijan in an attempt to influence the privatization of the country's state oil company. In its discussion of the FCPA's "knowledge" standard, the Second Circuit referred to evidence and testimony from the trial indicating that, among other things, Bourke (1) knew corruption was pervasive in Azerbaijan, (2) knew his business partner, nicknamed the "Pirate of Prague," had a reputation for corruption, (3) created companies to shield himself and other investors from potential liability, and (4) during a conference call, expressed concerns that his business partner and company were bribing officials.

¹⁷ Liebo was "sentenced to 18 months in prison, suspended with three years' probation, with 60 days of home confinement and 600 hours of community service." Richard L. Cassin, "May it Please the Court," FCPABlog.com (May 1, 2008), available at <http://www.fcpablog.com/blog/tag/richard-h-liebo#sthash.yKfuMnjZ.dpuf>.

¹⁸ FCPA Guide at 14 (citing Complaint, *SEC v. Innospec, Inc.*, No. 10-cv-448 (D.D.C. Mar. 18, 2010), ECF No. 1).

¹⁹ 15 U.S.C. § 78dd-1.

²⁰ FCPA Guide at 22 (citing H.R. Rep. No. 100-576, at 920 (1988)).

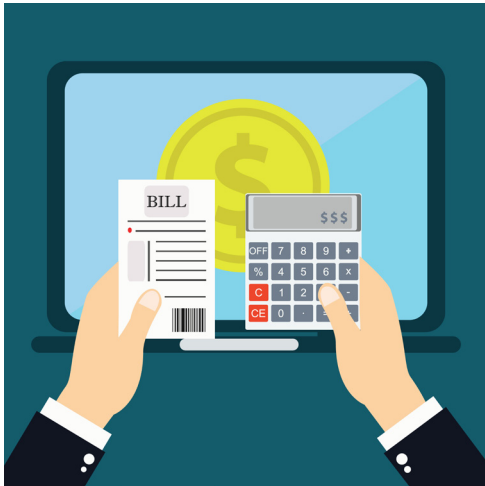
²¹ *Id.*

²² 667 F.3d 122 (2d Cir. 2011).

The Second Circuit made clear that there was abundant evidence that Bourke had “serious concerns about the legality” of his partner’s business practices “and worked to avoid learning exactly what [he] was doing.” When viewing the totality of the evidence, the Second Circuit found that “a rational juror could conclude that Bourke deliberately avoided confirming his suspicions” about his business partners’ bribes. Bourke was sentenced to 366 days in prison and ordered to pay a \$1 million fine.

Although corporations and individuals are generally subject to the same standards under the FCPA, there is an additional requirement applicable only to the prosecution of individuals. Specifically, the government must demonstrate that an individual has acted “willfully” when bribing a foreign official. The FCPA does not define the term “willfully,” but it has been construed as connoting an “act committed voluntarily and purposefully, and with a bad purpose, i.e., with ‘knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law.’”²³ Moreover, to prove a “willful” violation of the FCPA’s anti-bribery prohibitions, the Government “must prove that the defendant acted with knowledge that his conduct was unlawful.”²⁴ The FCPA does not, however, “require the government to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated the FCPA.”²⁵

Individual Liability Under the FCPA’s Accounting & Internal Control Provisions



Individuals may also be held civilly and criminally liable for failing to comply with the FCPA’s accounting (or “books and records”) and internal control provisions. The provisions apply to foreign and domestic issuers of securities, and to their officers, directors, employees and agents.²⁶

To hold an individual liable for civilly violating the FCPA’s books and records and internal control provisions, the U.S. Securities and Exchange Commission (“SEC”) must demonstrate that the individual “knowingly circumvent[ed] or knowingly fail[ed] to implement a system of internal accounting controls or knowingly falsif[ied] any book, record, or account” described in 15 U.S.C. § 78m(b)(2).²⁷

For example, in 2006 the SEC settled an enforcement action against David Pillor—the former Senior Vice President for Sales and Marketing (and member of the board of directors) of InVision Technologies, Inc.²⁸ The SEC alleged that InVision’s sales agents and distributors made payments to foreign officials in China, Thailand and the Philippines to obtain or retain business for the company. At the time of the transactions, Pillor received email communications from a regional sales manager suggesting that the company’s third

²³ *FCPA Guide* at 14 (citing *United States v. Kay*, 513 F.3d 432, 448 (5th Cir. 2007)).

²⁴ *Id.* (citing *Bryan v. United States*, 524 U.S. 184, 191-92 (1998)).

²⁵ *Id.* (citing *Kay*, 513 F.3d at 447-48).

²⁶ An “issuer” is a U.S. or foreign company, or an officer, employee, agent or stockholder thereof, that either issues securities (or American Depositary Receipts) or must file reports with the SEC. 15 U.S.C. § 78dd-1(a).

²⁷ 15 U.S.C. § 78m(b)(5). To hold an individual criminally liable for violating the accounting and internal controls provisions of the FCPA, the government must also demonstrate that an individual acted “willfully” in violating these provisions. *See* 15 U.S.C. § 78ff(a).

²⁸ *SEC v. David M. Pillor*, No. 1:06-C-4906 (N.D. Cal. 2006); SEC Litigation Release No. 19803 (August 15, 2006).

parties were intending to make improper payments to foreign officials. InVision subsequently paid the invoices for these transactions and improperly recorded the payments as legitimate business expenses. The SEC claimed that Pillor aided and abetted InVision's failure to establish and maintain a system of internal controls adequate to detect and prevent the company's violations of the FCPA. He also indirectly caused the falsification of InVision's books and records. In settling the matter with the SEC, Pillor agreed among other things, to pay a \$65,000 civil penalty.

Civil liability for violation of the books and records and internal control provisions of the FCPA may also be triggered based on an individual's position as a "control person" within the company. The SEC relied on this theory in a 2009 enforcement action involving two senior executives of Nature's Sunshine Product, Inc., a manufacturer of nutritional and personal care products.²⁹ The SEC alleged that the company bribed customs officials and purchased false documentation to conceal the improper payments. The SEC charged the executives as "control persons", alleging that they had knowledge of the misconduct due to their supervisory positions. Notably, the Complaint never claims that the executives participated in or knew of the misconduct—the allegations are based on a "failure to adequately supervise" theory.

Penalties for violating the FCPA

The penalties for violating the FCPA can be severe. An individual criminal conviction carries up to a \$250,000 fine and five years in prison.³⁰ Civil penalties can go as high as \$16,000 per violation.³¹ Criminal violations of the accounting and internal control provisions may result in a fine of up to \$5 million and twenty years in prison per violation.³² Civil violations of these provisions may result in a fine of \$7,500 to \$150,000 per violation.³³ In addition, the "Sentence of fine" statute permits the Government to fine persons up to twice the gross pecuniary gain or loss resulting from the corrupt payment.³⁴ Moreover, an individual's fines may not be paid by his or her employer.³⁵

Prioritizing the Prosecution of Individuals: The Yates Memo & DOJ Disclosure Pilot Program

While the government has spent the past decade emphasizing the importance of prosecuting individual FCPA violators, in 2015 and 2016, the DOJ formalized this strategy by announcing two new policies that will likely have a dramatic impact on the number of individuals investigated, charged and convicted of violating the FCPA.

²⁹ *SEC v. Nature's Sunshine Products, Inc. et al.*, No. 09-0672 (D. Utah 2009); SEC Litigation Release No. 21162 (July 31 2009).

³⁰ 15 U.S.C. §§ 78dd-2(g)(2)(A), 78dd-3(e)(2)(A), 78ff(c)(2)(A); 18 U.S.C. § 3571.

³¹ 15 U.S.C. §§ 78dd-2(g)(2)(B), 78dd-3(e)(2)(B), 78ff(c)(2)(B); see also 17 C.F.R. § 201.1004.

³² 15 U.S.C. § 78ff(a).

³³ 15 U.S.C. § 78u(d)(3); see also 17 C.F.R. § 201.1004.

³⁴ 18 U.S.C. § 3571(d).

³⁵ 15 U.S.C. §§ 78dd-2(g)(3), 78dd-3(e)(3), 78ff(c)(3).

The Yates Memo

In September 2015, DOJ Deputy Attorney General Sally Quillian Yates issued a memorandum to all DOJ attorneys, titled “Individual Accountability for Corporate Wrongdoing” (the “Yates Memo”).³⁶ The Yates Memo formalizes the DOJ’s goal of “combat[ing] corporate misconduct” by seeking “accountability from individuals who perpetrate the wrongdoing.” The policies outlined in the Yates Memo heighten the risk of individual civil or criminal liability. The Yates Memo identifies six “key steps” to enable DOJ prosecutors “to most effectively pursue the individuals responsible for corporate wrongs.”

- 1 “To be eligible for any cooperation credit, corporations must provide to the [DOJ] all relevant facts about the individuals involved in corporate misconduct.”
- 2 “Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.”
- 3 “Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.”
- 4 “Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.”
- 5 “Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.”
- 6 “Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.”

The steps outlined in the Yates Memo make clear that corporations must assist the DOJ with the prosecution of culpable individuals to be eligible for any cooperation credit. This will incentivize corporations to turn over individuals to preserve the best possible deal for the company. In turn, this could have a chilling effect on company employees who may fear that they will be implicating themselves if they cooperate with an investigation. It may force them to choose between remaining loyal to the company by cooperating—potentially opening themselves up to criminal or civil liability—and protecting themselves by exercising their Fifth-Amendment rights. This may also create an increasing number of conflicts of interest for companies, requiring the retention of separate representation for certain individuals.

³⁶ Department of Justice: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, September 9, 2015, available at <http://bit.ly/justice-dag>.

DOJ FCPA Enforcement “Pilot Program”



In April 2016, the DOJ underlined its commitment to prosecuting individuals by launching a one-year “pilot program” designed to encourage companies to voluntarily self-disclose potential violations and identify the individuals who engaged in wrongdoing. Although the pilot program aims to address several policy goals, it also serves as a reminder of the DOJ’s renewed commitment to individual prosecutions. The pilot program is outlined in a memorandum titled: “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance” (the “Guidance”).³⁷

The Guidance “sets forth the requirements for a company to qualify for credit for voluntary self-disclosure, cooperation, and timely and appropriate remediation under this pilot program, including exceptions to the general rules.” The requirements include:

1. Voluntary Disclosure in FCPA Matters
2. Full Cooperation in FCPA Matters
3. Timely and Appropriate Remediation in FCPA Matters

The Guidance highlights several factors involving individuals that will impact potential cooperation credit. For example, in order for a disclosure to be considered “voluntary,” a company must disclose “all relevant facts known to it, including all relevant facts about the individuals involved in any FCPA violation.” The Guidance cites to the Yates Memo as support for its requirement that companies disclose “facts related to involvement in the criminal activity by the corporation’s officers, employees, or agents.” Companies must also make officers and employees—including those located overseas—available for DOJ interviews (subject to the individuals’ Fifth Amendment rights). In addition, to receive credit for “timely and appropriate remediation,” companies must discipline employees responsible for the misconduct and implement “a system that provides for the possibility of disciplining others with oversight of the responsible individuals.” Companies must also determine “how compensation is affected by both disciplinary infractions and failure to supervise adequately.”

If a company fails to voluntarily disclose potential violations but otherwise fully cooperates and engages in timely and appropriate remediation of the misconduct, it will receive “at most a 25% reduction off the bottom of the Sentencing Guidelines fine range.” In contrast, companies that meet all the rules outlined in the Guidance (voluntary disclosure, full cooperation, and remediation) will be eligible for “up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought.” Moreover, if at the time of resolution the company has implemented an effective compliance program, it will not be required to retain a corporate monitor. Under these circumstances, the DOJ may also consider a declination of prosecution.

³⁷ Department of Justice: Andrew Weissmann, “The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance,” April 5, 2016, available at <https://www.justice.gov/opa/file/838386/download>.

Compliance tips

Recent policy pronouncements and enforcement actions make clear that individuals face an increasing risk of liability under the FCPA. In an effort to reduce this risk, individuals should take steps to protect themselves from potential liability. Although no single step will insulate an individual from the DOJ, when taken together, these steps may help mitigate or even prevent FCPA violations.

- > **Embrace a Culture of Ethics & Compliance:** Companies must develop and implement a robust anti-corruption compliance program. Not only does this mitigate risk for the company, but it also reduces the risk of liability for individuals. The compliance program should be tailored to risk, with the most resources and controls dedicated to the areas that create the greatest source of risk. Documenting adherence to the company compliance program will not only help prevent a potential violation of the law, but also provides individuals with a compelling argument should misconduct occur.
- > **Don't Stick Your Head in the Sand:** It is critical to conduct meaningful due diligence before entering into agreements with third parties or other business partners. Red flags must be investigated and, if they result in the discovery of potential wrongdoing, must be addressed. If company employees or third parties are suspected of paying bribes, this information must be reported to the company compliance officer and investigated. Ignoring red flags does not make them go away.
- > **It's Not Worth the Risk:** When a high value transaction is on the line, individuals may be tempted to skirt FCPA compliance requirements in order to secure the deal. The risk is not worth the reward. Any improper payment, no matter how small, could jeopardize the reputation of an individual and the company. Moreover, once an individual begins down this path, it is often difficult to stop. Corrupt officials rarely stop asking after they receive the first bribe—they return and often increase their demands. Although there are circumstances under which payments may need to be made (i.e., when an individual's life or safety are threatened), these situations are rare and should be handled in accordance with a company's compliance program.
- > **Lead by Example:** All employees play a critical role in defining the ethical culture of a company. Company management must be clear that bribery will never be tolerated, even if it results in the loss of business. A visible commitment to ethics and compliance is critical, as it sets the tone for the entire company. Employees (including senior executives) and board members should be trained regularly to ensure they understand the consequences of failing to comply with the FCPA and company compliance policies. And, when necessary, disciplinary action must be taken against employees that engage in wrongdoing—regardless of their position or value to the company.
- > **Don't be Afraid to Ask for Help:** Individuals should be familiar with the best way to obtain guidance from the company on how to comply with the FCPA. The guidance should be viewed as a supplement to training, not a substitute. Individuals should also have access to anonymous hotlines to enable them to obtain guidance in situations in which confidentiality is paramount.

Individuals must remain vigilant about their compliance with the FCPA. Understanding the reach of the FCPA is the first step in helping to mitigate or prevent potential violations under the statute. Although this White Paper provides helpful guidance for individuals seeking to learn more about their risks under the FCPA, it is general in nature and must be supplemented by guidance from a company compliance officer or counsel.

For additional information about this issue and others, please contact info@TRACEinternational.org.

About TRACE

TRACE International and TRACE Incorporated are two distinct entities with a common mission to advance commercial transparency worldwide by supporting the compliance efforts of multinational companies and their third party intermediaries. TRACE International is a non-profit business association that pools resources to provide members with anti-bribery compliance support while TRACE Incorporated offers both members and non-members customizable risk based due diligence, anti-bribery training and advisory services. Working alongside one another, TRACE International and TRACE Incorporated offer an end-to-end, cost-effective and innovative solution for anti-bribery and third party compliance.

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