

Global Anti-Corruption/Foreign Corrupt Practices Act Team  
White Collar Defense and Investigations Group  
Securities Litigation and Enforcement Group

To: Our Clients and Friends

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## DOJ and SEC Release Long-Awaited FCPA Resource Guide

Following a year of anticipation and speculation from the business community and FCPA bar, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) on Wednesday released a 130-page guidance manual on the U.S. Foreign Corrupt Practices Act (“FCPA”). While the DOJ and SEC have not signaled any shifts in enforcement or addressed the concerns expressed by the U.S. Chamber of Commerce and others about the breadth and economic impact of the FCPA, the manual succeeds in compiling and articulating enforcement policy, provides helpful hypotheticals on key anti-bribery issues, highlights recent matters where the DOJ and SEC declined to pursue FCPA penalties, and provides guidance on the types of compliance efforts that will be recognized and rewarded by the government.

### What the Manual Is and Is Not

The manual is a guidance document, and not more. The DOJ and SEC emphasize that the manual, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, which is available at [www.justice.gov/criminal/fraud/fcpa/guide.pdf](http://www.justice.gov/criminal/fraud/fcpa/guide.pdf), is meant to help guide companies in complying with the FCPA. The manual “is designed to provide practical advice about, and useful insights into, our enforcement considerations.” As such, it is a helpful resource for understanding how the government interprets and enforces the key provisions of the FCPA.

The manual “is non-binding, informal, and summary in nature,” “does not constitute rules or regulations,” and does not “limit the enforcement intentions or litigation positions” of the government. The manual does not articulate any new or different interpretations of the FCPA, nor does it prevent the DOJ or SEC from shifting its future position on key anti-bribery provisions of the statute.

## Key Areas of Guidance

The manual sets forth guidance on a variety of key topics related to FCPA enforcement, including the following:

- *Gifts* - Enforcement actions tend to focus on (a) “single instances of large, extravagant gift-giving (such as sports cars, fur coats, and other luxury items)” or (b) small payments or gifts that represent a “systematic or long-standing course of conduct.” Small gifts that are tokens of esteem or gratitude are not likely to trigger an enforcement action.
- *Facilitating Payments* - While the FCPA contains a narrow exception for facilitating/expediting payments made in furtherance of routine governmental action that involves non-discretionary acts, the DOJ and SEC warn that such payments may still violate local law or another country’s anti-bribery law (such as the UK Bribery Act). The government focuses on the purpose of the payments and notes that payments that cause a government official to ignore requirements or bend the rules do not qualify under this exception.
- *Definition of “Foreign Official”* - Despite concerns about their expansive interpretation, the DOJ and SEC continue to assert that an instrumentality of a foreign government includes entities where the government owns or controls a majority of shares, and can, in limited circumstances, include entities where a government owns a minority interest if the government has substantial control over the company. According to the government, “foreign official” includes any officer or employee of such instrumentalities.
- *Third Party Agents* - The manual highlights red flags associated with retaining third parties in foreign countries, including: excessive commissions, unreasonably large discounts to distributors, a consulting agreement that contains a vague scope of work, lack of requisite experience, close relation to or association with a foreign official, and payments to offshore bank accounts. It urges companies to undertake risk-based due diligence with respect to third party partners.
- *Local Law Affirmative Defense* - The DOJ and SEC concede that this defense “arises infrequently, as the written laws and regulations of countries rarely, if ever, permit corrupt payments.” In fact, no person or entity has ever successfully asserted this defense.
- *Reasonable and Bona Fide Business Expenditure Affirmative Defense* - The DOJ has opined that certain expenditures on behalf of foreign officials are permissible, including travel and expenses to visit company facilities or operations, travel and expenses for training, and travel and expenses for product demonstration or promotional activities. They distinguish this type of travel from trips to tourist destinations where business does not take place.
- *Successor Liability* - Despite concerns expressed by the Chamber of Commerce and others, the DOJ and SEC continue to assert that successor liability “is an integral component of corporate law” that “applies to all kinds of civil and criminal liabilities,” including the FCPA. The manual suggests that the DOJ and SEC have only taken action against successor companies in “limited circumstances,” primarily in cases involving “egregious and sustained violations” or where the acquiring company either participated in violations or failed to stop misconduct from occurring. The manual advises that voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program may decrease the likelihood of an enforcement action.

However, the manual should not give comfort to acquiring companies that they can avoid successor liability, as the record of matters brought by both the DOJ and SEC reflect that there can be serious consequences for the acquisition of a company that was engaged in corruption.

## Assessing When to Prosecute

The manual notes that the seriousness of the offense discovered in an FCPA investigation is a threshold consideration in deciding whether to bring an action. Federal prosecutors and the SEC also consider whether the company: (a) has effective compliance procedures in place; (b) self-reported the misconduct; (c) cooperated with law enforcement authorities; and (d) took appropriate remedial action to discipline wrongdoers and improve internal controls so as to prevent a recurrence of the misconduct.

*Declinations.* The manual states that, in the past two years alone, the DOJ “has declined [to bring] several dozen cases against companies where potential FCPA violations were alleged.” It identifies several recent examples of such declinations, including:

- An isolated improper payment by a single employee at a small foreign subsidiary.
- Small bribes paid by a foreign subsidiary’s customs agent.
- Improper payments made in cases involving, respectively, building code inspectors and foreign social security officials.
- Discovery of improper payments to local government officials during pre-acquisition due diligence.

Notably, in each of the declination examples, the company voluntarily disclosed both the misconduct and the company’s internal investigation findings to the DOJ and SEC. The examples all include appropriate internal investigations, remediation, and cooperation with the government. While voluntary disclosure can be a risky undertaking, the DOJ and SEC suggest that, in certain circumstances, they will be inclined to decline enforcement action when companies self-report FCPA violations.

## Best Practices: Suggested Compliance Measures

The Manual also sets forth “hallmarks” of effective compliance programs and practical tips for companies to incorporate in effective anti-corruption compliance programs, including:

- *Senior Management Commitment and Clearly Articulated Policy* - Senior management must clearly articulate company standards, and effectively communicate and disseminate them throughout the organization.
- *Code of Conduct* - Take steps to ensure the company’s code of conduct remains current and effective, including periodic reviews and updates.
- *Compliance Policies & Procedures* - Ensure the company has an appropriate compliance program tailored to the size and nature of the business.
- *Oversight, Autonomy & Resources* - Assign responsibility for oversight and implementation of a compliance program to one or more senior executives who have direct access to an

organization's governing authority. Devote adequate staffing and resources to the compliance program in light of the size, structure, and risk profile of the business.

- *Risk Assessment* - Effectively analyze and address particular risks based on the business. The DOJ and SEC “will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources had been devoted to a higher risk area.”
- *Training & Continuing Advice* - Maintain periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners.
- *Incentives & Disciplinary Measures* - Implement appropriate and clear disciplinary procedures, which are applied reliably and promptly in commensurate with the violation.
- *Third-Party Due Diligence & Payments* - Understand the qualifications and associations of third-party business partners and the business rationale for including a third party in a transaction. Undertake appropriate and ongoing monitoring of third-party relationships.
- *Confidential Reporting & Investigation* - Ensure a mechanism (e.g., an anonymous hotline or an ombudsman) for employees and others to report misconduct or violations. Properly fund a process for investigating an allegation and documenting the company's response.
- *Periodic Testing & Review of Compliance Program* - Regularly evaluate and improve the compliance program.
- *Clear Gift-Giving Guidelines and Processes* - Larger companies should consider implementing automated gift-giving clearance processes and set clear monetary thresholds for gifts along with annual limitations.
- *Reducing FCPA Risk in Mergers & Acquisitions* - Consider seeking a guidance opinion from the DOJ in anticipation of a potential acquisition involving specific due diligence challenges. Ensure thorough risk-based FCPA and anti-corruption due diligence on potential acquisitions. Implement in a timely manner the acquiring company's compliance program into the acquired company.

## Further Questions About the FCPA

If you have any questions about the DOJ/SEC FCPA Resource Guide, recent FCPA enforcement actions, how to comply with the FCPA, or how to create procedures to implement FCPA compliance policies, please contact a member of Bryan Cave LLP's Global Anti-Corruption/Foreign Corrupt Practices Act Team, the White Collar Defense and Investigations Group, the Securities Litigation and Enforcement Group, or the authors of this client alert:

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