

WORLD TOURS AND THE SUMMER OLYMPICS: RECENT PITFALLS UNDER THE FOREIGN CORRUPT PRACTICES ACT IN THE AREAS OF GIFTS, ENTERTAINMENT, AND TRAVEL

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ABSTRACT

In the spring of 2015, the United States Securities and Exchange Commission brought two significant Foreign Corrupt Practices Act cases involving gifts, entertainment, and travel. The SEC brought the case of *In the Matter of FLIR Systems* involving FCPA violations concerning the financing of a “world tour” of personal travel for government officials. The SEC then filed the case of *In the Matter of BHP Billiton* involving FCPA violations concerning the sponsored attendance of foreign officials at the 2008 Summer Olympics in Beijing. These landmark cases affirm previous guidance by the Securities and Exchange Commission and the United States Department of Justice that gifts, entertainment, and travel given for corrupt and improper purposes will violate the FCPA. These cases also signify active involvement by United States regulators in pursuing violations under the FCPA for improper conduct concerning hospitality. This Article will provide an outline of the FCPA and emphasize the affirmative defense for certain “reasonable and bona fide” expenditures under the statute. The Article will then look at formal and informal guidance on gifts, entertainment, and travel as these subject matters relate to the FCPA. The Article will next discuss the recent *FLIR* and *BHP Billiton* cases. Finally, the Article will discuss key takeaways gleaned from these cases, and the

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FCPA compliance measures that should be undertaken in the areas
involving gifts, entertainment, and travel.

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INTRODUCTION

The spring of 2015 bloomed two major Foreign Corrupt Practices Act (“FCPA”) cases involving the areas of gifts, entertainment, and travel.¹ In April 2015, the Securities and Exchange Commission (the “SEC”) brought forth the case of *In the Matter of FLIR Systems*,

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd, 78ff (2012)).

involving FCPA violations concerning the financing of a “world tour” of personal travel for government officials.² In May 2015, the SEC filed the case of *In the Matter of BHP Billiton*, involving FCPA violations concerning the sponsored attendance of foreign officials at the 2008 Summer Olympics.³ These cases affirm previous guidance by the SEC and the Department of Justice (the “DOJ”) that gifts, entertainment, and travel given for corrupt and improper purposes violate the FCPA.⁴ These cases also signify active involvement by United States regulators in pursuing violations under the FCPA for improper conduct concerning hospitality.

Companies operating on an international basis need to be wary and vigilant about compliance with the FCPA in the area of hospitality. Companies need to make sure that they have proper compliance policies and procedures, as well as robust internal controls in place to combat high-risk activities involving hospitality and foreign officials. They also need to make sure that such policies and procedures and internal controls are properly implemented so as to protect them from liability under the FCPA.

This Article will address issues involving the hospitality area in relation to the enforcement of and compliance with the FCPA. Part I provides an outline of the FCPA, and emphasizes the affirmative

2. FLIR Systems, Inc., Exchange Act Release No. 74673, 2015 WL 1544884 (Apr. 8, 2015) [hereinafter FLIR]; Press Release, SEC, SEC Charges Oregon-Based Defense Contractor with FCPA Violations, (Apr. 8, 2015) [hereinafter FLIR Press Release], <http://www.sec.gov/news/pressrelease/2015-62.html> [<http://perma.cc/7UYD-G86P>]; see also Samuel Rubinfeld, *Flir Pays \$9.5 Million to Settle FCPA Allegations*, WALL ST. J.: RISK & COMPLIANCE J. (Apr. 8, 2015, 1:19 PM), <http://blogs.wsj.com/riskandcompliance/2015/04/08/flir-pays-9-5-million-to-settle-fcpa-allegations/> [<http://perma.cc/G4NX-JJ29>].

3. BHP Billiton Ltd., Exchange Act Release No. 74998, 2015 WL 2393657 (May 20, 2015) [hereinafter BHP Billiton]; Press Release, SEC, SEC Charges BHP Billiton with Violating FCPA at Olympic Games (May 20, 2015) [hereinafter BHP Billiton Press Release], <http://www.sec.gov/news/pressrelease/2015-93.html> [<http://perma.cc/V5DG-TGLK>]; see also Scott Patterson, *SEC Fines BHP \$25 Million After Gifts Probe*, WALL ST. J. (May 20, 2015, 2:00 PM), <http://www.wsj.com/articles/sec-charges-bhp-with-violating-fcpa-at-2008-summer-olympics-1432127870> [<http://perma.cc/2K72-J7U>].

4. See U.S. DEP’T OF JUSTICE & SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 15-16 (2012) [hereinafter FCPA RESOURCE GUIDE], <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf> [<http://perma.cc/F42U-K4RZ>].

defense for certain “reasonable and bona fide” expenditures under the statute. Part II looks at formal and informal guidance on gifts, entertainment, and travel as these subject matters relate to the FCPA. Part III discusses the recent *FLIR* and *BHP Billiton* cases. Part IV then provides what the author believes to be key takeaways from these cases and other recent FCPA cases. Finally, Part V discusses FCPA compliance measures that the author believes should be undertaken in the areas involving gifts, entertainment, and travel.

I. THE FCPA

The FCPA establishes civil and criminal liability for the bribery of foreign government officials in order to obtain or retain business.⁵ The anti-bribery law can be divided into accounting and anti-bribery prohibitions.⁶

5. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a). The FCPA became law in 1977 and was created in response to a report issued by the SEC in 1976 that found that many public companies had engaged in questionable payments overseas and falsified their accounting with respect to such payments in their books and records. See S. REP. NO. 95-114, at 1-2 (1977); H.R. REP. NO. 95-640, at 1-3 (1977); SEC, 94TH CONG., REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, SUBMITTED TO THE SENATE COMMITTEE ON BANKING, HOUSING & URBAN AFFAIRS (Comm. Print 1976). Prior to the FCPA, there were no domestic laws prohibiting domestic companies from paying bribes to foreign government officials nor specific provisions in the federal securities laws explicitly prohibiting such payments of, or disclosure of, bribes to foreign officials. *Id.*; see also DONALD R. CRUVER, *COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE* (2d ed. 1999). The FCPA is both a civil and criminal statute; the DOJ is responsible for criminal enforcement of the FCPA and civil enforcement of the anti-bribery provisions against non-issuers, while the SEC is responsible for civil enforcement of the accounting provisions and for civil enforcement of the anti-bribery provisions with respect to issuers. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 395-96 (2010).

6. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a), 78m(b)(2). The FCPA was amended in 1988 to revise and clarify several of its provisions in response to criticisms of the original statute. See Foreign Corrupt Practices Act Amendment of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25. The statute was amended again in 1998 to conform its provisions to the OECD Anti-Bribery Convention. See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998).

A. THE GENERAL STATUTE

The FCPA accounting provisions require that domestic and foreign companies with securities publicly traded in the United States properly report any relevant bribes.⁷ More specifically, the accounting provisions require that issuers, companies that have a class of securities registered with the SEC or are required to file reports with the SEC, maintain certain recordkeeping standards and internal accounting controls.⁸ The recordkeeping standard requires that issuers “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”⁹ The internal controls provision requires that issuers create a system of internal accounting controls that provide “reasonable assurances” that transactions are executed in “accordance with management’s general or specific authorization.”¹⁰

7. See 15 U.S.C. § 78m(b)(2).

8. See *id.* The FCPA applies to any issuer that has a class of securities registered under Section 12(g) of the Securities Exchange Act of 1934 (“Exchange Act”) or which is required to file reports under Section 15(d) of the Exchange Act as well as to any officer, director, employee, or agent of such an issuer or any stockholder acting on behalf of such issuer. 15 U.S.C. § 78dd-1(a). This would include certain foreign companies that list stock on a U.S. securities exchange and their relevant personnel. *Id.* The relevant accounting provisions can be found in Section 13(b)(2) of the Exchange Act, which specifically require issuers to keep accurate books and records and establish and maintain a system of internal accounting controls. 15 U.S.C. § 78m(b)(2). In addition, the SEC has adopted two rules related to the accounting provisions. Rule 13b2-1 provides that “[n]o person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to Section 13(b)(2)(A)” of the Exchange Act. 17 C.F.R. § 240.13b2-1 (2015). Rule 13b2-2 prohibits a director or officer of an issuer from making or causing to be made any materially false or misleading statement or omission in connection with any audit. *Id.* § 240.13b2-2.

9. 15 U.S.C. § 78m(b)(2)(A). The term “reasonable detail” is defined to mean “such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.” *Id.* § 78(m)(b)(7).

10. 15 U.S.C. § 78m(b)(2)(B). The provision specifically requires that issuers:

[D]evelop and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management’s general or specific authorization;

The FCPA anti-bribery provisions prohibit the bribing of foreign government officials for the purpose of obtaining or retaining business, directing business to other persons, or securing any improper advantage.¹¹ More specifically, the FCPA anti-bribery provisions prohibit:

(1) any issuer, domestic concern, or any person acting within U.S. territory, or any officer, director, employee, agent, or stockholder acting on behalf of any of the foregoing;

(2) from using any means or instrumentality of U.S. commerce "corruptly" in furtherance of;

(3) an offer, payment, or promise to pay, or authorization of the payment of anything of value;

(4) to (a) any "foreign official," (b) any foreign political party or party official, (c) any candidate for foreign political office, (d) any public international organization official, or (e) any other person while "knowing" that the payment or promise to pay will be given to any of the foregoing;

(5) for the purpose of (a) influencing any act or decision of that person in his or her official capacity, (b) inducing that person to do or omit to do any act in violation of his lawful duty, (c) securing any improper advantage, or (d) inducing that person to use his influence with

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Id. Civil liability will be found with respect to violations of the accounting provisions, and criminal liability will also be found under the accounting provisions when a person "knowingly" circumvents or fails to implement a system of internal accounting controls or "knowingly" falsifies the books and records. *See id.* § 78m(b)(5).

11. *See id.* § 78dd-1(a), 78dd-2(a), 78dd-3(a).

a foreign government to affect or influence any government act or decision;

(6) in order to assist such issuer, domestic concern, or person acting within U.S. territory, in obtaining or retaining business, or directing business to any person.¹²

The anti-bribery provisions apply to any issuer and “domestic concern,” defined as any United States citizen, national or resident, and any corporation, partnership, or association that has its principal place of business in the United States, or that is incorporated in the United States.¹³

There are two affirmative defenses to the FCPA anti-bribery provisions.¹⁴ The first affirmative defense applies when the payment at issue is lawful under the written laws of a relevant foreign official’s country.¹⁵ The second affirmative defense allows for payments that are considered “reasonable and bona fide” expenditures incurred by foreign officials directly related to the promotion of products or services, or the execution or performance of a contract with a foreign government or

12. *Id.* There is both criminal and civil liability for violations of the anti-bribery provisions and the provisions have been incorporated into the federal securities laws as Section 30A of the Exchange Act. *See id.* § 78dd-1(a). Issuers subject to the anti-bribery provisions are the same as the relevant issuers subject to the accounting provisions. *See supra* note 8 and accompanying text. The term “foreign official” means “[A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.”

15 U.S.C. § 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A). It is worth noting that on May 16, 2014, the U.S. Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi* issued a decision in which an appellate court defined the term “instrumentality” of a foreign government for the first time as the term is used in the definition of a “foreign official” under the FCPA. *See United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014). The decision set out a two-part test and list of factors for determining what constitutes an “instrumentality” of a foreign government under the FCPA and provided clarity as to the meaning of a “foreign official” under the FCPA. *See id.* at 925-27. The decision also affirmed an interpretation by the DOJ and SEC that state-owned and state-controlled entities could be considered “instrumentalities” of a foreign government subject to the FCPA. *See id.*; *see also* FCPA RESOURCE GUIDE, *supra* note 4, at 19-21.

13. 15 U.S.C. § 78dd-1(a), 78dd-2(a), 78dd-2(h)(1), 78dd-3(a).

14. *See id.* § 78dd-1(c)(1) to (2), 78dd-2(c)(1) to (2), 78dd-3(c)(1) to (2).

15. *See id.* § 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1).

agency.¹⁶ There is also an exception to the anti-bribery provisions which allows for so-called “facilitation” or “grease payments” to foreign officials for the purposes of expediting or securing the performance of a “routine government action,” such as obtaining permits or processing visas.¹⁷

16. *Id.* § 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

17. *Id.* § 78dd-1(b), 78dd-2(b), 78dd-3(b). The term “routine government action” means any action which is ordinarily and commonly performed by a foreign official, such as obtaining permits, processing visas, and lining up basic services. *Id.* § 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A). Specifically, the FCPA defines “routine government action” as:

[A]n action which is ordinarily and commonly performed by a foreign official in –

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing government papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across the country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

Id. § 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A). Payments made to expedite any of the basic services listed above or “of a similar nature,” are not considered payments prohibited by the FCPA. *Id.* § 78dd-1(f)(3)(A), 78dd-2(h)(4)(A), 78dd-3(f)(4)(A). The facilitation payments exception is an exception only to the FCPA’s anti-bribery provisions and is not an exception to the accounting provisions. See Lucinda A. Low, Owen Bonheimer & Negar Katirai, *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, 1665 PLI/CORP 711, 725 (2008). Issuers that make facilitation payments, and do not properly record such payments in their books and records, will be liable under the accounting provisions. *Id.*, 15 U.S.C. § 78m(b)(2).

B. AFFIRMATIVE DEFENSE FOR CERTAIN “REASONABLE AND BONA FIDE”
EXPENDITURES

Of relevance to this Article is the fact that there is an affirmative defense under the FCPA for certain “reasonable and bona fide” expenditures.¹⁸ More specifically, the statute states that “[i]t shall be an affirmative defense” under the anti-bribery provisions that:

[T]he payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to— (A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a contract with a foreign government or agency thereof.¹⁹

Thus, certain “reasonable and bona fide” expenditures will fall under the affirmative defense provision to the anti-bribery sections when they are directly related to the promotion of products or services, or the execution or performance of a contract with a foreign government or agency.²⁰ The statute also cites “travel and lodging expenses” incurred by or on behalf of a foreign official as an example of a reasonable and bona fide expenditure.²¹ Nevertheless, the statute leaves open the question as to when expenditures may be considered “reasonable” within the context of the affirmative defense. At what point would a gift, trip, or entertainment expense be too much so as to cross the line beyond being “reasonable and bona fide” and potentially constitute a bribe in violation of the FCPA? Would a gift of a coffee mug be okay? What about a luxury sports car? Would flying a team of foreign officials from China to New York City in coach class to see a demonstration of a product be acceptable? What about if that same trip involved flying them in first class, and a side trip to Niagara Falls or Las Vegas? These are all questions that the FCPA practitioner has had to navigate in trying to determine whether certain gifts, entertainment, and travel expenses cross the line on what is or is not allowed under the FCPA.

18. 15 U.S.C. § 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

19. *Id.* § 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

20. *Id.* § 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

21. *Id.* § 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2).

II. GUIDANCE ON GIFTS, ENTERTAINMENT, AND TRAVEL

Leading up to the recent 2015 cases on gifts, entertainment, and travel, the DOJ and the SEC issued both formal and informal guidance in these areas as they relate to the FCPA. Formal guidance was issued through the FCPA Resource Guide,²² while enforcement actions offered informal guidance addressing whether and when certain gifts, entertainment, and travel expenditures may go beyond the “reasonable and bona fide” standard and violate the FCPA.²³

A. FCPA RESOURCE GUIDE

In November 2012, the DOJ and the SEC published the FCPA Resource Guide, which was intended to help companies comply with the FCPA.²⁴ The FCPA Resource Guide contains a section covering gifts, entertainment, and travel, and another section covering the affirmative defense for “reasonable and bona fide” expenditures.²⁵

1. Gifts, Entertainment, and Travel

The FCPA Resource Guide contains a section concerning the areas of gifts, entertainment, and travel.²⁶ The Guide states that the FCPA “does not prohibit gift-giving,” but rather “prohibits the payments of bribes, including those disguised as gifts.”²⁷ It then states that certain “hallmarks” of “appropriate gift-giving” are when gifts are “given openly and transparently, properly recorded in the giver’s books and records, provided only to reflect esteem or gratitude, and permitted under local law.”²⁸ The Guide also notes that “[i]tems of nominal value, such as cab fare, reasonable meals and entertainment expenses . . . are unlikely to improperly influence an official,” and thus are unlikely to result in an enforcement action.²⁹ However, the Guide states that the

22. FCPA RESOURCE GUIDE, *supra* note 4, at 15-18, 24; *see infra* Part II.A.

23. *See infra* Part II.B.

24. *See* FCPA RESOURCE GUIDE, *supra* note 4, at Foreword.

25. *See id.* at 15-18, 24.

26. *See id.* at 15.

27. *Id.* at 16.

28. *Id.*

29. *Id.*

“larger or more extravagant the gift . . . the more likely it was given with an improper purpose.”³⁰ In this respect, the Guide notes that enforcement cases brought by the DOJ and SEC in these areas have involved “single instances of large, extravagant” gifts “such as sports cars, fur coats, and other luxury items” as well as “widespread gifts of small items as part of a pattern of bribes.”³¹

Outside of the gift area, the FCPA Resource Guide also notes that numerous FCPA enforcement actions have been brought involving corrupt payments associated with travel and entertainment expenses, and cites *UTStarcom* and *Lucent* as examples.³² In *UTStarcom*, a telecommunications company spent almost \$7 million on trips for its customers, including employees of Chinese state-owned companies, to

30. *Id.*

31. *Id.* at 15-16 n. 92 (citing Complaint, SEC v. RAE Sys. Inc., No. 1:10-cv-02093 (D.D.C. Dec. 10, 2010), <http://www.sec.gov/litigation/complaints/2010/comp21770.pdf> [<http://perma.cc/Z5NW-FWD4>]; Non-Prosecution Agreement, *In re* RAE Sys. Inc. (Dec. 10, 2010), <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rae-systems.pdf> [<http://perma.cc/54XA-NFN5>]; Complaint, SEC v. Daimler AG, No. 1:10-cv-00473 (D.D.C. Apr. 1, 2010), <http://sec.gov/litigation/complaints/2010/comp2010-51.pdf> [<http://perma.cc/7GC3-UC56>]; Criminal Information, United States v. Daimler AG, No. 1:10-cr-00063-RJL (D.D.C. Mar. 22, 2010), <http://www.justice.gov/criminal/fraud/fcpa/cases/daimler/03-22-10daimlerag-info.pdf> [<http://perma.cc/AST2-Q2G4>]). The FCPA Resource Guide notes one case brought by both the DOJ and SEC in which a defendant gave a government official, among other things, a country club membership fee, a generator, and an automobile worth \$20,000. *Id.* at 16 n. 93 (citing Complaint, SEC v. ABB Ltd., No. 04-cv-01141 (D.D.C. July 6, 2004), <http://www.sec.gov/litigation/complaints/comp18775.pdf> [<http://perma.cc/R7EY-TG9S>]; Criminal Information, United States v. ABB Vetco Gray, Inc., No. 04-cr-279 (S.D. Tex. June 22, 2004), <http://www.justice.gov/criminal/fraud/fcpa/cases/abb/06-22-04abbvetco-info.pdf> [<http://perma.cc/WZ99-YZRA>]).

32. *Id.* at 15 n. 94, 97 (citing Complaint, SEC v. UTStarcom, Inc., No. 09-cv-6094 (N.D. Cal. Dec. 31, 2009), <http://www.sec.gov/litigation/complaints/2009/comp21357.pdf> [<http://perma.cc/EG5K-ALKP>]; Non-Prosecution Agreement, *In re* UTStarcom Inc. (Dec. 31, 2009) [hereinafter *UTStarcom*], <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/12-31-09utstarcom-agree.pdf> [<http://perma.cc/NP39-EKDP>]; Complaint, SEC v. Lucent Techs. Inc., No. 1:07-cv-02301 (D.D.C. Dec. 21, 2007), <http://www.sec.gov/litigation/complaints/2007/comp20414.pdf> [<http://perma.cc/U56J-NG3F>]; Non-Prosecution Agreement, *In re* Lucent Technologies (Nov. 14, 2007) [hereinafter *Lucent*], <http://www.justice.gov/criminal/fraud/fcpa/cases/lucent-tech/11-14-07lucent-agree.pdf> [<http://perma.cc/6JV5-24UB>]).

travel to popular United States tourist destinations.³³ Similarly, in *Lucent*, a technology company spent millions of dollars on travel for Chinese government officials to primarily visit United States tourist destinations.³⁴

The FCPA Resource Guide also cautions that companies can violate the FCPA when they give payments or gifts to third parties, such as a foreign official's family member, as an indirect way of corruptly influencing a relevant foreign official.³⁵ As an example, the Guide notes a case in which a defendant provided airline tickets, among other things, to a cousin of a foreign official whose influence the defendant was seeking in order to obtain government contracts.³⁶ In addition to the case-cited examples, the Guide provides the following examples of improper travel and entertainment:

- A \$12,000 birthday trip for a government decision-maker from Mexico that included visits to wineries and dinners;
- \$10,000 spent on dinners, drinks, and entertainment for a government official;
- a trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in 'pocket money' for each official; and

33. See *UTStarcom*, *supra* note 32. The relevant trips were purportedly for the individuals to conduct training at the company's facilities, but in reality, no training occurred on many of these trips. *Id.*

34. See *Lucent*, *supra* note 32. In *Lucent*, the company spent millions of dollars on trips for Chinese government officials to supposedly inspect factories and train officials on using the company's equipment when, in reality, many of these trips involved little or no time at the company's facilities, but instead involved visits to tourist destinations such as Disney World, the Grand Canyon, Hawaii, Universal Studios, and New York City. *See id.*

35. See FCPA RESOURCE GUIDE, *supra* note 4, at 16.

36. See *id.* (citing *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991)). The defendant was convicted at trial and received a prison sentence. *Id.* (citing Judgment, *United States v. Liebo*, No. 4-89-76 (D. Minn. Jan. 31, 1992), <http://www.justice.gov/criminal/fraud/fcpa/cases/liebor/1992-01-31-liebor-judgment.pdf> [<http://perma.cc/2ANL-GYCQ>]).

- a trip to Paris for a government official and his wife that consisted primarily of touring activities via a chauffeur-driven vehicle.³⁷

Finally, in the section covering gifts, entertainment and travel, the FCPA Resource Guide provides compliance recommendations with respect to hospitality and the FCPA.³⁸ The Guide states that a company should have “clear and easily accessible guidelines and processes in place” for gift-giving by company employees and agents.³⁹ The Guide also notes that many large companies have “automated gift-giving clearance processes” and “set monetary thresholds for gifts” along with annual limitations.⁴⁰

2. Reasonable and Bona Fide Expenditures

The FCPA Resource Guide also has a section discussing reasonable and bona fide expenditures, and the affirmative defense related to such expenditures.⁴¹ Under this section, the Guide cautions that trips for “personal entertainment purposes” will not be considered “bona fide” business expenses under the affirmative defense.⁴² The Guide also warns that hospitality expenditures mischaracterized in a company’s books and records can lead to violations of the FCPA accounting provisions.⁴³ The Guide then states that whether a specific payment is a bona fide expenditure “requires a fact-specific analysis” and provides the

37. *Id.*

38. *Id.*

39. *Id.*

40. *See id.* The Guide notes that there can also be certain exceptions for gifts approved by management. *Id.*

41. *See id.* at 24.

42. *Id.* (citing *Liebo*, 923 F.2d at 1311-12). The Guide notes that the DOJ has provided guidance about “legitimate promotional and contract-related expenses” through several opinion procedure releases. *Id.* It then states that under these releases that the DOJ has opined that the following types of expenses on behalf of foreign government officials did not warrant FCPA enforcement action: (1) “travel and expenses to visit company facilities or operations;” (2) “travel and expenses for training;” and (3) “product demonstration or promotional activities, including travel and expenses for meetings.” *Id.*

43. *See id.* The Guide states that “when expenditures, bona fide or not, are mischaracterized in a company’s books and records, or where unauthorized or improper expenditures occur due to a failure to implement adequate internal controls, they may also violate the FCPA’s accounting provisions.” *Id.*

following “non-exhaustive list of safeguards” that may be helpful to companies in evaluating whether certain expenditures are appropriate or risk violating the FCPA:

- Do not select the particular officials who will participate in the party’s proposed trip or program or else select them based on pre-determined, merit-based criteria;
- pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt;
- do not advance funds or pay for reimbursements in cash;
- ensure that any stipends are reasonable approximations of costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable;
- ensure the expenditures are transparent, both within the company and to the foreign government;
- do not condition payment of expenses on any action by the foreign official;
- obtain written confirmation that payment of the expenses is not contrary to local law;
- provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred; and
- ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in the company’s books and records.⁴⁴

44. *Id.* (citing U.S. DEP’T OF JUSTICE, FCPA OP. RELEASE 11-01 (June 30, 2011), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2011/11-01.pdf> [<http://perma.cc/T7G7-FDR9>]; U.S. DEP’T OF JUSTICE, FCPA OP. RELEASE 08-03 (July 11, 2008), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.pdf> [<http://perma.cc/2D77-PWUV>]; U.S. DEP’T OF JUSTICE, FCPA OP. RELEASE 07-02 (Sept. 11, 2007), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf> [<http://perma.cc/A92L-6T24>]; U.S. DEP’T OF JUSTICE, FCPA OP. RELEASE 07-01 (July 24, 2007), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.pdf> [<http://perma.cc/C6F>]

B. POST FCPA RESOURCE GUIDE

After the FCPA Resource Guide was published in November 2012, and up until the time of the most recent 2015 cases of *FLIR* and *BHP Billiton*, the DOJ and the SEC continued to bring cases related to gifts, entertainment, and travel. While there were many FCPA cases that involved ancillary violations concerning hospitality issues, there were at least two cases where such issues were the primary subject matter.

In *Diebold*, the DOJ and the SEC brought FCPA actions involving the bribing of officials at government-owned banks with vacations and gifts.⁴⁵ It was alleged, among other things, that the company's

U-AVAM]; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-04 (Sept. 3, 2004), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0404.pdf> [<http://perma.cc/574L-4FN9>]; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-03 (June 14, 2004), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0403.pdf> [<http://perma.cc/TD3S-U9BC>]; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-01 (Jan. 6, 2004), <http://www.justice.gov/criminal/fraud/fcpa/opinion/2004/0401.pdf> [<http://perma.cc/YP5D-L47H>]; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 96-01 (Nov. 25, 1996), <http://www.justice.gov/criminal/fraud/fcpa/opinion/1996/9601.pdf> [<http://perma.cc/PFC3-K57N>]; and U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 92-01 (Feb. 1992), <http://www.justice.gov/criminal/fraud/fcpa/review/1992/r9201.pdf> [<http://perma.cc/SH9-9KTN5>].

45. See Deferred Prosecution Agreement & Criminal Information, *United States v. Diebold, Inc.*, No. 5:13CR464 (D. Ohio Oct. 22, 2013), http://www.justice.gov/criminal/fraud/fcpa/cases/diebold/combined_dpa.pdf [<http://perma.cc/F25W-7299>]; Press Release, Dep't of Justice, *Diebold Incorporated Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay \$25.2 Million Criminal Penalty* (Oct. 22, 2013), <http://www.justice.gov/opa/pr/diebold-incorporated-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-252> [<http://perma.cc/T2TH-R7X4>]; SEC v. *Diebold, Inc.*, No. 1:13-cv-01609 (D.D.C. Oct. 22, 2013) [hereinafter *Diebold*], <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-225.pdf> [<http://perma.cc/TN33-Y826>]; Press Release, SEC, *SEC Charges Diebold with FCPA Violations* (Oct. 22, 2013) [hereinafter *Diebold Press Release*], <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539977273> [<http://perma.cc/LAQ5-8FB4>]. *Diebold* agreed to pay a little more than \$48 million to settle the allegations brought by the DOJ and SEC, which included a \$25.2 million civil penalty related to the DOJ action and a \$22.9 million in disgorgement fees related to the SEC action. *Diebold Press Release, supra*. *Diebold* also entered into a deferred prosecution agreement with the DOJ, agreed to implement rigorous internal controls, appoint a compliance monitor, and consent to a final judgment with the SEC wherein it agreed to be permanently enjoined from violating Sections 30A, 13(b)(2)(A) and 13(b)(2)(b) of the Exchange Act. *Id.*; see also *Deferred Prosecution Agreement & Criminal Information, United States v. Diebold, Inc.*, No. 5:13CR464 (D. Ohio Oct. 22, 2013), <http://www.justice.gov/criminal/fraud/fcpa/cases/d>

subsidiaries in China and Indonesia provided gifts, entertainment, and travel for officials at government-owned banks in China and Indonesia who had the ability to influence their banks' purchasing decisions.⁴⁶ These officials were given free trips to popular tourist destinations in Europe and the United States, such as the Grand Canyon and Disneyland, which the company falsely recorded in its books and records as legitimate training expenses.⁴⁷

In *Bruker*, the SEC brought an FCPA action against a company for providing non-business related travel to Chinese government officials in an effort to obtain business.⁴⁸ The action involved, among other things, improper reimbursement payments to Chinese government officials for pleasure travel in the United States and Europe.⁴⁹ The relevant officials were responsible for authorizing the purchase of company products, and the vacations typically followed business-related travel funded by the

iebold/combined_dpa.pdf [<http://perma.cc/F25W-7299>].

46. See Diebold, *supra* note 45, at 2, 5-8; see also Diebold Press Release, *supra* note 45.

47. See Diebold, *supra* note 45, at 2, 5-12; see also Diebold Press Release, *supra* note 45. The company's Chinese subsidiary also provided government bank officials with cash gifts. See Diebold Press Release, *supra* note 45. Unrelated to the hospitality violations, it was also alleged that the company falsified its books and records to conceal approximately \$1.2 million in bribes paid to employees at privately owned banks in Russia. *Id.* For further analysis on the *Diebold* action, see Eric Carlson et al., Covington & Burlington LLP, *Diebold Pays over \$48 Million to Settle FCPA Allegations*, COVINGTON (Oct. 24, 2013), http://www.cov.com/~media/files/corporate/publications/2013/10/diebold_pays_over_48_million_to_settle_fcpa_allegations.ashx [<http://perma.cc/Q5LN-TDET>]; Richard Smith, *Takeaways from Diebold's FCPA Settlements*, LAW360 (Nov. 4, 2013, 12:56 PM), <http://www.law360.com/articles/484980/takeaways-from-diebold-s-fcpa-settlements> [<http://perma.cc/H45R-ZZY7>].

48. See Bruker Corporation, Exchange Release No. 73,835, Fed. Sec. L. Rep (CCH) ¶ 80,809 (Dec. 15, 2014) [hereinafter Bruker]; Press Release, SEC, SEC Charges Massachusetts-Based Scientific Instruments Manufacturer with FCPA Violations (Dec. 15, 2014) [hereinafter Bruker Press Release], <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543708934> [<http://perma.cc/TP99-QVJ6>].

49. See Bruker, *supra* note 48; Bruker Press Release, *supra* note 48. The leisure travel included travel in the United States, Czech Republic, France, Germany, Italy, Norway, Sweden, and Switzerland. See Bruker, *supra* note 48; see also Bruker Press Release, *supra* note 48. Besides the allegations concerning non-business related travel, the action also alleged that the company engaged in sham "collaboration agreements" to direct money to Chinese government officials. See Bruker, *supra* note 48; see also Bruker Press Release, *supra* note 48.

company.⁵⁰ The SEC alleged that the company lacked internal controls to prevent and detect the improper payments, and falsely recorded the payments in its books and records as legitimate business expenses.⁵¹

In addition to *Diebold* and *Bruker* there were several other major cases that involved improper hospitality related payments in violation of the FCPA.⁵² These cases signified continued efforts by regulators to take action on improper payments related to gifts, entertainment, and travel.

50. See *Bruker*, *supra* note 47; see also *Bruker* Press Release, *supra* note 47.

51. See *Bruker*, *supra* note 47; see also *Bruker* Press Release, *supra* note 47. The SEC Order found that the company violated the FCPA's internal controls and books and records provisions. See *Bruker*, *supra* note 47; see also *Bruker* Press Release, *supra* note 47. The company agreed to pay \$1,714,852 in disgorgement, \$310,117 in prejudgment interest, and a \$375,000 penalty. See *Bruker*, *supra* note 47; see also *Bruker* Press Release, *supra* note 47. For further analysis on the *Bruker* case, see Mike Koehler, *SEC Brings Another Travel and Entertainment FCPA Enforcement Action*, FCPA PROFESSOR (Dec. 16, 2014), <http://www.fcprofessor.com/sec-brings-another-travel-and-entertainment-fcpa-enforcement-action> [http://perma.cc/38VC-NHXP]; Stephanie Russell-Kraft, *SEC Fines Bruker Corp. \$2.4M for FCPA Violations in China*, LAW360 (Dec. 15, 2014, 5:16 PM), <http://www.law360.com/articles/604807/sec-fines-bruker-corp-2-4m-for-fcpa-violations-in-china> [perma.cc/U3HL-W6G4].

52. In *Stryker*, it was alleged, among other things, that a company's subsidiaries bribed foreign officials by paying their expenses for trips that lacked any legitimate business purpose. See *Stryker Corporation*, Exchange Act Release No. 70,751, 107 S.E.C. Docket 2765, 2013 WL 5757376 (Oct. 24, 2013); Press Release, SEC, SEC Charges *Stryker Corporation* with FCPA Violations (Oct. 24, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540044262> [http://perma.cc/DRM8-AV4H]; see also Samuel Rubinfeld, *Stryker Corp Settles FCPA Case, Pays \$13 Million*, WALL ST. J.: RISK & COMPLIANCE J. (Oct. 24, 2013, 12:14 PM), <http://blogs.wsj.com/riskandcompliance/2013/10/24/stryker-corp-settles-fcpa-case-pays-13-million/> [http://perma.cc/8E8L-TYHP]. In *Weatherford*, an oilfield services company was charged for, among other things, authorizing improper entertainment and travel for foreign officials in Africa and the Middle East to win business. See *Complaint, SEC v. Weatherford Int'l Ltd.*, Case No. 4:13-cv-03500 (Nov. 26, 2013), <http://www.sec.gov/litigation/complaints/2013/comp-pr2013-252.pdf> [http://perma.cc/QZ9Z-5B59]; Press Release, SEC, SEC Charges *Weatherford International* with FCPA Violations (Nov. 26, 2013), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694> [http://perma.cc/9LSJ-ER2K]; see also Press Release, Dep't of Justice, *Three Subsidiaries of Weatherford International Limited Agree to Plead Guilty to FCPA and Export Control Violations* (Nov. 26, 2013), <http://www.justice.gov/opa/pr/three-subsidiaries-weatherford-international-limited-agree-plead-guilty-fcpa-and-export> [http://perma.cc/8QH5-MJ8N]; Thomas Fox, *The Weatherford Settlement*, CORPORATE COMPLIANCE INSIGHTS, (Dec. 10, 2013), <http://www.corporatecomplianceinsights.com/the-weatherford-fcpa-settlement/> [http://perma.cc/KFA2-LR9F]. In *Hewlett-Packard*, it was alleged, among other things, that a company provided gifts and

III. RECENT FCPA ENFORCEMENT CASES CONCERNING GIFTS, ENTERTAINMENT, AND TRAVEL

In 2015, the SEC brought *FLIR and BHP Billiton*, two major enforcement cases concerning gifts, entertainment, and travel. *FLIR* involved a company financing a “world tour” of personal travel for

leisure travel to foreign officials in order to win contracts with a foreign government agency. See Hewlett-Packard Co., Exchange Act Release No. 71,916, 180 S.E.C. Docket 2797 (Apr. 9, 2014); Press Release, SEC, SEC Charges Hewlett-Packard with FCPA Violations, SEC Press Release 2014-73, (Apr. 9, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370541453075> [<http://perma.cc/9HXW-L6PK>]; see also Press Release, Dep’t of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), <http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery> [<http://perma.cc/53V8-8UK7>]; Press Release, Dep’t of Justice, Hewlett-Packard Russia Pleads Guilty to and Sentenced for Bribery of Russian Government Officials (Sept. 11, 2014), <http://www.justice.gov/opa/pr/hewlett-packard-russia-pleads-guilty-and-sentenced-bribery-russian-government-officials> [<http://perma.cc/XE2E-2DGS>]; Doug Carroll, *HP’s Russia Unit Pleads Guilty in Bribery Case*, USA TODAY (Sept. 12, 2014, 8:16 PM), <http://www.usatoday.com/story/money/business/2014/09/11/hp-russia-poland-mexico-bribery/15479533/> [<http://perma.cc/R9ZF-34PH>]. In *Avon* it was alleged, among other things, that a company provided gifts, travel and entertainment to Chinese government officials in order to “obtain and retain business benefits” for it in China. See Complaint, SEC v. Avon Prods., Inc., Case No. 14-CV-9956 (Dec. 17, 2014), <http://www.sec.gov/litigation/complaints/2014/comp-pr2014-285.pdf> [<http://perma.cc/KC6F-BN3C>]; Press Release, SEC, SEC Charges Avon with FCPA Violations (Dec. 17, 2014), <http://www.sec.gov/news/pressrelease/2014-285.html> [<http://perma.cc/PS5B-VSCW>]; see also Press Release, Dep’t of Justice, Avon China Pleads Guilty to Violating the FCPA by Concealing More than \$8 Million in Gifts to Chinese Officials (Dec. 17, 2014), <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials> [<http://perma.cc/5QX2-QNL4>]; Phil Wahba, *Avon Settles Justice Department Charges of China Bribery for \$135 Million*, FORTUNE (Dec. 17, 2014, 6:02 PM), <http://fortune.com/2014/12/17/avon-bribery-probe-settlement/> [<http://perma.cc/6MSX-3GKN>]. A recent major action in *Alstom* also involved, among other things, the improper use of gifts, entertainment, and travel. See Press Release, Dep’t of Justice, Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery> [<http://perma.cc/A7AK-BB4Y>]; see also Martin Weinstein et al., *Client Memorandum: Alston S.A. Pleads Guilty to FCPA Violations and Agrees to Pay a Record \$772 Million Criminal Fine*, WILLKIE FARR & GALLAGHER LLP (Dec. 23, 2014), http://www.willkie.com/~media/Files/Publications/2014/12/Alston_SA_Pleads_Guilty_to_FCPA_Violations.pdf [<http://perma.cc/7BDM-JY9P>].

government officials, and *BHP Billiton* involved a company sponsoring the attendance of foreign officials at the 2008 Summer Olympics in Beijing.⁵³

A. FLIR AND THE FINANCING OF A “WORLD TOUR” OF PERSONAL TRAVEL FOR GOVERNMENT OFFICIALS

On April 8, 2015, the SEC filed a settled Administrative Order (the “FLIR Order”) against FLIR Systems Inc. for violating the FCPA.⁵⁴ The SEC charged the company with violating the FCPA by financing what one employee called a “world tour” of personal travel for foreign government officials in the Middle East who played important roles in decisions to purchase the company’s products.⁵⁵ According to the SEC, the company earned more than \$7 million in profits as a result of sales “influenced by the improper travel and gifts.”⁵⁶ As part of settling the case, the company agreed to pay approximately \$9.5 million, representing both disgorgement and a civil money penalty.⁵⁷

1. “World Tour”

The FLIR Order alleges that in November 2008, the company entered into a contract with the Saudi Arabia Ministry of Interior (the “Ministry”) to sell binoculars with infrared technology for

53. See FLIR, *supra* note 2; see also BHP Billiton, *supra* note 3.

54. See FLIR, *supra* note 2; see also FLIR Press Release, *supra* note 2. The company develops infrared technology for use in binoculars and other sensing products and systems. See FLIR, *supra* note 2; see also FLIR Press Release, *supra* note 2. On November 17, 2014, the SEC filed a settled Administrative Order against two former FLIR employees that were primarily involved in the violations underlying the FLIR case. See *In re* Stephen Timms & Yasser Ramahi, Exchange Release No. 73,616, 2014 WL 6338805 (Nov. 17, 2014); Press Release, SEC, SEC Sanctions Two Former Defense Contractor Employees for FCPA Violations (Nov. 17, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543472839> [<http://perma.cc/S9AF-W8ZJ>]; see also Rachel Louise Ensign, *SEC Settles Bribery Probe with Flir Systems Employees*, WALL ST. J.: RISK & COMPLIANCE J. (Nov. 17, 2014, 6:48 PM), <http://blogs.wsj.com/riskandcompliance/2014/11/17/sec-settles-bribery-probe-with-flir-systems-employees/> [<http://perma.cc/L6D6-GCSG>].

55. FLIR, *supra* note 2, at *2; see also FLIR Press Release, *supra* note 2.

56. FLIR, *supra* note 2, at *2; see also FLIR Press Release, *supra* note 2.

57. See FLIR, *supra* note 2, at *6-7; see also FLIR Press Release, *supra* note 2.

approximately \$12.9 million.⁵⁸ At the time, there were two company employees based out of the company's Middle East office that were responsible for this contract.⁵⁹ Under the contract, the company agreed to a "Factory Acceptance Test," or equipment inspection, by Ministry officials before the delivery of the binoculars to Saudi Arabia.⁶⁰ The company hoped that a successful delivery of the binoculars would lead to an additional product order in the next year or two.⁶¹

In February 2009, the two relevant employees began preparing for the Factory Acceptance Test to take place in July 2009, and in doing so, made arrangements to send Ministry officials on what one of the employees referred to as a "world tour" before and after the Factory Acceptance Test.⁶² Before arriving in Boston, the location of the Factory Acceptance Test, the Ministry officials were treated with visits to Casablanca, Paris, Dubai, and Beirut.⁶³ Once they got to the Boston area, they spent a five-hour day at the company's Boston facility where they conducted and completed the Factory Acceptance Test.⁶⁴ The agenda for the Ministry officials' remaining seven days in Boston included three other one to two-hour-long visits to the company's facility, additional meetings with company personnel at their hotel, and other leisure activities.⁶⁵ One of the company employees also took the Ministry officials on a weekend trip to New York.⁶⁶ Overall, Ministry officials traveled for 20 nights on the "world tour," with all of their airfare and luxury hotel accommodations paid for by the company.⁶⁷ The FLIR Order stated that there "was no business purpose" for the trips outside of the Boston area.⁶⁸

One of the relevant employees forwarded the air travel expenses for the Ministry to his manager for approval, and attached a summary

58. See FLIR, *supra* note 2, at *2.

59. See *id.*

60. *Id.* This Factory Acceptance Test was a "key condition to the fulfillment of the contract." *Id.*

61. See *id.*

62. *Id.*

63. See *id.*

64. See *id.*

65. See *id.*

66. See *id.*

67. *Id.*

68. *Id.*

reflecting the full extent of the travel involved.⁶⁹ The manager approved the travel, and also directed the employee to break the travel submission into two so as to make the expenses “appear smaller.”⁷⁰ This employee also forwarded the travel expenses along with an itinerary that detailed the Paris and Beirut visits to the company’s finance department, which the finance department later processed.⁷¹ Neither the manager nor anyone in the finance department questioned the itinerary or travel expenses even though they reflected travel outside of the Boston area.⁷²

After the Factory Acceptance Test in Boston, the Ministry gave its permission for the company to ship the binoculars.⁷³ The Ministry later placed an additional order for binoculars for approximately \$1.2 million.⁷⁴ Overall, the company earned over \$7 million in profits as a result of the sales of its binoculars to the Ministry.⁷⁵

2. *Additional Travel and Expensive Watches*

In addition to the “world tour,” the FLIR Order also alleges that the company paid for additional travel and expensive watches for Ministry officials.⁷⁶ The FLIR Order alleges that the company paid approximately \$40,000 for additional travel by Ministry officials from 2008 through 2010.⁷⁷ This included trips to Dubai over New Years in 2008 and 2009, and trips within Saudi Arabia to allegedly “help FLIR win business” with other Saudi Arabian government agencies.⁷⁸ The FLIR Order also alleges that a company partner paid for travel for officials from the Egyptian Ministry of Defense in June and July of 2011.⁷⁹ While the travel focused on a legitimate equipment inspection at the company’s Stockholm factory, it also included a “non-essential” visit to Paris.⁸⁰ Overall, the Egyptian officials traveled for fourteen days, with most only

69. *See id.*

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.* at *3.

74. *See id.*

75. *See id.*; *see also* FLIR Press Release, *supra* note 2.

76. *See* FLIR, *supra* note 2, at *3-4.

77. *See id.* at *3.

78. *Id.*

79. *See id.*

80. *Id.*

participating in legitimate business activities during four of those days, for a total cost of approximately \$43,000.⁸¹ The company reimbursed the partner for most of the travel costs.⁸²

The FLIR Order also alleges that in February 2009, at the instruction of the two relevant employees involved in the “world tour,” a third-party agent of the company purchased five watches for approximately \$7000.⁸³ The employees then gave the watches to Ministry officials during a March 2009 trip to Saudi Arabia “to discuss several business opportunities.”⁸⁴ One of the employees subsequently submitted an expense report to the company for reimbursement of the watches, which were identified as “executive gifts,” and had the names of the specific Ministry officials who received the watches.⁸⁵ However, despite these red flags, reimbursement for the watches was approved and paid for within the company.⁸⁶

3. FLIR's FCPA Policies and Training and Internal Controls

The FLIR Order noted that while the company had a code of conduct and anti-bribery policy that prohibited employees from violating the FCPA, it had “few internal controls” over travel in its international sales offices.⁸⁷ The FLIR Order also noted that the company had few controls over gift-giving to customers and foreign government officials.⁸⁸ The FLIR Order additionally stated that the employees responsible for approving gifts and expenses were not trained to identify gifts and expenses that were “potentially problematic.”⁸⁹

The FLIR Order stated that the company violated the anti-bribery, books and records, and internal controls provisions of the FCPA. Accordingly, the company was ordered to cease and desist from committing or causing any violations of the FCPA, and to pay disgorgement plus prejudgment interest of approximately \$8.5 million,

81. *See id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.* at *4.

86. *See id.*

87. *Id.*

88. *See id.*

89. *Id.*

as well as a civil penalty of \$1 million.⁹⁰ The company was also ordered to report its FCPA compliance to the agency for the next two years.⁹¹ In the press release associated with the case, Kara Brockmeyer, Chief of the SEC's FCPA Unit, stated, "FLIR's deficient financial controls failed to identify and stop the activities of employees who served as de facto travel agents for influential foreign officials to travel around the world on the company's dime."⁹²

B. BHP BILLITON AND SPONSORING THE ATTENDANCE OF FOREIGN OFFICIALS AT THE 2008 SUMMER OLYMPICS

On May 20, 2015, the SEC filed a settled Administrative Order (the "BHPB Order") against BHP Billiton Ltd. and BHP Billiton Plc. (collectively "BHP Billiton") for violating the FCPA when it sponsored the attendance of foreign government officials at the 2008 Summer

90. *See id.* at *5-6. The SEC Order stated that the company violated the FCPA's anti-bribery provision, Section 30A of the Exchange Act, "by corruptly providing expense gifts of travel, entertainment, and personal items to the" Ministry "officials to retain or obtain business for" the company. *Id.* at *6. The SEC Order also stated the company violated the FCPA's internal controls provision, Section 13(b)(2)(B) of the Exchange Act, "by failing to devise and maintain a sufficient system of internal accounting controls to prevent the provision and approval of the watches and the travel and the falsification of FLIR's books and records to conceal the conduct." *Id.* The Order then stated that "[a]s a result of this same conduct, FLIR failed to make and keep accurate books and records in violation of" the FCPA's books and records provision. *Id.*

91. *See id.* at *7.

92. FLIR Press Release, *supra* note 2 (quoting SEC FCPA Unit Chief Kara Brockmeyer). It is worth noting that the SEC Order noted "significant remedial efforts" undertaken by the company in response to the wrongful conduct, including conducting an internal investigation, self-reporting certain conduct to the SEC, and cooperating with the SEC's investigation. FLIR, *supra* note 2, at *5; *see also* FLIR Press Release, *supra* note 2. In a statement by the company on the day that the case was brought, the company admitted to self-reporting the actions to the SEC and cooperating with the SEC's investigation and enhancing its controls, policies and training. *See* Press Release, FLIR, *FLIR Systems Announces Resolution with Securities and Exchange Commission* (Apr. 8, 2015), <http://investors.flir.com/releasedetail.cfm?ReleaseID=905462> [<http://perma.cc/NR8T-CMCC>]. The company also stated that it had self-reported the relevant activities to the DOJ and that the DOJ declined to pursue a case against the company. *See id.*; *see also* Rubinfeld, *supra* note 2.

Olympic Games.⁹³ As part of settling the case, BHP Billiton agreed to pay a \$25 million civil money penalty.⁹⁴

According to the BHPB Order and the associated press release, this matter involved the company's "failure to devise and maintain sufficient internal controls over a global hospitality program that the company hosted in connection with its sponsorship of the 2008 Beijing Summer Olympic Games."⁹⁵ The BHPB Order also stated that the company invited approximately 176 government officials, as well as some of their spouses, to attend the Olympic Games at the company's expense.⁹⁶ Sixty of these officials ended up attending, some with their spouses or guests.⁹⁷ The hospitality packages that were provided included luxury hotel accommodations, Olympic event tickets, meals, and sightseeing excursions, at a value of approximately \$12,000 to \$16,000 per package.⁹⁸ Company executives also approved the offer of airfare to approximately fifty-one government officials and thirty-five of these officials' spouses or guests.⁹⁹

Internally, the company informed its employees that one of the main objectives of the Olympic sponsorship was to strengthen the company's business relationships with key government officials, and that the company's hospitality program was a primary means to achieve

93. See BHP Billiton, *supra* note 3; see also BHP Billiton Press Release, *supra* note 3. BHP Billiton is an international producer of commodities. BHP Billiton, *supra* note 3, at *2.

94. See BHP Billiton, *supra* note 3, at *9.

95. *Id.* at *1, *2-8. In December 2005, BHP Billiton and the Beijing Organizing Committee announced an agreement in which the company would become an "official sponsor" of the 2008 Olympic Games. *Id.* at *2. Pursuant to this agreement, the company paid a sponsorship fee and supplied raw materials that would be used to make Olympic medals. *Id.* In exchange the company received, among other things, the rights to use the Olympic trademark in announcements and advertisements and "priority access" to event tickets, suites, and accommodations in Beijing during the Olympics. *Id.*

96. See BHP Billiton, *supra* note 3, at *1-3; BHP Billiton Press Release, *supra* note 3.

97. See BHP Billiton, *supra* note 3, at *3. The Order noted that the majority of the invitations were made to government officials in countries in Africa and Asia that had a history of corruption. *Id.* at *1, *4.

98. See *id.* at *3.

99. See *id.* at *3.

that goal.¹⁰⁰ The BHPB Order alleged that, apart from the company's desire to "enhance business opportunities by strengthening relationships with its guests," the trips "had no other business purpose."¹⁰¹

According to the BHPB Order, the company developed "insufficient" internal controls despite knowing that inviting foreign government officials to the Olympics "created a heightened risk" of violating both the anti-bribery laws and the company's code of conduct.¹⁰² The BHPB Order also stated that the company required employees to complete hospitality applications for individuals, including government officials whom they sought to invite to the Olympics.¹⁰³ However, the company did not mandate independent compliance or legal review of the applications, and failed to provide employees with training on how to complete the applications or evaluate the bribery risks associated with making the invitations.¹⁰⁴ In addition, hospitality applications submitted by individual business division units looked at whether there were any business dealings between an invited government official and a particular business division unit submitting an application; however, the company had no controls in place to check whether the invited government official also had any business dealings with other business division units within the company.¹⁰⁵ The BHPB Order found that, as a result of these failures and insufficient internal controls, the company "invited government officials who were directly involved in, or in a position to influence, pending negotiations, regulatory actions, or business dealings" with the company.¹⁰⁶

The BHPB Order found that the company violated the internal controls and the books and records provisions of the FCPA, and ordered the company to cease and desist from committing or causing violations

100. *See id.* at *3.

101. *Id.*

102. *Id.* at *1, *4-6.

103. *See id.* at *4-5.

104. *See id.* at *5. In addition, the company did not institute a process for updating the hospitality applications or reassessing the appropriateness of invitations already made. *Id.* at *6.

105. *See id.* at *6.

106. *Id.* at *2, *6. The SEC Order cited to situations involving the countries of Burundi, the Philippines, Congo, and Guinea where foreign government officials that were directly involved in, or in a position to influence pending negotiations regulatory actions or business dealing with the company, were invited by the company to the Olympics. *Id.* at *6-8.

of these provisions, report on the operation of its FCPA and anti-corruption compliance program for a period of one year, and pay a civil penalty of \$25 million.¹⁰⁷ With respect to compliance with the FCPA, the SEC's press release regarding the case highlighted the dangers of having deficient internal controls in place concerning gifts, entertainment, and travel.¹⁰⁸ Andrew Ceresney, the Director of the SEC's Division of Enforcement stated, "BHP Billiton footed the bill for foreign government officials to attend the Olympics while they were in a position to help the company with its business or regulatory endeavors."¹⁰⁹ To that end, Ceresney said, "BHP Billiton recognized that inviting government officials to the Olympics created a heightened risk of violating anti-corruption laws, yet the company failed to implement sufficient internal controls to address that heightened risk."¹¹⁰

107. *See id.* at *8-10; Exchange Act §§ 13(b)(2)(A) – 13(b)(2)(B), 15 U.S.C. § 78m (2012). According to the SEC's Order, the company violated the FCPA's books and records provision, Section 13(b)(2)(A) of the Exchange Act, "because its books and records, namely certain Olympic hospitality applications, did not, in reasonable detail, accurately and fairly reflect pending negotiations or business dealings between" the company and "government official invited to the Olympics." BHP Billiton, *supra* note 3, at *9; Exchange Act § 13(b)(2)(A), 15 U.S.C. § 78m. The SEC Order stated that the company violated the FCPA's internal controls provision, Section 13(b)(2)(B) of the Exchange Act, "because it did not devise and maintain internal accounting controls over the Olympic hospitality program that were sufficient to provide reasonable assurance that access to assets and transactions were executed in accordance with management's authorization." BHP Billiton, *supra* note 3, at 9; Exchange Act § 13(b)(2)(B), 15 U.S.C. § 78m.

108. *See* BHP Billiton Press Release, *supra* note 3.

109. *Id.* (quoting SEC Enforcement Director Andrew Ceresney).

110. *Id.* Antonia Chion, an Associate Director of the SEC's Division of Enforcement, stated, "[a] 'check the box' compliance approach of forms over substance is not enough to comply with the FCPA." *Id.* She noted that "[a]lthough BHP Billiton put some internal controls in place around its Olympic hospitality program, the company failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations." *Id.* It is worth noting that the Order acknowledged that the company undertook "significant" cooperation and remedial efforts. *Id.* at *9. As far as cooperation is concerned the Order noted that in response to the SEC's investigation the company conducted an internal investigation and voluntarily produced large volumes of documents from around the world. *See id.* The Order also noted various remedial efforts undertaken by the company. *See id.* at *9. In a statement by BHP Billiton on the day that the case was brought, the company noted its cooperation with the SEC and that it had taken remedial actions to address the relevant conduct involved. *See* Press Release,

IV. TAKEAWAYS FROM RECENT FCPA CASES INVOLVING GIFTS, ENTERTAINMENT, AND TRAVEL

There are several takeaways that can be gathered from the recent cases of *FLIR* and *BHP Billiton*, and the hospitality cases preceding them. One takeaway is that these cases indicate that regulators will continue to pursue FCPA violations in the hospitality area. Some commenters believe that regulators may also be moving toward taking a more aggressive stance in this regard.¹¹¹ Others believe that compliance programs in the hospitality area may face “enhanced scrutiny” by regulators.¹¹² Whichever the case may be, *FLIR*, *BHP Billiton*, and earlier hospitality FCPA cases suggest that FCPA violations involving hospitality will likely continue to be an area of heightened focus for regulators, and companies should be vigilant in maintaining compliance programs that will limit their exposure to these types of violations.

Another takeaway from recent FCPA hospitality cases is that the hospitality area continues to be an area of importance to regulators, and those who run afoul in this area may be subject to major penalties. This is most apparent from the \$25 million civil penalty imposed in *BHP Billiton*, which, at the time of this Article, is the largest civil penalty ever imposed by the SEC in an FCPA enforcement action.¹¹³ In this

BHP Billiton, BHP Billiton Announces End of US Investigations (May 20, 2015) [hereinafter *Billiton Statement*], <http://www.bhpbilliton.com/home/investors/news/Pages/Articles/BHP-Billiton-Announces-End-of-US-Investigations.aspx> [<http://perma.cc/J6LE-TKWF>]; see also Samuel Rubinfeld, *BHP Changed its Compliance Program Amid FCPA Probe*, WALL ST. J.: RISK & COMPLIANCE J. (May 20, 2015, 6:24 PM), <http://blogs.wsj.com/riskandcompliance/2015/05/20/bhp-changed-its-compliance-program-amid-fcpa-probe> [<http://perma.cc/YY4K-LJUK>]. The company also stated that the DOJ had completed an investigation into the company and did not take any action. *Billiton Statement, supra*; see also Patterson, *supra* note 3.

111. See Martin Weinstein et al., *Client Memorandum: BHP Billiton Fined \$25 Million for FCPA Violations Related to Olympic Entertainment*, WILLKIE FARR & GALLAGER LLP, at 2 (May 27, 2015), http://www.willkie.com/~media/Files/Publications/2015/05/BHP_Billiton_Fined_25_Million_for_FCPA_Violations_Related_to_Olympic_Entertainment.pdf [<http://perma.cc/E7GT-KD5V>].

112. Lucinda A. Low & Tom Best, *Does SEC's Enforcement Action Against BHP Billiton Take the FCPA's Accounting Provisions Too Far?*, STEPTOE & JOHNSON LLP, (May 27, 2015), at 2, <http://www.steptoel.com/publications-10482.html> [<http://perma.cc/BZ6Y-SWWB>].

113. See MoFo FCPA and Global Anti-Corruption Team, *Client Alert: Top Ten International Anti-Corruption Developments for May 2015*, MORRISON FOERSTER, at 2 (June 9, 2015), <http://www.mofo.com/~media/Files/ClientAlert/2015/06/150609FCPA>

regard, some commenters have viewed the imposition of the record-setting penalty in an FCPA hospitality case as “remarkable” for a case that did not include a concurrent bribery charge.¹¹⁴ Other commenters have viewed the penalty as the SEC sending a “powerful message” to companies that it is willing to bring major fines for compliance failures in the hospitality area.¹¹⁵

The recent hospitality cases also illustrate how companies need to do more than just have sufficient policies and procedures and internal controls in place on paper. They must also ensure that their policies and procedures and internal controls are properly implemented.¹¹⁶ In this respect, some commenters have warned that regulators may find FCPA violations when a company has expressly prohibited wrongful conduct, but has not taken steps to ensure that its employees have complied with the policies and procedures and internal controls.¹¹⁷ Consequently, a company’s compliance program needs to be more than just a “paper tiger.”¹¹⁸ It must also be properly implemented in order to detect and prevent violations of the FCPA in the hospitality area.

TopTen.pdf [<http://perma.cc/KV4T-7MSC>]; Paul Weiss, *Memorandum to Clients: SEC Extends Application of FCPA Accounting Provisions in BHP Billiton Enforcement Action*, PAUL WEISS, at 1 (May 27, 2015), <http://www.paulweiss.com/media/2946569/28may15alert.pdf> [<http://perma.cc/J2CP-6UQT>]; Mike Koehler, *Issues to Consider from the Recent BHP Billiton Enforcement Action*, FCPA PROFESSOR, at 1 (May 27, 2015), <http://www.fcpaprofessor.com/issues-to-consider-from-the-recent-bhp-billiton-enforcement-action> [<http://perma.cc/D4RT-QPC8>].

114. Mendelsohn et al., *supra* note 113, at 6.

115. Stephanie Russell-Kraft, *SEC Flexes Bigger FCPA Muscles in \$25M BHP Billiton Case*, LAW360 (May 22, 2015, 1:32 PM), <http://www.law360.com/articles/658330/sec-flexes-bigger-fcpa-muscles-in-25m-bhp-billiton-case> [<http://perma.cc/HY55-H9H9>]. Some commenters also viewed the \$25 million civil penalty as “harsh” based on the facts underlying the case. See Weinstein et al., *supra* note 111, at 3.

116. See FLIR, *supra* note 2, at *4; BHP Billiton, *supra* note 3, at *6-9.

117. See *Foreign Corrupt Practices Act Alert: FLIR Systems Agrees to Pay \$9.5 Million to Settle SEC Charges of Violating the FCPA by Providing Gifts and Personal Travel to Saudi Arabian Officials*, SULLIVAN & CROMWELL LLP, at 3 (Apr. 9, 2015) [hereinafter *Foreign Corrupt Practices Act Alert*], http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Foreign_Corrupt_Practices_Act_Alert_04_09_15.pdf [perma.cc/P6M5-HS9P].

118. Rebekah Mintzer, *Inhospitable Hospitality: BHP Billiton’s \$25M FCPA Fine*, CORPORATE COUNSEL (May 28, 2015) (quoting Gregory Paw, a partner at Pepper Hamilton), <http://www.corpcounsel.com/top-stories/id=1202727590973/Inhospitable->

Another takeaway from recent FCPA hospitality cases is that there needs to be training on the policies and procedures and internal controls in order for them to be effective.¹¹⁹ In *BHP Billiton*, the SEC noted that the company had general training on its code of conduct, but faulted the company for failing to train employees on how to fill out the relevant hospitality applications or determine the eligibility of government officials under the FCPA.¹²⁰ Training on the policies and procedures is consistent with advice given in the FCPA Resource Guide, which states that compliance policies and procedures cannot work unless “effectively communicated throughout a company” including through “periodic training.”¹²¹

These cases also endorse the idea that a company’s internal controls ideally should be centralized, and that all of a company’s business activities should be taken into consideration when dealing with the question of hospitality to foreign officials. In *BHP Billiton*, the SEC determined that hospitality applications submitted by individual business division units generally only reflected negotiations between the government official and the particular business division unit submitting an application.¹²² However, the company had no process in place to determine whether the invited government official was involved in negotiations or business dealings with other business division units within the company.¹²³ As a result, the right hand of the company did not know of or check on the business dealings, and conflicts arising

Hospitality-BHP-Billitons-3625M-FCPA-Fine?mcode=1202615466090&curindex=0
[<http://perma.cc/G8WP-D8ZA>].

119. See FLIR, *supra* note 2, at *4; BHP Billiton, *supra* note 3, at *5.

120. See BHP Billiton, *supra* note 3, at *5-6; Mintzer, *supra* note 118, at 2; see also Andrew E. Levine et al., *FCPA Update: Internal Controls of Olympic Proportions: BHP Billiton Settles SEC Investigations of Olympic Hospitality*, DEBEVOISE & PLIMPTON, at 8 (May 2015), http://www.debevoise.com/~media/files/insights/publications/2015/05/fcpa_update_may_2015.pdf [<http://perma.cc/KU4M-X3M7>].

121. FCPA RESOURCE GUIDE, *supra* note 4, at 59. The Guide also notes that “[r]egardless of how a company chooses to conduct its training . . . the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language.” *Id.* In this regard, one of the remedial efforts undertaken by the company, and acknowledged by the SEC, in FLIR was that the company “enhanced access by its employees to its anti-bribery policy by providing translations into languages spoken in all countries in which it has offices.” FLIR, *supra* note 2, at *5.

122. See BHP Billiton, *supra* note 3, at *6.

123. See *id.*

therefrom, of the left hand of the company. The best way to resolve this issue is to have a centralized compliance function within the company so that it may, as a whole, determine whether the provision of any kind of hospitality to a foreign official may be improper under the FCPA.

A final takeaway from recent FCPA hospitality cases is that the SEC will not hesitate to bring these kinds of cases. First, the SEC has established that they will initiate these cases even when there is not a parallel DOJ action involved. Both *FLIR* and *BHP Billiton* were brought solely by the SEC.¹²⁴ Likewise, the SEC will has shown that it will pursue books and records and internal controls charges in hospitality cases regardless of whether or not bribery is also charged under Section 30A.¹²⁵ While *FLIR* involved books and records and internal controls charges, and a Section 30A anti-bribery charge, *BHP Biliton* only sought books and records and internal controls charges.¹²⁶

V. COMPLIANCE WITH THE FCPA CONCERNING GIFTS, TRAVEL, AND ENTERTAINMENT

The recent FCPA hospitality cases should serve to remind companies of the FCPA risks they face when providing hospitality to foreign officials. This is a high-risk area; one that a company needs to be

124. See *FLIR*, *supra* note 2; *BHP Billiton*, *supra* note 3.

125. See *FLIR*, *supra* note 2, at *5-6; *BHP Billiton*, *supra* note 3, at *8.

126. See *FLIR*, *supra* note 2, at *5-6; *BHP Billiton*, *supra* note 3, at *8. One other takeaway from both *FLIR* and *BHP Billiton* which is not necessarily specific to the gift, entertainment, and travel area, but is still worth noting nonetheless, is that both cases involved the SEC acknowledging “significant” remedial efforts, and in the case of *BHP Billiton* “significant” cooperation, by the companies involved. *FLIR*, *supra* note 2, at *5; *BHP Billiton*, *supra* note 3, at *9. Some commenters surmised that at least in the *FLIR* case, that the *FLIR* settlement, including the low penalty involved, showed the benefits that companies could receive when they self-report FCPA violations, cooperate with regulators, and undertake remedial measures. See *Foreign Corrupt Practices Act Alert*, *supra* note 117, at 3; Jeremy Zucker et al., *FLIR FCPA Action Highlights Continued Focus on Penalizing Improper Expenditures for Government Officials*, DECHERT LLP (Apr. 13, 2015), http://www.dechert.com/FLIR_FCPA_Action_Highlights_Continued_Focus_on_Penalizing_Improper_Expenditures_for_Government_Officials_04-13-2015/ [<http://perma.cc/9KKT-MDDZ>]; Stephanie Russell-Kraft, *FLIR’s \$9.5M FCPA Settlement Reflects Cooperation with SEC*, LAW360 (Apr. 8, 2015, 7:36 PM), <http://www.law360.com/articles/640847/flir-s-9-5m-fcpa-settlement-reflects-cooperation-with-sec> [<http://perma.cc/7LXT-MPLM>].

very cognizant of when designing policies and procedures and internal controls. This is especially true given that, as demonstrated in *BHP Billiton*, companies can be charged for violating the FCPA books and records and internal controls provisions even when no bribery is charged.¹²⁷

Given the continued risks that gifts, entertainment, and travel pose as far as FCPA liability is concerned, companies need to have effective compliance policies and procedures and internal controls in place to detect and prevent bribery and violations of the FCPA. Companies should particularly ensure that they have robust internal controls in place concerning high-risk activities involving any kind of hospitality provided to foreign officials. This includes having independent legal and compliance reviews of hospitality transactions. Periodic training on the relevant policies and procedures relating to hospitality issues would also be beneficial. In addition, a centralized function over compliance in the hospitality area can protect a company from potential violations of the FCPA.

Companies should also closely look at *FLIR* and *BHP Billiton* in reviewing whether their compliance policies and procedures cover the problematic deficiencies discovered in those cases. Companies should pay special attention to the section covering gifts, entertainment, and travel in the FCPA Resource Guide, and follow the recommendation in the Guide that companies have “clear and easily accessible guidelines and processes in place” for the giving of gifts by company employees.¹²⁸ Companies should also review the section devoted to reasonable and bona fide expenditures in the Guide, look at the safeguards listed in that section, and ideally make such safeguards part of their policies and procedures and internal controls.¹²⁹

127. See *BHP Billiton*, *supra* note 3. Indeed, some commenters believe that SEC enforcement of the FCPA internal controls provisions is increasing and, as a result, companies need to focus more attention on this area. See Thomas Fox, *On the Oregon Trail: the BHP Enforcement Action and High Risk Hospitality*, FCPA COMPLIANCE & ETHICS BLOG (May 22, 2015), <http://fcpacompliancereport.com/2015/05/on-the-oregon-trail-the-bhp-enforcement-action-and-high-risk-hospitality/> [<http://perma.cc/KH67-LAK5>].

128. FCPA RESOURCE GUIDE, *supra* note 4, at 16.

129. See *id.* at 24. Such safeguards include ensuring that a company does not condition the payment of an expense on any action by a foreign official or provide any additional compensation beyond what is necessary to pay for actual expenses incurred. See *id.* at 24 (citing U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 11-01, *supra* note 44;

Finally, companies need to make sure that they properly implement their compliance policies and procedures and internal controls. As *BHP Billiton* showed, a good compliance program without effective implementation is nothing more than a compliance program on paper, and consequently, will not protect a company from FCPA liability.¹³⁰ Therefore, a compliance program needs to be a properly implemented one in order to be an effective one.

CONCLUSION

The *FLIR* and *BHP Billiton* cases show how companies can find themselves in violation of the FCPA in the areas of gifts, entertainment, and travel, particularly when they fail to properly implement both the relevant compliance policies and procedures as well as internal controls needed to prevent such violations. As *BHP Billiton* illustrates, FCPA violations can be charged as a result of insufficient internal controls even when no bribery is charged.

The recent cases indicate that regulators will continue to pursue FCPA violations in the hospitality area. Therefore, companies operating on an international basis need to be vigilant about compliance with the FCPA in this area, and ensure that they create and implement the proper policies and procedures and robust internal controls needed to protect them from FCPA liability. Taking these steps will help companies stay in compliance with the FCPA in the high-risk hospitality area.

U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 08-03, *supra* note 44; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 07-02, *supra* note 44; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 07-01, *supra* note 44; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-04, *supra* note 44; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-03, *supra* note 44; U.S. DEP'T OF JUSTICE, FCPA OP. RELEASE 04-01, *supra* note 44).

130. See *BHP Billiton*, *supra* note 3, at *2-8.