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White Collar Defense and Investigations Alert November 2012

A Modicum of Clarity: DOJ and SEC Shed Some Light on the Foreign Corrupt Practices Act

On November 14, 2012, the Department of Justice and the Securities and Exchange Commission issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*.[1] Although this resource breaks no new ground, it offers useful guidance to help lawyers and clients alike understand the government's interpretation of the FCPA.

Background

Congress enacted the Foreign Corrupt Practices Act (the "FCPA" or "Act") in 1977, but it remained an infrequently enforced statute until the last decade. Enforcement efforts by the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have increased dramatically in recent years, leading to fines of hundreds of millions of dollars in some cases. These eye-catching penalties have prompted multinationals to adopt compliance programs and extensively investigate allegations of corrupt practices, particularly bribery of officials of foreign governments or public international organizations, either directly by company employees or indirectly through third-party agents.

Despite the surge in FCPA investigations and enforcement, few of these high-risk cases actually have been litigated, resulting in a scarcity of legal authority demarcating the reach of this vague, bluntly written statute. In addition, FCPA practitioners and regulated entities have perceived an inconsistency in the manner in which the government approaches possible violations of the Act, leading to uncertainty and heightened investigative and legal costs. In response, commentators and members of the regulated community have called for Congress to amend the law.

In a speech in Washington, D.C. on November 8, 2011, Assistant Attorney General Lanny A. Breuer, head of the DOJ Criminal Division, acknowledged the private sector's concerns but rejected calls for amending the Act.[2] Instead, he stated that the Government would provide in 2012 a "lay person's guide" with transparent, detailed new guidance on the FCPA's criminal and civil enforcement provisions.[3] One year later, the new *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("*FCPA Guide*" or "*Guide*") partially fulfills its intended purpose.

Overview of the *FCPA Guide*

There is little in the *FCPA Guide* that is actually new. Substantively, it breaks no new ground, does nothing to moderate the law's harsh effects, and to be sure, purports neither to give rise to enforceable rights nor to offer binding legal interpretations. Indeed, much of its content will strike seasoned FCPA practitioners as common knowledge. Most problematically, it offers no bright-line rules, instead relying on checklists and multi-factor tests that leave ample room for the government to make case-specific decisions without running the risk of inconsistency with positions taken in the *FCPA Guide*. In this sense, the *Guide* still leaves regulated entities and their employees to rely on guesswork in assessing the difference between lawful and unlawful behavior.

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1 Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the Foreign Corrupt Practices Act* (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

2 Lanny A. Breuer, Ass't Attorney General of the United States, Address at the Twenty-Sixth National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), *available at* http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html.

3 *Id*.

At the same time, the *FCPA Guide* mitigates the vagueness of the FCPA's standards, to an extent, by providing extensive case studies and hypothetical scenarios. By comparing the facts of an investigation to these examples, a company can evaluate its potential exposure and take corrective measures. Lawyers and compliance officers also can use the examples when advising clients on prospective decisions about pre-merger due diligence, gifts and entertainment policy, and the drafting or revision of a code of conduct. Equally useful, these examples should provide a powerful tool that companies under investigation may use to persuade the DOJ and SEC not to charge, by contending that the facts of a particular case are similar to those of past declinations described in the *FCPA Guide*. Even if the *Guide* is not technically binding, it will be difficult as a practical matter for the government to deviate from the policies set forth in this resource.

Detailed guidance of this sort has little precedent in white-collar practice and could be particularly useful in an area as nebulous as this one. If nothing else, the DOJ and SEC have provided in one brief (120 pages), authoritative document a collection of resources that are otherwise scattered among numerous disparate sources (such as prior DOJ opinions, DOJ and SEC press releases, and anecdotal experience). Despite its flaws, the *FCPA Guide* should be a key resource for any company that does business internationally.

The primary message of the *Guide* is one that FCPA practitioners long have known: The key to avoiding FCPA prosecution and liability is proactive, effective conduct by a company. Foremost among any such measures—both to prevent corrupt conduct by employees and, if such conduct occurs, to dissuade prosecution and avoid any finding of corrupt intent under the Act—is maintaining an effective, comprehensive and risk-based compliance program. In crafting such a policy, the *Guide* should serve as an invaluable initial resource. Where violations are found, timely disclosure to the DOJ and SEC and appropriate remedial measures have to be seriously considered as means of minimizing potential penalties—and perhaps avoiding any enforcement action at all.

Specific Issues for FCPA Enforcement

In a question-and-answer format, the *FCPA Guide* provides guidance about most of the issues fundamental to FCPA enforcement, compliance, and practice:

- **Jurisdiction.** The *FCPA Guide* lays out the key issues on which FCPA jurisdiction depends, particularly: (1) whether a company is a qualifying "issuer" or "domestic concern" under the Act, and (2) whether the alleged violation occurred on U.S. soil, even if committed by a foreign person or foreign non-issuer.[4] The *Guide* also explains that liability may result even from some completely extraterritorial conduct, such as an act by a foreign national or company committed outside of the United States, but committed to aid or abet a violation of the FCPA, or a bribery scheme in which a U.S. person participates but in which no co-conspirator acts within the United States.[5]

- **The Business Purpose Test.** To determine if a payment is a bribe, courts apply the "business purpose test," looking to whether a payment was made "to assist . . . in obtaining or retaining business."[6] As the *Guide* discusses, this test has been construed broadly by the government, reaching even payments made to secure favorable tax treatment with no direct relationship to the sale of goods or services.[7]

- **Gifts, Entertainment, and Travel.** The FCPA does not categorically prohibit companies from giving gifts to government officials or covering travel or entertainment expenses.[8] There is a sliding scale: Items of nominal

4 *FCPA Guide* at 10–11 (citing 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3).

5 *FCPA Guide* at 12.

6 *Id*. at 12–13 (citing 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3).

7 *Id*. at 13 (citing United States v. Kay, 359 F.3d 738, 755–56 (5th Cir. 2004)).

8 *FCPA Guide* at 15. It overstates the reach of the Act, therefore, to suggest that under the FCPA it is necessarily a crime to "pick[] up the tab at a restaurant" when dining with a foreign official. See Peter J. Henning, "In Bribery Law, the Watchword Is Uncertainty," *N.Y. Times Dealbook* (Nov. 15, 2012, 1:29 p.m.), http://dealbook.nytimes.com/2012/11/15/in-bribery-law-the-watchword-is-uncertainty/.

value (such as cab fare for a foreign official, the subject of an oft-cited but perhaps apocryphal FCPA anecdote) are unlikely to violate the FCPA, but larger and more extravagant gifts will attract the attention of prosecutors and regulators. Even in the absence of any bright-line rule, the *Guide*'s numerous hypothetical examples provide useful guidance as to the factors on which determinations of lawfulness may depend.[9]

- **Charitable Contributions.** Even a charitable contribution may constitute an unlawful bribe under the Act if it was made to influence a foreign official in order to obtain or retain business.[10] The *FCPA Guide* suggests a series of due diligence measures for prospective donors and includes a checklist of questions any company should ask before making a charitable contribution in connection with business operations overseas.[11]

- **Government Instrumentalities.** The Act covers not only payments made to foreign officials working for government agencies but also extends to officials employed by "state-owned and state-controlled entities" in areas as diverse as telecommunications, extraction, and banking and finance—even where the relevant government does not own a controlling share of the entity.[12] The *Guide* provides no fewer than eleven factors that courts have used to determine whether such entities constitute government "instrumentalities" under the FCPA.[13] This is consistent with the DOJ's recent litigation posture but leaves regulated entities with great uncertainty about whether a particular official is covered by the FCPA. To be sure, this is an area that would benefit from an amendment of the Act.

- **Third-party agents.** FCPA practitioners long have known that payments to foreign sales or business agents can be risky and must be closely monitored. The *Guide* provides a list of common red flags to look for when dealing with third-party agents, including whether the agent is related to a foreign official and whether the foreign official requested the participation of the sales agent.[14]

- **Successor Liability.** As a general matter, a company that merges with or acquires another company often will assume, directly or indirectly, any FCPA liability that the predecessor company might have had. As indicated by hypothetical scenarios in the *Guide*, a company must perform extensive FCPA due diligence before acquiring or merging with a company engaged in international trade, particularly one with governmental clients.[15] Where potential violations are found, a successor entity might be able to prevent or mitigate punishment by timely disclosing and remediating the conduct in cooperation with the DOJ and SEC.[16] A failure to perform adequate pre-merger due diligence will be viewed by regulators in a very dim light.

- **Accounting and Internal Control.** The FCPA's "books and records" provision and its "internal controls" provision require issuers to maintain records that reflect "in reasonable detail" a company's transactions and enable management to maintain control over its assets.[17] At a minimum, these provisions prohibit off-the-books payments by a company to foreign officials or mischaracterizing such payments in its records.[18] The *FCPA Guide* makes clear what has long been known: When certain elements of a violation of the anti-bribery provisions of the FCPA are not met, regulators may simply fall back on the accounting provisions of the FCPA and charge violations of these provisions instead. (Elsewhere, the *Guide* states that such conduct may also be

9 *FCPA Guide* at 17–18.
10 *Id*. at 16.
11 *Id*. at 19.
12 *Id*. at 20–21.
13 *Id*. at 20.
14 *Id*. at 22–23.
15 *Id*. at 31–33.
16 *Id*. at 29–30.
17 *Id*. at 38–39 (quoting 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(2)(B)).
18 *FCPA Guide* at 39.

charged as routine commercial bribery under the Travel Act, a relatively novel approach that may be used more in the future.[19])

- **Compliance Program Essentials.** The *Guide* identifies numerous "hallmarks of effective compliance programs," including: tone at the top, with a commitment by senior management to an anti-corruption policy; training and provision of codes of conduct to employees overseas, translated into employees' languages; tailoring of policies to the company's particular risks (as opposed to off-the-rack policies that may not reflect the company's circumstances); incentives and disciplinary measures to encourage employee participation; measures for confidential reporting and internal investigation; and periodic testing and review of program effectiveness.[20] It seems likely that a compliance program that does not meet the criteria laid out in the *Guide* will be viewed skeptically by the government.

- **Resolutions**. Although an FCPA investigation could ripen into a prosecution and subsequently a trial or plea agreement, the corporate target of an investigation more often succeeds in negotiating a deferred prosecution agreement, a non-prosecution agreement, or, most favorably, a declination, under which the government determines that no enforcement action is warranted.[21] The government's general policies in this area as set out in the *FCPA Guide* are not especially different from its policies in other types of cases and, with respect to the DOJ, largely track the Principles of Federal Prosecution of Business Organizations. The government helpfully identifies six cases in which the facts warranted a declination.[22] To be sure, lawyers negotiating with the government will seek to show that the facts of a particular case fit within these fact patterns.

Conclusion

The new *FCPA Guide* is a flawed resource that provides the regulated community with little that is new, and it is no substitute for congressional action to provide greater predictability in the application of the Act. Nevertheless, it is a valuable first step in adding clarity to a frustratingly vague law. It should serve as a starting point for any company crafting a compliance program or planning its response to allegations of FCPA violations. Companies and practitioners will ignore the *Guide* at their peril.

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19 *Id*. at 48.
20 *Id*. at 57–63.
21 *Id*. at 74–75.
22 *Id*. at 77–79.

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