

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

11/15/2012

DOJ and SEC Issue Guidance on FCPA Matters

After months of delays, the Securities Exchange Commission (“SEC”) and Department of Justice (“DOJ”) released its guidance on matters regarding the U.S. Foreign Corrupt Practices Act (“FCPA”). On November 14, 2012, the DOJ and the SEC released a 120-page “Resource Guide” to the FCPA. [\(Click here to see the report.\)](#)

The agencies described the guidance as “an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities.” Well, that’s not quite true. Much of the guidance does not change or add to any of the positions advanced by the agencies in its prior enforcement actions or prior advisory opinions.

Moreover, the Resource Guide is disappointing in one very significant way: Proponents of FCPA reform, including the U.S. Chamber of Commerce and the American Bar Association, pressed hard to have the government recognize that proof of a company’s robust compliance program could be an affirmative defense. This would have been consistent with the United Kingdom’s Bribery Act, which has an “adequate procedures” defense to the corporate offense of failing to prevent bribery. Unfortunately, the United States agencies rejected that proposal.

There are several sections of the Resource Guide that are helpful. One, it details several instances in which DOJ and SEC have declined to pursue enforcement actions against U.S. companies (using concrete examples from its case load, but not disclosing the names of the companies or individuals under investigation). Obviously, this is quite helpful because it shows “what works” to close an investigation with no charges. This is a great window into the government’s thinking as, typically, the government cannot share its thought process, and the companies being investigated generally do not share this information.

The Resource Guide also lists several factors that the agencies will use to assess design and effectiveness of a company’s compliance program. It also addresses the issue of when an acquiring company will or will not be liable (successor liability) for violations committed by companies acquired through merger or acquisition.

The Resource Guide also gives guidance on other areas that have spawned much regulatory and criminal enforcement activity over the past few years. Specifically, it addresses issues related to gifts, travel and entertainment provided to foreign officials. In addition, it affirms the position the government has taken in litigated cases that state-owned or state-controlled entities (including those in which the government holds a minority interest) constitute “instrumentalities” of foreign governments and that their employees therefore constitute “foreign officials” under the FCPA.

The Resource Guide, taken as a whole, reaffirms the use of traditional “best practices” as the best way to head off prosecution: a robust code of conduct that is regularly audited and tested and changed when warranted, thorough and objective internal investigations to ferret out any possible violations, and self-reporting and full cooperation with the government when the internal investigation uncovers misconduct.

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