

THE NEW




GUIDANCE


JOINT DOJ- SEC GUIDANCE ON FCPA CLARIFIES
AND CONFIRMS AGENCY ENFORCEMENT
ATTITUDES AND POLICIES



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THE NEW FCPA GUIDE CLARIFIES THE LAW AND HOW IT IS APPLIED BY THE ENFORCEMENT AGENCIES, EXPRESSLY CONFIRMS PRE-EXISTING ENFORCEMENT PRACTICES AND POLICIES, AND CONSOLIDATES CURRENT AGENCY THINKING IN A SINGLE SOURCE.



For the first time since the U.S. Foreign Corrupt Practices Act ("FCPA") was enacted in 1977, the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have jointly issued written guidance designed to provide clarity regarding this increasingly prominent law. Following a recommendation of the Organization of Economic Cooperation and Development that the United States consider issuing public guidance and calls from the U.S. Chamber of Commerce and other stakeholder groups for statutory amendments to the Act, the enforcement agencies issued a 120-page Resource Guide on the U.S. Foreign Corrupt Practices Act (the "Guide").

On November 14, 2012, almost a year to the day after Assistant Attorney General Lanny Breuer announced that guidance would be forthcoming, the agencies released the Guide, which contains narrative discussions of key issues, hypotheticals, case summaries, "anonymized" examples of declinations, examples of violations, enforcement principles, over 400 footnotes, and "practical tips" for complying with the law.

Overall, the Guide clarifies the law and how it is applied by the enforcement agencies, expressly confirms pre-existing enforcement practices and policies, and consolidates current agency thinking in a single, comprehensive reference source. The Guide addresses the issues raised by those championing changes to the FCPA, but does not revise the law or current enforcement policies. Advocates for change may nonetheless welcome the fact that written guidance has been issued, that the Guide extensively uses hypotheticals and examples, and that the agencies provided some comfort as to enforcement priorities regarding gifts and entertainment, successor liability, extortion, and other issues.

Less than 48 hours after the Guide was released, I had the privilege at the American Conference Institute's annual FCPA conference of chairing a panel discussion of the Guide with senior enforcement officials from both the DOJ and the SEC. Immediately before that panel, Lanny Breuer, the Assistant Attorney General for the DOJ's Criminal Division, addressed the attendees of the conference. Both the panel and Assistant Attorney General Breuer's remarks provided additional context and unique commentary on the Guide.

The Legal Effect of the Guide. The small print of the Guide notes that it is "non-binding, informal, and summary" and that its text "does not constitute rules or regulations." As a result, the Guide would have little legal authority if cited in court. At the same time, enforcement officials have confirmed that companies may reasonably expect the agencies to adhere to the terms of the Guide.

Jurisdiction Over Foreign Entities. The Guide provides a number of clarifications of the jurisdictional quilt of the FCPA, in particular jurisdiction over foreign entities (including subsidiaries of U.S. companies or issuers). For example, foreign entities may become subject to FCPA jurisdiction by taking any action in furtherance of a corrupt payment "while in the territory of the United States." In contrast to previous statements by enforcement officials that this provision encompasses an "effects test," the Guide instead tracks the narrower statutory language.

The Guide also expresses the view that jurisdiction over a foreign entity will exist if an agent of a foreign entity takes actions in the territory of the United States, even if the entity itself (the principal of the agent) takes no action in U.S. territory. The Guide further cautions that a foreign entity may also subject itself to FCPA criminal jurisdiction if it aids and abets, conspires with, or acts as an agent of a U.S. company.

Parent Company Liability for Actions of a Foreign Subsidiary.

A related jurisdictional issue is whether a U.S. corporation or an "issuer" can be held liable for improper payments made by a foreign subsidiary. Some critics of the FCPA have asserted that the enforcement agencies have improperly held U.S. companies liable for actions by a foreign subsidiary when the parent had no involvement in the activity and despite the fact that the subsidiary was not itself subject to the FCPA.

The Guide confirms the agencies' past position that parents may be held liable for subsidiary conduct under "traditional agency principles." The Guide further states that the agencies will focus on the parent's control, both generally and as to the actions under investigation. Although the principle and precedents that foreign subsidiaries of U.S. corporations are not directly subject to the anti-bribery provisions of the FCPA implicitly remain, the Guide makes clear that, depending on the

facts, there may be jurisdictional alternatives for extending the anti-bribery rules to foreign subsidiaries.

Successor Liability. Advocates for amending the FCPA have argued that there should be no FCPA successor liability, that reasonable M&A due diligence should protect a company from successor liability, or that agencies should delineate what level of due diligence is “sufficient.” The agencies and others have responded that the risk of successor liability encourages due diligence, that enforcement agencies give acquiring companies a reasonable time to stop and remediate past violations of companies they acquire, and that companies should not be able to immunize themselves for past violations by reorganizing or by merging with another company.

The Guide defends and preserves the agencies’ views that successor liability can apply where pre-merger FCPA violations later come to light. At the same time, the Guide does offer comfort that companies that conscientiously seek to identify, address, and remedy bribery issues -- either before or soon after closing -- will be given considerable credit for doing so, and that the result may be a decision to take no enforcement action. The Guide also confirms that a company that acquires a foreign company that has not been subject to the FCPA will not be held retroactively liable for improper payments that the acquired company may have made prior to the acquisition. The concomitant caution, of course, is that if improper conduct continues after the time of the acquisition, it could create FCPA violations for the acquirer.

Gifts and Entertainment. Some calls for reform and questions raised by some members of Congress featured concerns that companies could be subject to penalties or prosecution under the FCPA for modest gifts or hospitality for government officials, including paying for taxi rides and cups of coffee. The agencies, which had previously challenged such assertions as apocryphal and unrealistic, used the Guide to reject explicitly the notion that modest hospitality could give rise to an enforcement action.

The Guide expressly states that “for a gift or other payment to violate the statute, the payor must have corrupt intent,” a point that is clearly the case under the statute, if not one that the agencies have trumpeted in the past. It dismissively deals with the taxi fare and modest meals examples: “it is difficult to envision any scenario in which the provisions of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent.” The Guide further notes that small gifts are mentioned in FCPA cases only when they are part of a larger pattern of more egregious conduct.

The Guide also includes examples and hypotheticals clearly designed to assure readers that minor gifts or hospitality generally are not FCPA issues. Hypotheticals note, for example, that within the context of an appropriate inspection and training visit by officials, the provision of such benefits as business-class airfare for international travel, modestly priced dinners, and tickets to a baseball game and a play would not create an FCPA violation. Together with guidance suggesting that compliance resources should be deployed to address the most serious corruption risks, this section may diminish the disproportionate amount of compliance attention that has traditionally been devoted to the reasonableness of gifts, travel, and hospitality.

Definition of “Foreign Official.” The definition of “foreign official,” among the most widely discussed issues in the recent policy debates, is really an issue about the definition of “instrumentality”; the uncertainty arises in determining whether or not a state-owned company is covered.

The Guide states that whether a company is an “instrumentality” requires a “fact-specific” analysis, citing a “non-exclusive list” of 11 factors that courts have used in jury instructions. The Guide does provide some solace by stating that “as a practical




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matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.” The Guide notes, however, that this principle is not universal, citing one exception involving a 43 percent government-owned company over which the government otherwise had “substantial control.” Even so, by giving heavy weight to share ownership, the Guide will simplify this issue in many situations and effectively eliminate entities in which governments have minority, passive investments, or so-called “golden shares” that carry with them no special powers of control.

Compliance. Compliance receives more attention in the Guide than any other single topic. The discussion of compliance includes a listing of 10 “hallmarks” of an effective compliance program along with a caution that programs should be tailored to the risks and business profile of the company. This point will be relevant both to smaller companies assessing how to deploy limited resources and to larger corporations seeking to prioritize compliance initiatives on a global basis.

Officials emphasize that in investigations they will almost invariably want to assess a company’s compliance program, both at the time that issues arose and at the time of the investiga-



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tion. The Guide reinforces their view that an effective program is measured by a company's compliance culture, while noting helpfully that compliance programs are not expected to be perfect and that a single violation does not necessarily signify an ineffective compliance program.

The suggestion that an effective compliance program should be an affirmative defense to an FCPA violation finds no support in the Guide, and officials explaining the Guide rejected this proposal categorically. Their explanations highlighted the fact that the "adequate procedures" provisions of the UK Bribery Act are a defense only to that law's strict liability provision, that the DOJ considers multiple factors (including compliance) when considering whether to prosecute, and that such a defense would shift attention to the sufficiency of compliance programs rather than focusing on the underlying issue of improper payments.

Voluntary Disclosure. One of the perennials of FCPA discussions is whether and when corporations should voluntarily disclose issues or violations to government enforcement officials. Consistent with the theme enforcement officials have stressed over the past few years, the Guide states that both agencies place "a high premium" on self-reporting. The triad of factors that agencies emphasize in discussing this issue is timely disclosure, full cooperation, and strong remediation. Although all three may not be enough to prevent an investigation or penalties, the Guide notes that self-reporting is an important factor in both DOJ and SEC guidance on enforcement.

The subject reappears in the Guidance, if implicitly, in discussions about declinations and independent compliance monitors. The Guide provides six recent actual, but "anonymized," examples of declinations – cases in which the agencies declined to prosecute. All six of the examples involved voluntary disclosure by the companies. Similarly, in its discussion of Compliance Monitors and when companies may be allowed to self-monitor, the Guide notes that self-monitoring is permitted "typically in cases when the company has made a voluntary disclosure."

OPEN ISSUES:

Among the issues not directly addressed by the recent policy debate or the new Guide are the following, most of which could be addressed without guidelines, but that remain open issues for companies directly affected by FCPA enforcement and their counsel. These issues include:

- The length of time enforcement agencies sometimes take to resolve a matter following a voluntary disclosure or completion of an investigation;
- More complete statistics on declinations and the factors leading to decisions not to prosecute;
- The circumstances in which the agencies will request companies voluntarily to conduct an internal investigation or produce documents in the absence of evidence of specific wrongdoing, and whether DOJ and SEC practices differ.

By any measure, however, the sweep of the Guide is impressive and is a significant and unprecedented milestone in the administration of the FCPA.

EXPERT BIO

Homer Moyer, the architect of Miller Chevalier's pre-eminent international practice, is regarded as one of the country's leading Foreign Corrupt Practices Act (FCPA) lawyers and has been recognized as a premier lawyer in other international legal fields as well. A political appointee of both political parties, he has also developed and guided pro bono projects that have been hailed for their global impact.