

Foreign Corrupt Practices Act, Bribery and International Anti-Corruption Update

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DOJ and the SEC to U.S. Businesses: We Expect Action on Effective Compliance Programs

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Based on my experience as a U.S. Attorney, I see the new joint Department of Justice (“DOJ”) and Securities Exchange Commission (“SEC”) [Resource Guide](#) to the Foreign Corrupt Practices Act (“FCPA”) as a game changer that presents important opportunities for clients with an international footprint. The message from Lanny Breuer at DOJ and Rob Khuzami at the SEC should be loud and clear: it is time to examine and improve your compliance plan because the government wants U.S. businesses to lead the charge in defeating foreign corruption by effective internal efforts — and for those who don’t heed the call, there will be consequences.

FCPA enforcement has exploded in the last ten years from just a handful of enforcement actions in 2004 to more than 70 in 2010, during the time I was U.S. Attorney for Oregon. We’re still considering the implications, but here are some quick take-aways that I see, having worked closely with key authors of the Resource Guide on various enforcement efforts when I was in office:

- **Emphasis on Compliance:** If you read nothing else, read the “Principles of Enforcement,” starting at page 52. While it begins with a recitation of old policy guidelines, the “Principles” go on to provide a seven-page description of the hallmarks of an effective compliance program, complete with case studies, hypotheticals and additional guidance references. This is a blunt force message from the government: we are expecting companies to meet this minimum level of compliance program if they hope to escape enforcement action if things go wrong. While it is not a legal “safe harbor,” as some had lobbied for, the fact is that a company who meets these compliance hallmarks will be well-situated to discourage enforcement action: as a U.S. Attorney picking from an ocean of cases, evidence of an effective compliance plan was always a factor — the Resource Guide underscores that and gives a map to precisely what the government is expecting.
- **Opportunity:** The emphasis on compliance creates an important opportunity: it is time to conduct a thorough assessment of your compliance program to ensure it meets the

hallmarks outlined in the Resource Guide. Meeting these hallmarks will help down the road; failing to re-assess following the publication of the Resource Guide could be construed by the government as an inadequate commitment to integrity.

- **Expect Expanded Enforcement:** The good news is the opportunity created by the emphasis on compliance, but with opportunity comes risk. For years, the DOJ and the SEC have faced complaints that the FCPA is ambiguous and thus overbroad. The Resource Guide was published precisely to meet these objections – and clear the way for continued vigorous enforcement. From DOJ’s perspective, if you cannot comply even with this level of detailed guidance, you are a ripe target.
- **Remaining Ambiguity:** The volume of the Guide notwithstanding, it leaves plenty of ambiguities — for example, the Resource Guide did give some guidance on who is a foreign official in a quasi-public setting, but there are still plenty of questions as to who qualifies as a foreign official and how to differentiate between some promotional expenses (legal) and bribes (illegal) in foreign settings. This remaining ambiguity, however, underscores the importance of establishing an effective compliance program — the ambiguities are here to stay, but a compliance program is something a business can control.

My colleague [Bob Calo](#), a DOJ and SEC veteran who chairs our [FCPA Practice Group](#), noted some of the disappointments in a [Legal Alert](#) yesterday.

- **Detail and the Internal Politics Among Enforcers:** Providing detailed guidance is risky as an enforcer — you tend to create nooks and crannies where bad actors can hide. As U.S. Attorney, I found myself arguing against issuing detailed enforcement guidance in other settings for precisely this reason. I have no doubt that many of my former colleagues raised this objection to the Resource Guide. The decision to publish with such detail reflects a policy choice by DOJ and the SEC: we recognize that the Resource Guide may give some bad actors a chance to make mischief, but we believe the value of providing responsible businesses better guidance to encourage effective compliance programs far outweighs any risk. Again, this underscores the fact that the Resource Guide seems intended to put U.S. businesses in the lead role of enforcement by creating an atmosphere where compliance will be rewarded.

Our friends in the business community are plainly hearing the message. Disappointed though some may be that the DOJ and the SEC did not go farther, it is our responsibility in the bar to help our clients capitalize on the important opportunities the Resource Guide presents.

This article was previously published on Lane Powell’s [D&O Discourse](#) blog.

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