

## Articles

November 2012

### The New Foreign Corrupt Practices Act Resource Guide: An Opportunity to Review Your Nonprofit's Compliance

Related Topic Area(s): Antitrust and Trade Regulation

On November 14, 2012, the long-awaited U.S. Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") Foreign Corrupt Practices Act ("FCPA") guidance (the "Guidance") was released. Styled "A Resource Guide to the U.S. Foreign Corrupt Practices Act," this 130-page document represents the DOJ and SEC's effort to answer critics of the Act and to clarify their interpretation of key provisions of the Act and the principles guiding their enforcement efforts. ([Click here](#) to access a PDF copy of the Guidance.)

The FCPA does not distinguish between for-profit corporations and nonprofit organizations with respect to its anti-bribery provisions. Regardless of the type of entity involved, the FCPA prohibits offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign government official to assist in obtaining or retaining business. "Business" has been interpreted broadly and would include all activities in furtherance of an organization's nonprofit and tax-exempt purposes.

While the Guidance offers little that is new, it does, however, serve as an excellent resource as to how the DOJ and SEC are likely to enforce the Act, providing useful checklists and hypotheticals that help shore-up the boundaries of what does or does not violate the FCPA, at least in the agencies' opinions. Nonprofits of all sizes and types are doing business in remote corners of the world, often in areas known for government corruption, such as Latin America, Asia, and Africa. Accordingly, nonprofit organizations are well-advised to review the Guidance and determine whether their anti-corruption compliance programs are adequate, especially those organizations with activities or a presence outside the United States.

A few key takeaways for nonprofits from the Guidance:

#### FCPA Jurisdiction

In Chapter 2 ("The FCPA: Anti-Bribery Provisions"), the DOJ and SEC emphasize the broad sweep of their jurisdiction.

- In addition to corporations that list on U.S. securities exchanges, the Guidance emphasizes that the FCPA also applies to "domestic concerns." Domestic concerns include *any* individual who is a U.S. citizen, national, or resident, or any corporation, partnership, *association*, *unincorporated organization* (such as a nonprofit organization), or sole proprietorship that is organized under U.S. law or that has its principal place of business in the United States.
- Officers, directors, or agents acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.
- The Guidance makes clear that even when a "domestic concern" is not involved, the U.S. will still assert "territorial jurisdiction" if there is any contact with the United States, no matter how small, in furtherance of a corrupt payment. In this way, the U.S. catches many organizations in its jurisdictional net that believe they are beyond the reach of the FCPA.

#### Foreign Official

Also in Chapter 2, the DOJ and SEC discuss the broad definition of who is a "foreign official" under the FCPA. If your organization has a non-U.S. chapter, or is conducting business or trade shows outside of the United States, chances are it is interacting with persons considered to be foreign officials under the FCPA.

- A foreign official includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization" (such as the United Nations, World Bank, etc.).

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- The DOJ and SEC have interpreted this definition to include officials operating through state-owned or state-controlled entities. Thus, business conducted with members of a state-controlled educational organization in China, a doctor in a state-owned hospital in Brazil, or an official acting on behalf of the Ministry of Commerce in Singapore, is *all* business with foreign officials.

### **Gifts, Travel, Entertainment, and Other Things of Value**

The DOJ and SEC provide detailed examples of the types of gifts, travel, entertainment, and other expenses that do and do not violate the FCPA.

- The Guidance makes clear that the giving of things of “nominal value,” such as cab fare, *reasonable* meal and entertainment expenses, and company promotional items, does not in and of itself violate the FCPA. The Guidance uses an organization’s provision of nominal gifts at a “trade show” as an example.
- Where the organization sponsors the trade show or has a booth, and provides free hats, pens, or beverages as a way of promoting business and hospitality, and/or invites current or prospective customers that are foreign officials out to drinks and pays a “moderate bar tab,” these are considered legitimate *bona fide* expenditures made in connection with the promotion and explanation of the organization’s practices and are not in violation of the FCPA.
- By contrast, extravagant gifts, excessive entertainment, and especially travel with no apparent business purpose will likely place an organization or an individual under FCPA scrutiny.
- Reviewing your organization’s existing compliance program to ensure that effective guidelines and controls exist on gifts, travel, and trade show-related expenses, especially in countries or industries where foreign officials will be in attendance, is key.

### **Charitable Activities Are Not Exempt**

The Guidance also makes clear that while it recognizes that U.S. companies and organizations often engage in charitable giving as part of legitimate local outreach, such contributions (whether money or in-kind) are within the scope of the FCPA and must not be used as a pretense to funnel bribes to foreign officials, or otherwise influence them in connection with obtaining or retaining business.

- As stated, the FCPA prohibits the paying of money or “anything of value” to a foreign official to secure an improper advantage.
- Thus, “charity” can be interpreted to mean not only monetary contributions (grants or donations), but also free training, educational services, materials, etc.
- The DOJ emphasizes that proper due diligence and controls are critical for charitable giving and suggests questions to consider, including: (1) the purpose of the payment; (2) whether the payment is consistent with the organization’s internal guidelines; (3) whether the payment is at the request of a foreign official; (4) whether the foreign official is associated with the charity and, if so, could make decisions about your organization’s business in that country; and (5) whether the payment is conditioned upon receipt of benefits to your organization.

### **Use of Agents**

Finally, the DOJ and SEC emphasize that corrupt payments made through third parties or intermediaries are also prohibited.

- An organization cannot outsource its FCPA liability. It will generally be held criminally and civilly liable for the actions of its agents, distributors, service providers, and/or joint venture partners that violate the FCPA.
- Thus, even if a nonprofit’s only “international” operations involve the identification of a trade show forum through an agent, the organization must ensure its partner is acting in compliance with the FCPA. Questions like what is the permitting process in this country are important. Foreign agents can be an invaluable resource for the provision of local advice, and may help facilitate introductions or business transactions, however, there are risks associated with engaging third parties.
- Conducting risk-based due diligence on the agent, his company, proposed fees, and any close affiliations or relations to foreign officials is critical *prior to* engaging with the agent. Setting forth the terms of the engagement in clear contractual language, which includes FCPA compliance, is also necessary.

In sum, while there is nothing new in it, the Guidance serves as an excellent FCPA reference manual for how the DOJ and SEC interpret key provisions of the Act and prioritize their enforcement efforts. And, it is a helpful tool to use when designing, implementing, or updating an anti-corruption compliance program at your nonprofit organization.

If you have any questions concerning the FCPA or how to protect your nonprofit against possible FCPA liability, please contact the authors or other attorneys in Venable’s [Foreign Corrupt Practices Act](#)

**and Anti-Corruption Group.**

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