

DOJ and SEC Issue FCPA Guidance

November 16, 2012

The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have released [new guidance](#) on the criminal and civil enforcement provisions of the Foreign Corrupt Practices Act (FCPA), entitled “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (herein, the “Guide”).

The 120-page Guide includes an extensive discussion of the FCPA and other statutes used in corruption investigations, provides helpful examples and hypotheticals, and discusses the government’s “Guiding Principles on Enforcement.”^[1] The Guide represents the government’s response to requests from Congress, the defense bar, members of the business community, and the Organisation for Economic Co-operation and Development (OECD) for additional clarity on the FCPA, and has been anticipated since November 8, 2011, when Assistant Attorney General Lanny A. Breuer announced that such guidance would be issued.^[2]

As expected, the Guide thoroughly consolidates and recites existing case law and resolutions and provides new examples of cases in which the DOJ or SEC previously issued declinations. While the Guide may be helpful to many, those expecting something groundbreaking may be disappointed, as the Guide does not provide any new substantive interpretations. Nor does it address many of the nuanced questions with which many companies grapple.

Overview of the Guide

The Guide contains eight substantive chapters, which address the statute (chapters 2 and 3), related laws (chapter 4), the guiding principles of enforcement by the DOJ and SEC (chapter 5), penalties, sanctions and remedies (chapter 6), resolutions (chapter 7), whistleblowers (chapter 8), and the DOJ Opinion Procedure (chapter 9). In addition to describing statutory requirements and enforcement practices, the

^[1] Letter from Senators Amy Klobuchar and Chris Coons to Eric Holder, Attorney General of the United States (Feb. 15, 2012), available at <http://www.scribd.com/doc/81899022>; U.S. Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the FCPA (Oct. 2010), available at http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf; OECD, United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions (adopted by the Working Group on Bribery in International Transactions on Oct. 15, 2010), available at <http://www.oecd.org/dataoecd/10/49/46213841.pdf>.

^[2] Lanny A. Breuer, Assistant Attorney General, Criminal Division, Dep’t of Justice, Address at 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>.

Guide contains hypotheticals, examples of actual enforcement cases, and lists of factors and/or red flags to consider in addressing a number of recurring FCPA issues.

Not surprisingly, the Guide does not contain any new substantive positions or interpretations. Rather, it largely represents a compilation of previously available material—including from prior resolutions, court opinions, civil complaints and opinion procedure releases—which detail the positions that the agencies and the courts historically have taken on the FCPA's key terms. Because the Guide collects publicly available positions, it will be most useful to those who do not deal regularly with FCPA issues, effectively creating an FCPA hornbook for their use and reference.

“Guiding Principles of Enforcement” Emphasize Self-Reporting, Cooperation and Remedial Efforts

The Guide reiterates prior guidance about the factors that the DOJ and SEC consider in determining whether to bring an enforcement action, namely those enumerated in the SEC's *Enforcement Manual* and the DOJ's *Principles of Federal Prosecution of Business Organizations*. This will not be news to experienced practitioners. The Guide also repeats the DOJ's and SEC's prior emphasis on self-reporting, cooperation and remedial efforts. According to the Guide, both organizations put a “high premium” on these factors “in determining the appropriate resolution of FCPA matters.”

Key Elements of an Effective Corporate Compliance Program

The Guide reaffirms the importance that the DOJ and SEC place on a strong corporate compliance program. Although the Guide cautions that “there is no one-size-fits-all” compliance program and that each “should be tailored to an organization's specific needs, risks, and challenges,” it enumerates ten “Hallmarks of Effective Compliance Programs” that previously have been articulated in DOJ resolutions:

- a commitment from senior management and a clearly articulated policy against corruption;
- a code of conduct and compliance policies and procedures that are clear, concise and accessible to all employees;
- oversight of the compliance program by one or more specific senior executives who have appropriate authority within the organization, adequate resources to ensure implementation and direct access to the organization's governing authority, such as the board of directors;
- tailoring of the compliance program to the risks that the company faces;
- means to communicate the relevant anti-corruption policies and procedures throughout the organization, including through periodic training and certification for all directors, officers, relevant employees, agents and business partners;
- appropriate disciplinary procedures and incentives;
- appropriate, risk-based due diligence for third parties;
- a mechanism for employees to report confidentially any suspected or actual misconduct and a process for investigating and documenting the company's response;
- continuous auditing, review and updating of the compliance policies to address new risks; and
- pre-acquisition due diligence and post-acquisition integration for mergers and acquisitions.

The Guide's “hallmarks” also mirror some of the factors identified in the DOJ's public statements in connection with its first publicly announced decision not to prosecute a company for an employee's FCPA violation.³ In that case, the DOJ declined to prosecute Morgan Stanley in part because of its robust

³ Press Release, Dep't of Justice, Former Morgan Stanley Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* <http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>.

compliance program, even though an employee pled guilty to an FCPA violation involving bribery in the Chinese real estate industry. Davis Polk represented Morgan Stanley in the investigation and resolution.

The Guide Confirms Prior DOJ Guidance on Mergers and Acquisitions Compliance

In listing merger and acquisition due diligence as a compliance program “hallmark,” the Guide also reiterates prior DOJ guidance on mergers and acquisitions, as described in the recent NORDAM, Data Systems and BizJet resolutions. As in those cases, the Guide suggests that companies engaging in a merger or acquisition should be prepared to take the following actions both before and after the transaction:

- conduct appropriate, risk-based FCPA and anti-corruption due diligence on prospective targets through legal, accounting and compliance personnel;
- ensure that the company’s internal controls, including its compliance program and anti-corruption policies and procedures, apply to the newly acquired or merged entities as quickly as practicable;
- promptly train directors, officers, employees, agents, consultants, representatives, distributors and joint venture partners of the newly acquired or merged entities on anti-corruption laws and the company’s related policies; and
- conduct an FCPA-specific audit of the newly acquired or merged entities as quickly as possible.

The Guide confirms general principles with respect to successor liability in the FCPA context, noting that “[s]uccessor liability is an integral component of corporate law,” and dedicates a multipage hypothetical to explore relevant considerations. Further, the Guide reiterates that the “mere acquisition” of a foreign company not previously subject to the FCPA would not retroactively create FCPA liability for the acquiring issuer and underscores that the above steps are important techniques to reduce the risk of incurring liability for continued noncompliance by the acquired company. Finally, the Guide notes that both the DOJ and SEC have taken action with respect to successor companies in “limited circumstances,” citing three examples: where the successor company “directly participated” in violations, where the successor company failed to stop post-acquisition misconduct, and for “egregious and sustained” violations.

Hypotheticals Addressing Recurring FCPA Issues

The Guide contains six multipart hypothetical questions with answers addressing recurring FCPA issues such as (1) jurisdiction of the DOJ and SEC over FCPA issues, (2) providing gifts, travel and entertainment to foreign officials, (3) facilitating payments, (4) successor liability when the acquired company was not previously subject to the FCPA, (5) successor liability when the acquired company was previously subject to the FCPA and (6) third-party vetting and due diligence. These hypotheticals, with modifications to address each business’s specific risks, may be a useful addition to compliance training programs.

The Guide Provides New Insight into DOJ and SEC Declinations

For the first time—other than the public disclosure of the Morgan Stanley declination described above—the DOJ and SEC have provided examples of investigations in which they declined to take enforcement action against companies. The commentary includes the list of factors that were relevant to each declination. Consistent with the *Enforcement Guide* and *Principles of Federal Prosecution*, the declinations came after each company (1) self-disclosed the misconduct, (2) conducted an investigation, (3) took remedial actions and (4) enhanced its compliance program.

The Guide Confirms the DOJ’s and SEC’s Views of Key Statutory Terms

Finally, the Guide also provides the DOJ’s and SEC’s views on several statutory terms and the elements for establishing a violation. These interpretations are consistent with positions that the DOJ and SEC have taken in past litigation.

The Guide's discussion of who constitutes a "foreign official" focuses principally on the meaning of the term "instrumentality" of a foreign government, and despite prior criticism, the Guide repeats the DOJ's and SEC's views on that term. It notes that determining whether an organization is an "instrumentality" is "fact-specific" and lists a "non-exclusive," eleven-factor test. Consistent with the DOJ's prior positions, the relevant factors include a foreign state's ownership and control of the entity, the foreign state's characterization of the entity and its employees, the circumstances surrounding its creation, the entity's obligations and privilege under the law, the entity's level of financial support by the foreign state, and whether the entity generally is perceived to perform official or governmental functions.

In defining "anything of value," the Guide outlines the DOJ's and SEC's historical approach to gifts, travel, entertainment and business promotion expenditures. Consistent with prior practice, the Guide notes that "reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by [the] DOJ or SEC." By contrast, "single instances of large, extravagant gift-giving" or "widespread gifts of smaller items as part of a pattern of bribes" have been the subject of enforcement actions. With respect to payment of travel and entertainment expenses, the Guide notes that both the DOJ and SEC "have brought cases where these types of expenditures occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent."

Consistent with prior positions taken by the DOJ, the Guide explains that the statutory requirement of "corrupt" intent means "an intent or desire to wrongfully influence the recipient" and that the facilitating payments exception applies only to "'routine governmental action' that involves non-discretionary acts."

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The Guide is a comprehensive survey of existing precedent that reflects the government's interpretation of previously available material such as court opinions, civil complaints, investigation resolutions and opinion procedure releases. It serves as a useful compendium of relevant materials, especially for those who do not deal regularly with FCPA issues. Because the Guide does not provide substantial new insight into enforcement priorities or the government's interpretation of key statutory terms, however, it is unlikely to change fundamentally the principles and strategies that have guided FCPA compliance efforts in the past.

Other materials of interest include the DOJ [press release](#) relating to the Guide and an [FCPA Guide Fact Sheet](#) distributed by the DOJ.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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