

## *The FCPA Guidance: An Exploration of ‘Corruptly’ and ‘Willfully’*

I am back from my surgery and convalescence and I wanted to thank everyone for the good wishes and thoughts. I would also like to give a very big special thanks to Mary Shaddock Jones for her entire series of timely and topical articles that she and her associate Miller Flynt wrote while I was out. I would also like to thank Candice Tal, Founder and CEO of Infortal Worldwide and Alexandra Wrage, Founder and President of Trace International, for their articles as well. I hope that you enjoyed the articles from all of these great compliance practitioners.

Today I wanted to begin to look at the Department of Justice (DOJ) “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (the “Guidance”), which was released last week and available (at no cost) here. My review will be through the prism of Major League Baseball (MLB) and the events last week where the owner of the Florida Marlins completely and utterly neutered the team through the fire sale give away of all of the team’s talent. The giveaway of the Marlins talent was so devastating that I can only say that the Houston Astros are no longer the worst team, nor have the lowest payroll, in baseball. Jeffrey Loria, owner of the Marlins, promised all of the Marlin fans, politicians and voters of south Florida that if they publicly funded a new stadium for him to the tune of \$400MM, he would commit to paying for and fielding a competitive baseball team. Not only did he not tell the truth to those folks, he apparently continued to ‘dissemble’ while assembling his now traded talent. According to **Sports Illustrated**, “Shortstop Jose Reyes and left-hander Mark Buehrle, two of the five Marlins headed to Toronto in a pending blockbuster, are upset that the team broke verbal promises to them regarding trades, according to major-league sources. The Marlins do not award no-trade clauses, but club officials, while recruiting Reyes and Buehrle as free agents last offseason, assured both players that they would not be moved, sources said. Buehrle knew the Marlins' history of dumping high-priced players, and it concerned him, according to a friend. Team president David Samson, however, told both Buehrle and his wife, Jamie, that the team was committed to a long-term vision, sources said. A source close to Reyes, asked if the shortstop also received verbal assurances from the Marlins that he would not be traded, responded, "The answer is yes. A vehement yes.””

I thought about the above while reading the Guidance. Initially I would note that despite the protestations of numerous of the FCPA *commentariatti*, the Guidance is an excellent resource for the compliance professional. It collects, in one very usable volume, the DOJ and SEC enforcement actions, Opinion Releases, current compliance *best practices*, and relevant Prosecutorial and Sentencing Guidelines. The item which caught my eye with regard to the Marlins giveaway of their players was the section on “*What Does “Corruptly” Mean*”. Fortunately for Loria, he is not subject to the FCPA as the definition cited by the DOJ reads as follows:

In order for a corporation to be criminally liable under the FCPA, it must be found to have acted corruptly. The word “corruptly” is used in order to make clear that the offer,

payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, wrongfully to direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to fail to perform an official function.

The Guidance goes on to relate that the FCPA focuses on intent, so that it does not require that a corrupt act succeed in its purpose. Further, a foreign official need not solicit, accept or indeed receive a bribe for the FCPA to be violated. The Guidance points to the InnoSpec enforcement action in which “a specialty chemical company promised Iraqi government officials approximately \$850,000 in bribes for an upcoming contract. Although the company did not, in the end, make the payment (the scheme was thwarted by the U.S. government’s investigation), the company still violated the FCPA and was held accountable.” Further this is why “Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent—that is, the intent to improperly influence the government official. The corrupt intent requirement protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions.”

But beyond corruptly, for an individual to be criminally liable under the FCPA, that person must act ‘willfully’. The Guidance notes that the FCPA does not define ‘willfully’ but the Guidance points to its construction by federal court decisions. Indeed in *US v. Kay*, the US Supreme Court upheld jury instructions stated that willfully is “knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law” thereby connoting a willful act is one which is committed both voluntarily and purposefully, and with a bad purpose in mind. The Guidance went on to cite the US Supreme Court in *Bryan v. United States*, for the proposition that “[a]s a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’ In other words, in order to establish a ‘willful’ violation of a statute, ‘the Government must prove that the defendant acted with knowledge that his conduct was unlawful.’”

So what if we look at Jeffery Loria under these two requirements of the FCPA? First, under the corporate requirement of ‘corruptly’ do you think that he misled the voters of Florida when he told them that if they built it, they (top notch ballplayers) will come because Loria would pay for them. Remember its “offer, payment, promise, or gift, must be intended to induce the recipient” but that payment does not have to be made, or in Loria’s case withdrawn. What about under the individual requirement of ‘willfully’ regarding Loria’s and the Marlin’s statements to the players it signed? Here the standard is “knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law”. Were they doing a bad act when they promised that they would not be traded and then they were unceremoniously traded? I guess the bottom line is that Mr. Loria had better be glad he is not subject to the UK Bribery Act where bribery of both public officials and regular citizens is a violation of that law.

Or here in Houston we could simply celebrate that there is a worse owner than Jim Crane because, you know, we got new Astros uniforms from him. I feel better already.

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