Foreign Corrupt Practices Act Guidance Provides Insights to the U.S. Government’s Interpretation of the FCPA and Highlights the Importance of Effective Compliance Programs and Robust Due Diligence.

Executive Summary

On November 14, 2012, the Criminal Division of the U.S. Department of Justice (“DOJ”) and the Enforcement Division of the U.S. Securities and Exchange Commission (“SEC”) released A Resource Guide to the U.S. Foreign Corrupt Practices Act (the “Guide”), which provides detailed explanations of the provisions of the Foreign Corrupt Practices Act (“FCPA” or the “Act”) and closely examines the approach of the SEC and DOJ to FCPA enforcement.¹

The FCPA contains both anti-bribery and accounting provisions that aim to prevent and punish bribery of foreign government officials. As multinational corporations are well aware, the FCPA’s anti-bribery provisions prohibit certain classes of persons and entities from making or promising to make payments of “anything of value” to foreign government officials to knowingly influence the foreign official in his or her official capacity to obtain or retain business. The FCPA’s accounting provisions require companies whose securities are listed in the United States or that are required to file certain reports with the SEC to meet certain accounting requirements, including (i) making and keeping records that accurately and fairly reflect the transactions of the company, and (ii) devising and maintaining an adequate system of internal accounting controls.

The Guide provides clarification about certain provisions of the FCPA (in some instances using hypothetical fact patterns), and provides insight into FCPA enforcement approaches and practices of the U.S. government, but does not go so far as to announce any new FCPA priorities or positions. This Client Alert highlights key aspects of the Guide, including clarification of the definition of “foreign official” and the meaning of “anything of value”; explanation of liability stemming from mergers and acquisitions or from corporate subsidiaries; suggestions for effective corporate compliance programs and robust due diligence processes; and a summary of potential consequences for FCPA violations.


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The Guide comes in the context of increasing extra-territorial application of anti-bribery laws and statutes and greater regulatory enforcement of corrupt practices both in the United States and in foreign jurisdictions.\(^2\) Because the United States is one of many jurisdictions with anti-bribery rules, individuals and businesses are urged to be aware that even if certain conduct does not run afoul of the FCPA, it may violate one or more of the anti-bribery laws, statutes or regulations that are in force in other jurisdictions.\(^3\)

**Clarification of the Definition of “Foreign Official” and the Meaning of “Anything of Value”**

The Guide aims to facilitate a better understanding of two key terms in the FCPA: “foreign official” and “anything of value.” Despite these clarifications, the Guide urges individuals and corporations to remember that “any type of corrupt payment” will carry a risk of prosecution, thus illustrating the government’s commitment to stringent enforcement against corrupt practices. (p. 21).

**Definition of “Foreign Official”**

While the Guide aims to provide clarification of the definition of “Foreign Official,” it does not narrow the definition, despite requests and recommendations from various organizations and public interest groups. Thus, the FCPA applies to corrupt payments made to any “foreign official” or employee of a foreign government and to those acting on the foreign government’s behalf. “Foreign officials” include officers or employees of, or any person acting in an official capacity for or on behalf of, a department, agency, or “instrumentality” of a foreign government. A foreign official can also be an employee or representative of a Public International Organization. While the FCPA prohibits payments made only to foreign officials, not to foreign governments, it may be difficult to determine if payments to foreign governments are being used for corrupt purposes, such as to benefit a foreign official as so defined under the Act. (pp. 19-21).

Moreover, officers and employees of government agencies and instrumentalities of the state fall within the definition of a “foreign official.” An “instrumentality” of a foreign government can include, in some circumstances, state-owned and state-controlled entities. Because many governments operate through such state-
owned and state-controlled entities (such as hospitals, universities and state-owned/controlled companies), it may be difficult to identify those entities that qualify as “instrumentalities” under the FCPA. While the Guide states that an entity is “unlikely” to qualify as an instrumentality if a government does not own a majority of shares, the Guide indicates that the DOJ and SEC will evaluate whether an entity is an agency or instrumentality of a foreign government based on factors including ownership, control, status, and function. (pp. 20-21).

The Meaning of “Anything of Value” and Practical Advice Regarding Travel, Gift and Entertainment Expenses

The Guide provides more practical guidance with regard to the meaning of “anything of value.” The FCPA does not contain a minimum threshold amount for corrupt gifts or payments, and an improper benefit can take many forms, including large payments of cash (often in the guise of consulting fees or commissions), and payments for travel, gift and entertainment expenses and other things of value. The Guide explains that small payments and gifts when they comprise a systematic or long-standing course of conduct that is indicative of a scheme to corruptly influence foreign officials can violate the FCPA. (pp. 14-16). Further, the Guide notes, indirect payments or gifts, for example to third parties, designed to improperly influence a foreign official may violate the FCPA. (pp. 21-22). The Guide clarifies, however, that it would be “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.” Similarly, small gifts or tokens of esteem or gratitude and items of nominal value, or reasonable meals and entertainment expenses, the Guide notes, will likely not be subject to enforcement under the FCPA. (p. 15).

The Guide provides realistic, though somewhat simplified, examples of reasonable and corrupt travel and entertainment expenses. With regard to travel expenses, business class airfare, hotel accommodations and transportation to a company’s facilities are likely “reasonable” travel expenses, presuming that such travel is for a legitimate business purpose. With regard to entertainment expenses, a moderately priced dinner and sporting event that do not evidence corrupt intent and would likely be deemed “reasonable” entertainment expenses. (pp. 17-18). Corporations should evaluate travel, gift and entertainment expenses on a case-by-case basis and give careful consideration to the jurisdiction within which the expenses will be provided – the Guide notes that what could be considered a modest payment in the United States may be a more significant amount in another country – in order to ensure that they are reasonable under the circumstances and tied to a clear business purpose. Corporations should further ensure that travel, business and entertainment expenses are consistent with the company’s documented policies and procedures.
Corporate Liability for Anti-Bribery Violations

It is well-established that a company will be liable for violations of the FCPA where its directors, officers, employees, or agents, acting within the scope of their employment, engage in conduct that violates the FCPA, and do so intending, at least in part, to benefit the company. In addition, a parent company may be liable for violations of the FCPA for the acts or omissions of its subsidiary. Similarly, a successor company may be liable for the acts or omissions of the company with which it is merging or which it is acquiring.

Parent – Subsidiary Liability

The Guide explains that a parent company may be liable under the FCPA for payments made by its subsidiary, whether foreign or domestic. While the Guide indicates that mere ownership of the subsidiary will not automatically render a parent liable, the government will undertake an evaluation of the relationship between the entities and may impute conduct to the parent in the following circumstances: (1) where the parent participated sufficiently in the activity to be directly liable for the conduct (for example, when it directed its subsidiary's misconduct or otherwise directly participated in the misconduct), or (2) where the parent had control (i.e. knowledge and direction) of the subsidiary's actions, such that the subsidiary’s actions and knowledge can be imputed to the parent. Further, the Guide explains that a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company. Thus, if an agency relationship exists between a parent and subsidiary company, the parent can be held liable for the actions committed by the subsidiary’s employees. (pp. 27-28).

In connection with the accounting provisions of the FCPA, which apply to every issuer that has a class of registered securities or that is required to file periodic reports pursuant to the Exchange Act, or whose securities are traded on a national securities exchange in the United States, the Guide provides that the accounting requirements include the books and records of the issuer’s “consolidated subsidiaries and affiliates.” (p. 43). The Guide recognizes that companies may be unable to exercise the same degree of control over minority-owned subsidiaries or affiliates as they do over majority or wholly-owned subsidiaries or affiliates. As such, the Guide provides that if a parent company owns less than 50 percent of a subsidiary or affiliate, the parent is only required to use its best efforts to cause the minority-owned entity to devise and maintain a system of internal accounting controls consistent with the issuer’s own obligations under the FCPA. (p. 43).

Successor Liability and Practical Tips to Reduce Risk in the Mergers and Acquisition Context

When a company merges with or acquires another company, the successor company generally assumes the predecessor’s liabilities, including any violations
The Guide emphasizes the need for companies that are acquiring or merging with another company to conduct extensive pre-acquisition/merger due diligence and post-acquisition/merger improvement of compliance programs and internal controls. (pp. 28-30).

While it is clear that the government is committed to enforcement of the FCPA, the Guide provides that in certain circumstances, the DOJ and SEC have declined to take action against successor companies where such companies have voluntarily disclosed FCPA violations and have subsequently remedied such conduct and agreed to cooperate with the government. The Guide notes that the DOJ and SEC have only previously taken action against successor companies “in cases of egregious and sustained violations, or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.” (pp. 28-30).

The Guide provides two practical tips to reduce risk in the mergers and acquisitions context. First, a company may seek an opinion from the DOJ in anticipation of a potential acquisition, though the government will not always provide such ex ante guidance even if requested. Second, a company should conduct risk-based FCPA and anti-corruption due diligence as noted above. The Guide makes a number of recommendations as to specific steps companies should undertake in their diligence process in the mergers and acquisition context, including: conducting thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions; ensuring that the acquiring company’s code of conduct and compliance policies regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses and merged entities, and when appropriate, training agents and business partners on the FCPA; conducting an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and disclosing any corrupt payments discovered as part of due diligence of newly acquired entities or merged entities. (pp.62-65).

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4 In this regard, the Guide points out that successor liability does not create liability where none existed before. To illustrate this point, the Guide notes as an example that where an issuer acquires a foreign company not previously subject to the FCPA’s jurisdiction, the mere acquisition of the company does not retroactively create FCPA liability for the acquiring issuer.

5 The DOJ released one such opinion (“Release 08-02”), pursuant to a request by Halliburton Company and its controlled subsidiaries, in 2008. Release 08-02 is available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

6 The DOJ required Johnson & Johnson to undertake such measures and to establish an enhanced corporate compliance program as part of a deferred prosecution agreement (“DPA”) that Johnson & Johnson, on behalf of itself and its subsidiary DePuy, Inc. entered into with the DOJ as a result of various violations of the FCPA. A summary of the measures and the enhanced corporate compliance program is available in Attachments C and D to the DPA, available at http://www.justice.gov/criminal/fraud/fcpa/cases/deputy-inc/04-08-11deputy-dpa.pdf.
Suggestions for Effective Compliance Programs

Although recognizing that there is no one-size-fits-all program, the Guide details “hallmarks” of effective compliance programs. Establishing an effective compliance program is particularly important as both the DOJ and SEC consider the adequacy of a company’s program in deciding (1) whether to take enforcement action against a corporation for potential FCPA violations and (2) the nature of any potential resolution should an enforcement action be commenced. The enumerated hallmarks do not provide new advice especially for large, multinational corporations, but rather serve as a reminder of “best practices.”

The Guide emphasizes that in evaluating a company’s compliance program, the government will ask three questions: (1) whether the company’s compliance program is well-designed; (2) whether it is being applied in good faith; and (3) whether it works. The Guide adds that an effective compliance program includes a commitment from senior management that results in a “culture of compliance”; clear anti-corruption policies, codes of conduct and procedures; officers with sufficient compliance authority, autonomy, and oversight; risk assessments based on the industry and markets within which the company operates; continuing training and advice; incentives and disciplinary measures; due diligence of third parties; confidential reporting and internal investigation; and periodic testing and review of the effectiveness of the compliance program. (pp.57-62).

Potential Consequences of FCPA Violations

While the FCPA provides for criminal and civil penalties for individuals and corporations, individuals and companies who violate the FCPA may face additional, and significant, collateral consequences, including suspension or debarment from contracting with the federal government (this suspension and debarment could also be applied to officers and directors of the company), cross-debarment by multilateral development banks, and the suspension or revocation of certain export privileges. (pp. 69-71).

The DOJ and/or the SEC may agree to resolve FCPA violations through a negotiated Deferred or Non-Prosecution Agreement. Deferred Prosecution Agreements (“DPAs”) defer prosecution for a period of time pending successful adherence to and completion of the terms of the agreement. In the DPA context, charges are filed against the company or individual but are subsequently dismissed if/when the terms of the agreement are met. DPAs generally require a defendant to agree to pay a monetary fine, waive the statute of limitations, admit the relevant facts, cooperate with the government, and enter into certain
remediation and compliance commitments, which may include appointment of a corporate compliance monitor.\(^7\) (pp. 74–80).

In certain circumstances, the DOJ or SEC may decline to pursue a violation of the FCPA, resulting in a declination or termination letter. Such decisions are within the discretion of the government.\(^8\) (pp. 75–77). While the government rarely publicizes decisions to decline enforcement, the Guide provides six recent examples that the DOJ and SEC have declined to pursue. While each fact pattern is unique, common factors include: voluntary disclosure; immediate and substantial steps to improve compliance programs; completion of a thorough internal investigation; immediate termination of the illegal conduct and termination or discipline of the employees involved; and full cooperation with investigations by the DOJ and the SEC. Additionally, in four of the six fact patterns, the Guide notes that the total amount of the improper payments was small and the activity appeared to be relatively isolated. (pp. 77–79).

**Conclusion**

The Guide emphasizes the U.S. government’s adherence to strong enforcement of the FCPA, and it was issued at a time of the expansion of anti-bribery and anti-corruption laws and regulations worldwide. In light of this trend, companies, organizations and individuals are encouraged to stay informed of the changes and evolution of such laws and regulations and to establish effective, risk-based compliance and due-diligence procedures designed to avoid violating the FCPA and other anti-bribery and anti-corruption laws and regulations.

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\(^7\) The Guide reiterates factors that the government will consider in requiring appointment of a corporate compliance monitor, which includes seriousness of the offense; duration of the misconduct; pervasiveness of the misconduct (including whether the conduct cuts across geographic and/or product lines); nature and size of the company; quality of the company's compliance program at the time of the misconduct; and subsequent remediation efforts. (pp. 71-72).

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FCPA and the U.K. Bribery Act

In recent years, there has been a growing international consensus around combatting corruption and bribery. One result of this trend was the passage of the U.K. Bribery Act in 2010. The British government released guidance about the U.K. Bribery Act most recently in October 2012 (“U.K. Guidance”) which, similar to the Guide issued by the DOJ and SEC, provides clarification and detailed information about certain provisions of the U.K. Bribery Act and provides insight into enforcement of the U.K. Bribery Act by the Ministry of Justice and the Serious Fraud Office. Two provisions from the U.K. Guidance are highlighted here.

First, the U.K. Bribery Act, in contrast to the FCPA, allows corporate defendants to plead the existence of adequate compliance policies as an affirmative defense (known as the “adequate procedures” defense). The U.K. Bribery Act guidance provides that a commercial organization “will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.” (U.K. Guidance p. 15). The U.S. government in FCPA enforcement actions may consider and issue mitigating credit for an effective corporate compliance program, but the existence of such a compliance program cannot be used as an affirmative defense in the U.S.

Second, unlike the FCPA, the UK Bribery Act prohibits facilitation payments. The U.K. Guidance explains that the U.K. Bribery Act does not have an exemption for small bribes paid to facilitate otherwise routine government action because such exceptions “create artificial distinctions that are difficult to enforce, undermine corporate antibribery procedures . . . perpetuate an existing ‘culture’ of bribery, and have the potential to be abused.” (U.K. Guidance p. 18).

The full text of “The Bribery Act Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing” published by the UK Ministry of Justice is available at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.