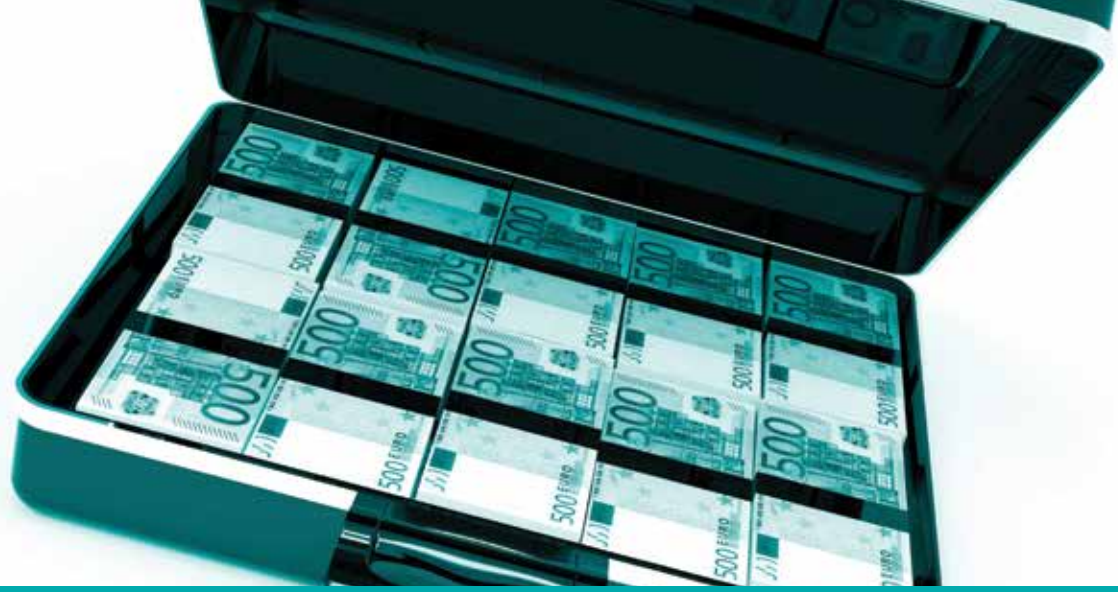

ICLG

The International Comparative Legal Guide to:

Business Crime 2016

6th Edition

A practical cross-border insight into business crime

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Business Crime*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of business crime.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting business crime, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in business crime laws and regulations in 31 jurisdictions.

All chapters are written by leading business crime lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Gary DiBianco and Ryan Junck of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Coerced Corporate Social Responsibility and the FCPA

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I. Introduction

Many corporations, aware that such efforts can positively shape their reputations, evaluate anti-corruption and other ethics and corporate governance concerns — including policies toward charitable donations and other support to the communities in which they operate — together under the umbrella of Corporate Social Responsibility ("CSR").

Can CSR run afoul of the law? As several commentators noted following two United States Securities & Exchange Commission ("SEC") enforcement actions — announced in 2004 and 2012, each based on the donation of funds to the same Polish charity — CSR and other charitable "contributions can fall within the U.S. Foreign Corrupt Practice Act's ("FCPA") prohibitions. Companies face practical challenges to ensure such contributions do not lead to FCPA liability".[1]

Legal and compliance personnel working for clients with high FCPA exposure — those operating in challenging jurisdictions and subject to many points of contact with government officials — likely will experience frequent requests for charitable contributions and other CSR payments, often accompanied by some degree of coercion. Of course, there are many salutary reasons to engage in CSR; doing so improves the broader community where the business operates, bolsters corporate reputation, and aligns with employees' expectations. Unfortunately, areas with lower levels of economic development, where CSR requests naturally arise, typically correlate with higher risks for corruption.[2]

At the head of the comet of potential FCPA liability is naked bribery, a plainly corrupt request from an individual foreign official for the proverbial (or literal) big bag of cash in exchange for a clear business nexus. But streaming away from that head for a seemingly ever-increasing distance is a tail of potential anti-bribery liability, propelled by enforcement authorities' interpretations of the FCPA. This tail might reach different types of coerced social responsibility contributions, from a thin veneer over the common bribe through a range of well-intentioned conduct. How far does it stretch?

II. Resolutions, Investigations, and Written Guidance

Given the relative paucity of case law applying the FCPA's anti-bribery provisions, and the even greater scarcity of specific appearances of donations and contributions in DOJ and SEC FCPA resolutions, it is difficult to discern guiding principles to protect companies. Scholars have carefully scrutinised the results of the Department of Justice's FCPA opinion release procedure, which offer non-binding guidance on a fact-specific basis about DOJ's views on a wide range of corruption-related matters. Several of these opinion releases address contributions and donations. More recently, some guidance has been offered in the joint DOJ/SEC *Resource Guide to the U.S. Foreign Corrupt Practices Act*.[3] Collectively, these sources inform the search for guiding principles to prevent companies from being accused of committing bribery via contributions and donations.

A. Resolutions and Investigations

1. The Chudow Castle Cases: Schering-Plough and Eli Lilly

Because practitioners must rely on settled enforcement actions — particularly prior to the release of the *Resource Guide* in 2012 — they have become well-acquainted with a "small charitable foundation in Poland":[4] the Chudow Castle Foundation (the "Foundation"), dedicated to restoring and preserving historic sites (including the titular castle at Chudów) in the Silesia region of Poland.[5] At the time, the founder and president of the Foundation, Andrzej Sośnierz,[6] also oversaw the Silesian Health Fund, a Polish regional government agency, and was in a position to steer its business.[7]

On June 16, 2004, U.S. pharmaceutical company Schering-Plough Corporation[8] settled an SEC enforcement action that sounded alarms throughout the anti-corruption bar. The SEC's allegations related to a series of 13 donations, totaling 315,800 zloty (approximately $76,000), made by a Polish subsidiary of Schering-Plough to the Foundation.[9] The SEC alleged that the donations were structured at or below the level of the relevant Schering-Plough manager's approval and misleadingly described as relating to medical programmes (i.e. consistent with the charitable donation policies of Schering-Plough).[10] Schering-Plough settled without admitting or denying the SEC's charge that the "donations" were booked in violation of the FCPA's books-and-records provisions and that it failed to maintain adequate internal controls because it did not conduct "*any due diligence* prior to making promotional or charitable donations".[11]

Eli Lilly and Company ("Lilly"), another U.S. pharmaceutical company, had learned in August 2003 that it was under investigation by the SEC, but did not settle with the SEC until December 20, 2012.[12] The SEC's complaint includes allegations that Lilly violated the books and records provisions of the FCPA in recording eight payments by Lilly's Polish subsidiary, totaling 154,500 zloty (approximately $39,000), to the same Foundation, at the behest of the same official, with the same intent to influence that official to steer public business toward the purchase of certain products.[13] According to the SEC, just as in the *Schering-Plough* case, Lilly

booked the payments with misleading descriptions, including claiming that some of the payments were in exchange for rental of conference space on Foundation property that never was used by Lilly.[14] The Lilly complaint also alleges that Lilly's Russian entity's internal controls were insufficient to vet proposals to donate to charities favoured by Russian government officials.[15]

Commentators reacted with alarm to the *Schering-Plough* settlement. "No good deed goes unpunished" suggested more than one treatment of the SEC's charges.[16] As one article cautioned, these "cases were significant because the recipient charity was *bona fide*, so standard due diligence alone would not have cautioned against the donations".[17]

In the years following the *Schering-Plough* settlement, an audience member at an anti-corruption conference asked a DOJ official at a conference to discuss how much due diligence is expected with respect to overseas donations.[18] *The FCPA Blog* reported in October 2009 that a question about the FCPA compliance of charitable contributions was "[t]he question most asked by [its] readers during the past year".[19] Several commentators have proposed reform efforts to change the FCPA or its enforcement to protect companies from the dreaded consequences of *Schering-Plough*,[20] and multiple DOJ FCPA Opinion Procedure queries have requested governmental blessing for donations.

Some of these opinion requests concerned donations directly to foreign states, rather than only to non-governmental charity organisations. In higher-risk jurisdictions, requests for donations directly to government entities often may outnumber requests for donations to charities. Not every foreign official will happen to have founded and remain the chief executive of a *bona fide* charity, but most of them will be able to think of government entities that could use additional funding. From the perspective of the FCPA's anti-bribery provisions, which contemplate improper transfers of money or other things of value *to a government official*,[21] donations to *bona fide* charities and to government *agencies* (not to *government officials* individually) can be equivalent. Neither is addressed directly by the language of the anti-bribery provisions.

At a high level, do these cases stand for the proposition that charitable donations (or other corporate social responsibility payments) are "fair game" for U.S. regulators? To an extent, yes: at least for U.S. enforcement authorities, everything is fair game. Charities are not beyond suspicion, and the idea that the "pretense of charitable contributions" might be used to "funnel bribes to government officials" arises specifically in the 2012 *Resource Guidance*.[22] But to ask the same question more narrowly, should companies consider the Chudow Castle cases to have opened the door to a new world of liability?

Perhaps not. The fact patterns set forth in the SEC's complaints against Schering-Plough and Lilly allege transparent bribery schemes that happened to be styled as a series of charitable donations, and they should be easily distinguishable from most companies' "good deeds" of corporate social responsibility. Strictly speaking, a genuine "good deed", motivated by goodwill, would negate corrupt intent and could not create liability. But rarely is it easy to discern the intent of individuals approving a questionable gift. Even if the recipient of the gift or donation is an unquestionably worthy cause, use of that goodwill, if it also involves favourably impressing a governmental official to get a business advantage, presents grey areas.[23] Both sets of facts come with many red flags triggering alarm bells, regardless of the involvement of a charity. These types of connections to government officials would be just as troubling to discover, for example, as part of due diligence on a third-party agent.

As is made clear in the *Schering-Plough* complaint, *some* due diligence on charitable contributions is necessary. But every enforcement action relating to contributions or donations to date has involved far more red flags than mere failure to carry out due diligence. While "no good deed goes unpunished", a good deed is hard to find deep in the facts of the Chudow Castle cases.

a) Distinguishing Red Flags

The descriptions of conduct provided by the SEC set forth a bevy of red flags that clearly distinguish the donations to the Foundation from garden-variety corporate giving. For example, the SEC's allegation in *Schering-Plough* that payments to the charity were being structured to fall within managerial approval limits, that the proportion and quantity of the payments were "highly unusual", and that the relevant manager viewed the payments as "dues" "required to be paid for assistance" all stand out as unlikely to occur in a legitimate corporate social responsibility context.

In the *Lilly* complaint, the SEC emphasised that the genesis of the charitable contribution was a request by the Foundation's director during commercial negotiations in his capacity as head of the Health Fund, and that the Eli Lilly manager involved knew "that the Director had established the Chudow Foundation and that it was a project to which he was devoted and lent much effort".[24] The first Lilly payment was characterised in internal documents as being "for [the Director]", and emails referred to a "so-called rebate" — suggesting that the payments to the foundation might have been intended to be a kickback tied to sales volume, not just donations to curry favor or even goodwill.[25]

b) Importance of Books and Records

As one commentator put it, "although only FCPA accounting violations were charged, the SEC made clear its view that the payments [in *Schering-Plough* and *Lilly*] were improper under the FCPA despite the fact that they were not made to the foreign official himself".[26] Without the thing of values going to a government official, according to opinion releases and the *Resource Guide* (discussed below) and to the plain language of the statute, there can be no anti-bribery violation.

As always, guarding against accounting violations is of paramount importance. It is possible that if the payments to the Foundation had been booked correctly and transparently, they might have evaded enforcement action entirely. Instead, both defendants recorded at least some of the donations in ways that not only were inaccurate but were known to be false by someone at the company recording the donations, referencing medical programs allegedly carried out by the (historical preservation) charity or referencing fictitious services never delivered.

2. Stryker

On October 25, 2013, Stryker Corporation, a U.S. medical device manufacturer, settled an SEC enforcement action on the basis of a cease and desist order in an administrative proceeding.[27] Stryker's sanctioned conduct in Greece consisted of a "sizeable and atypical donation" to a public Greek university to fund a laboratory led by a prominent professor and director of affiliated medical clinics.[28] The order further notes that the "donation was made pursuant to a quid pro quo arrangement with the foreign official, pursuant to which Stryker Greece understood it would obtain and retain business . . . in exchange for making the donation to the foreign official's pet project".[29] The donations, said the SEC, were "improperly booked as a legitimate marketing expense in an account entitled 'Donations and Grants'".[30]

The Director of the SEC's Division of Enforcement has repeatedly offered Stryker as an example of the SEC's efforts to "take an expansive view of the phrase 'anything of value'"[31] and to prosecute bribery involving "other, less traditional, items of value".[32] In fact, he made it explicit that he sees *Stryker*, together with *Schering-*

Plough and *Lilly*, as examples of the SEC's laying "bribery charges" against "companies that made contributions to charities that were headed by or affiliated with foreign government officials to induce them to direct business . . . .".[33]

3. Alstom

The massive ($772 million) settlement between Alstom, S.A., a French energy and engineering company, and DOJ, announced December 22, 2014, includes a glancing reference to a bribe funneled through a charitable organisation: "$2.2 million to a U.S.-based Islamic education foundation associated with [an employee of the Saudi Electric Company]".[34] No additional information is provided — $2.2 million is but a small portion of the $75 million of bribery that DOJ alleged.

Given that DOJ characterised the same $2.2 million payment, earlier in the Information, as a bribe "paid directly to foreign officials",[35] one assumes that the link between the employee and the charity must have been close, obvious, and well-known, suggesting that the charitable form of the $2.2 million was relatively unimportant compared to the substantive allegation — that money was being funneled to an official with the power to influence the company's project.

4. Louis Berger

On July 17, 2015, Louis Berger International Inc. ("Louis Berger"), a U.S. construction management company, entered into a deferred prosecution agreement ("DPA") with the DOJ to resolve allegations of FCPA bribery. In Vietnam, according to the DPA's Statement of Facts, Louis Berger was able to obtain and retain public contracts because it "paid bribes to Vietnamese officials through . . . a non-governmental organisation that [Louis Berger] funded . . . sometimes disguised as 'donations'".[36]

Even though the DPA is not nearly as specific about the NGO "donations" as were the SEC's *Schering-Plough* and *Eli Lilly* complaints, it does provide enough information to suggest that the company's NGO "donations" were not what caught enforcement authorities' attention: the donations at issue, it says, were "paid . . . to a bank account jointly held by [Louis Berger and the foundation] in Vietnam. . . . The bribe money was then withdrawn from the joint account as cash and paid directly to foreign officials . . . .".[37]

The DPA does not suggest that the payments to the joint Louis Berger-NGO account themselves were bribes: instead, it makes clear that bribery occurred when money was withdrawn and paid in cash "directly to foreign officials".[38] Louis Berger's Vietnam conduct as described by the DPA appears to be a fairly standard bribery scheme that just happened to involve a non-governmental organisation, rather than a scheme that turned on donations either directly to a government agency or through a charity or other NGO.

B. Disclosed Investigations

Corporate social responsibility contributions also recently have made headlines as a result of their mentions in corporate disclosures of ongoing investigations into potential FCPA violations. Although these disclosures do not provide detailed factual allegations, they do indicate that the concept of hiding bribes in corporate social responsibility payments remains of interest to DOJ and SEC. Both disclosed investigations to date appear to relate to large-scale bribery relating to business-critical state-issued licences: a casino's gaming licence and an energy company's extractive concessions.

After Wynn Resorts, Limited ("Wynn") was sued by a director and then-significant shareholder, Kazuo Okada, seeking information on (among other things) a pledge made by Wynn to the University of Macau Development Foundation, the SEC requested in February 2012 that Wynn preserve documents relating to the pledge and its licence renewals.[39] Roughly a year and a half later, Wynn announced that the SEC's Staff had informed it that it had completed its investigation and did not intend to recommend enforcement action against Wynn.[40] The Nevada Gaming Control Board likewise had concluded its parallel investigation into the allegations in February 2013;[41] the DOJ had announced in April 2013 that it was investigating Wynn's donation by way of a motion to intervene in a lawsuit between Wynn and Mr. Okada.[42]

In its quarterly report on Form 10-Q dated November 12, 2013, Hyperdynamics Corporation ("Hyperdynamics"), a U.S. energy company, announced that it had received a subpoena from the DOJ, which was investigating whether its "activities in obtaining and retaining [concession rights in Guinea] and [its] relationships with charitable organizations potentially violate the FCPA . . . .".[43] Hyperdynamics received a declination letter from DOJ in May 2015.[44] The SEC, which issued a subpoena to Hyperdynamics after DOJ,[45] resolved its investigation on September 29, 2015 through a cease and desist order that did not mention charitable organizations.*

C. Guidance: Opinion Procedure Releases and the Resource Guide

1. Opinion Procedure Releases

Commentators have discussed at length the DOJ FCPA Opinion Procedure Releases relating to contributions and donations,[46] culminating in Release 10-02, which cited previous Opinion Procedure Releases relating to "charitable-type grants or donations" as providing examples of due diligence or controls that could be employed to protect companies from FCPA liability when making donations overseas, including "FCPA certifications by the recipient; due diligence to confirm that none of the recipient's officers were affiliated with the foreign government at issue; a requirement that the recipient provide audited financial statements; a written agreement with the recipient restricting the use of funds; steps to ensure that the funds were transferred to a valid bank account; confirmation that contemplated activities had occurred before funds were disbursed; and ongoing monitoring of the efficacy of the program".[47]

Is this practical advice? These are prudent steps that will reduce the risk of anti-corruption risk from donations. However, many companies are not going to have the luxury of implementing each of these steps to the extent described. For example, as one commentator notes, several of the extensive due diligence and monitoring steps outlined in this release may be impractical or impossible to accomplish if the donating company or the receiving charity lacks the infrastructure and capacity to carry out (or submit to) detailed monitoring and reporting.[48] "[A] company may rationally choose not to donate at all rather than be subject to these requirements."[49]

That, though, would be an extreme reaction in the context of most corporate giving programmes. One must consider the context of these Opinion Procedure Requests. By the time-consuming and costly nature of the process — working with attorneys to submit a formal request, and providing detailed information voluntarily to the DOJ — these Requests likely are reserved for the largest, most strategic contributions warranting the most extensive due diligence work and controls. The companies making these requests, by definition, want certainty from DOJ: it is natural to enumerate as many due diligence steps and controls as possible in order to evoke a favourable response.

2. Informal DOJ Guidance

The FCPA Blog reported in 2008 that Mark Mendelsohn, then in charge of DOJ's FCPA prosecutions, had dispensed some "common-sense" guidelines in response to an audience question about charitable contributions in the years following the announcement of *Schering-Plough*.[50] He reportedly suggested that companies consider whether there is a nexus between the charity and any government entity from which the company is seeking a decision, if

a governmental decision-maker holds a position at the charity, and if the donation is consistent with the company's overall pattern of charitable contributions.[51] In other words, he noted some the same red flags identified as distinguishing in this chapter's discussion of *Schering-Plough* and *Lilly*, above.

3. The *Resource Guide*

The joint *Resource Guide* discusses charitable contributions for several pages, primarily in the context of *Schering-Plough* and Opinion Release 10-02.[52] It also includes a set of basic due diligence questions, discussed in more detail below.[53]

The *Resource Guide* reiterates a position, potentially conflicting with the SEC's implications that the Chudow Castle cases concerned improper payments under the FCPA,[54] but consistent with multiple prior Opinion Procedure Releases: that the "FCPA prohibits payments to foreign *officials*, not to foreign *governments*".[55] This maxim — based on the plain language of the statute — is worth keeping in mind: even if any number of other red flags is present, regulators must be able to tie a donation to a foreign official to prove anti-bribery liability. Of course, in the absence of one more of the elements of anti-bribery liability, DOJ and SEC still can question the accounting treatment and internal controls relating to a payment, even if it would be difficult or impossible to show that a foreign official actually received a thing of value.

III. Evaluating Requests for Contributions

Companies operating in high-risk jurisdictions with many government or state-owned enterprise touchpoints face a constant stream of requests for garden-variety improper payments but also for various types of donations and sponsorships — "coerced" Corporate Social Responsibility. Short of pulling out of these jurisdictions entirely, companies often will not be able simply to ignore each request or otherwise "choose not to donate", as suggested by at least one commentator,[56] without facing significant pressure or consequences. Likewise, a strict annual charitable giving plan[57] might be hard to balance between being specific enough to act as a real control, yet sufficiently flexible to prevent mutiny from the business (or external stakeholders) when the pre-set donations plan inevitably fails to account for unexpected events, such as natural disasters.

In such an environment, an effective compliance programme must educate employees to recognise potentially problematic requests and elevate them for the review of legal and compliance personnel sufficiently empowered to make a sound decision: they must be able to consider business concerns without being cowed by them. These personnel must then be able to carefully evaluate each situation to understand what liability might be risked.

A. Asking the *Resource Guide* Diligence Questions

The *Resource Guide* — issued years after the *Schering-Plough* settlement — provides the official DOJ/SEC synthesised guidance based on that settlement, DOJ Opinion Procedure Releases, and perhaps even on the government's then-current thinking regarding the ongoing *Lilly* investigation. The questions listed provide a hint as to how contributions and donations might be analysed in an enforcement action.

1. What is the purpose of the payment?

As noted above, a true "good deed" has no corrupt intent and cannot violate the FCPA — but it can be hard to discern, from the distance of enforcement authorities or even of a company's legal and compliance function, what is genuine goodwill and what happens to put money in a foreign official's pocket. For practical purposes, this is subsumed in question 4 below, which spells out the purpose that enforcement authorities are going to look for.

2. Is the payment consistent with the company's internal guidelines on charitable giving?

This question implies the existence of such a policy, which can be a double-edged sword — for example, in *Schering-Plough*, the government faulted the company for donating to the Foundation (and its clearly non-medical mission), contrary to internal guidelines.[58] Surely, if the company had not had such guidelines, it would have been faulted for their absence. Any company of sufficient size and sophistication likely will have some sort of policy or guidelines already, but from *Schering-Plough* we see the need to draft these policies to preserve flexibility if it becomes advantageous (in a legal way) to donate outside a specified core mandate, making it easier for the company to comply with its own policies and avoid being caught in violation of its own rules.

Further, as discussed above, given the number of allegedly misbooked charitable donations pursued by the DOJ and SEC, the company's internal systems should provide for exhaustive and accurate tracking to ensure that the company can monitor donations effectively.[59]

3. Is the payment at the request of a foreign official?

If a foreign official requested the payment, a company should be careful to verify if that official (or any other) is associated with the relevant entity, or to determine what other motives the foreign official might have for requesting a donation to the organisation. If, for business reasons, it is not possible to reject such requests out of hand, companies should explore formalising any such payments as part of a transparent contractual process (as discussed below). The particular danger is that regulators could argue that the satisfaction or prestige of seeing her chosen entity receive funding is a "thing of value" given by the company to the foreign official, regardless of whether she or any other foreign official were to receive any financial benefit.

4. Is a foreign official associated with the entity, and, if so, can the foreign official make decisions regarding your business in the country?

When considering whether a government official is linked to the entity, one must keep in mind the sheer variety of government officials, many of whom might be on the boards of recipient entities (particularly in a local context in more rural areas). For example, the mayor might be on the board of a hospital, or a doctor or professor from the nearby state-run hospital or university might be on the board of a local charity. It is also important to keep in mind officials associated with less common manifestations of the FCPA definition of "foreign official",[60] including employees of certain public international organisation (some of which are heavily involved in charity work)[61] and officials of foreign political parties. One commentator, for example, considers the inclusion of foreign political parties in the FCPA to prohibit payments to officials of rebel groups.[62] The association also need not be formal — although the director of the Foundation in the Chudow Castle cases was an officer of the charity, a non-officer might still be said to have a "special connection" or "special interest" in a recipient entity.[63]

5. Is the payment conditioned upon receiving business or other benefits?

Commentators, following the lead of the Chudow Castle settlements, have identified such as a key red flag, going so far as to argue that having proven *quid pro quo*, enforcement authorities need not prove a connection to a foreign official.[64] However, as most relevant matters have to date been resolved as books-and-records or internal controls matters, it is not clear if a finding of *quid pro quo* truly has this power.[65]

B. Special Situations

One also should watch for the following circumstances, which may call for additional diligence or monitoring efforts.

1. Duress and Extortion

Employees and third parties need to know that their physical safety comes before anti-bribery concerns. Some of the more extreme examples of requests for payments, including social responsibility payments, can qualify as duress, thereby negating corrupt intent.[66] For example, a "donation" might be sought — with dire consequences for refusal implied — by corrupt local authorities. A company's agents in such a situation must be allowed to do what is necessary to stay safe, with the caveat that even extorted payments can make a company liable under the books-and-records provisions of the FCPA. To avoid this risk, companies must be sure to take and process reports of any such incident, taking care to record any resulting payments correctly in the books and records of the company.

Another important reason to track carefully such incidents is that the defence of duress can be weakened by repetition: the first time one's truck driver strays into a corrupt village and has to pay to continue her journey might be excusable, but if the company knows that this likely will happen again when the truck passes through a certain town *en route*, the decision to continue driving that route may re-establish as corrupt intent.[67] One should also keep in mind that duress is interpreted narrowly to refer to potential physical harm — for example, the concept of "economic duress" typically is not recognised.[68]

2. Compelled Giving and Contracts: the other *Quid Pro Quo*

Commentators, following the lead of the Chudow Castle settlements, have identified *quid pro quo* as a key red flag, going so far as to argue that having proven *quid pro quo*, enforcement authorities need not prove that funds flowed or were to have flowed to a foreign official. Given that the matters in which regulators might have interpreted away the foreign official element have to date been resolved as books-and-records or internal controls matters, it is not clear if a finding of *quid pro quo* has this power.[69]

What is clear, however, is that one version of *quid pro quo* — what some might call "consideration" — is permissible. The FCPA includes a specific exception for reasonable, *bona fide* expenses directly related to the performance of a contract.[70] Compelled giving — often a feature of extractive industry concessions in less-developed countries — can require companies (as a condition of contract or compliance with local law, which itself provides another FCPA affirmative defence) to contribute to pre-selected charities, perhaps with ties to government officials,[71] or directly to government agencies and instrumentalities with similar ties. This obviously presents challenges and can require careful diligence work, but the fact that there technically is *quid pro quo* — giving in consideration for receiving the other benefits of the contract — does not in and of itself trigger anti-bribery liability.

Consider a company that wishes to run trucks through a town with poor infrastructure. A local official might demand or suggest that the company agree to improve that town's infrastructure in exchange for permission to transit the town. Perhaps the official's prestige would be increased if the company agrees to build new roads. Despite the explicit *quid pro quo*, this arrangement (if, and only if, it is documented and booked completely transparently and correctly) should not raise a high risk of violating the FCPA.

3. Major Donations or Projects

As discussed above, the *Wynn* and *Hyperdynamics* investigations suggest that authorities are interested in exploring the FCPA *bona fides* of major, game-changing donations that might have a business nexus with critical company licences or permissions. Likewise, the non-governmental organisation reflected in the *Louis Berger* DPA appears to have been used to open a new country's market to the company. Accordingly, in keeping with the idea that a compliance programme should be risk-based, such major donations or projects deserve extra scrutiny, and perhaps some of the extra due diligence steps or monitoring controls set forth in DOJ's Opinion Procedure releases, discussed above.

If the facts are murky enough and the matter important enough, the company also should consider engaging counsel to prepare an FCPA Opinion Procedure Request. Although DOJ is not obliged to respond to all such requests, if it does, DOJ likely will view conduct disclosed more charitably than if it were to have learned of it through a whistleblower. The act of disclosure to the Department during the procedure itself practically advances the effort to negate corrupt intent.

As *FCPA Professor* author Mike Koehler noted, the facts behind Opinion Procedure Release 10-02, discussed above, could be fairly summarised as follows: "to get a government-issued license, an entity subject to the FCPA is directed by a government agency to provide something of value to an institution whose board members include a sitting government official and a former government official".[72] Despite the red flags, the DOJ — perhaps taking a "results based" approach, as suggested by Koehler,[73] or perhaps favourably impressed by the breadth of diligence and monitoring steps offered by the requestor[74] — indicated that it would take no enforcement action. Although the DOJ through the Opinion Procedure cannot speak for the SEC or foreign anti-corruption enforcement agencies, a positive opinion likely would have persuasive value.

IV. Conclusion

Enforcement authorities have put companies subject to the FCPA on notice that donations to foreign charities will come under the same rigorous scrutiny as any other non-U.S. payment. Despite the alarm sounded by anti-corruption specialists following the announcement of the *Schering-Plough* settlement and its involvement of a *bona fide* charity, the cases brought so far relating to donations have not involved any donation-specific risks — instead, they involve fairly obvious bribery schemes that happen to include donations. Nevertheless, companies should take advantage of the available guidance and tighten their anti-corruption compliance programmes to defend against risks posed by foreign charitable contributions.

V. Endnotes

1. E.g., Reagan R. Demas, Biting the hands that feed: corporate charity and the U.S. Foreign Corrupt Practices Act. 29 Am. U. Int'l L. Rev. 335 (2014); William Nelson, No Good Deed Goes Unpunished: Charitable Contributions and the Foreign Corrupt Practices Act, 11 DePaul Bus. & Com. L.J. 331 (2013); Francesca M. Pisano, The Foreign Corrupt Practices Act and Corporate Charity: Rethinking the Regulations, 62 Emory L.J. 607 (2013).
2. See Pisano, *supra* note 1, at n.93.
3. FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, U.S. Dep't of Just & Securities & Exchange Comm'n (Nov. 14, 2013), http://www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter *Resource Guide*].
4. Complaint, *SEC v. Eli Lilly*, No. 12-2045 (D.D.C. 2012) [hereinafter *Lilly Complaint*].
5. Complaint, *SEC v. Schering-Plough*, No. 04-0945, 1 (D.D.C. 2004) [hereinafter *SP Complaint*].

6. He since has led Poland's national health fund and gone on to a career in Poland's lower house of parliament.
7. *SP Complaint*, at 2-3.
8. Schering-Plough merged in 2009 with Merck, and the surviving business operates under the Merck name.
9. *SP Complaint*, at 3.
10. *SP Complaint*, at 3, 5.
11. *SP Complaint*, at 4 (emphasis added).
12. Eli Lilly & Co., "Lilly Reaches Agreement with U.S. Securities & Exchange Commission", Dec. 20, 2012, available at https://investor.lilly.com/releasedetail.cfm?ReleaseID=728165.
13. *Lilly Complaint*, at 3-6.
14. *Lilly Complaint*, at 4.
15. *Lilly Complaint*, at 15.
16. Richard L. Cassin, "Charity Without Fear," Oct. 11, 2009, available at http://www.fcpablog.com/blog/2009/10/12/charity-without-fear.html; Nelson, *supra* note 1, at 331; Hughes Hubbard & Reed, "All Facially Good Deeds May Not Go Unpunished", Mar. 2014, available at http://www.hugheshubbard.com/PublicationDocuments/abikoff_%20eAlert-Anti-Corruption-April2014.pdf; Robert L. Waldman & William H. Devaney, "The FCPA and Anti-Corruption Enforcement: What Does It Mean for Charitable Contributions?", Mar. 2013, available at https://www.venable.com/files/Publication/f8897d4e-af59-40e1-a9b5-44902796f62b/Presentation/PublicationAttachment/85db6f4e-8017-4e17-8b0a-491b2667a1b2/The_FCPA_and_AntiCorruption_Enforcement_What_Does_It_Mean_for_Charitable_Contribution.pdf.
17. Demas, *supra* note 1, at 349.
18. Cassin, *supra* note 16.
19. *Id*.
20. Demas, *supra* note 1, at 361-68; Pisano, *supra* note 1, at 621-38.
21. 15 U.S.C. 78dd-1, 78dd-2, 78dd-3 (it is forbidden "to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value [to any foreign official, etc.]").
22. *Resource Guide*, at 16.
23. Demas, *supra* note 1, at 358.
24. *Lilly Complaint*, at 4.
25. *Id.*, at 6.
26. Demas, *supra* note 1, at 356.
27. Order, In the Matter of Stryker Corp., File No. 3-15587 (SEC Oct. 24, 2013).
28. *Id.*, at 5.
29. *Id*.
30. *Id.*, at 6.
31. Andrew Ceresney, FCPA, Disclosure, and Internal Controls Issues Arising in the Pharmaceutical Industry, remarks at CBI's Pharmaceutical Compliance Congress (Mar. 3, 2015), available at https://www.sec.gov/news/speech/2015-spch030315ajc.html.
32. Andrew Ceresney, Remarks at 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), available at https://www.sec.gov/News/Speech/Detail/Speech/1370543493598.
33. *Id*.
34. Information at 23, *United States v. Alstom S.A.*, No. 3:14-cr-00246-JBA (D. Conn. filed Dec. 22, 2014).
35. *Id.*, at 9.
36. Deferred Prosecution Agreement, *United States v. Louis Berger International, Inc.*, No. 15-3624 (MF), (D.N.J. filed July 7, 2015).
37. *Id*.
38. *Id*.
39. Wynn Resorts Ltd., Form 8-K (Feb. 13, 2012).
40. Wynn Resorts Ltd., Form 8-K (July 8, 2013).
41. Chris Sieroty, "Wynn Resorts: SEC concludes inquiry, not planning to recommend enforcement action", July 8, 2013, available at http://www.reviewjournal.com/business/casinos-gaming/wynn-resorts-sec-concludes-inquiry-not-planning-recommend-enforcement-action.
42. Reuters, "U.S. says Okada's Universal is target of criminal probe", Apr. 10, 2013, available at http://www.reuters.com/article/2013/04/10/us-casinos-universal-usa-idUSBRE93907P20130410.
43. Hyperdynamics Corp., Form 10-Q (Nov. 12, 2013).
44. Hyperdynamics Corp., Form 8-K (May 26, 2015).
45. *Id*.
46. E.g., Demas, *supra* note 1, at 342-46; Nelson, *supra* note 1, at 346-54.
47. Dep't of Justice, FCPA Opinion Proc. Release 10-02 (July 16, 2010), at 6, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2010/1002.pdf (citations omitted).
48. Demas, *supra* note 1, at 348.
49. *Id*.
50. Robert L. Cassin, "When is Charity a Bribe?", Jan. 7, 2008, available at http://www.fcpablog.com/blog/2008/1/8/when-is-charity-a-bribe.html.
51. *Id*.
52. *Resource Guide*, at 16-19.
53. *Resource Guide*, at 19.
54. Demas, *supra* note 1, at 355-57.
55. *Resource Guide*, at 20. (Emphasis in original.)
56. Demas, *supra* note 1, at 348.
57. *Id*.
58. *SP Complaint*, at 5.
59. See Nelson, *supra* note 1, at 372.
60. 15 U.S.C. §78dd-2(h)(2)(A) (defining "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof").
61. Nelson, *supra* note 1, at 338.
62. Rashad Abelson, "FCPA Applied to Syria", Oct. 14, 2014, available at http://www.nationalsecuritylawbrief.com/fcpa-applied-to-syria/.
63. See Demas, *supra* note 1, at 352.
64. See, e.g., Demas, *supra* note 1, at 355.
65. Companies subject to the U.K. Bribery Act and other anti-corruption laws should keep in mind that the "foreign official" element is not universal, and that some anti-corruption laws (such as the UKBA) prohibit bribery of private persons as well.
66. See *Resource Guide*, at 27.
67. See *Resource Guide*, at n.169.
68. *Resource Guide,* at 27.
69. Companies subject to the U.K. Bribery Act and other anti-corruption laws should keep in mind that the *foreign official* element is not universal, and that some anti-corruption laws (such as the UKBA) prohibit bribery of private persons as well.

70. 15 U.S.C. 78dd-1(c)(2), etc.

71. See Thomas R. Fox, "Compelled Giving and the FCPA", July 30, 2010, available at http://fcpacompliancereport.com/2010/07/compelled-giving-and-the-fcpa/.

72. Mike Koehler, "A Results Based Opinion Procedure Release?", July 27, 2010, available at http://fcpaprofessor.blogspot.com/2010/07/results-based-opinion-procedure-release.html (noting DOJ's frequent reference to the avowed humanitarian motivations of the requestor).

73. *Id*.

74. DOJ calls the measures "significant" and notes that the Requestor has undertaken each step set forth in previous Opinion Procedure Releases "and has gone further". Opinion Proc. Release 10-02, *supra* note 49, at 6-7.

* Order, In the Matter of Hyperdynamics Corporation, File No. 3-16843 (SEC Sept. 29, 2015).

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