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DOJ and SEC Release Long-Awaited FCPA Resource Guide

On November 14, 2012, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) released their long-anticipated guidance on the U.S. Foreign Corrupt Practices Act (FCPA), entitled *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "Guide").¹ The FCPA has been a hotbed of enforcement activity in recent years, with DOJ and SEC levying billions of dollars in fines against numerous corporations and individuals. The Guide comes in response to a growing chorus of complaints from the business community and defense bar regarding the lack of clarity in many key FCPA provisions.

According to DOJ and SEC, the Guide "is an unprecedented undertaking ... to provide the public with detailed information about [their] FCPA enforcement approach and priorities." Although the Guide does not offer any significant departures from previous DOJ and SEC positions, it is a valuable resource for companies and individuals seeking to mitigate FCPA liability. The Guide includes relevant statutory language, administrative actions (including examples where the agencies declined to bring charges), DOJ opinion releases, case law, and hypotheticals regarding the FCPA. Of note, the Guide underscores the priority regulators place on robust compliance programs, thorough internal investigations, and voluntary self-reporting to the government. Although the Guide is "non-binding, informal, and summary in nature," it nevertheless now serves as the best single source for FCPA guidance.

The Guide addresses a wide variety of topics, including who and what is covered by the FCPA; the definition of a "foreign official;" gifts, travel and entertainment expenses; facilitating payments; successor liability in mergers and acquisitions; effective compliance programs; and the various types of criminal and civil resolutions available under the FCPA. This Client Alert highlights several key takeaways from the 120-page Guide. Should you require further analysis or explanation of the FCPA or the Guide, please contact the authors of this Client Alert or the Brownstein Hyatt Farber Schreck attorney with whom you normally consult.

ANTI-BRIBERY PROVISIONS

In general, the FCPA prohibits the corrupt payment, offer to pay, or promise to pay anything of value to a foreign official in order to obtain or retain business.

¹ The Guide is available online at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

Who is a “Foreign Official”?

The FCPA defines "foreign official" to include "any officer or employee of a foreign government or any department, agency, or instrumentality thereof..." The Guide addresses what constitutes a "department, agency or instrumentality of a foreign government" and echoes the agencies' prior opinions that "instrumentality" is broadly defined to include state-owned or controlled entities. The Guide provides a non-exhaustive list of factors that DOJ and SEC consider in determining whether an entity constitutes a government instrumentality, including the foreign government's extent of ownership, control and characterization of the entity and its employees. The Guide notes that although no one factor is dispositive or more important than another, it is unlikely that an entity would qualify as an "instrumentality" if a foreign government does not own or control a majority of its shares. However, the Guide states that there are circumstances in which an entity may qualify as an instrumentality absent majority ownership by a foreign government if that government exercises substantial control over the entity.

Anything of Value

Although the FCPA does not contain a minimum threshold amount, the Guide emphasizes the corrupt intent element of an anti-bribery violation (i.e., the intent to improperly influence a government official). "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, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct." Robert Khuzami, Director of the SEC's Division of Enforcement, explained that DOJ and SEC hope that the Guide "will clear up some myths about the type of conduct that gets prosecuted under the FCPA — that it is not the \$5 cup of coffee, or the one off \$50 gift to a public official, that companies need to be concerned about, but payments of real and substantial value that clearly represent an unambiguous intent to bribe a foreign official to obtain or retain business."²

Gifts, Travel and Entertainment

The Guide discusses providing gifts, travel and entertainment to foreign officials and includes hypotheticals to help illustrate the propriety of various scenarios. For instance, when hosting foreign

² Robert Khuzami, Director, SEC Div. of Enforcement, Remarks During News Briefing About SEC-DOJ FCPA Guide (Nov. 14, 2012), available at <http://www.sec.gov/news/speech/2012/spch111412rk.htm>.

officials in the U.S. for several days in order to inspect facilities and/or conduct training, a company can pay for business-class airfare, a moderately priced dinner, a baseball game and a play for the foreign officials performing the inspection. In contrast, a company cannot pay for the officials to travel first-class with their spouses for a week-long trip to Las Vegas, where the company has no facilities.

Of note, the Guide leaves unresolved the substantial grey area between items of nominal value and extravagant gifts like sports cars, fur coats and other luxury items. While the Guide provides detailed examples of extravagant and improper gifts and entertainment that are clearly unreasonable (e.g., \$10,000 spent on dinners, drinks, and entertainment for a government official, or a trip to Paris for a government official and his wife that consists primarily of sightseeing), it fails to provide more detailed guidance regarding what constitutes a “reasonable” meal or entertainment expense under the FCPA.

Pre-Acquisition Due Diligence and Post-Acquisition Integration

The Guide emphasizes that companies should conduct thorough FCPA due diligence prior to a merger or acquisition. Such actions "demonstrate to DOJ and SEC a company's commitment to compliance and are taken into account when evaluating any potential enforcement action DOJ and SEC evaluate whether the acquiring company promptly incorporated the acquired company into all of its internal controls, including its compliance program. Companies should consider training new employees, reevaluating third parties under company standards, and, where appropriate, conducting audits on new business units." The Guide notes that "DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct."

ACCOUNTING PROVISIONS

The FCPA's accounting provisions, which only apply to public companies, require public companies to make and keep books and records that, in reasonable detail, accurately and fairly reflect the disposition of the company's assets. The accounting provisions also require public companies to maintain a sufficient system of internal controls. While these provisions have always operated in tandem with the FCPA's anti-bribery provisions to prohibit off-the-books accounting and the use of slush funds, the Guide explicitly states that the accounting provisions “do not apply only to bribery-related violations.” Yet, the Guide notes that "DOJ's and SEC's enforcement of the books and records provisions has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery."

COMPLIANCE PROGRAMS

Despite calls from the business community for a formal compliance defense to FCPA enforcement, the Guide does not endorse an effective compliance program safe harbor. Nevertheless, the Guide emphasizes the benefits of an effective compliance program and notes that DOJ and SEC "do not hold companies to a standard of perfection" as no compliance program can ever prevent all illicit activity. The Guide includes several instances where DOJ and SEC declined to prosecute a company on the basis of its robust and good-faith compliance efforts. Thus, an effective compliance program may influence government regulators in determining whether to take enforcement action, and even if regulators were to take action, may limit the term of corporate probation and the penalty amount.

The Guide makes clear that there is no "one-size-fits-all" approach to compliance. Compliance programs should be tailored to a company's specific business, risks and challenges. The Guide focuses on three basic premises of compliance programs: whether the company's compliance program is well designed; whether it is applied in good faith; and whether it works. The Guide highlights the following "hallmarks" of effective compliance programs:

- *Commitment from Senior Management and a Clearly Articulated Policy Against Corruption.* DOJ and SEC "consider the commitment of corporate leaders to a 'culture of compliance' and look to see if this high-level commitment is also reinforced and implemented by middle managers and employees at all levels of a business."
- *Code of Conduct and Compliance Policies and Procedures.* Policies should be clear, concise and available to all employees (including in local languages). Effective policies and procedures require an in-depth understanding and analysis of the company's business, third-party agents, customers, government interactions, and industry and geographic risks. The Guide highlights that some global companies have created "web-based approval processes to review and approve routine gifts, travel and entertaining involving foreign officials and private customers with clear monetary limits and annual limitations."
- *Oversight, Autonomy and Resources.* DOJ and SEC "consider whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization. Those individuals must have appropriate authority within the organization, adequate autonomy from management and sufficient resources to ensure that the company's compliance program is implemented effectively."
- *Risk Assessment.* The Guide cautions that "[o]ne-size-fits-all compliance programs are generally ill-conceived and ineffective because resources inevitably are spread too thin, with too much focus on

low risk markets and transactions to the detriment of high-risk areas. Devoting a disproportionate amount of time policing modest entertainment and gift-giving instead of focusing on large government bids, questionable payments to third-party consultants or excessive discounts to resellers and distributors may indicate that a company's compliance program is ineffective."

- *Training and Continuing Advice.* A company should ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, third-party agents and business partners.
- *Incentives and Disciplinary Measures.* "A compliance program should apply from the board room to the supply room—no one should be beyond its reach. DOJ and SEC will thus consider whether, when enforcing a compliance program, a company has appropriate and clear disciplinary procedures, whether those procedures are applied reliably and promptly and whether they are commensurate with the violation." Publicizing disciplinary actions internally can have an important deterrent effect, and positive incentives can drive compliant behavior.
- *Third-Party Due Diligence.* The Guide notes that although the degree of appropriate third-party due diligence may vary based on industry, country and nature of the transaction, three guiding principles always apply:
 - *First*, as part of risk-based due diligence, companies should understand the qualifications and associations of their third-party partners, including their business reputation, and relationship, if any, with foreign officials;
 - *Second*, companies should have an understanding of the business rationale for including the third party in the transaction and ensure that the contract terms specifically describe the services to be performed;
 - *Third*, companies should undertake some form of ongoing monitoring of third-party relationships, including updating due diligence periodically, exercising audit rights, providing periodic training and requesting annual compliance certifications by the third party.
- *Confidential Reporting and Internal Investigation.* "An effective compliance program should include a mechanism for an organization's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation." Once an allegation is made, companies should have an "efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken."
- *Continuous Improvement: Periodic Testing and Review.* "[A] good compliance program should constantly evolve DOJ and SEC evaluate whether companies regularly review and improve their compliance programs and not allow them to become stale."

CONCLUSION

Ultimately, the Guide does not contain any significant changes to DOJ and SEC policy regarding the FCPA. However, it is an invaluable single source and collection of relevant FCPA precedent. It also contains several hypotheticals, case studies and best-practices reflecting the agencies' views on the FCPA. The Guide underscores the emphasis regulators place on robust compliance programs, thorough internal investigations and voluntary self-reporting to the government.

This document is intended to provide you with general information about new FCPA Resource Guide. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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