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*Practice Group:**Government  
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## What Do Federal Authorities Expect of Companies Subject to the FCPA?

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In mid-November 2012, federal authorities released their much-anticipated “[FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act](#),” prepared jointly by the Justice Department’s Criminal Division and the Enforcement Division of the Securities and Exchange Commission. Many had hoped that it would clarify gray areas in the statute, but there is little in it that is new, or that will alter the advice that has long been given on these topics by experienced FCPA counsel. That said, it is a comprehensive treatise of great value, if only because it collects this information in a single place.

At 120 pages in length, with more than 400 endnotes, the Guide references virtually every significant piece of authority on the FCPA, including case law, prior enforcement actions, formal interpretive opinions, and speeches by senior U.S. officials, along with a thorough description of the statutory and policy underpinnings of the Act. The Guide provides a clear and concise reiteration of many core issues including, in particular:

- The steps companies are expected to take to assure that their own personnel and others acting on their behalf do not violate the Act;
- The legal consequences for those who fail to take such steps; and
- The actions a company can take to offset or reduce the sanctions for any FCPA violation that might occur by maintaining an effective compliance program, self-reporting apparent violations of the Act, and cooperating with investigations by law enforcement authorities.

The Guide represents yet another indication of the U.S. government’s unyielding commitment to FCPA enforcement, and federal authorities are likely to view it as having drawn sharp lines that must not be crossed – indeed, the Guide may be used as a sword against those who deviate from its provisions. With that in mind, companies should take the opportunity to reassess their compliance efforts in light of the Guide, particularly with regard to its elaboration of the elements of effective FCPA compliance.

### “Hallmarks of Effective Compliance Programs”

For most companies, the starting point in considering how to comply with the FCPA is a policy prohibiting bribery of foreign officials. In this regard, the Guide reiterates what DOJ and SEC officials have long said: that a policy prohibiting bribery, *without more*, is insufficient to be of much value in achieving compliance with the FCPA’s requirements. To satisfy enforcement officials, additional steps are required to assure that the FCPA policy is understood and followed, and that potential violations come to the attention of company management so they can be evaluated and, if necessary, corrected.

Although U.S. enforcement authorities reject the notion of a complete “compliance defense,” an effective program will be viewed by the government as one element in its assessment of whether to bring an FCPA charge against a company in the exercise of prosecutorial discretion. The existence of

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a compliance program may lead to a relatively favorable outcome for the company or, in some cases, even a decision by the government not to bring charges. By contrast, a lack of effort to comply with the Act is almost certain to result in a charge and the severe consequences that are likely to follow.

The Guide recognizes that “a company’s failure to prevent every single violation does not necessarily mean” that its compliance program was not “generally effective,” and notes that federal authorities understand that “no compliance program can ever prevent all criminal activity by a corporation’s employees.” There are no formulaic requirements regarding compliance programs; instead, any evaluation by law enforcement authorities will focus on three basic questions:

- *Is the company’s compliance program well designed?*
- *Is it being applied in good faith?*
- *Does it work?*

In this regard, the Guide describes a series of “hallmarks of effective compliance programs.”

- *A commitment from senior management and a clearly articulated policy against corruption.* This begins, according to the Guide, with “the board of directors and senior executives setting the proper tone for the rest of the company.” This message should be “reinforced and implemented by middle managers and employees at all levels of a business.”
- *A code of conduct and compliance policies and procedures.* The Guide states that these should “outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures.”
- *Oversight, autonomy and resources.* The DOJ and SEC will look to whether responsibility for the oversight and implementation of the program has been assigned to “one or more specific” senior executives in the company, and whether those individuals have sufficient authority and resources “to ensure that the program is implemented effectively.”
- *Risk assessment.* According to the Guide, “assessment of risk is fundamental to developing a strong compliance program,” and a good program will be designed to address the particular risks relating to the company’s business activities.
- *Training and continuing advice.* Federal authorities expect that FCPA compliance policies will be effectively communicated throughout the company, with periodic training that will typically cover “company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies.”
- *Incentives and disciplinary measures.* The Guide notes that a compliance program “should apply from the board room to the supply room,” and that it must be “fairly and consistently applied across the organization.”
- *Third-party due diligence and payments.* Noting that third parties, such as agents, consultants and distributors, “are commonly used to conceal the payment of bribes to foreign officials,” the Guide identifies several guiding principles, stating that a company should:
  - “understand the qualifications and associations of its third-party partners”;
  - “have an understanding of the business rationale for including the third party in the transaction”;
  - “undertake some form of ongoing monitoring of third-party relationships” and;

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- inform third parties of its compliance expectations and, as appropriate, seek assurances that the third party will adhere to those expectations.

The Guide also stresses the need for due diligence in connection with merger and acquisition transactions, given the prospect of successor liability for the acquiring entity, and the potential that improper conduct, if not identified, will continue after the completion of an acquisition.

- Confidential reporting and internal investigation. Federal authorities expect that there will be a mechanism for company personnel and others to report suspected misconduct “on a confidential basis and without fear of retaliation.” Companies are also expected to have an “efficient, reliable, and properly funded process” in place to investigate allegations of wrongdoing, and to reevaluate their policies and procedures in light of any violations.
- Periodic testing and review. The DOJ and SEC will evaluate “whether companies regularly review and improve their compliance programs” in light of changes to their businesses and the environments in which they operate.

These “hallmarks of effective compliance” are useful objectives, not only for their value in persuading U.S. enforcement officials to credit a company for its FCPA compliance efforts, but more importantly to prevent and detect FCPA violations in the first place. With law enforcement officials undertaking increasingly aggressive FCPA investigations and seeking increasingly costly penalties, and the Dodd-Frank whistleblower provisions making it more likely than ever before that an FCPA violation will come to the attention of the authorities, companies should promptly reassess and, if necessary, bolster their corporate compliance programs in light of the guidance the government has now provided.

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