

## DOJ and SEC Release Long-Awaited FCPA Guidance

On November 14, 2012, the Department of Justice (DOJ) and the U.S. Securities and Exchange Commission (SEC) jointly released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Guide”). The Guide is intended to provide guidance to “enterprises of all sizes – from small businesses doing their first transactions abroad to multi-national corporations with subsidiaries around the world.”<sup>1</sup> It compiles information from prior enforcement actions and matters the DOJ and SEC have declined to pursue, as well as hypothetical scenarios, to provide insight into the DOJ’s and SEC’s priorities in this critical white collar area. Moreover, at 120 pages, the Guide is vastly more detailed than the DOJ’s prior six-page “Lay Person’s Guide to the FCPA.”

As many of our clients know, the FCPA prohibits corrupt payments or offers to pay money or anything of value to foreign government officials or third parties acting on their behalf, when such payments or offers to pay are made to assist in obtaining new business or retaining existing business.<sup>2</sup> The FCPA also contains an accounting and internal controls provision that, in essence, requires U.S. public companies and foreign companies listed on U.S. stock exchanges to maintain accurate books and records and to have sound internal controls.<sup>3</sup>

The Guide addresses several key issues arising from the FCPA on which multinationals have long sought guidance, including (i) the elements of an effective anti-corruption compliance program; (ii) gifts and entertainment expenses; (iii) facilitating payments; (iv) the FCPA’s broad definition of “foreign official”; (v) successor liability when a company merges with or acquires another company that has committed acts of bribery; and (vi) FCPA jurisdiction over foreign companies that do not trade on U.S. exchanges.

***Anti-Corruption Compliance Programs.*** Of particular concern to in-house counsel in large, mid-sized, and small companies is how to implement an effective anti-corruption compliance program. Such a program not only helps to prevent, detect, and remediate violations, but, as the Guide emphasizes, can also be a significant mitigating factor in the decision whether to bring an enforcement action or in the penalty sought by the government if an action is brought.<sup>4</sup> While the Guide notes that compliance is not “one-size-fits-all” and should be specifically tailored to a company’s corruption risks, it does set forth the following “hallmarks” of an effective program:

- a strong commitment from the board of directors and senior executives to institute a “culture of compliance”;

- a clear and concise code of conduct, translated into local languages as necessary, with policies and procedures on such issues as due diligence of third party agents and gifts, travel, and entertainment expenses;
- oversight over the program by one or more senior executives who report directly to the board of directors or a board committee;
- a risk-based program that allocates compliance resources to areas of greatest risk, rather than a program that is “spread too thin” by focusing on all areas;
- periodic training for all directors, officers, relevant employees and, where appropriate, third-party agents and business partners, including training in local languages;
- clear disciplinary procedures for misconduct and, as appropriate, bonuses or other incentives for superior compliance leadership;
- due diligence on agents, consultants, and distributors that is risk-based and focuses broadly on three categories: (i) the third party’s qualifications to do work for the company and any relationship the third party has with foreign officials; (ii) the role and need for the third party’s services, with contract and payment terms commensurate to that role; and (iii) ongoing monitoring of the third party by the company;
- a mechanism for employees confidentially to report suspected or actual misconduct; and
- periodic testing and review of the compliance program to ensure its effectiveness.<sup>5</sup>

***Gifts and Entertainment.*** Clients are often unsure how to comply with the FCPA’s broad prohibition of giving “anything of value” to a foreign official, particularly in the context of small gifts and entertainment expenses. While the Guide does not provide any dollar cut-offs, it does point out that enforcement actions have focused on small payments and gifts only when they are part of a more systematic bribery scheme designed to corruptly influence a foreign official. Items such as cab fare, reasonable meals and entertainment, and promotional items, without more, are unlikely to attract the DOJ’s or SEC’s interest. Neither are gifts reflecting esteem or gratitude that are given openly and transparently. On the other hand, bigger ticket items such as fur coats, sports cars, or lavish trips or dinners are not appropriate because “[t]he larger or more extravagant the gift . . . the more likely it was given with an improper purpose.”<sup>6</sup>

***Facilitating Payments.*** The FCPA contains an exception for “facilitating payments” to secure “routine governmental action,” such as processing permits, securing visas, or delivering mail.<sup>7</sup> FCPA practitioners have long viewed this area with trepidation and have often counseled clients not to rely on the exception, in part because there is little clarity concerning the type and amount of payments allowed. The Guide confirms that this long-standing skepticism is well-placed. It states only that whether or not a facilitating payment is proper turns on “the *purpose* of the payment rather than its value.”<sup>8</sup> The Guide also points out that such payments may violate the laws of other countries such as the U.K., where there is no exception

for facilitating payments.<sup>9</sup> Facilitating payments are thus likely to remain an area of uncertainty for companies doing business abroad.

**Foreign Official Definition.** A prerequisite under the FCPA's anti-bribery provisions is that the improper payment or offer to pay must be made to a "foreign official." This provision is quite broad and includes not just officers and employees of foreign government departments and agencies, but also employees of "instrumentalities" of foreign governments.<sup>10</sup> The Guide points out that many governments operate through state-owned and state-controlled entities, particularly in areas such as aerospace and defense manufacturing, healthcare and life sciences, banking and finance, energy, telecommunications, and transportation. In determining whether an entity is an instrumentality of a foreign government, the DOJ and SEC analyze, among other things, (i) the foreign state's extent of ownership of the entity; (ii) the foreign state's degree of control over the entity; (iii) the state's characterization of the entity and its employees; and (iv) the general perception that the entity or person is performing an official or governmental function. The Guide notes that an entity is unlikely to be seen as an "instrumentality" if the foreign government does not own or control a majority of the entity's stock, unless there are clear indicia of substantial government control despite this lack of majority ownership. Again, there is no bright-line test, and the Guide expressly states that no single factor is dispositive.<sup>11</sup>

**Successor Liability.** The Guide also addresses the issue of when a company that acquires or merges with another company assumes liability for the target's FCPA violations. The Guide emphasizes that the DOJ and SEC have only brought enforcement actions against successor companies in a limited number of situations involving "egregious and sustained violations" or where the successor participated in or failed to stop violations after the acquisition.<sup>12</sup> The DOJ and SEC strongly encourage pre-acquisition due diligence to "identify business and regional risks and . . . lay the foundation for a swift and successful post-acquisition integration into the acquiring company's corporate control and compliance environment."<sup>13</sup>

**Jurisdiction Over Foreign Non-Issuers.** Of particular interest to non-U.S. companies whose shares do not trade on a U.S. exchange is the Guide's statement that such foreign non-issuers may be prosecuted "if they directly, or through an agent, engage in *any* act in furtherance of a corrupt payment while in the territory of the United States."<sup>14</sup> Other pronouncements by the DOJ, including the DOJ's Criminal Resource Manual, which is cited in the Endnotes to the Guide, appear to advance a more expansive jurisdictional reading, in which a foreign non-issuer may be liable for merely *causing* an act to take place within the U.S.<sup>15</sup> This more expansive view has been widely criticized as inconsistent with the text of the FCPA, which states that foreign non-issuers can only be liable for acts in furtherance of a bribery scheme that are committed "*while in the territory* of the United States."<sup>16</sup> It remains to be seen whether the language in the Guide reflects a helpful narrowing of the DOJ's view of FCPA jurisdiction over foreign

non-issuers, or whether the DOJ will continue to argue that the FCPA vests broad jurisdiction over such companies merely for causing acts to take place in the U.S.

The Guide also reaffirms the DOJ and SEC's view that foreign non-issuers may be liable for aiding and abetting, conspiring with, or acting as an agent of a U.S. company, citizen, national, or resident, regardless of whether the foreign non-issuer itself takes any action in the U.S.<sup>17</sup>

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While the Guide offers few if any surprises, it represents a high-water mark in the government's effort to offer guidance on a statute that in-house counsel, corporate compliance officers, and outside advisers have long considered ill-defined and, at times, confusing. With FCPA enforcement activity remaining at an historic high, the Guide is an important resource that collects under one roof a range of subjects critically important to any multinational company, no matter how large or small.

For further information, please contact one of the following members of our White Collar, Regulatory Enforcement and Internal Investigations group:

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<sup>1</sup> DOJ Press Release, November 14, 2012.

<sup>2</sup> 15 U.S.C. § 78dd-1, 78dd-2, 78dd-3.

<sup>3</sup> 15 U.S.C. § 78m.

<sup>4</sup> Guide at 56.

<sup>5</sup> Guide at 57-62.

<sup>6</sup> Guide at 15.

<sup>7</sup> 15 U.S.C. § 78dd-1(b); 15 U.S.C. § 78dd-2(b); 15 U.S.C. § 78dd-3(b).

<sup>8</sup> Guide at 25 (emphasis in original).

<sup>9</sup> *Id.*; see U.K. Serious Fraud Office's discussion of facilitating payments, available at <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx>.

<sup>10</sup> 15 U.S.C. § 78dd-1(f)(1)(A); 15 U.S.C. § 78dd-2(h)(2)(A); 15 U.S.C. § 78dd-3(f)(2)(A).

<sup>11</sup> Guide at 20-21.

<sup>12</sup> Guide at 28.

<sup>13</sup> *Id.*

<sup>14</sup> Guide at 11 (emphasis in original).

<sup>15</sup> Criminal Resource Manual § 9-1018 (quoted at Guide 107, Endnote 55); see also Lay Person's Guide to the FCPA at 3.

<sup>16</sup> 15 U.S.C. § 78dd-3(a) (emphasis added).

<sup>17</sup> Guide at 12.