

SEC and DOJ Release Highly Anticipated FCPA Resource Guide

If you have any questions regarding the matters discussed in this memorandum, please contact any of the attorneys listed on page 3, or call your regular Skadden contact.

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On November 14, 2012, the Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) jointly released the long-anticipated Resource Guide to the U.S. Foreign Corrupt Practices Act.¹ The Resource Guide tracks developments with respect to FCPA enforcement and interpretation and provides meaningful insight into the government's perspective on a number of enforcement issues. Although the Resource Guide will serve as a good reference tool for FCPA practitioners and in-house lawyers, it does not announce new policies or provide guidance that has not been gleaned from existing cases, settlements and opinion letters. It is clear from the Resource Guide, however, that vigilance, diligence and informed common sense are the principles to apply when evaluating whether a company's practices are compliant with the anti-bribery and accounting provisions of the FCPA.

What Companies Should Do Now

The publication of the Resource Guide provides the impetus for companies to pursue a self-assessment to ensure that their existing internal controls are robust, and that their policies conform with best practices. While the Resource Guide does not provide the nuts and bolts for employing effective and sustainable compliance measures, it compiles and confirms case law and government guidance to benchmark the sufficiency of a company's controls and policies. In particular, the Resource Guide confirms the elements the government considers to be essential to an effective compliance program and provides practical examples regarding travel, gifts, entertainment and bona fide promotional and educational expenses. The Resource Guide also confirms guidance regarding acquisition and investment due diligence.

Of course, the Resource Guide is an expression of the government's views rather than judicial precedent. Accordingly, while the Resource Guide is helpful in assessing compliance issues and future conduct, as well as in predicting the government's position in investigations and in court, the views in the Resource Guide — particularly regarding jurisdiction and knowledge — remain subject to challenge in enforcement proceedings.

Substantive Guidance in the Resource Guide

Jurisdictional Reach

Although the Resource Guide generally hews closely to the FCPA's statutory language on jurisdiction, it sets out a controversial theory of "co-conspirator jurisdiction." Specifically, while the Resource Guide acknowledges that a non-U.S. national or company must act within the territorial United States in furtherance of a bribery payment to be subject to jurisdiction, it also states that co-conspirators in the scheme may be subject to jurisdiction "even if they themselves" were not present in the United States and did not take any action in the United States. The Resource Guide does not cite judicial support for this proposition and in fact the U.S. District Court for the District of Columbia

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¹ The Resource Guide is available online to the public at <http://www.justice.gov/criminal/fraud/fcpa> and <http://www.sec.gov/spotlight/fcpa.shtml>.

expressed skepticism of this theory in a trial of individuals in the Las Vegas “Shot Show” sting case. *United States v. Patel*, CR No. 9-0335 (D.D.C. June 6, 2011), Tr. at 9-11.

Facilitating Payments: A Narrow Exception

The Resource Guide reiterates the narrow nature of the facilitation exception to the FCPA anti-bribery provisions. Given the prohibition against such payments in the U.K. Bribery Act and the difficulty in ensuring that the payment qualifies as a facilitation payment, many companies have adopted policies that do not permit such payments to be made, or only permit them with the approval of a designated in-house legal officer.

Who Qualifies as a “Foreign Official”?

The Resource Guide’s discussion of who constitutes a “foreign official” or an “instrumentality of a foreign government” does not advance the state of the law and is merely a restatement of prior positions advanced by the DOJ and SEC. It does recite the non-exclusive list of factors that recently have been adopted by courts for use in jury instructions, including the extent of the foreign state’s ownership of the entity, the foreign state’s degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials), the foreign state’s characterization of the entity and its employees, the circumstances surrounding the entity’s creation, and the purpose of the entity’s activities. The Resource Guide acknowledges that the 50 percent ownership stake is a good litmus test for whether an entity qualifies as an instrumentality of a foreign government, but cautions that, even with less than a 50 percent ownership interest, an entity may be deemed an instrumentality of a foreign government.

Intermediaries and “Conscious Avoidance”

In discussing liability for payments through third parties, the Resource Guide highlights the DOJ’s 2009 prosecution of Frederick Bourke for an investment in connection with privatization of the Azerbaijan Republic’s state oil company. In addition to contending that Bourke had actual knowledge of a corrupt scheme, the government’s alternative theory in that case was more aggressive: that Bourke invested in the privatization with conscious avoidance of the likelihood that others had made payments to Azeri officials to ensure favorable treatment. The Resource Guide emphasizes the Second Circuit Court of Appeals’ 2011 affirmance of the government’s “conscious avoidance” instruction in the case, reflecting that the DOJ remains committed to broad theories of liability for indirect payments.

What Gifts and Entertainment Are Permissible?

Companies expecting that the Resource Guide would provide a concrete definition of what constitutes an acceptable gift, meal or expense will be disappointed. Rather, the Resource Guide reiterates the rule of reason and the need to analyze each situation from a compliance perspective, with an eye towards assessing whether the benefit is routine hospitality (which is permissible) or a disguised bribe (which is not). The Resource Guide compiles prior guidance from DOJ Opinion Procedure Releases and reaffirms that cups of coffee, reasonable bar bills and even a baseball game will not in and of themselves trigger liability. It further clarifies that the “DOJ’s and SEC’s anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct. ...” A company’s compliance policies should include guidance on the value of gifts and entertainment as well as on the situations where they may be provided.

Due Diligence Is a Key to Compliance

The Resource Guide compiles the government’s prior guidance regarding transactional due diligence, including reference to the DOJ Opinion Procedure Release 08-02 (the Halliburton release) and a useful

list of transactions in which the DOJ has and has not taken enforcement action. The Resource Guide addresses, through a hypothetical example, the increasingly common question of successor liability for pre-acquisition conduct when a target company previously was not subject to FCPA jurisdiction and acknowledges that acquisition by a U.S. company “does not create jurisdiction where none existed before.” However, the Resource Guide notes that post-acquisition misconduct by the acquired company would be subject to prosecution, and thus pre-acquisition diligence of non-U.S. entities is important to ensuring that appropriate compliance structures can be implemented upon acquisition.

“Hallmarks” of an Effective Compliance Program

The Resource Guide contains an extensive section detailing the “hallmarks” of an effective compliance program, including descriptions and suggestions for implementing adequate compliance policies, training, disciplinary measures, risk assessments, third-party diligence programs, confidential reporting and periodic testing. While “no compliance program can ever prevent all criminal activity by a corporation’s employees,” the guide highlights the government’s view of the key elements of an effective anti-corruption compliance program. The guidance here is consistent with the U.S. Sentencing Guidelines and with compliance obligations imposed in FCPA settlements for the past several years. Importantly, like the U.K. Bribery Act, the government acknowledges that compliance programs are not one-size fits all and that each company, based on size, business model, risk and culture, will need to develop the appropriate mix of controls to implement effective and sustainable compliance. The Resource Guide provides the common sense advice to focus on the specific risks facing the company and to reassess those risks on a periodic basis.

Hypotheticals

Finally, the guide includes a variety of hypothetical situations that provide express but non-binding answers as to the government’s view of the application of the FCPA in specific cases. These hypotheticals address a wide variety of legal issues including jurisdiction, the treatment of gifts, travel and entertainment expenses, facilitating payments, successor liability and standards for vetting third-parties. These hypotheticals are useful in that they provide concrete examples of existing DOJ and SEC perspectives on given factual scenarios. As with other aspects of the Resource Guide, the hypotheticals make clear that vigilance, diligence and informed common sense remain key to compliance with the FCPA.

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