

## *A Cornucopia of Great FCPA Articles for Your Friday Consideration*

It has been a great couple of weeks for article regarding the Foreign Corrupt Practices Act (FCPA). While I have resisted having a Friday Round Up of all things FCPA compliance related because both the FCPA Professor, on his site and Dawn Lomer on iSight.com have two of the best, some of the articles that I have read over the past are well worth a post about. So with a tip of the hat to both of these blogging colleagues, I submit for your Friday consideration the three following authors with their superior articles.

### *The FCPA Professor*

The FCPA Professor has published two excellent articles over the past two weeks on the FCPA. The first was his 80 page tome, "*The Story Of The Foreign Corrupt Practices Act*". In this article, published in the Ohio State Law Journal, the Professor explored the more than two years of investigation, deliberation, and consideration, which led to the passage of the FCPA in 1977. Noting that it was "a pioneering statute and the first law in the world governing domestic business conduct with foreign government officials in foreign markets" the Professor wove together "information and events scattered in the FCPA's voluminous legislative record to tell the FCPA's story through original voices of actual participants who shaped the law." In his article I learned who supported legislation aimed at stopped the bribing of foreign government official and how the final legislation came into being after a long and arduous process.

This week, the Professor published his review of the Department of Justice FCPA Guidance, which came out last month, entitled "*Grading the Foreign Corrupt Practices Act Guidance*". It was published in Bloomberg / BNA's White Collar Crime Report. As you have come to expect from the Professor, his review is proactive. His abstract details some of the items he discusses, such as "(i) the enforcement agencies' motivations in issuing the Guidance and the fact that it should have been issued years ago; (ii) the utility of the Guidance from an access-of-information perspective and how the Guidance can be used as a measuring stick for future enforcement agency activity; (iii) how the Guidance is an advocacy piece and not a well-balanced portrayal of the FCPA as it is replete with selective information, half-truths, and, worse information that is demonstratively false; (iv) how, despite the Guidance, much about FCPA enforcement remains opaque; and (v) how, despite the Guidance, FCPA reform remains a viable issue."

As I once said about Dick Cassin and his FCPA Blog, "If the FCPA Blog didn't exist, someone would have to create it and fortunately for us Dick has done so." To this list I now must add the FCPA Professor, so to paraphrase Paul Samuelson, when asked to comment about Milton Friedman winning the Nobel Prize in Economics, "if the FCPA Professor didn't exist, we would have to invent him." You can agree or disagree with the Professor but he stirs debate and puts out topics for dialogue, which as the son of Professor, is what I think that academicians should do.

## ***Alexandra Wrage***

For the longest time, my This Week In FCPA colleague Howard Sklar crowed to me about Alexandra and how he was such a big fan. Of course I knew of her and her work as President of Trace. Like many of us, I bemoaned the fact she no longer blogs on a regular basis. She does speak on a regular basis and early this year I heard her speak at the Beacon Events Corruption and Compliance South and Southeast Asia Summit. Fortunately she spoke *after* I did because she is a very dynamic speaker. In addition to her numerous speaking engagements, she does publish articles from time-to-time and yesterday we were treated to a most timely article on gift giving and gift receiving. It was published on the Corporate Insider blog site of Corporate Counsel and was entitled, “*Tis the Season When Gifts Become Bribes*”. In her article, Wrage explored the receipt of gifts by employees in the context of corruption. The article is certainly worth your time to read but she listed the points that any company or compliance professional needs to consider in a gift giving or gift receiving policy:

- Gifts should be modest, tokens of esteem.
- Ideally, they should bear the corporate logo or reflect the company’s products and they should be provided openly and transparently.
- Delivering to an office is preferable to sending to a home address.
- One gift-giving holiday or event should be observed. It doesn’t matter if it’s Diwali, Eid, the Lunar New Year, July 4th, or Christmas, but pick (only) one.
- Perishable gifts of flowers or food are generally thought to be less risky, in part because they can’t be resold.
- Give consistently and without regard to pending or recent procurement or other official decisions.
- Follow corporate policy.
- Document everything.
- Give in good faith and without expectation of any quid pro quo.
- A moderate annual affirmation of both new and longstanding relationships is not a bribe.

Good ideas to follow any time of the year.

## ***Jim McGrath***

Jim is a former prosecutor and chief legal officer of a federally funded drug task force so he comes with a different perspective than my civil law background. Jim blogs on his own site, the Internal Investigations Blog and as you may discern from the name of his blog, he tends to look at the investigative side of things. He did so again in a post entitled, “*Little Things Mean A Lot: The FCPA Guide on Internal Investigations*”. McGrath looked at the DOJ FCPA Guidance from his investigative perspective and came up with the following nugget: "An effective compliance program should include a mechanism for an organization’s employees and others to report suspected or actual misconduct or violations of the company’s policies on a confidential basis

and without fear of retaliation. Companies may employ, for example, anonymous hotlines or ombudsmen. Moreover, *once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken.*" From this he wrote that the "text mandates that companies not only have "in place an efficient [and] reliable . . . process for investigating [an] allegation", but that it be "properly funded" as well. [italics in original]

McGrath believes that this language should raise concerns for Chief Compliance Officer "across the land, since "properly funded internal investigation" has now been added to the pile of ill-defined terms such as "foreign official", "instrumentality", and "anything of value". Further he raised the following questions:

- What happens if the unforeseeable occurs and the wheels come off in far greater severity than anticipated when the CCO stocked the internal probe war chest?
- Will that shortcoming be considered a hallmark of a less-than-effective compliance program and militate against a non-prosecution or deferred prosecution agreement or will it factor into a higher culpability score and greater penalties?
- And who – as if practitioners didn't know – will decide these issues?

I recommend all of these articles and authors to you. Each brings a different perspective and each can help you build, create or enhance your compliance program to meet *best standards*. A good Friday to all and let us hope that the Texans can recover from their debacle in Boston.

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