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DOJ and SEC Release Much-Anticipated Guidance on FCPA

By [Robert Soza](#) and [Orlando Segura](#)

In recent years, corporations in the United States and around the world have seen record levels of enforcement of the Foreign Corrupt Practices Act ("FCPA"), resulting in billions of dollars of civil judgments and numerous criminal convictions against both corporations and individuals. Despite the fact that the statute was passed in 1977, the federal government has failed to provide comprehensive guidance on how it interprets the law. Not surprisingly, lawmakers, corporations, and practitioners alike have grown concerned and frustrated with the environment of uncertainty regarding how to comply with the FCPA given the limited amount of case law and enforcement actions available to interpret the law.

On November 14, 2012, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") published long-awaited guidance on their interpretation of the law. Although the guidance is not binding and does not constitute new rules or regulations, it does clarify certain key provisions of the law. For example, the guidance document addresses the questions of how successor liability for FCPA violations applies in the mergers and acquisitions context, the definition of a "foreign government official," and what constitutes proper and improper gifts, travel, and entertainment expenses - all of which were sources of confusion in the regulated community. In each of these highlighted areas, the DOJ and SEC provided insight into how they will enforce the law going forward. Specifically:

Successor Liability in M&A Context – One of the most significant aspects of the guidance concerns the issue of successor liability for purchasers of companies that engaged in pre-acquisition bribery. The DOJ had taken the position that a purchaser who performs due diligence in an attempt to discover past bribery could still be held liable under the FCPA for pre-acquisition bribery. The guidance now makes it clear that pre-acquisition bribery will not be the basis for FCPA liability against a purchaser. However, the guidance makes it clear that a purchaser can be held liable for the actions of its new subsidiaries after the acquisition is completed if such bribery continues. Thus, any enterprise engaging in mergers and acquisitions is strongly encouraged to conduct thorough anti-corruption due diligence in order to ensure that the purchaser's code of conduct and compliance policies apply to the newly acquired business, to train employees on the FCPA, to audit newly acquired businesses, and to disclose any corrupt payments discovered as part of its due diligence. Failure to conduct proper due diligence and take necessary remedial action could render an otherwise profitable acquisition virtually worthless to a purchaser.

Definition of Foreign Official – One of the most discussed issues in FCPA practice in recent years concerns the scope of who is a "foreign official" under the act. Specifically, companies have

asked for guidance as to whether state-owned enterprises are "instrumentalities" under the law and if employees of those enterprises are considered "foreign officials." The guidance reaffirmed that "foreign officials" may extend to employees of state-owned and state-controlled entities. However, the guidance also suggests that an entity is unlikely to qualify as an instrumentality absent 50 percent or greater foreign government ownership, and it provides a list of specific factors to be considered to determine whether a particular entity is an agency or instrumentality of a foreign government.

Proper and Improper Gifts, Travel, Entertainment Expense – In fairly specific terms, the guidance clarified that the offer of "anything of value" can take many forms, and that the FCPA does not contain a materiality standard for corrupt gifts or payments. If something is given with corrupt intent, then it is proscribed by the FCPA no matter how small the thing given. However, the guidance also stated that companies that engage in the ordinary and legitimate promotion of their businesses by transferring small, nominal things will likely not face prosecution. "It is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent," the guidance provides. Only when the provision of small payments and gifts comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business will the DOJ and SEC seek to allege a violation of the act.

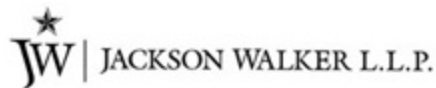
DOJ and SEC address a wide variety of other topics in similar detail in their guidance, including who and what is covered by the FCPA's anti-bribery and accounting provisions; the nature of facilitating payments; the scope of territorial and extraterritorial jurisdiction; the hallmarks of an effective corporate compliance program; liability for the actions of third parties; and the different types of civil and criminal resolutions available under the FCPA.

In summary, the much-anticipated guidance reinforces the importance for companies – from small businesses to multinational corporations – to develop and implement compliance and training programs, engage in in-depth due diligence efforts, and analyze mergers and acquisitions of foreign companies for potential successor liability in order to avoid potential SEC and DOJ prosecutions.

*Jackson Walker attorneys have extensive experience in FCPA compliance matters, and have developed compliance programs and conducted training for companies in U.S., Europe, Canada, and Mexico. For more information, please contact **Robert Soza** at 210.978.7718 or rsoza@jw.com.*

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