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Navigating the DOJ FCPA Opinion Procedure: Certainty for Businesses Facing Increased, Indeterminate Anti-Bribery Enforcement

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Navigating the DOJ FCPA Opinion Procedure: Certainty for Businesses Facing Increased, Indeterminate Anti-Bribery Enforcement

By Fahad A. Juneja*

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I. INTRODUCTION

Foreign Corrupt Practices Act (FCPA) criminal investigations have become an increasingly routine feature on the corporate landscape.¹ However, as the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have ramped up their domestic enforcement of the FCPA, there has been a lack of transparency and guidance coupled with much after-the-fact prosecution of U.S.-based companies.² Although the DOJ provides proactive guidance by issuing advisory opinions to companies at the outset of business transactions through its DOJ FCPA Opinion Release Procedure,³ this procedure is seldom used by businesses, as it is perceived to be costly, cumbersome, potentially invasive, and time-consuming.⁴ The DOJ Opinion Procedure allows businesses to submit information about their prospective conduct to the DOJ, after which the DOJ issues an advisory opinion on whether the party's proposed conduct conforms to anti-bribery enforcement policy.⁵ If the DOJ finds that the requestor's conduct conforms to the present FCPA enforcement policy, there will be a rebuttable presumption that the requestor's conduct is in compliance with the FCPA.⁶ As FCPA enforcement continues to rise, it remains to be seen whether the DOJ Opinion Procedure will reach its powerful potential as a proactive method of compliance. Potentially exacerbating the problem is the lack of literature specifically addressing strategic uses of the DOJ Opinion Procedure for companies contemplating prospective transactions or payments that may implicate the FCPA.

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¹ See *infra* Part II.

² See Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 499–500 (2011).

³ See *infra* Part V.

⁴ See *infra* Part IV.A.

⁵ 28 C.F.R. § 80.1 (2014).

⁶ See *id.* § 80.10.

Part I of this article provides an overview of current FCPA enforcement and trends, along with common challenges that businesses face in complying with the FCPA.⁷ Next, Part II analyzes the murky beginnings and increasing clarity of the DOJ Opinion Procedure through subsequent congressional amendments and through a recent SEC and DOJ informal FCPA publication.⁸ Parts III and IV discuss when and how to use the DOJ Opinion Procedure to a business's advantage and how to avoid common pitfalls.⁹ Taking potential concerns into consideration, a business should ultimately use the DOJ FCPA Opinion Procedure when the business (1) is truly uncertain about the lawfulness of prospective activity, (2) believes that the information it will provide the DOJ will not be disclosed (or will not cause injury if disclosed), and (3) believes that the protection afforded will outweigh potential harm to the business if it does not disclose its prospective conduct and is later challenged on it.¹⁰

Part V outlines in detail the procedures for successfully submitting a DOJ FCPA Opinion Request.¹¹ Finally, Part VI evaluates whether the benefits of strategically using the DOJ FCPA Opinion Procedure extend to voluntarily disclosing actual or potential FCPA violations, concluding that that the empirical evidence does not support this view in spite of DOJ rhetoric to the contrary.¹² Although the DOJ Opinion Procedure remains an underutilized, extremely valuable tool for advisory opinions, the benefits of the procedure do not appear to extend to voluntary disclosures of FCPA violations at this time.¹³

II. THE CURRENT FCPA LANDSCAPE

The Foreign Corrupt Practices Act¹⁴ was enacted with the

⁷ See *infra* Part I.

⁸ See *infra* Part II.

⁹ See *infra* Parts III–IV.

¹⁰ See *infra* Part IV.B.

¹¹ See *infra* Part V.

¹² See *infra* Part VI.

¹³ See *infra* Part VI.

¹⁴ The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff (2012), *amended by* Foreign Corrupt Practices Act Amendment of 1988, 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff (2012),

goal of “restor[ing] public confidence in the integrity of the marketplace”¹⁵ by addressing corruption through anti-bribery and record-keeping provisions.¹⁶ The impetus for passage of the FCPA came from reports of U.S. companies making bribes both domestically and abroad.¹⁷ An SEC investigation reported to Congress in 1976 that more than 400 companies (including more than 117 respected Fortune 500 companies in a variety of industries) had admitted to making illegal or improper payments overseas, estimated to exceed \$300 million.¹⁸

Today, for many American businesses trying to compete and survive by developing international business relationships and pursuing transactional opportunities abroad,¹⁹ the FCPA is the most important U.S. law governing international business.²⁰ Since its passage in 1977, the FCPA prohibits U.S. citizens, foreign companies listed on a U.S. stock exchange, and entities physically present in the U.S. from offering or promising to pay a foreign official “anything of

and the International Anti-Bribery and Fair Competition Act of 1998, 15 U.S.C. §§ 78dd-1 to 78dd-3, 78ff (2012).

¹⁵ U.S. Dep’t of Justice & U.S. Secs. & Exch. Comm’n, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 14, 2012) [hereinafter Resource Guide], available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>; see also Fraud Section, U.S. Dep’t of Justice & Office of the Chief Counsel for Int’l Commerce, U.S. Dep’t of Comm., Lay Person’s Guide to the FCPA (2010), available at <http://insct.syr.edu/wp-content/uploads/2013/02/lay-persons-guide.pdf> (noting that “[t]he FCPA was intended to have and has had an enormous impact on the way American firms do business.”).

¹⁶ Bruce Hinchey, *Punishing the Penitent: Disproportionate Fines in Recent FCPA Enforcements and Suggested Improvements*, 40 PUB. CONT. L.J. 393, 394-95 (2011).

¹⁷ Westbrook, *supra* note 2, at 499–500.

¹⁸ *Id.*

¹⁹ See Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 997–98 (2010) (noting that American businesses are looking outside of the United States in large part due to “the increase in globalization and the saturation of domestic markets, it is no longer just large resource extraction companies that are doing business in overseas markets. If the increase in FCPA enforcement over the last decade has taught us anything, it is that large and small companies in all industries face FCPA risk and exposure.”).

²⁰ Dieter Juedes, *Taming the FCPA Overreach Through an Adequate Procedures Defense*, 4 WM. & MARY BUS. L. REV. 37, 39 (2013) (citing Koehler, *supra* note 19, at 997).

value” to obtain or retain business.²¹ To further promote anti-bribery, the FCPA accounting provisions require domestic and foreign companies traded on U.S. stock exchanges to regularly provide reports to the SEC, maintain accurate records, and create internal compliance controls that accurately reflect payments to foreign officials.²² In effect, the FCPA provisions work together, as the FCPA bribery provision punishes instances of bribery, while the FCPA books and records provision helps detect bribery in the first place.²³

For many businesses in the United States that undertake extensive promotional activities to market and sell their products internationally, such efforts may involve paying the expenses of international customers to travel to the company’s facilities for product demonstrations, training programs, and conferences.²⁴ However, if the international customer happens to be a government official or an individual affiliated with a foreign government-controlled enterprise—which often is not readily apparent—the company’s payments for the customer’s expenses may be seen as bribes in violation of the FCPA.²⁵ The FCPA prohibits giving (or even offering) “*anything of value*” to foreign government officials in order to gain the official’s influence in obtaining or retaining business or an improper advantage.²⁶ Though the FCPA does not define the term “value,” the DOJ has enforced the term broadly to include both tangible and intangible benefits.²⁷ Accordingly, paying

²¹ *Id.* at 39 n.4 (citing 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1), 78dd-3(a)(1) (2012)).

²² *Id.* at 39; James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 827 (2012) (citing 15 U.S.C. § 78m(a)-(b) (2012)).

²³ Juedes, *supra* note 20, at 39–40.

²⁴ Richard M. Strassberg & Kyle A. Wombolt, *Beware Foreign Corrupt Practices Act Traps*, N.Y. L.J. (July 21, 2008), available at http://www.goodwinprocter.com/~media/Files/Publications/Attorney%20Articles/2008/Beware_Foreign_Corrupt_Practices_Act_Traps.pdf.

²⁵ *Id.*

²⁶ *Id.* (citing 15 U.S.C. § 78dd-1(a) (2012)) (emphasis added).

²⁷ *Id.* (noting as an example that businesses paying expenses for customers to attend product demonstrations “would be construed as providing those customers with something of ‘value’ under the Act”); see also Ashby Jones, *Highlights from the Long-Awaited FCPA Guidance*, WALL ST. J. L. BLOG (Nov. 14, 2012, 2:24 PM), <http://blogs.wsj.com/law/2012/11/14/highlights-from-the-long-awaited-fcpa->

expenses for customers to attend product trainings or demonstrations would be construed as providing something of “value” under the FCPA, and thus, such payments and situations may implicate the FCPA.²⁸

Consequently, companies should proceed with caution and take steps to ensure that payments for promotional activities are legitimate business expenditures capable of withstanding the scrutiny demanded by the FCPA.²⁹ The level of requisite caution and due diligence, however, depends in large part on the scope and intensity of current DOJ and SEC FCPA enforcement.

A. *Enforcement of the FCPA*

While the DOJ and SEC initiated just two or three FCPA cases per year during the FCPA’s first twenty-eight years, and related fines seldom exceeded \$1 million, times have clearly changed.³⁰ The DOJ now considers enforcing the FCPA as “one of its top priorities—second only to fighting terrorism.”³¹ The number of cases has “skyrocketed” in the current era,³² as the SEC and the DOJ have

guidance/ (explaining that the FCPA does not contain a minimum threshold amount for corrupt payments or gifts under the FCPA “anything of value” statutory language, but that it is unlikely that taxi fare or coffee provisions would ever evidence the sufficient corrupt intent to be more than nominal value).

²⁸ Strassberg & Wombolt, *supra* note 24. However, “not all payments to foreign officials [or government representatives] are banned by the FCPA. The FCPA includes as an affirmative defense payments that are ‘reasonable and bona fide’ expenditures, ‘such as travel and lodging expenses, incurred by or on behalf of a foreign official’ as long as the payments are ‘directly related’ to ‘the promotion, demonstration or explanation of products or services’ or the ‘execution of performance of a contract with a foreign government or agency thereof.’” *Id.* Despite being labeled as an “affirmative defense,” however, the provision merely clarifies the type of conduct covered by the FCPA. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 495.

³¹ Juedes, *supra* note 20, at 40–41.

³² Roger M. Witten et al., *Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies*, 64 BUS. LAW. 691, 691–92 (2009).

brought ten times as many cases as in prior years,³³ with fines increasing dramatically and settlement amounts dwarfing previous records.³⁴ The agencies do not appear to have any intent of relenting from increased FCPA enforcement, as the SEC created a specialized unit in 2010 to be “more proactive” in FCPA enforcement,³⁵ and the head of the DOJ’s criminal division has reaffirmed that the agency is “in a new era of FCPA enforcement[,] and [it is] here to stay.”³⁶ Preliminary data suggests that the SEC and the DOJ have continued their aggressive cross-border enforcement of the FCPA in 2014.³⁷

In order to develop new strategies for FCPA compliance, enforcement agencies have recently focused on international cooperation and incentivizing companies to disclose employee violations.³⁸ First, an increase in international cooperation on anti-

³³ Westbrook, *supra* note 2, at 495–96 (noting that while the SEC and the DOJ “typically initiated just two or three cases a year” during the FCPA’s first twenty-eight years of enforcement, since 2007, government agencies have brought ten times as many enforcement actions). In 2010, for example, government agencies initiated a whopping 74 enforcement actions; in 2011, there were 48 enforcement actions; in 2012, there were 23 enforcement actions; and in 2013, there were 27 enforcement actions. *2014 Mid-Year FCPA Update*, GIBSON, DUNN, & CRUTCHER LLP (July 7, 2014), available at <http://www.gibsondunn.com/publications/pages/2014-Mid-Year-FCPA-Update.aspx>.

³⁴ Westbrook, *supra* note 2, at 496 n.22 (“Eight of the ten highest monetary penalties in FCPA-related settlements were reached in 2010.”). In 2012, there were a total of twenty-three FCPA enforcement actions. *2012 Year-End FCPA Update*, GIBSON, DUNN, & CRUTCHER LLP (Jan. 2, 2013), available at <http://www.gibsondunn.com/publications/Documents/2012YearEndFCPAUpdate.pdf>. In 2013, the total number of FCPA enforcement actions was again on the rise, with twenty-seven agency actions. *2013 Year-End FCPA Update*, GIBSON, DUNN, & CRUTCHER LLP (Jan. 6, 2014), available at <http://www.gibsondunn.com/publications/Documents/2013-Year-End-FCPA-Update.pdf>.

³⁵ Cheryl Scarboro, Chief of the Foreign Corrupt Practices Act Unit, U.S. Sec. & Exch. Comm’n, Remarks at News Conference Announcing New SEC Leaders in Enforcement Division (Jan. 13, 2010), available at <http://www.sec.gov/news/speech/2010/spch011310newsconf.htm>.

³⁶ Lanny A. Breuer, Assistant Att’y Gen., Speech at 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

³⁷ *2014 Mid-Year FCPA Update*, *supra* note 33.

³⁸ Barta & Chapman, *supra* note 22, at 827–28.

bribery enforcement has aided U.S. domestic enforcement efforts.³⁹ Second, companies are increasingly presented with incentives to disclose employee violations to obtain favorable treatment instead of facing aggressive prosecution.⁴⁰ Finally, the SEC and the DOJ continue to interpret the FCPA's jurisdiction broadly to include conduct outside of the United States.⁴¹

1. *International Enforcement Efforts*

In addition to having familiarity and awareness of DOJ and SEC FCPA enforcement, companies must also focus beyond the American regulatory sphere, as “[o]ther countries have joined the United States in a push for wider investigations [of,] and larger penalties” for anti-bribery.⁴² For example, a landmark U.K. Bribery Act enacted in 2010 appears to overtake the FCPA as the most wide-ranging and aggressive international anti-bribery statute.⁴³ Since its passage, “[t]he revolutionary U.K. Bribery Act 2010 is still causing ripples of uncertainty in the United Kingdom and global business communities, despite the [U.K.]’s efforts to enforce the Act in such a way that ‘ethical companies have nothing to fear.’”⁴⁴ Although the few

³⁹ *Id.* at 828.

⁴⁰ *Id.*

⁴¹ *Id.* at 827–28.

⁴² *FCPA/Anti-Bribery Spring Alert 2011*, HUGHES HUBBARD & REED LLP, June 2011, at i, available at [http://www.hugheshubbard.com/NewsDocuments/Hughes%20Hubbard%20FCPA%20Anti-Bribery%20Alert%20Spring%202011%20PART1\[1\].pdf](http://www.hugheshubbard.com/NewsDocuments/Hughes%20Hubbard%20FCPA%20Anti-Bribery%20Alert%20Spring%202011%20PART1[1].pdf).

⁴³ *Id.*; see also *FCPA/Anti-Bribery Alert Winter 2013*, HUGHES HUBBARD & REED LLP, December 2013, at i, available at <http://www.hugheshubbard.com/PublicationDocuments/FCPA%20Anti-Bribery%20Alert%20Winter%202013.pdf> (noting three years after the introduction of the U.K. Bribery Act that “[w]here once enforcement of the U.K. Bribery Act seemed a paper tiger, we now see active prosecutions”). The U.K. Bribery Act also appears to lack recognized FCPA exceptions such as the “exception for ‘facilitating or expediting payments’ made in furtherance of routine governmental action” *Id.* at 29. Such payments could subject a business to sanctions under the U.K. Bribery Act. *Id.*

⁴⁴ *Id.* at 265. In fact, due to the U.K. Bribery Act’s “sweeping scope,” it has not only received criticism from business circles, but the U.K. Ministry of Justice also delayed the Act’s implementation until July 1, 2011—seven months after the

prosecutions of the U.K. Bribery Act have left the international business community with little guidance, Director David Green clarified that further prosecutions under the U.K. Bribery Act would be forthcoming.⁴⁵ Furthermore, in addition to the U.K., other countries such as Germany, and surprising newcomers including Australia and Canada, are now willing to investigate and prosecute instances of corruption.⁴⁶

Regarding comparative levels of international anti-bribery enforcement, seven countries—the United States, the United Kingdom, Denmark, Germany, Italy, Norway, and Switzerland—have been classified as “active” anti-bribery corruption enforcers by Transparency International,⁴⁷ meaning that these countries “were among the [eleven] largest exporters in the world, have at least ten major cases, initiated at least three major cases in the last three years, and concluded at least three major cases with substantial sanctions.”⁴⁸ Another nine countries—Argentina, Belgium, Finland, France, Japan, South Korea, the Netherlands, Spain, and Sweden—are classified as “moderate” enforcers, meaning that the countries have at least one major case along with other active investigations.⁴⁹ Accordingly, due to the global nature of anti-bribery enforcement, while U.S.

date initially promised—to allow the business community time to adjust to the new compliance policies. *Id.* at 267.

⁴⁵ *Id.*

⁴⁶ *FCPA/Anti-Bribery Spring Alert 2011*, *supra* note 42, at i, 2 (stating that “countries, such as Germany, are more willing than ever to investigate and prosecute corruption. . . . [Germany] has over 100 open corruption investigations”); *FCPA/Anti-Bribery Winter Alert 2013*, *supra* note 43, at i (noting that “where we once wondered if non-U.S. governments would continue to strengthen and enforce anti-bribery laws, we see resounding confirmation in the form of investigations and enforcement activity from heretofore unseen jurisdictions such as Australia and Canada.”).

⁴⁷ Transparency International is a non-governmental organization with chapters in more than 100 countries whose “[m]ission is to stop corruption and promote transparency, accountability and integrity at all levels and across all sectors of society.” *Mission, Vision, and Values*, TRANSPARENCY INT’L (Oct. 16, 2011), http://www.transparency.org/whoweare/organisation/mission_vision_and_values.

⁴⁸ *FCPA/Anti-Bribery Spring Alert 2011*, *supra* note 42, at 121.

⁴⁹ *Id.* at 121–22. Interestingly, Transparency International’s 2010 Progress Report identified the primary cause of global FCPA under enforcement as a “lack of political will,” which arises in the obstruction of investigations and failure to fund and staff enforcement-related efforts. *Id.* at 122.

businesses are justifiably focused on FCPA enforcement, it is becoming increasingly important for companies to not lose sight of non-U.S. anti-bribery enforcement systems that their actions may implicate.

2. *Recent FCPA Enforcement Trends*

After a momentary decrease in the number of enforcement actions between 2010—which had a record-high number of enforcement actions—and 2012, enforcement actions in 2013 increased by 17%.⁵⁰ Furthermore, the market rate for resolving an FCPA enforcement action for corporations “spiked precipitously in 2013,” as there was a nearly fourfold increase for the average closing price for corporate FCPA resolutions, which includes DOJ and SEC fines, penalties, disgorgement, and prejudgment interest.⁵¹ In addition, two of the nine total corporate FCPA resolutions in 2013 made the “FCPA Top 10” list for the ten highest FCPA settlements in U.S. history.⁵² While speaking at the 2013 American Conference Institute FCPA Conference about FCPA cases on the horizon, the DOJ’s FCPA Unit Chief stated that he expected more “top 10 quality type cases” in 2014.⁵³

With regard to industries affected by FCPA enforcement actions, although the DOJ and the SEC in 2013 brought actions against traditionally “high risk” FCPA industries such as oil, petroleum services, and medical devices, the agencies also pursued prosecutions in industries not normally associated with the FCPA, such as clothing and automated teller machine manufacturing.⁵⁴ Finally, although new leadership was put in place at both the DOJ and the SEC early in

⁵⁰ See *2013 Year-End FCPA Update*, *supra* note 34 (noting that the total enforcement actions in 2012 was twenty-three and total enforcement actions in 2013 was twenty-seven). “2013 marked another year of vigorous international anti-corruption enforcement” due to (1) “a return to the robust enforcement totals of recent years,” (2) “a nearly fourfold increase in the size of the average corporate fine,” (3) “increas[ed] aggressive deployment of traditional criminal investigative techniques,” and (4) “the expansion of multijurisdictional, cross-border cooperation and prosecution” *Id.* at 1.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 8.

2013, and a few prosecutors have left the FCPA enforcement practice for in-house legal departments or private practice, there are sufficiently seasoned remaining FCPA prosecutors so as to “not expect any break in the drumbeat of further prosecutions.”⁵⁵ This increase in overall enforcement, coupled with increased average corporate fines, appears to indicate continued, vigorous FCPA enforcement.⁵⁶

B. Challenges that Businesses Face when Attempting to Comply with the FCPA

The FCPA is one of the most feared statutes for U.S. businesses operating overseas. This is due in large part to perfect FCPA compliance being extremely difficult or unlikely due to the statute’s expansive language, the absence of available judicial and administrative guidance, and the inherent realities involved in generating business globally.⁵⁷ Because the FCPA has been amended twice in its history but has not received sustained congressional attention nor been the subject of formal rulemaking, along with the FCPA being seldom litigated,⁵⁸ there is little interpretation of the Act.⁵⁹ Consequently, businesses and individuals that intend to comply with the FCPA have to do so with scant legislative or judicial guidance.

Both the DOJ and the SEC have taken expansive interpretations of the FCPA’s definition of “foreign official.”⁶⁰ Although the FCPA statute defines “[t]he term ‘foreign official’ [as an] officer or employee of a foreign government or any department, agency, or

⁵⁵ *Id.* at 20.

⁵⁶ *Id.*

⁵⁷ Juedes, *supra* note 20, at 42.

⁵⁸ Westbrook, *supra* note 2, at 562.

⁵⁹ Juedes, *supra* note 20, at 42–45.

⁶⁰ *Id.* at 43–44; *see* 15 U.S.C. § 78dd-1(a) (2012); Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. 27 (2011) (statement of the Hon. Michael B. Mukasey, Partner, Debevoise & Plimpton LLP) (“The DOJ’s and SEC’s enforcement . . . make clear that they interpret the terms ‘foreign official’ and ‘instrumentality’ extremely broadly.”).

instrumentality thereof . . . ,”⁶¹ the meaning of the term “instrumentality,” which is not at all clear or intuitive, is not defined by the statute.⁶²

Importantly, the DOJ and the SEC have also failed to provide a list of factors for determining whether a party is an instrumentality of a foreign government, and neither agency has clarified the term in a meaningful way.⁶³ In fact:

the DOJ has [brazenly] admitted that ‘it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a ‘foreign official’ within the meaning of the FCPA.’⁶⁴

The DOJ has admitted that it does not support a change in the definition or its interpretation of “foreign official” or “instrumentality” because if companies are “not paying bribes,” they should have nothing to fear.⁶⁵ Such ambiguity of FCPA key terms is especially problematic in light of the fact that the broad

⁶¹ 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A) (2012) (emphasis added).

⁶² Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 820 (2011) (noting that “the confusion surrounding this language centers on the ambiguous term ‘instrumentality[,]’ . . . [which] the FCPA does not define . . .”).

⁶³ Juedes, *supra* note 20, at 44.

⁶⁴ *Id.* (quoting *DOJ’s FCPA Team Pressing Forward With Pharma Probes*, MCGUIRE WOODS LLP (July 20, 2010), <http://www.mcguirewoods.com/Client-Resources/Alerts/2010/7/DOJsFCPATeamPressingForwardwithPharmaProbes.aspx>).

⁶⁵ Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary, 112th Cong. 67 (2011) (DOJ Deputy Assistant Att’y Gen. Greg Andres), *available at* http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.PDF (noting that the DOJ “[does not] support a change in the definition of foreign official . . . [or instrumentality] because we are fearful . . . [of] a bright line rule with respect to who constitutes a foreign official. [The DOJ believes] if companies are not paying bribes, that there is really no fear of prosecution from FCPA enforcement.”).

“instrumentality” interpretation has periodically been applied to payments to foreign officials of companies that have state-owned interests.⁶⁶ Once a company with a state-controlled or state-influenced interest has been seen by the DOJ and the SEC as an instrumentality under the FCPA, *all* employees or agents of the company are considered to be “foreign officials.”⁶⁷ For example, the DOJ and the SEC alleged that American construction company KBR made improper payments to “foreign officials” who were employees of Nigeria LNG Limited.⁶⁸ The agencies claimed that these employees were “foreign officials” for purposes of the FCPA, despite the Nigerian government having only a 49% ownership stake in Nigeria LNG Limited, while 51% of the company was owned by a consortium of private multinational oil companies, such as Shell, Total, and Eni.⁶⁹ KBR eventually settled with the government, without the government ever clarifying its interpretation of “foreign official” publicly.⁷⁰

The KBR example is illustrative in that even if a company is majority-owned by private, non-governmental entities, as long as the company has *some* state-controlled ownership, the SEC and the DOJ may consider any of the company’s employees “foreign officials” under the FCPA.⁷¹ Such a questionable interpretation not only prevents businesses from reliably determining which companies are sufficiently state-owned to qualify as an instrumentality of foreign officials, but it also presents serious difficulties in countries like China, where state ownership is prevalent.⁷² For instance,

⁶⁶ *Id.* at 44–45.

⁶⁷ *Id.* at 44.

⁶⁸ Mike Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence, 43 *IND. L. REV.* 389, 412–13 (2010).

⁶⁹ *Id.*; *Our Company Shareholders*, NIGERIA LNG LIMITED, <http://www.nlng.com/PageEngine.aspx?&id=43> (last visited Jan. 30, 2014).

⁷⁰ See SEC Charges KBR, Inc. with Foreign Bribery, Litigation Release No. 20897A, 95 SEC Docket 570 (Feb. 11, 2009), <http://www.sec.gov/litigation/litreleases/2009/lr20897a.htm>.

⁷¹ Koehler, *supra* note 68, at 413.

⁷² See Andrew Weissmann & Alixandra Smith, U.S. Chamber Inst. for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 6 (2010), *available at* http://ilr.iwssites.com/uploads/sites/1/restoringbalance_fcpa.pdf (noting that the FCPA “should take into account the realities that confront businesses that operate

pharmaceutical companies operating abroad are increasingly exposed to FCPA liability because they often interact with doctors, nurses, and hospitals that fall within the “government employee” proscription.⁷³

However, there are faint signs of progress on this front, as members of Congress have encouraged the DOJ to articulate and clarify “under what circumstances an employee of an instrumentality who is not exercising the sovereign authority of the state may be considered a ‘foreign official.’”⁷⁴

III. HISTORY AND DEVELOPMENT OF THE DOJ FCPA OPINION PROCEDURE

The FCPA Opinion Procedure has evolved from its roots as an informal and discretionary system in the 1980s to a standardized process providing parties that seek guidance more assurance, responsiveness, and confidentiality than was originally provided to them.⁷⁵ The FCPA Opinion Procedure allows businesses to obtain the advisory opinion of the DOJ on whether the business’s prospective conduct conforms with, or would violate, the DOJ’s present anti-bribery enforcement policy.⁷⁶ If the DOJ finds that the

in countries with endemic corruption . . . or in countries where many companies are state-owned (e.g., China) and it therefore may not be immediately apparent whether an individual is considered a ‘foreign official’ within the meaning of the act.”); *see also* Koehler, *supra* note 68, at 413 (criticizing the DOJ and the SEC’s charging documents in such contexts that “contain little more than mere conclusory legal statements as to the key ‘foreign official’ element . . . [T]he SEC’s complaint against Oscar Meza . . . is silent as to any factual evidence supporting the theory that employees of unidentified ‘Chinese state-owned companies’ are ‘foreign officials.’”).

⁷³ Johnathan D. Rockoff & Christopher M. Matthews, *Pfizer Settles Federal Bribery Investigation*, WALL ST. J., Aug. 8, 2012, <http://online.wsj.com/news/articles/SB100008723963904442469045775110723150588>.

⁷⁴ Letter from Amy Klobuchar, U.S. Senator (Democrat, Minn.), & Chris Coons, U.S. Senator (Democrat, Del.), to Eric Holder, Attorney Gen. (Feb. 15, 2012), *available at* [http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary_FCPA_02_16_12\[1\].pdf](http://www.mainjustice.com/justanticorruption/wp-admin/documents-databases/265-2-judiciary_FCPA_02_16_12[1].pdf).

⁷⁵ KEVIN T. ABIKOFF, CORPORATE GOVERNANCE: AVOIDING AND RESPONDING TO MISCONDUCT § 18.08 (Law Journal Seminars-Press, 2007 & Supp. 2013).

⁷⁶ 28 C.F.R. § 80.1 (2014).

requestor's conduct conforms to present FCPA enforcement policy, there will be a rebuttable presumption that the requestor's conduct is in compliance with the FCPA.⁷⁷ Notably, although the DOJ specifically denies that its public releases of advisory opinions have precedential value, the DOJ has followed a trend of extending to new cases an "analytical framework" that it previously applied to a similar category of cases or situations.⁷⁸ This appears to indicate that the DOJ's previous guidance influences its future analyses of similar situations or circumstances.⁷⁹

A. *Uncertain Beginnings*

The original 1977 version of the FCPA had no mention of an advisory opinion procedure or review procedure, and the legislative history does not appear to have contemplated such a procedure.⁸⁰ At the direction of President Carter in 1978, the DOJ responded to the uncertainty claimed by some sectors of the business community by establishing its first attempt at an FCPA review procedure in March 1980.⁸¹ The original version of the review procedure gave the DOJ great leeway, as the DOJ was not required to issue a response, had the freedom to state, or refuse to state, its enforcement intentions, and even had the ability to promise only a "'reasonable effort' to respond within thirty days."⁸² The original rule also failed in stating the exact impact of an opinion letter from the DOJ and did not provide much confidentiality.⁸³

Initial fears for businesses contemplating the FCPA review procedure included the SEC and the DOJ potentially reaching

⁷⁷ *See id.* § 80.10.

⁷⁸ ABIKOFF, *supra* note 75, at n.14 (citing, as evidence of trends, DOJ Opinion Procedure Releases No. 10-03 and 11-01).

⁷⁹ *Id.*

⁸⁰ *Id.* (citing H.R. REP. NO. 95-640 (1977); S. REP. NO. 95-114 (1977); H.R. REP. NO. 95-831 (1977) (Conf. Rep.)). However, the conferees, in considering the FCPA legislation, recognized inherent difficulties with clarity and enforcement. H.R. REP. NO. 95-831, at 14 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 4121, 4126.

⁸¹ ABIKOFF, *supra* note 75; *see* 28 C.F.R. § 50 (1980).

⁸² ABIKOFF, *supra* note 75 (citing 28 C.F.R. § 50.18 (1980)).

⁸³ *Id.*

different interpretations on the legality of a business's prospective conduct,⁸⁴ the DOJ's ability to continually demand additional supporting documents,⁸⁵ and the possibility of the agencies' opinion releases being too narrow to provide adequate assurances against prosecution.⁸⁶

By 1983, the chilling effect on businesses in response to FCPA uncertainties became widely recognized.⁸⁷ The lack of clarity in the FCPA provisions created problematic and unnecessary burdens on businesses and individuals required to comply with the law.⁸⁸

B. Increasing Clarity: The 1988 and 1992 Changes to the FCPA Opinion Process and the 2012 Guidance

Amendments to the FCPA in 1988 created a procedure for the Attorney General to issue guidelines, while also requiring the DOJ to create an updated procedure for providing advisory opinion letters.⁸⁹ Legislative history shows that the FCPA Opinion Procedure was intended to clarify the DOJ's enforcement intentions under the FCPA with respect to specific business transactions, while maintaining the confidentiality of documents that were submitted under this

⁸⁴ *Id.* (“This fear was initially buttressed by the SEC’s refusal to participate in the review process . . . Nevertheless, the SEC issued a statement that it would not commence any enforcement action against a company that received a favorable DOJ letter prior to May 31, 1981. This policy was later extended indefinitely and has not been altered since.”); *see also* S. REP. NO. 95-114, at 11–12 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4109–10 (explaining the carefully considered division of enforcement of the FCPA between the SEC and the DOJ).

⁸⁵ ABIKOFF, *supra* note 75. Unfortunately, this fear has not yet been fully abated. *Id.*; *see* 28 C.F.R. § 80.7 (2014) (“[T]he [DOJ] may request whatever additional information or documents it deems necessary to review the matter.”).

⁸⁶ ABIKOFF, *supra* note 75. This fear has also not been properly dealt with at the time of the current writing, as the DOJ “continues to issue opinion letters that tend to be couched in narrow, tentative terms.” *Id.*

⁸⁷ *Id.*

⁸⁸ S. REP. NO. 98-207, at 4 (Aug. 3, 1983).

⁸⁹ Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, § 102 Stat. 1107, 1417 (1988); *see also* H.R. REP. NO. 100-576, at 923 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1956 (discussing the House of Representatives’ bill that would create an opinion procedure allowing for DOJ advisory opinions in response to specific firm inquiries concerned about their FCPA conduct conformance).

procedure.⁹⁰

Shortly thereafter in 1992, the DOJ created the current formal advisory opinion process, the DOJ Opinion Procedure, through which businesses and individuals obtain an advisory opinion of the Attorney General on whether their prospective future conduct conforms with the FCPA's anti-bribery provisions.⁹¹ In 2012, the DOJ, along with the SEC, released a long-awaited Resources Guide to the FCPA, which provided a detailed analysis of the FCPA and closely examined how both agencies approached enforcement of the FCPA.⁹² Currently, all of the DOJ FCPA enforcement actions⁹³ and FCPA Opinion Procedure releases⁹⁴ are available on the DOJ's website. In an effort to improve transparency, the DOJ FCPA website was revamped in 2013 to organize the opinion releases into eighteen subject matter areas from "Audit Rights" to the "Written Laws Affirmative Defense."⁹⁵

IV. WHEN TO USE THE DOJ OPINION PROCEDURE

Before proceeding with the FCPA Opinion Procedure, it is important for businesses to consider whether the time and effort involved in preparing and submitting a request is worth the expense and potentially negative implications of the request. Notably, "[t]he

⁹⁰ 132 CONG. REC. H2977-01 (daily ed. May 20, 1986) (joint statement of Rep. John D. Dingell & Rep. Timothy E. Wirth) (discussing the purpose, proposed practice, and intentions behind the DOJ FCPA Opinion Procedure).

⁹¹ ABIKOFF, *supra* note 75.

⁹² RESOURCE GUIDE, *supra* note 15 (noting that the Guide includes "hypotheticals, examples of enforcement actions and matters that the SEC and DOJ have declined to pursue, and summaries of applicable case law and DOJ opinion releases"); *see also* Legal Aspects of International Sourcing § 12.19 (2013) (providing an overview and discussing the historical context of the Resource Guide).

⁹³ *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html> (last visited Jan. 31, 2014) (providing a helpful list of FCPA, or FCPA-related, enforcement actions by the DOJ that may be arranged alphabetically or chronologically).

⁹⁴ *Index to Releases*, U.S. DEP'T OF JUSTICE FRAUD SEC., <http://www.justice.gov/criminal/fraud/fcpa/index/> (last visited Jan. 31, 2014) (providing all relevant DOJ FCPA Opinion Releases divided by topic).

⁹⁵ *Id.*; *see 2013 Year-End FCPA Update*, *supra* note 34.

DOJ has published [opinion] releases on a range of FCPA issues and in *nearly every instance* the DOJ has stated its intention not to bring an enforcement action with respect to the proposed conduct based on the proactive compliance measures disclosed by the company in seeking the opinion.⁹⁶ In fact, DOJ attorneys have indicated that they look favorably on businesses that engage in the DOJ Opinion Procedure, as opinion requests indicate a robust FCPA compliance process.⁹⁷

However, if a business does not submit an opinion request when faced with an uncertain FCPA situation, the DOJ may interpret the business's failure to submit an opinion adversely. After bringing FCPA enforcement actions against companies, the DOJ has claimed that if companies were uncertain about FCPA enforcement, they should have used their ability to request an opinion pursuant to the FCPA Opinion Procedure.⁹⁸

The DOJ considers the FCPA Opinion Procedure as “unique among the criminal laws,” “soft” precedent, and ultimately as “the best procedure” for handling business concerns related to the FCPA.⁹⁹ The DOJ sees the FCPA Opinion Procedure as providing

⁹⁶ Mike Koehler, *Revisiting A Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 648 (2012) (emphasis added) (discussing DOJ FCPA Opinion Procedure Release examples).

⁹⁷ See, e.g., Alexandra Wrage, *Approaching the Sphinx: The DOJ's Opinion Release Procedure*, TRACEBLOG, (Mar. 2, 2009), <http://traceblog.org/2009/03/02/approaching-the-sphinx-the-doj-opinion-release-procedure/>.

⁹⁸ See Brief for the United States at 60–61 n.15, *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2012) (No. 11-15331-C), 2012 WL 3638390, at *44–45 n.15 (citing DOJ FCPA Opinion Procedure as an avenue defendants failed to use that would have successfully resolved the alleged ambiguity); Brief for the United States at 60 n.20, *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007) (Nos. 05-20604, 05-20606), 2006 WL 5582336, at *60 (stating that if defendants were uncertain about FCPA enforcement against their bribes, they could have requested an opinion pursuant to the DOJ FCPA Opinion Procedure); Brief for Plaintiffs-Appellees and Cross-Appellants at 69–70, *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109 (2d Cir. 2004) (No. 03-7090 (L)), 2003 WL 25905485, at *69–70 (arguing that the defendant failed to pursue a DOJ FCPA opinion to avoid further scrutiny from the DOJ into its other criminal conduct).

⁹⁹ Examining Enforcement of the Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime and Drugs of the Comm. on the Judiciary, 111th Cong. 7 (2010) (statement of DOJ Deputy Assistant Att'y Gen. Greg Andres),

concerned companies with “explicit guidance”; for example, when companies have questions about who constitutes a public official, they may ask and thereby obligate the DOJ to provide an advisory opinion on the particular issue.¹⁰⁰ While the DOJ recognizes that the FCPA Opinion Procedure has been historically underutilized, the agency consistently encourages companies to request assistance before committing a potential FCPA violation.¹⁰¹ The DOJ sees a more robust FCPA Opinion Procedure system as serving both the interests of businesses and the DOJ, as well as the SEC’s interest in avoiding FCPA violations before they occur.¹⁰²

A. *Concerns Associated with Opinion Requests*

However, there are several potential concerns—real and imagined—that deter businesses from submitting requests for advisory opinions.¹⁰³ First and foremost, potential requestors fear the implications of a negative opinion from the DOJ with regard to future dealings with the agency.¹⁰⁴ For example, a company considering

available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg66921/pdf/CHRG-111shrg66921.pdf> (stating that the DOJ FCPA Opinion Procedure “is unique among the criminal laws. Those opinions are published and available to companies to analyze them, to understand where the government is focusing its enforcement, and what specifically violates the law.”).

¹⁰⁰ Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary, 112th Cong. 68 (2011), *available at* http://judiciary.house.gov/_files/hearings/printers/112th/112-47_66886.pdf (statement of DOJ Deputy Assistant Att’y Gen. Greg Andres).

¹⁰¹ *See* Alice S. Fisher, Assistant Attorney Gen., U.S. Dep’t of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act 7–8 (Oct. 16, 2006), *available at* <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf>.

¹⁰² *See id.*

¹⁰³ *See Opinion Procedure Releases*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/opinion/> (last visited Jan. 27, 2014) (documenting one opinion release in 2013, two opinion releases in 2012, one in 2011, three in 2010, and one in 2009); Juedes, *supra* note 20, at 51–52 (theorizing reasons for the FCPA Opinion Procedure’s disuse).

¹⁰⁴ Michael B. Mukasey & James C. Dunlop, *Can Someone Please Turn on the Lights? Bringing Transparency to the Foreign Corrupt Practices Act*, 13 ENGAGE:

whether to submit an opinion request concerning its due diligence obligations toward third-parties in a potential acquisition may fear being asked by the DOJ to explain and defend its current internal due diligence process.¹⁰⁵ Companies are also frequently (and reasonably) concerned with the DOJ requesting additional information if the agency determines that the information submitted is insufficient.¹⁰⁶ Although a company has the option to withdraw its opinion request at any time,¹⁰⁷ this does not alleviate the concern that withdrawing a pending request may pique the curiosity of the DOJ.¹⁰⁸

Similarly, a requestor may fear what the DOJ's answer could mean in future litigation—especially in light of historic FCPA fines and settlements.¹⁰⁹ If a proposed transaction is not permitted by the DOJ through its advisory opinion, and the requestor moves forward in one way or another, such action may be tantamount to an admission that the requestor had knowledge that a payment was corrupt or improper.¹¹⁰ Accordingly, requestors should evaluate the costs, benefits, and risks when filing an opinion request and be prepared to refrain from the proposed transaction if it is not

J. FEDERALIST SOC'Y PRAC. GROUPS 49, 52 (2012), available at http://www.fed-soc.org/library/doclib/20120405_MukaseyDunlopEngage13.1.pdf.

¹⁰⁵ Wrage, *supra* note 97.

¹⁰⁶ Hinchey, *supra* note 16, at 423; see 28 C.F.R. § 80.7 (2014).

¹⁰⁷ 28 C.F.R. § 80.15 (2014).

¹⁰⁸ Wrage, *supra* note 97; see Juedes, *supra* note 20, at 51 (“[T]he [DOJ FCPA Opinion] process may be seen as mere ‘window dressing’ by firms and actually alert law enforcement to potential illegal bribery.”).

¹⁰⁹ See, e.g., Richard L. Cassin, *Alcoa Lands 5th on our Top Ten List*, THE FCPA BLOG (Jan. 10, 2014, 1:08 AM), <http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html> (listing the Top Ten FCPA enforcement actions of all time: (1) Siemens, \$800 million in 2008; (2) KBR/Halliburton, \$579 million in 2009; (3) BAE, \$400 million in 2010; (4) Total S.A., \$398 million in 2013; (5) Alcoa, \$384 million in 2014; (6) Snamprogetti Netherlands B.V./ENI S.p.A, \$365 million in 2010; (7) Technip S.A., \$338 million in 2010; (8) JGC Corporation, \$218.8 million in 2011; (9) Daimler AG, \$185 million in 2010; and (10) Weatherford International, \$152.6 million in 2013).

¹¹⁰ Carl Pacini et al., *Enhanced Enforcement of the Foreign Corrupt Practices Act: Improving the Ethics of U.S. Business Practices Abroad*, in RESEARCH ON PROFESSIONAL RESPONSIBILITY AND ETHICS IN ACCOUNTING 77 (Cynthia Jeffrey ed. 2012).

sanctioned by the DOJ.¹¹¹

Additionally, because the DOJ Opinion Procedure can be cumbersome and untimely, many potential businesses do not take advantage of the procedure.¹¹² This is often because businesses cannot afford the thirty days it may take the DOJ to evaluate a transaction or venture, when crucial efforts to negotiate, structure, and finalize the transaction may be required.¹¹³

B. Proceeding with the DOJ Opinion Procedure in Light of its Drawbacks

Considering these potential concerns, a business should use the DOJ FCPA Opinion Procedure when the business (1) is truly uncertain about the lawfulness of a proposed transaction or payments; (2) believes the information it will provide to the DOJ will not be disclosed (or will not cause injury if disclosed); and (3) believes that the protection afforded to the opinion request outweighs potential harm to the requestor if it does not disclose and is later challenged.¹¹⁴

Although the effort involved in obtaining an FCPA Opinion is admittedly burdensome,¹¹⁵ the clarity that opinion releases provide allows companies to move forward with thorny transactions confidently.¹¹⁶ For example, a U.S.-based Fortune 500 company that

¹¹¹ *Id.*

¹¹² Mukasey & Dunlop, *supra* note 104, at 52.

¹¹³ *Id.*

¹¹⁴ RALPH H. FOLSOM ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS 553 (3d ed. 2013).

¹¹⁵ Michael J. Gilbert, *FCPA 'Opinion Requests' Key in Enforcement Barrage*, 238 N.Y. L.J. 114, 115 (June 16, 2008), available at [http://www.dechert.com/files/Publication/6aa98e29-e940-43ba-85e5-8cfc138d7cf4/Presentation/PublicationAttachment/fe85ff4a-c119-4e2d-92d3-934436201f01/NYLJ_Article_\(FCPA\)08.pdf](http://www.dechert.com/files/Publication/6aa98e29-e940-43ba-85e5-8cfc138d7cf4/Presentation/PublicationAttachment/fe85ff4a-c119-4e2d-92d3-934436201f01/NYLJ_Article_(FCPA)08.pdf) (“a requestor (or its counsel) will likely be required to review documents, interview key players, perform an extensive background check on relevant entities and persons, and familiarize itself with applicable local law . . .”).

¹¹⁶ *Id.* (“FCPA issues can be complicated and lead to significant uncertainty. Too often companies and their counsel, faced with a potentially problematic transaction, take on themselves the unnecessary burden of predicting the

was considering whether to acquire a controlling position in a foreign company became concerned about buying into a significant FCPA problem.¹¹⁷ However, instead of canceling the transaction or moving forward with it and assuming implicit risk, the company requested a DOJ FCPA Opinion Release.¹¹⁸ The company proceeded with its request despite being faced with both complicated facts and the foreign government's strict time deadlines.¹¹⁹

Seeking an expedited review, the company submitted its request on January 2, 2008.¹²⁰ The DOJ completed its review in a timely manner and issued its opinion release, blessing the transaction only thirteen days later on January 15th.¹²¹ The DOJ's opinion release in this situation presents several lessons for potential requestors: first, the timeliness of the DOJ's response to the requestor appears to indicate the agency's willingness to work with companies that approach it prior to a transaction closing; second, the DOJ recognizes and approves of a requestor's "remarkable" due diligence in consulting with FCPA enforcement agencies before concluding potentially problematic transactions.¹²²

Fortunately, the DOJ's willingness to provide opinion releases on expedited schedules appears to be a burgeoning trend.¹²³ Due to the nature of business negotiations, companies are not likely to have complete information about the structure of a pending transaction until right before the transaction closes—which is usually when a business is least likely to stop and allow the DOJ to consider an opinion request.¹²⁴ However, relatively recent FCPA opinions have been issued in record time and on expedited schedules, with the

government's eventual view of the situation. Instead, they should consider simply asking.”).

¹¹⁷ *Id.* at 114. (citing U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW: OPINION PROCEDURE RELEASE NO. 08-01 (Jan. 15, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0801.pdf>).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Mark Miller, *FCPA Opinion Procedure: DOJ's Speed Improves*, NAT'L L.J. (Aug. 4, 2008).

¹²⁴ *Id.* (“For a company in a hurry, even 30 days can be too long.”).

turnaround time on one request being a remarkable four days.¹²⁵ For example, for Release No. 2008-02,¹²⁶ the requestor, Halliburton, was bidding for a U.K.-based company, but the U.K. takeover rules did not allow Halliburton the luxury of conducting FCPA due diligence before the transaction's closing and also limited the information Halliburton could obtain prior to closing.¹²⁷ Although the rapidly approaching bidding deadlines meant the DOJ had only a few days to issue its opinion, the DOJ was able to mobilize its attorneys, obtain its necessary agency approvals, and issue the release in time without holding up the transaction.¹²⁸ The story of the Halliburton opinion release exemplifies the FCPA Opinion Procedure at its best—when the DOJ was able to issue its opinion on a timetable consistent with the “get-it-done-yesterday needs of a significant international transaction.”¹²⁹

Finally, in deciding whether to make an FCPA Opinion Request, companies should note that in nearly every one of DOJ's published FCPA releases, on a divergent range of issues, the DOJ has decided not to bring an enforcement action against the proposed conduct based in large part on the requestor's proactive measures in seeking the DOJ's opinion.¹³⁰ In numerous instances, the DOJ has

¹²⁵ *Id.*

¹²⁶ U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW: OPINION PROCEDURE RELEASE NO. 08-02 (June 13, 2008), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf>.

¹²⁷ Miller, *supra* note 123.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See, i.e.,* Koehler, *supra* note 96, at 648 (citing U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW: OPINION PROCEDURE RELEASE NO. 09-01 (Aug. 3, 2009), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2009/0901.pdf>) (noting that in Opinion Procedure Release 09-01, the DOJ stated its intention not to take enforcement action with respect to requestor's proposal to provide sample medical devices to a foreign government for a total of \$1.9 million for all units, in part because the requestor stated that it did not believe the senior official suggesting the donation would personally benefit); Koehler, *supra* note 96, at 648–49 (citing U.S. DEP'T OF JUSTICE, FOREIGN CORRUPT PRACTICES ACT REVIEW: OPINION PROCEDURE RELEASE NO. 07-01 (July 24, 2007), *available at* <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf>) (noting that in Opinion Procedure Release 07-01, the DOJ stated that it did not intend to take enforcement action against a requestor who proposed to cover domestic expenses

recognized a requestor's good-faith efforts to comply with the FCPA by proactive compliance measures such as the DOJ FCPA Opinion Procedure.¹³¹

V. PROCEDURE FOR OBTAINING DOJ FCPA OPINION RELEASES

A. *Informal Discussions Prior to Formal Requests*

Because the opinion procedure process can be lengthy and costly for requestors who are unprepared, the process should not be undertaken lightly.¹³² DOJ officials recommend prospective requestors meet with them informally, prior to making a formal request, to prevent an onerous process.¹³³ Such informal meetings can be helpful to determine whether an opinion request should be pursued, and if so, may aid in narrowing potential issues and identifying information that will be required by the DOJ for the opinion.¹³⁴

B. *Content Requirements for FCPA Opinion Requests*

Requests must be in writing and include all relevant and material information that bears on the conduct for which an FCPA Opinion is requested, as well as the circumstances of the prospective conduct.¹³⁵ This includes "background information, complete copies of all operative documents, and detailed statements of [any and] all collateral or oral understandings."¹³⁶ The request must concern non-

for an Asian country's delegation trip to the United States because the purpose of the trip was to familiarize the delegates with the requestor's operations and because the requestor represented that it would not host entertainment for the officials nor provide them with spending money or stipends).

¹³¹ Koehler, *supra* note 96, at 649.

¹³² STUART H. DEMING, *THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS* 27 (2d ed. 2010).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 28 C.F.R. §§ 80.2, 80.6 (2014).

¹³⁶ *See id.* § 80.6.

hypothetical, specified, and prospective conduct.¹³⁷ Having an executed contract is not a prerequisite, “and, in most . . . instances, an opinion request should be made before the requestor commits to proceed[ing] with a transaction.”¹³⁸ A number of FCPA Opinion Request forms and templates are available electronically and in print.¹³⁹

Before making the request, the company or individual requestor should ensure that they are either an issuer or a domestic concern, as only those categories of parties may receive an opinion.¹⁴⁰ However, if there is more than one issuer or domestic concern involved in the transaction, the requestor should consider making a joint request for an opinion, as opinions apply only to the parties that request them.¹⁴¹

The requesting party has an affirmative obligation to make full and true disclosures with respect to its prospective conduct.¹⁴² Each request must be signed by an appropriate senior officer (1) “with operational responsibility for the conduct that is the subject of the request” and (2) who has been designated by the requestor’s CEO to sign the opinion request.¹⁴³ In certain cases, the DOJ may require the CEO to sign the opinion request.¹⁴⁴

¹³⁷ 28 C.F.R. § 80.1 (2014). Although the subject of the request need not involve “only prospective conduct,” a request is not considered by the DOJ “unless that portion of the transaction for which an opinion is sought involves only prospective conduct.” 28 C.F.R. § 80.3 (2014).

¹³⁸ RESOURCE GUIDE, *supra* note 15, at 86.

¹³⁹ See SECURITIES LAW TECHNIQUES APPENDIX, 82F (A.A. Sommer, Jr., ed., 1997 & Supp. 2013) (providing a form outline of a company’s request to the DOJ for an FCPA Opinion in the context of a proposed joint venture; it is available online through Lexis or in print through Matthew Bender publications). *Id.* at 82D (providing a form for two entities engaging in a joint venture to make representations and warranties with regard to FCPA compliance and specifically to FCPA Opinion Requests as a possible prerequisite for either party in assigning its rights to a third party).

¹⁴⁰ FCPA’s anti-bribery provisions apply to U.S. persons and businesses (“domestic concerns”), and the FCPA’s accounting provisions apply to public companies that are either listed on stock exchanges or are required to file periodic SEC reports (“issuers”). RESOURCE GUIDE, *supra* note 15, at 2, 86.

¹⁴¹ *Id.* at 86.

¹⁴² *Id.* at 87.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

If the requestor's submission lacks any required information, "the [DOJ] may request whatever additional information or documents it deems necessary to review the matter."¹⁴⁵ However, the DOJ is required to make any additional information requests within thirty days.¹⁴⁶ Following a DOJ additional information request, the requestor must provide the information to the DOJ promptly, as a request "will not be deemed complete until the [DOJ] receives such additional information."¹⁴⁷ The additional information may be provided orally, promptly confirmed in writing, and signed and certified by the same individual who signed the initial request.¹⁴⁸

C. *Submission and Delivery*

A request for a DOJ FCPA Opinion is required to be in writing and should be addressed to the Assistant Attorney General in charge of the Criminal Division.¹⁴⁹ There should be an original and five copies of the request.¹⁵⁰

D. *DOJ Actions in Response to an FCPA Opinion Request*

Within thirty days after receiving a request in accordance with the above procedure, the Attorney General (or his designee) must respond to the request by issuing an opinion that notes whether the prospective conduct violates the applicable FCPA provisions¹⁵¹ for purposes of the DOJ's present enforcement policy.¹⁵² The DOJ may

¹⁴⁵ 28 C.F.R. § 80.7 (2014).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ 28 C.F.R. § 80.2 (2014) (The request should be addressed as follows: Attention: FCPA Opinion Group, P.O. Box 28188, Central Station, Washington, D.C. 20038. The address for hand delivery is Room 2424, Bond Building, 1400 New York Avenue NW, Washington, D.C. 20005.).

¹⁵⁰ *Id.*

¹⁵¹ 15 U.S.C. §§ 78dd-1 to 78dd-2 (2012).

¹⁵² 28 C.F.R. § 80.8 (2014); *see also* 28 C.F.R. § 80.13 (2014) ("An FCPA Opinion will state only the Attorney General's opinion as to whether the prospective conduct would violate the Department's present enforcement policy under 15 U.S.C. 78dd-1 and 78dd-2.").

not, however, orally provide clearance, release, or other statements purporting to limit its enforcement discretion.¹⁵³ Notably, the DOJ has reserved the right to take other positions or actions, as it considers appropriate.¹⁵⁴

E. FCPA Opinion Release's Effect on Requestors

An FCPA Opinion applies only to the party requesting it and has no application to parties that do not join the request for the opinion.¹⁵⁵ FCPA Opinion request submissions and FCPA Opinion releases do not alter the responsibility of a requestor to comply with the FCPA's recordkeeping provision¹⁵⁶ and accounting requirements.¹⁵⁷ If the Attorney General issues an opinion that the requestor's conduct conforms to the DOJ's present FCPA enforcement policy, there will be a rebuttable presumption that the requestor's conduct is in compliance with the FCPA against any action brought against the requestor.¹⁵⁸

However, an FCPA Opinion does not bind or obligate agencies other than the DOJ, nor does it affect the requestor's obligations to other agencies.¹⁵⁹ Though the SEC does not have an equivalent procedure, it has taken the position that it will not take civil enforcement action under the anti-bribery provisions of the FCPA

¹⁵³ 28 C.F.R. § 80.9 (2014); *see also* DEMING, *supra* note 132, at 26 ("Reliance can be placed only on a written opinion and not on oral statements by Justice Department officials.").

¹⁵⁴ 28 C.F.R. § 80.8 (2014).

¹⁵⁵ 28 C.F.R. § 80.5 (2014).

¹⁵⁶ 15 U.S.C. § 78m(b)(2)–78m(b)(3) (2012).

¹⁵⁷ *Id.*; 28 C.F.R. § 80.12 (2014).

¹⁵⁸ 28 C.F.R. § 80.10 (2014). However, this presumption can be rebutted by a preponderance of evidence; in evaluating the presumption, a court weighs all relevant factors, "including but not limited to whether information submitted to the Attorney General was accurate and complete and whether the activity was within the scope of the conduct specified in any request received by the Attorney General." *Id.*

¹⁵⁹ 28 C.F.R. § 80.11 (2014); *see* 28 C.F.R. § 80.13 (2014) ("If the conduct for which an FCPA Opinion is requested is subject to approval by any other agency, such FCPA Opinion shall in no way be taken to indicate the Department of Justice's views on the legal or factual issues that may be raised before that agency, or in an appeal from the agency's decision.").

against a party that has obtained a favorable DOJ opinion.¹⁶⁰ However, a favorable opinion does not preclude action by the SEC or the DOJ relative to the FCPA accounting and record-keeping provisions (or to any other statutory or regulatory provisions).¹⁶¹

F. Public Disclosure of Requestor's Opinion Request

FCPA Opinion requests are exempt from disclosure under 5 U.S.C. section 552 and are not made publicly available, except with the consent of the requestor.¹⁶² However, this does not limit the DOJ, at its discretion, from issuing a release “describing” the requestor’s identity, the foreign country’s identity where the proposed conduct may take place, and the DOJ’s proposed action in response to the FCPA Opinion request.¹⁶³ The DOJ maintains that such public releases do not disclose identifying information.¹⁶⁴

A requestor is permitted to ask the DOJ to not disclose the requestor’s “proprietary information” in the DOJ’s release.¹⁶⁵ However, the language of the regulation does not appear to require the DOJ to comply with such requests.¹⁶⁶

G. Withdrawing FCPA Opinion Requests or Submitting Additional Requests

A requestor has the option of withdrawing the FCPA request prior to the Attorney General’s response to such a request.¹⁶⁷ In the case of withdrawal, “[t]he [DOJ] reserves the right to retain any FCPA Opinion request[s], documents and information submitted” for the request in order to use them for “any governmental purposes”

¹⁶⁰ DEMING, *supra* note 132, at 26 (citing Statement of Commission Policy Concerning Section 30A of the Securities Exchange Act of 1934, Exchange Act Release No. 181255, 4 Fed. Sec. L. Rep. (CCH) ¶ 26, 629 (Nov. 12, 1981)).

¹⁶¹ *Id.*

¹⁶² 5 U.S.C. § 552 (2012); 28 C.F.R. § 80.14 (2014).

¹⁶³ 28 C.F.R. § 80.14 (2014).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 80.14(b).

¹⁶⁶ *See id.* § 80.14.

¹⁶⁷ 28 C.F.R. § 80.15 (2014).

subject to some restrictions.¹⁶⁸

If, after receiving a DOJ opinion, a requestor is concerned about prospective conduct beyond the scope of the conduct specified in prior requests, the requestor may submit additional FCPA Opinion requests using the same opinion request procedure.¹⁶⁹

VI. DO THE BENEFITS OF THE DOJ FCPA OPINION PROCEDURE EXTEND TO INSTANCES OF VOLUNTEER FCPA DISCLOSURES?

While the DOJ appears to positively receive FCPA Opinion requests as reflections of a company's robust FCPA compliance policy, does the same attitude extend to voluntary admissions of FCPA violations? While voluntary disclosures of potential FCPA violations may appear, at face value, to potentially mitigate penalties for corporate FCPA noncompliance, the truth seems to be less clear-cut based on empirical evidence.

Voluntary disclosure occurs when a business approaches enforcement officials about potential FCPA violations prior to, and independent of, an investigation.¹⁷⁰ The DOJ, through memoranda¹⁷¹ and speeches,¹⁷² consistently expresses its position that voluntary

¹⁶⁸ *Id.* (“subject to the restrictions on disclosures in § 80.14”).

¹⁶⁹ 28 C.F.R. § 80.16 (2014); *see* RESOURCE GUIDE, *supra* note 15, at 87.

¹⁷⁰ Hinchey, *supra* note 16, at 396.

¹⁷¹ *See, e.g.*, Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and U.S. Attorneys (July 5, 2007) (noting that “prosecutors may consider a corporation’s timely and voluntary disclosure in evaluating the adequacy of the corporation’s compliance program and its management’s commitment to the compliance program.”).

¹⁷² *See* Gary G. Grindler, Acting Deputy Att’y Gen., U.S. Dep’t of Justice, Address at the 2010 Compliance Week Conference (May 25, 2010), <http://www.justice.gov/dag/speeches/2010/dag-speech-100525.html> (noting that cooperation is evaluated “during the prosecutorial decision-making process”); Lanny Breuer, Assistant Att’y Gen., Criminal Div., U.S. Dep’t of Justice, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act 3 (Nov. 17, 2009), <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf> (noting voluntary disclosures that “we certainly encourage and will appropriately reward”); Alice Fisher, Assistant Att’y Gen., U.S. Dep’t of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act 6 (Oct. 16, 2006), <http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf> (“[I]f you are doing the things you should be doing—

disclosures are considered by the DOJ, factored into DOJ enforcement, and may mitigate potential corporate noncompliance penalties.¹⁷³

Regarding the specific benefits of disclosure, however, the DOJ is consistently vague as to what, if any, benefits are actually conferred to disclosing corporations.¹⁷⁴ Recent increased enforcement and record-breaking FCPA settlements have led many to question whether there exists any tangible benefit for voluntarily disclosing potential FCPA violations.¹⁷⁵

Such criticism began to mount after the *In re Schnitzer Steel Industries, Inc.* settlement, in which Schnitzer Steel voluntarily disclosed bribes that a subsidiary had made to Chinese officials in order to gain a competitive advantage.¹⁷⁶ Despite Schnitzer Steel's "exceptional cooperation"¹⁷⁷ with the DOJ, the company still faced approximately \$15 million in fines from the DOJ and the SEC for the \$1.9 million paid in bribes by their subsidiary.¹⁷⁸ The *Schnitzer Steel* case has been repeatedly cited by critics of voluntary disclosure, arguing that the disproportionate fine levied against the company indicates recent FCPA enforcement trends do not reflect the promises

whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures . . . you will get a benefit . . . [Voluntary disclosure] may not mean that you or your client will get a complete pass, but you will get a real, tangible benefit.”).

¹⁷³ Hinchey, *supra* note 16, at 397.

¹⁷⁴ See, e.g., Fisher, *supra* note 172, at 6 (qualifying the benefits of voluntary disclosure by stating that “it would not make sense for law enforcement to make one-size-fits-all promises about the benefits of voluntary disclosure before getting all of the facts.”).

¹⁷⁵ Hinchey, *supra* note 16, at 397.

¹⁷⁶ *In re Schnitzer Steel Indus., Inc.*, 89 S.E.C. Docket 302, 2006 WL 2987067, at *2–5; Press Release, U.S. Dep’t of Justice, Former Senior Officer of Schnitzer Steel Industries Inc. Subsidiary Pleads Guilty to Foreign Bribes (June 29, 2007), http://www.justice.gov/opa/pr/2007/June/07_crm_474.html.

¹⁷⁷ Fisher, *supra* note 172, at 5.

¹⁷⁸ Jessica Tillipman, *Foreign Corrupt Practices Act Fundamentals*, BRIEFING PAPERS (THOMSON WEST), No. 08-10 (Sept. 2008), at 14–15, http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=1038&context=faculty_publications (noting that Schnitzer Steel was fined \$7.5 million in criminal penalties and \$7.7 million in disgorgement); see *In re Schnitzer Steel*, 2006 WL 2987067, at *7; Press Release, *supra* note 176.

of enforcement leniency for self-reporting and cooperation.¹⁷⁹

Confusingly, however, the DOJ has highlighted *Schnitzer Steel* as “an excellent example of how voluntary disclosure followed by extraordinary cooperation with the Department results in a real, tangible benefit to the company.”¹⁸⁰ Specifically, the DOJ cites Schnitzer Steel’s model cooperation as “critical” to its ability to obtain a deferred prosecution agreement and result in a DOJ recommendation that the company’s subsidiary pay “a criminal fine well below what it would otherwise have received.”¹⁸¹ However, the DOJ’s position regarding the benefits of Schnitzer Steel’s voluntary disclosure appears misguided and has been heavily criticized in light of comparable fines or less severe fines that the DOJ has since issued to companies found liable for FCPA violations without voluntary disclosures.¹⁸²

How then to proceed, with specific and consistent declarations from the DOJ vaguely singing the benefits of voluntary disclosure on one hand, and skeptical authors and commentators citing the unclear, allegedly nonexistent benefits of disclosure on the other? After an ambitious attempt to empirically determine if a pattern exists between the levels of bribes paid and the amount of fines levied due to those bribes in cases of voluntary and non-voluntary disclosures

¹⁷⁹ See Hinchey, *supra* note 16, at 398; Tillipman, *supra* note 178, at 14 (“Although the Government claims it will reward companies that self-report improper activity, a review of recent enforcement actions demonstrates that the SEC and the DOJ are still likely to impose harsh penalties on companies that voluntarily disclose FCPA violations.”); see also Michael Freedman, *Trust Us*, FORBES, (Dec. 9, 2006), <http://members.forbes.com/forbes/2006/1225/132.html?token=MTggT2N0IDIwMDcgMTU6MzE6MzggKzAwMDA%253D> (noting that the benefit to Schnitzer Steel from its voluntary disclosure is “hard to discern”).

¹⁸⁰ Fisher, *supra* note 172, at 5.

¹⁸¹ *Id.*

¹⁸² See, e.g., Tillipman, *supra* note 178, at 15 (noting that: “after Schnitzer Steel voluntarily disclosed a \$1.9 million improper payment, the Government fined the company \$7.5 million in criminal penalties and \$7.7 million in disgorgement. In contrast, after the Government learned of Statoil ASA’s \$5.2 million in improper payments . . . the U.S. Government fined the company \$10.5 million in criminal penalties and \$10.5 million in disgorgement . . . A comparison of these two actions does not adequately demonstrate the benefit Schnitzer received from its voluntary disclosure.”).

from 2002 to 2009,¹⁸³ the author of the survey found that the data indicates that “companies seem to face a penalty one and a half times larger if they voluntarily disclose FCPA violations as compared to companies that do not [voluntary disclose].”¹⁸⁴

Hence, a very real possibility exists that a voluntarily-disclosing company may face an FCPA penalty commensurate with, or even higher than, a penalty levied upon a non-disclosing company’s identical conduct. Voluntary disclosure also forecloses the possibility that the FCPA violations may not have been discovered in the first place, had the company proceeded to immediately rectify the situation without voluntarily disclosing.¹⁸⁵ If the survey results and academic criticisms are true, the current FCPA voluntary disclosure system is undoubtedly problematic, as such inconsistent and random penalties for responsible actors appear to remove incentives for voluntary disclosure.¹⁸⁶

VII. CONCLUSION

As international anti-bribery and FCPA enforcement remains on the rise, with increasingly aggressive enforcement and record-breaking settlements and fines, the contours of the FCPA and what exactly qualifies as a bribe to “foreign officials” remain unclear. In light of this persistent uncertainty, the DOJ Opinion Procedure remains an underutilized, useful tool for businesses that are: (1) legitimately uncertain about the lawfulness of a proposed transaction or of proposed payments, (2) believe the information they will provide in the request will not be disclosed (or will not cause injury if disclosed), and (3) believe that the protection afforded to the request

¹⁸³ See Hinchey, *supra* note 16, at 399–408 (discussing the survey’s methodology and means of analysis).

¹⁸⁴ *Id.* at 406.

¹⁸⁵ *See id.* at 418.

¹⁸⁶ *See id.*; *see also* Freedman, *supra* note 179. (“Cases . . . are prompting corporate defense lawyers to question the strategy of voluntary confessions [C]ompanies are finding that by turning themselves in they are opening themselves up to years of negative publicity, fines, criminal investigations, indictments and highly intrusive compliance monitors ‘When you look at the [voluntary disclosure] cases, they’re really all over the map. In some cases there appears to be credit and in some cases not.’”).

outweighs potential harm to the requestor if it does not disclose and is later challenged.

However, the benefits, guidance, and good favor the DOJ promises to companies that request a DOJ advisory opinion should not be assumed to exist when contemplating voluntary disclosure of FCPA violations. Evidence suggests that the DOJ rhetoric concerning the benefits of voluntary disclosure may not be in line with actual practice. Accordingly, a business considering FCPA compliance and guidance in the current climate of FCPA enforcement is well-advised to proceed cautiously with voluntary disclosures but to proceed significantly more comfortably with DOJ Opinion Procedure requests.