

DOJ/SEC Release Unprecedented Guidance on the FCPA

Yesterday, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) released their much anticipated and long overdue guidance on the Foreign Corrupt Practices Act (the “FCPA”): *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Resource Guide” or “Guide”). The 120-page inter-agency Guide is in its own words an “unprecedented undertaking,” representing the first time the government has provided a thorough analysis of the FCPA, clarifying information that had been previously scattered across a collection of informal opinions and judicial decisions. The Guide provides comprehensive information, including practical tips, to assist companies as they navigate the very fact-specific FCPA enforcement scheme.

While offering no bright-line rules on the FCPA, the Guide repeatedly highlights the need for companies to take a proactive, risk-based approach to stamp out corruption and effectively puts companies and their counsel on notice that there is a new, higher expectation of FCPA awareness. Indeed, in his brief remarks yesterday, SEC Director Robert Khuzami promised “vigorous prosecution of those who break the law [and] an equally vigorous effort to enable those who seek to abide by the law.”

Further underscoring a shifting enforcement regime, the Resource Guide is penned jointly by DOJ and SEC, with input from the Departments of Commerce and State. Companies and their counsel should expect increased inter-agency cooperation between DOJ and SEC, who may join with the FBI, Homeland Security, and the Department of Treasury’s Office of Foreign Assets Control in expanding FCPA enforcement efforts.

Key Takeaways From The Resource Guide

Among the many topics covered in the Guide are the following:

- *Foreign Officials.* The Guide reaffirms that a “foreign official” is defined broadly under the FCPA, particularly in countries that operate extensively through state-owned entities in the banking, finance, energy, healthcare, life sciences, and other fields.
- *Third Parties.* The Guide clarifies that the FCPA’s prohibition against making corrupt payments through intermediaries imposes a duty on companies to monitor certain common red flags and to appropriately follow-up on those warnings.
- *Gifts, Entertainment and Travel Expenses.* While “cups of coffee [and] cab fare” are unlikely to violate the FCPA, large gifts and patterns of small payments and token gifts may signal a systemic bribery scheme. As the government also continues to focus on lavish travel expenses, the Guide notes that companies should have clear guidelines in place governing such expenses.
- *Successor Liability.* The Guide provides “practical tips” for reducing successor FCPA risks (e.g., improve acquired companies’ codes of conduct and conduct training of directors, officers, employees, and in some cases third parties) and recounts occasions on which the United States has declined to prosecute because a successor reported and remediated misconduct.
- *Accounting.* The Guide lists 14 common accounting entries that may be used to conceal a bribe in corporate books, simultaneously cautioning companies who may be hiding corrupt transactions and aiding companies and their counsel who are searching for evidence of bribes while conducting due diligence.

Conclusion

The Resource Guide does not represent a shift in the government's FCPA policy so much as it gives unprecedented insight into where the government is likely to focus its expanding enforcement efforts in the coming years. The Guide underscores the increased cooperation between the SEC and DOJ, and clearly states that the government is likely to bring the harshest actions against companies that fail to implement effective and thorough compliance programs using the hallmarks now supplied by the government.

Ropes & Gray will host a webinar in late November 2012 to discuss in more depth the FCPA Resource Guide and related anti-corruption statutes and guidance. Invitations to the webinar are forthcoming. In the interim, if you wish to discuss how to implement the FCPA Resource Guide, please contact the Ropes & Gray attorney who usually advises you.