

***Demystifying the U.S. Foreign Corrupt Practices Act (Part I)***  
**By: Barry M. Sabin, Joseph Bargnesi, Jason S. Perkins**

**Background: *A Resource Guide to the U.S. Foreign Corrupt Practices Act***

On November 14, 2012, with input from the Departments of Commerce and State, the Criminal Division of the U.S. Department of Justice (the “DOJ”) and the Enforcement Division of the U.S. Securities and Exchange Commission (the “SEC”) released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Guide”).<sup>1</sup> Identified by DOJ and SEC leadership as an “unprecedented undertaking,”<sup>2</sup> the 120-page Guide represents the agencies’ most significant attempt to date to clarify, aggregate, and expand upon the guidance currently available regarding the agencies’ U.S. Foreign Corrupt Practices Act (“FCPA”) enforcement approach and priorities. According to the SEC, the Guide provides a “detailed analysis” of the FCPA, and closely examines “the SEC and DOJ approach to FCPA enforcement.”<sup>3</sup>

The Guide addresses a wide range of topics, including: who and what is covered by the FCPA’s anti-bribery and accounting provisions; the definitions of “foreign official” and “instrumentality”; what constitutes proper and improper gifts, travel, and entertainment expenses, as well as “facilitation payments”; and the different types of civil and criminal resolutions available in the FCPA context. The Guide also attempts to explain the concepts of “successor liability” and “parent/subsidiary liability,” while highlighting the need for risk-based due diligence, and reaffirming the importance of implementing an effective FCPA compliance program. Finally, the Guide conveys the agencies’ recommendations and illustrates how a business or individual may decrease the chance of being subjected to an enforcement action. It does so by providing hypotheticals, examples of enforcement actions, summaries of applicable case law, and explanations of matters that the SEC and DOJ have declined to pursue. While The Guide provides quite a bit of information, it does not delve into the cultural and linguistic challenges associated with due diligence and compliance. We’ll take a look at how using The Guide, outside counsel, and consultancy of a language services provider (LSP), can help you put together a thorough plan of attack.

**Examining the Guide’s Practical Limitations**

To minimize a company’s risk of being subjected to an enforcement action, a company must first understand who and what is covered by the FCPA, and what types of conduct are likely to lead to enforcement actions. Here, the Guide, in connection with the advice of experienced legal counsel, can serve as a useful resource. The Guide explains basic FCPA concepts, provides universal definitions, and illustrates the agencies’ enforcement approaches and priorities for several common scenarios. It is not without practical limitations, though. For instance, the Guide

<sup>1</sup> A free electronic copy of the Guide is available at [www.justice.gov/criminal/fraud/fcpa/guidance](http://www.justice.gov/criminal/fraud/fcpa/guidance).

<sup>2</sup> The Guide, at page 4 (foreword by Lanny A. Breuer and Robert S. Khuzami).

<sup>3</sup> November 14, 2012 SEC Press Release: “SEC and Justice Department Release FCPA Guide” available at <http://www.sec.gov/news/press/2012/2012-225.htm> (last accessed March 11, 2013).

does not answer or address every question a company might have about the requirements and applicability of the FCPA. And, taken alone, the Guide cannot provide a company with a complete and accurate assessment of the risk that it will be subject to under an FCPA enforcement action. Further, even if the Guide’s recommendations were fully comprehensive, the Guide could not tell a company if it had “done enough” to satisfy the Guide’s recommendations. Finally, the Guide also does not provide guidance on *how* to implement the remedial and preventative measures that it recommends, nor how to do so in an effective, cost-efficient manner. These are issues for which companies must use their own resources to fashion individualized, effective solutions.

Even when a company tries earnestly to implement the Guide’s recommendations, difficulties may arise. For one, a company may struggle to determine whether its efforts have been truly effective. Second, many of the Guide’s recommendations require the dedication of significant resources (*e.g.*, conducting risk-based due diligence, creating and implementing effective compliance programs, developing and providing training to employees and third-parties, and engaging in periodic audits). Thus, not only may the company find it challenging to gauge the effectiveness of its efforts, the company may have valid concerns about whether it is using its resources prudently and keeping costs contained.

These issues are significant, but they are not insurmountable. One area to explore in order to get the most from the Guide’s recommendations is a specific area of difficulty: cultural and linguistic variables.

### **Cultural and linguistic variables: Address them now, reduce risk**

“Cultural variables” and “linguistic variables” are each broad concepts. Cultural variables might include differences in expectations between members of one culture and those of another. For instance, an individual in India might have a different understanding of what constitutes a common business practice than someone from the United States. Specifically, that individual, in part because India has ranked highly on the corruption index, might characterize bribes as a normal part of doing business. Further, individuals from certain cultures might respond differently to different types of training or presentation of information than persons from other cultures. As an example, because of their widespread familiarity with advanced technologies, individuals from certain geographic areas might be more comfortable receiving online training than individuals in other geographic locations, who might respond better to a face-to-face presentation. Cultural variables could also include variations of specific business or social customs (*e.g.*, gift giving).

Linguistic variables encompass a myriad of issues dealing with language translation. For instance, differences between speakers of different languages—and even different dialects—can change the meaning of key terms. Additionally, even in circumstances where individuals are capable of speaking the same language (*e.g.*, the speakers are bilingual), they might be most comfortable communicating with someone in their native language during tense situations.

So, how are these cultural and linguistic differences relevant to the Guide and to staving off enforcement actions? For one, these variables may diminish the accuracy and effectiveness of communication within the company’s operations, the accuracy with which the company gauges the effectiveness of its risk-mitigating efforts, and the understanding the company has of its present and potential exposure to possible FCPA enforcement actions. If these cultural and linguistic differences are not addressed, companies may be at an increased risk of being subjected to an FCPA enforcement action. In addition, cultural and linguistic differences can create confusion or miscommunication during the course of investigations. In these scenarios, accuracy and impartiality are key. Mix-ups could lead to significant consequences.

In Part II, we’ll look at some of the real-life international situations in which challenges often arise due to these variables, and from there expand on the most effective resources companies have at their disposal to mitigate any potential problems.

### *Demystifying the U.S. Foreign Corrupt Practices Act (Part II)*

In Part I of this article, we discussed the Foreign Corrupt Practices Act (FCPA), and the resource guide that accompanies it (“the Guide”). The Guide aims to define the terms of the FCPA and help clarify what exactly is and isn’t covered by its parameters. However, as we addressed, these terms are subject to certain ambiguity due to the cultural and linguistic variables associated with certain concepts and phrases, which can put the parties involved on very different pages of the same book. The second part of our article will explore some of the circumstances in which these variables often have a complicating effect, as well as look at what international businesses can do to sidestep these challenges.

#### **Linguistic variables and real-world scenarios**

Perhaps nowhere are these concerns more relevant than when a company has foreign subsidiaries, or where the company plans to merge with another company that has foreign operations. This is because the Guide makes clear that a company may find itself subject to an FCPA enforcement action even if it was not “directly responsible” for the violation. This “indirect” liability arises primarily in two contexts: (1) when a parent company is deemed responsible for the violations of one of its subsidiaries (“parent/subsidiary liability”), or (2) when a company acquires or merges with another company, which violates or previously violated the FCPA (“successor liability”).

In accordance to the FCPA, a parent company can be held liable for the violations of its subsidiary if it “participated sufficiently” in the violation,<sup>4</sup> or it may be held liable under “traditional agency principles.”<sup>5</sup> Under traditional agency principles, often referred to as the doctrine of *respondet superior*, a parent company “is liable for bribery committed by the subsidiary’s employees.”<sup>6</sup> Indirect liability incentivizes parent companies to develop effective

---

<sup>4</sup> The Guide, at page 27.

<sup>5</sup> Id.

<sup>6</sup> Id.

compliance programs that are communicated to and followed by their subsidiaries. The Guide points out that parent companies are also wise to create sufficient risk-detecting and remedial measures, as well as adequate processes for self-reporting the discovery of questionable conduct. Similarly, in the mergers and acquisitions context, the surviving entity acquires the liabilities of the extinguished entity. As such, the Guide encourages companies to “conduct preacquisition due diligence and improve compliance programs and internal controls after acquisition.”<sup>7</sup>

In both the parent/subsidiary context, as well as the mergers and acquisitions context, a company’s efforts to comply with the Guide’s recommendations to avoid enforcement actions can be undercut by cultural and linguistic variables. Cultural and linguistic differences between a parent and its subsidiary, or between an acquirer and its target, can lead to incomplete or incorrect sharing of information. This problem is only exacerbated by the fact that a company’s subsidiaries or potential acquisitions might operate in some of the world’s riskiest areas for corruption. If unaddressed, or improperly addressed, cultural and linguistic variables may lead to insufficient transactional due diligence or inadequate training and monitoring of subsidiary operations. They may also diminish the effectiveness of efforts made to create, revise, or implement an effective compliance program. All of these issues may lead to less predictability about whether the company is likely to be subject to an enforcement action. And worse yet, they might make it more likely that the company will be subject to an enforcement action.

### **Dealing with FCPA Issues Raised by Cultural and Linguistic Variables**

When faced with cultural or linguistic variables, a company’s first inclination might be to enlist their own in-house or in-country resources to help overcome these challenges. As an in-house solution, companies may lean on bilingual employees, even when ordinarily those employees are not tasked with mediating cultural barriers or translating compliance-related documents. These decisions may be based upon a well-intentioned, but ultimately shortsighted notion about soft costs. Given what is at stake with regard to FCPA enforcement actions, and the potential for ambiguity when interpreting the FCPA, it is risky (and ultimately may be more costly) to rely solely on a bilingual assistant or bilingual paralegal in your office to fill such an important and uncharacteristic role.

One prudent alternative is to work with legal counsel to engage a sophisticated language service provider (LSP); especially an LSP that has experience assisting companies and law firms with the FCPA. Some of these LSPs have linguists who are former legal professionals and have dedicated their lives to providing translation support in this area. Similarly, if the LSP has experience assisting with due diligence reviews, creating and implementing compliance programs, translating compliance training materials, and assisting with formal DOJ or SEC investigations, that LSP can further help limit concern stemming from cultural and linguistic variables.

---

<sup>7</sup> The Guide, at p. 28.

While all LSPs are adroit providers of translation services, the sophisticated LSPs are capable of doing more than simply translating documents. Some LSPs provide a range of services, each of which can help to ensure the effectiveness of the implementation of policies and procedures designed to accord with the Guide's recommendations. A sophisticated LSP can also consult on the most efficient ways to deliver a uniform training presentation so that the messages refined by the company's legal department or outside counsel are delivered accurately and uniformly across all operations, regardless of location or native language. They should also be able to provide seasoned interpreters to assist with explanatory meetings and training sessions as well as remote interpretation in the form of whistle-blower tip lines to help companies vet possible breaches of FCPA policy.

LSPs can also provide helpful assistance during FCPA investigations. First, LSPs can help establish something that using in-house counsel cannot: impartiality. Through the use of LSPs, a company can demonstrate integrity and lack of bias when engaging in translation. Second, where a regulator is involved, utilizing an LSP can help ensure that translations are accurate. Here, where there is so much at stake, companies are wise to take every measure possible to ensure that there are no translation mistakes or misunderstandings.

Finally, LSPs may offer services that provide the opportunity for cost savings. For instance, some LSPs offer technology mechanisms that can help a company build an efficient library of content over time, which that company can continue to leverage as it builds and revises its policies and training programs. These cost savings are in addition to what a company can save when LSPs help implement policies, procedures, and training effectively, and the company positions itself to avoid the costs of defending costly FCPA enforcement actions.

## Conclusions

FCPA enforcement actions frequently are costly and time consuming. Companies are wise to take appropriate measures to avoid FCPA enforcement actions. Reviewing and attempting to accord with the Guide is a good place to start. The Guide does not provide all the answers, but it does provide some basic guidelines for avoiding an FCPA enforcement action. However, those guidelines are only valuable insofar as a company is capable of interpreting the Guide and implementing its recommendations effectively. As noted throughout, cultural and linguistic variables represent potential pitfalls to companies who are trying earnestly to accord with the Guide's recommendations. Given the LSP's ability to help promulgate a uniform, accurate, and appropriately-tailored message in a cost-efficient manner, and to act as a knowledgeable, independent liaison, they represent a solid investment that can significantly bolster a company's FCPA posture.

## About the Authors

Barry Sabin is a partner in the Washington, D.C. office of Latham & Watkins, where his practice is focused on white collar criminal investigations and internal investigations –with a distinct focus on accounting and securities fraud, healthcare fraud, Foreign Corrupt Practices Act (FCPA) matters, and congressional investigations. Mr. Sabin also serves as the global Co-chair of the firm’s Aerospace, Defense & Government services Industry Group and is a member of the Corporate Governance Task Force. Prior to joining Latham & Watkins, Mr. Sabin worked at the US Department of Justice for 18 years and most recently served as Deputy Assistant Attorney General for the Criminal Division.

Jason Perkins is the director of TransPerfect Legal Solutions’ (TLS) anti-corruption practice group. TLS is a member of the TransPerfect family of companies. Mr. Perkins frequently works with law firms and corporations to consult them on the cultural and linguistic challenges associated with anti-corruption due diligence, investigations, and compliance. Mr. Perkins is a graduate of the University of Maryland.

Joseph Bargnesi is an associate in the Washington, D.C. office of Latham & Watkins. He has experience representing clients in complex civil litigation, white collar criminal investigations and internal investigations. At Latham & Watkins, Mr. Bargnesi has advised clients on a range of criminal and regulatory matters, including international matters relating to alleged bribery under the Foreign Corrupt Practices Act (“FCPA”), accounting and securities fraud, and procurement fraud.