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FCPA Guidance: Déjà Vu All Over Again

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On November 14, 2012, the long-awaited U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") Foreign Corrupt Practices Act ("FCPA") guidance (the "Guidance") was released. Styled "A Resource Guide to the U.S. Foreign Corrupt Practices Act," this 120-page document represents DOJ's and the SEC's effort to answer critics of the Act and to clarify their interpretation of key provisions of the Act and the principles guiding their enforcement efforts. (**Click here** to access a PDF copy of the Guidance.)

Despite its length, the Guidance offers little that is new. Not surprisingly, the Guidance repeats DOJ's and the SEC's long-held interpretation of the FCPA. The Guidance does, however, serve as an excellent resource as to how DOJ and the SEC are likely to enforce the Act, providing useful checklists and hypotheticals that help shore up the boundaries of what does or does not violate the FCPA, at least in the agencies' opinions. As such, companies are well-advised to review the Guidance and tweak their anti-corruption compliance programs accordingly.

A few key takeaways from the Guidance:

- **FCPA Jurisdiction** – In Chapter 2 ("The FCPA: Anti-Bribery Provisions"), DOJ and the SEC emphasize the broad sweep of their jurisdiction, spending as much time discussing "territorial jurisdiction" as they do the more common jurisdictional hooks over issuers (companies that list on a U.S. securities exchange or otherwise make SEC filings) and domestic concerns (U.S. persons and entities). By doing so, the Guidance offers a not-so-gentle reminder to non-U.S. companies and persons, who may believe that they are beyond the reach of the FCPA, that any contact with the United States in furtherance of corrupt payments—no matter how fleeting—creates U.S. jurisdiction.
- **Gifts, Travel, Entertainment, and Other Things of Value** – Also in Chapter 2, DOJ and the SEC set forth and provide detailed examples of the types of gifts, travel, entertainment, and other expenses that do and do not violate the FCPA. For example, the Guidance makes clear that the giving of things of "nominal value," such as cab fare, reasonable meal and entertainment expenses, and company promotional items, does not in and of itself violate the FCPA. By contrast, extravagant gifts, excessive entertainment, and especially travel with no apparent business purpose will likely place a company or an individual under FCPA scrutiny. Significantly, the Guidance appears to be more lax with respect to the giving of gifts, travel, and entertainment than many existing corporate compliance programs, providing a hypothetical that does not violate the FCPA in which a company takes foreign government officials traveling on legitimate business to a baseball game and a play.
- **Successor Liability** – While the Guidance does not offer anything new on this front, it does make clear that companies that engage in appropriate, risk-based due diligence, quickly remedy control weaknesses, integrate the acquired company into their FCPA and other corporate compliance programs, and report any FCPA violations uncovered during this process, will likely not face enforcement. While DOJ and the SEC are not making any promises, emphasizing that each situation must be determined on its facts, the Guidance should nevertheless provide some level of comfort to the business community.
- **Examples of Declinations** – In Chapter 7 ("Resolutions"), the Guidance lists examples of past declinations of prosecution/enforcement by DOJ and the SEC. This is a helpful step forward, as the agencies are typically reluctant to discuss declinations. Although each example sets forth in detail the unique circumstances under which the declinations were given, several trends emerge from which important lessons can be drawn. For instance, all of the companies under investigation (1) conducted thorough internal investigations of the actual/potential violations, (2) self-reported to DOJ and/or the SEC, and (3) took substantial steps to improve their compliance weaknesses. Additionally, in most cases, the unlawful payments were never actually made, or the total amount of the unlawful payments or the profits received from them were small. Finally, the business relationship at issue was usually severed, and, typically, the most culpable employees and/or agents were terminated.
- **Credit for Voluntary Disclosure** – In the face of articles suggesting there is no actual credit for

voluntary disclosure and calls for DOJ and the SEC to somehow quantify the benefits of voluntary disclosure, the Guidance was surprisingly silent with respect to whether and to what extent potential defendants benefit from voluntarily disclosing an FCPA violation. Rather than providing specific examples of reduced penalties or sentences, or identifying the typical benefits disclosing defendants might receive, the Guidance simply refers to DOJ's Principles of Federal Prosecution, Principles of Federal Prosecution of Business Organizations, the SEC's "Seaboard Report," and the Sentencing Guidelines, all of which state that voluntary disclosure is one factor to be considered, among others, in deciding whether, or with what, to charge a corporation, and what penalty is appropriate.

In sum, while there is nothing new in it, the Guidance serves as an excellent FCPA reference manual for how DOJ and the SEC interpret key provisions of the Act and prioritize their enforcement efforts. And, it is a helpful tool to use when designing, implementing, or updating an anti-corruption compliance program.

If you have any questions concerning the FCPA or how to protect your company against possible FCPA liability, please contact the authors or other attorneys in Venable's **Foreign Corrupt Practices Act and Anti-Corruption Group**.