

DOJ, SEC Issue **FCPA Guidance**: Brave New World or Much Ado About Nothing?

At the urging of corporations and legislators seeking greater clarity and guidance on best practices for interpreting and protecting against liability under the Foreign Corrupt Practices Act (FCPA), the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) released A Resource Guide to the Foreign Corrupt Practices Act (the Guide). In its 10 chapters, the Guide provides an overview of the current state of the FCPA as interpreted by the courts, the DOJ and the SEC. In addition to setting forth black-letter law, the Guide provides concrete examples of the FCPA's practical application through hypotheticals and through anonymized anecdotes in which the government declined to prosecute, constituting what Assistant Attorney General Lanny Breuer described as perhaps "the most comprehensive effort ever undertaken by either the Justice Department or the SEC to explain [their] approach to enforcing a particular statute." Although the compilation of existing interpretive guidance in a single volume will make the Guide a useful centralized resource, the lack of substantial new information will do little to satisfy those pushing for greater clarity in the language and interpretation of the FCPA.

The hypotheticals and declinations that the DOJ and SEC offer constitute the most useful practical guidance set forth in the document. The Guide's hypotheticals set forth illustrative contrasts, such as between acceptable gifts and entertainment (free promotional items, beverages and gifts as "tokens of esteem or gratitude") and gift-giving that violates the FCPA (sponsoring an all-expense-paid trip for a foreign official), and between permissible grease payments (a one-time small payment to a clerk to ensure the expeditious processing of a permit application) with payments that run afoul of the statute (a modest cash payment to an agency director to obtain an environmental permit).

The declinations, although anonymized and largely omitting the cases' factual underpinnings, offer a unique perspective on the factors that the DOJ and SEC view as most important in deciding whether to initiate an enforcement action. Because declinations are rarely if ever publicized, the factors that prompt the DOJ and SEC to avoid prosecution provide a useful counterpoint to the considerations discussed in the publicized prosecutions that the government does decide to undertake. An analysis of the provided rationales for non-prosecution demonstrates that the following key considerations could make or break a decision to prosecute in the corporate setting:

- The dollar amount of the bribe(s) and potential profits at issue;
- The number of bribes and culpable employees;
- The company's diligence and internal self-detection of the unlawful conduct;
- The company's voluntary remedial conduct, including conduct preventing the payment of a potential bribe, prompt initiation of an internal investigation, termination of culpable employees, voluntary disclosure to the DOJ and SEC, strength of existing internal controls and compliance programs, and undertaking substantial steps to improve such programs;
- The company's constant and real-time cooperation with the DOJ and SEC.

The Guide also provides practical tips for reducing FCPA risk in mergers and acquisitions and implementing effective books and records and internal controls systems. The Guide notes that action against successor companies has been limited, "generally in cases 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." Instead, it is more typical for the DOJ and SEC to pursue enforcement actions against the predecessor company.

The Guide likewise notes that bribes are often mischaracterized in companies' books and records, and that the FCPA requires issuers to make and keep books, records and accounts "in reasonable detail," defined as the level of detail that would "satisfy prudent officials in the conduct of their own affairs." The Guide further notes that in instances where all the elements of a violation of the anti-bribery provisions are not met, companies nonetheless may be liable if the improper payments are inaccurately recorded. Internal controls over financial reporting are the processes used by companies to provide reasonable assurances regarding the reliability of financial reporting and the preparation of financial statements. Like the "reasonable detail" requirement in the books and records provision, the FCPA defines "reasonable assurances" as "such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

Assistant Attorney General Breuer recognized that "[n]o guide will satisfy every constituency[.]" This acknowledgment may prove to be an understatement. For all the practical insights into FCPA enforcement that the Guide does offer, it will almost certainly fall short of addressing the myriad concerns of those pushing for FCPA reform inside and outside the Beltway. Among other things, the Guide provides limited insights into precisely how much putative defendants can expect to benefit from voluntary disclosure of FCPA violations, nor does it proffer a concrete test for whom the DOJ and SEC consider "foreign officials" under the Act, or the scope of activity within the US sufficient to trigger jurisdiction over foreign entities. It is likely that posterity will view the Guide as the end of the beginning, rather than the beginning of the end, of a broad effort to streamline and clarify the FCPA.

Although the Guide leaves a number of areas unclear, it leaves no doubt that the DOJ and SEC intend to continue enforcing the FCPA to the greatest extent possible. Squire Sanders has provided additional details on these and other areas addressed in the Guide in its [Outline Of Resource Guide To The U.S. Foreign Corrupt Practices Act](#) on its Anticorruption Blog.

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