



DOJ & SEC Release Long Anticipated FCPA Guidance

On Wednesday, almost one year to the day after Assistant Attorney General Lanny Breuer first promised it at the National Conference on the FCPA in 2011, the Criminal Division of the Department of Justice and the Enforcement Division of the Securities and Exchange Commission released *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. As the foreword notes, the *Guide* is “an unprecedented undertaking by the DOJ and the SEC,” significantly more detailed and comprehensive than its predecessor, the DOJ’s *Lay Person’s Guide to the FCPA*. According to the DOJ and SEC, their common goal in preparing the *Guide* was to “provide helpful information about the FCPA and our FCPA enforcement efforts to businesses that want to compete fairly in foreign markets, so that those businesses can maximize their ability to comply with the FCPA in the most effective and efficient way suitable to their business and the markets in which they operate.” There is nevertheless one important caveat: the *Guide* “does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.” That is, the *Guide* does not represent the “law.” Nevertheless, it does provide the public with a rare glimpse into the DOJ and SEC’s current thinking about the FCPA.

The *Guide* has ten parts, plus two appendices containing the text of the FCPA and endnotes. The ten chapters of the *Guide* include:

1. an introduction providing contextual background on the fight against corruption;
2. a summary of the FCPA’s anti-bribery provisions;
3. a summary of the FCPA’s accounting provisions;
4. an overview of other related U.S. laws (such as the Travel Act and money laundering statutes);
5. an overview of considerations affecting whether the DOJ or SEC will open an investigation or bring charges;
6. a review of penalties, sanctions, and other collateral consequences for violations of the FCPA (including commentary on the imposition of compliance monitors);
7. an overview of the different types of resolutions;
8. a summary of relevant whistleblower provisions and protections;
9. a summary of the DOJ opinion procedure process; and
10. a conclusion.

Perhaps most helpfully, the *Guide* provides insight into the government's enforcement practices by using examples of actual enforcement actions and summaries of applicable case law and relevant DOJ opinion procedure releases. The *Guide* includes hypothetical scenarios that address (1) jurisdiction under the FCPA; (2) the treatment of gifts, travel, and entertainment expenses; (3) the use of facilitating payments; (4) successor liability involving acquired companies that were and were not previously subject to the FCPA (two separate examples); and (5) third-party vetting. Additionally, and likely in response to increasing demand that the agencies release details about their declination decisions, the *Guide* also contains six recent, "anonymized examples of matters" that the agencies declined to pursue, including a brief discussion of the key factors behind those declination decisions.

While the *Guide* addresses a variety of topics in some detail, there appear to be few surprises for experienced FCPA practitioners. For example, there is an extensive discussion in chapters two and three of who and what is covered by the FCPA's anti-bribery and accounting provisions, but the *Guide* largely tracks the position taken by the DOJ in several recent trials. The *Guide* also addresses the definition of a "foreign official" and what constitutes an instrumentality of a foreign government. Among other things, this section notes that, as a practical matter, an entity is unlikely to qualify as an instrumentality of a foreign government if a foreign government does not own or control a majority of the entity's shares. The *Guide* specifically reviews past DOJ and SEC enforcement actions involving entities in which a foreign government had less than 50 percent ownership, noting that foreign governmental control (separate from ownership) was the central reason to treat those entities as foreign government instrumentalities.

In its discussion of gifts, travel, and entertainment expenditures, the *Guide* emphasizes that the DOJ and SEC have not focused their enforcement efforts on the provision of reasonable travel and entertainment related to a company's bona fide promotional expenditures. It does not give concrete guidance about what is "reasonable" but explains that the agencies do not consider items of nominal value—such as cab fare, small meals and entertainment expenses—likely to improperly influence a foreign official. "It is 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," the *Guide* says. The same goes for "a small gift or token of esteem or gratitude." Instead, the DOJ and SEC have focused on corrupt payment of travel and entertainment expenses that, in conjunction with other conduct, reflects systemic bribery or other clear indicia of a company's corrupt intent.

The *Guide* includes a lengthy discussion of successor liability in the mergers and acquisitions context, including two hypothetical scenarios—one in which the acquired company was not previously subject to the FCPA, and another in which it was—as well as practical tips to assist companies in reducing the risk of FCPA violations related to their M&A activity. The *Guide* states that the DOJ and SEC will only take action against successor companies in limited circumstances, generally involving 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. More often, the DOJ and SEC only bring enforcement action against the predecessor company.

Finally, the *Guide* addresses the hallmarks of an effective corporate compliance program and includes a case study based on the government's recent decision not to bring an enforcement action against a major financial services firm because of its comprehensive risk-based compliance program. The *Guide* emphasizes that there is no one-size-fits-all program and that an effective program must be tailored to a company's specific business and its associated risks.

Broadly speaking, the *Guide* reiterates many of the positions long espoused by the government and avoids novel policy pronouncements. The *Guide* certainly will not satisfy everyone. But certain sections of it—such as the discussion of gifts, travel, and entertainment; the elements of an effective compliance program; the procedures for vetting third-parties; and the examples of how companies may avoid prosecution—might prove useful to companies and practitioners. If nothing else, the *Guide* will become a frequently cited source for insight into the government's theories of liability and enforcement practices.

Sidley will provide a more comprehensive, detailed analysis of the *Guide* in the near future. Until then, you can review the *Guide* at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> and <http://www.justice.gov/opa/pr/2012/November/12-crm-1354.html>.

If you have any questions regarding this update, please contact the Sidley lawyer with whom you usually work.

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