

FCPA CLIENT ALERT

DOJ AND SEC ISSUE GUIDANCE ON THEIR FCPA ENFORCEMENT APPROACH

INTRODUCTION

On November 14, 2012, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) issued their much-anticipated Foreign Corrupt Practices Act (FCPA) guidance, titled “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (Guide).¹ The Guide provides detailed information about the government’s FCPA enforcement approach and priorities. The Guide also includes a number of hypothetical factual scenarios that explain the DOJ and SEC views on those scenarios.

In this Client Alert, we address the following areas:

1. The long reach of FCPA jurisdiction;
2. The types of acts that violate the FCPA;
3. The expansive view of who qualifies as a “foreign official”;
4. The risks associated with using third party agents or consultants;
5. Affirmative defenses to the FCPA anti-bribery provisions;
6. Risks associated with parent-subsidiary and successor liability;
7. The guiding principles used by the government in enforcement decisions; and
8. The hallmarks of an effective FCPA compliance program.

THE LONG REACH OF FCPA JURISDICTION

The FCPA’s anti-bribery provisions apply broadly to (1) “issuers,” (2) “domestic concerns,” and (3) certain foreign nationals or foreign non-issuer entities that engage in acts furthering a corrupt payment while in the United States.

In practice, “issuers” are any company with a class of securities listed on a national securities exchange in the United States, or any company with a class of securities quoted in the over-the-counter market in

the United States and required to file periodic reports with SEC.² A company need not be a U.S. company to be an issuer. For example, foreign companies with American Depositary Receipts that are listed on a U.S. exchange are also issuers. Officers, directors, employees, agents, or stockholders acting on behalf of an issuer, and any co-conspirators may also be subject to the FCPA.³

The FCPA anti-bribery provisions apply to “domestic concerns” regardless of whether they act within or wholly outside of the United States. A “domestic concern” is “any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions or commonwealths or that has its principal place of business in the United States.”⁴ Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern can also be prosecuted under the FCPA anti-bribery provisions.

Additionally, foreign persons and foreign non-issuer entities that, either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorization to pay) while in U.S. territory may be subject to the FCPA. Officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities are covered under the FCPA as well.⁵

The FCPA anti-bribery provisions apply to conduct both inside and outside the United States. The Guide states that issuers and domestic concerns may be prosecuted for “using U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official.”⁶ The Guide also indicates that placing phone calls, emailing, text messaging, or faxing from, to, or through the United States or sending a wire transfer

¹ Enforcement Div. of the US Sec. and Exch. Comm’n & Criminal Div. of the US Dep’t. of Justice, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA Guidance)* available at www.justice.gov/criminal/fraud/fcpa and www.sec.gov/spotlight/fcpa.shtml (November 2012).

² *Id.* at 11; 15 U.S.C. § 78dd-1.

³ *Id.* at 11.

⁴ *Id.* at 11; 15 U.S.C. § 78dd-2.

⁵ *Id.* at 11.

⁶ *Id.*

from or to a U.S. bank or otherwise using the U.S. banking system can trigger liability under the FCPA.⁷ The Guide additionally clarifies that foreign individuals or companies can be liable under the FCPA even if they do not engage in any conduct within the United States, so long as another member of the bribery scheme is subject to FCPA jurisdiction.

ACTIONS IN VIOLATION OF THE FCPA ANTI-BRIBERY PROVISIONS

Business Purpose Test

The FCPA applies only to payments to foreign officials that meet the “business purpose test”—payments must be intended to induce or influence a foreign official to use his or her position “to assist in obtaining or retaining business for or with, or directing business to, any person.”⁸ The Guide emphasizes that the government considers the business purpose test to be expansive, extending to actions taken to gain a business advantage. The Guide offers examples of bribe payments that satisfy the business purpose test, which include winning a contract, influencing the procurement process, reducing or eliminating customs duties, gaining access to non-public bid tender and information, gaining favorable tax treatment, and obtaining exceptions to regulations.⁹

Intent

The Guide reminds readers that the FCPA’s intent element does not require “successful” bribes or actual receipt of payment by a foreign official. To violate the FCPA, the payments or actions taken need only be made “corruptly,” which the Guide defines as an intent or desire to wrongfully influence the recipient.¹⁰

To be *criminally* liable under the FCPA, an individual must act “willfully.” The Guide clarifies that although the term “willfully” is not specifically defined in the FCPA, it is generally interpreted by courts as “an act committed voluntarily and purposefully, and with bad purpose, i.e., with ‘knowledge that [a defendant] was doing a ‘bad’ act

under the general rules of law.’”¹¹ The Guide notes that proof of willfulness is not required to establish corporate criminal or civil liability (although proof of corrupt intent is required).¹²

Anything of Value

The Guide emphasizes that the FCPA prohibits the corrupt “offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to a foreign official.¹³ FCPA does not have a minimum threshold amount for corrupt payments or gifts.¹⁴ Examples of forms in which improper benefits can be disguised as include “consulting fees” or “commissions” given through intermediaries, travel expenses, expensive gifts, cash, widespread gifts of smaller items, and gifts to third parties as an indirect way of corruptly influencing a foreign official (i.e. an official’s family members).¹⁵

The FCPA does not prohibit gift-giving; rather, it prohibits the payment of bribes disguised as gifts.¹⁶ Similarly, the FCPA does not prohibit charitable contributions. However, companies cannot use the pretense of charitable contributions as a way to channel improper payments to foreign officials.¹⁷ The Guide emphasizes that proper due diligence and controls are key to minimizing the likelihood that a charitable contribution is an FCPA violation. The adequacy of preventative measures usually depends on a risk-based analysis and the facts at hand.¹⁸ The Guide lists various examples of charitable grants or donations that were approved by DOJ due to sufficient due diligence measures and controls.¹⁹

WHO IS A FOREIGN OFFICIAL?

The FCPA prohibits payments or offers of payments to foreign officials. The definition of foreign official includes “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international

⁷ *Id.*

⁸ *Id.* at 13.

⁹ *Id.*

¹⁰ *Id.* at 14.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 14-16.

¹⁶ *Id.* at 16.

¹⁷ *Id.*

¹⁸ *Id.* at 19.

¹⁹ *Id.*

organization,” or any person acting in an official capacity for or on behalf of any such entities.²⁰

The Guide emphasizes that the FCPA applies to government foreign officials regardless of rank.²¹ While the Guide does not offer a bright-line rule as to when an entity is to be considered an instrumentality of a foreign government, the Guide does present a list of non-exclusive factors to be considered when conducting a “fact specific analysis” to determine whether an entity is likely to be considered an instrumentality (and thus a foreign official), including:²²

- the foreign state’s extent of ownership of the entity;
- the foreign state’s degree of control over the entity;
- the foreign state’s characterization of the entity and its employees;
- the purpose of the entity’s activities,
- whether the governmental end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- the general perception that the entity is performing official or governmental functions.²³

The Guide also notes that the FCPA was amended in 1998 to expand the definition of “foreign official” to include employees and representatives of public international organizations. A public international organization is any organization designated as such by Executive Order under the International Organizations Immunities Act, 22 U.S.C. § 228.²⁴ Examples of public international organizations include the World Bank, the World Trade Organization, and the Organization of American States.²⁵

The Guide additionally clarifies that foreign governments do not fall into the category of foreign officials but warns companies to take steps to ensure that no monies are used for corrupt purposes.

²⁰ *Id.* at 19-20.

²¹ *Id.* at 20.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 21.

²⁵ *Id.* A comprehensive list of organizations designated as public international organizations is contained in 22 U.S.C. § 228 and can also be found at <http://www.gpo.gov/fdsys>.

PAYMENTS TO THIRD PARTIES

The FCPA explicitly prohibits corrupt payments made through third parties.²⁶ Many companies retain a local individual or company to help them conduct business in a foreign country. Although the foreign agents may provide legitimate advice regarding local customs and may help facilitate business transactions, companies should be aware of the risks of using third-party agents.²⁷

Using a third party in a bribery scheme does not eliminate the potential for criminal or civil FCPA liability. Rather, it is clear that Congress intended to impose liability on those with actual knowledge of wrongdoing as well as those who purposefully avoid actual knowledge by using third party agents in bribery schemes.²⁸ Under the FCPA, a person has the requisite knowledge when he is aware of a high probability of the existence of wrongdoing, unless the person actually believes that such wrongdoing does not exist.²⁹

The Guide lists the following common red flags associated with third parties: (1) excessive commissions to third-party agents or consultants; (2) unreasonably large discounts to third-party distributors; (3) third-party “consulting agreements” that include only vaguely described services; (4) the third-party consultant is in a different line of business than that for which it has been engaged; and (5) the third party became part of the transaction at the express request of the foreign official.³⁰

Businesses may reduce risks associated with the use of third party agents by applying an effective FCPA compliance program which includes due diligence of foreign third-party agents.

AFFIRMATIVE DEFENSES

The Local Law Defense

The FCPA anti-bribery provision recognizes the “local law” affirmative defense where the payment in question is lawful under the laws of the foreign country. However, as the Guide notes, the local law

²⁶ *Id.* at 21.

²⁷ *Id.* at 21-22.

²⁸ *Id.* at 22.

²⁹ *Id.*

³⁰ *Id.* at 22-23.

defense rarely arises in practice, as written laws and regulations of countries seldom permit corrupt payments. The absence of written laws in a foreign country and the fact that bribes may not be prosecuted under local law is not sufficient to satisfy the local law defense.³¹

The Reasonable and Bona Fide Business Expenditure Defense

The DOJ and SEC recognize that both foreign and domestic businesses may pay for legitimate and reasonable expenses, such as providing travel and lodging expenses to a foreign official, if such expenses are directly related to the promotion of the business's products and services, for training, or for the performance of a contract with a foreign government or agency. However, trips that are primarily for personal entertainment purposes are not considered bona fide business expenses and may violate the FCPA anti-bribery provisions.³²

However, whether a particular expenditure is considered bona fide requires a fact-specific analysis. The following is non-exhaustive list of safeguards, provided by the Guide, to help businesses evaluate whether a particular payment is legitimate or whether such payment may risk violating the FCPA:

- Do not select the specific officials who will join in a proposed trip or program, or else select them based on pre-determined, merit-based criteria.
- Pay directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt.
- Do not advance money or pay for reimbursements in cash.
- Make sure that payments are reasonable estimates of costs likely to be incurred.
- Do not condition payment of expenses on any action by the foreign official.³³

Facilitating Payments

The FCPA contains a narrow exception for facilitating or expediting payments made in furtherance of a routine government action. Routine

governmental actions include processing visas, providing mail service, supplying police protection, and offering utilities like phone service, power, and water. Routine governmental actions do not include decisions to award new business or continue business, or anything else that involves an official's discretion or that could be a misuse of the official's position. The facilitating payments exception applies only to routine government actions that involve non-discretionary acts.³⁴

The Guide cautions that although true facilitating payments may not violate the FCPA, they may still be illegal under local law in the countries where the company operates. Other countries' foreign bribery laws, such as the United Kingdom, may not contain a facilitating payments exception.³⁵

Coercion

The Guide makes clear that payments made as a result of duress or extortion, particularly payments made to foreign officials in response to imminent threat of physical are not considered facilitating payments and are not violations of the anti-bribery provisions. Payments made under these circumstances are not made with the "corrupt intent or for the purpose of obtaining or retaining business."³⁶

PRINCIPLES OF CORPORATE LIABILITY FOR ANTI-BRIBERY VIOLATIONS

Corporate liability principles apply to the FCPA. A company is liable where its "directors, officers, employees, or agents, acting within the scope of their employment, commit FCPA violations intended, at least in part, to benefit the company."³⁷

Parent-Subsidiary Liability

The Guide states that a parent can be liable for the conduct of its subsidiaries (1) directly, when it participates in the illegal conduct, or (2) indirectly, when the subsidiary is an agent of the parent.³⁸ The DOJ and SEC evaluate the parent's control when determining whether the subsidiary is an agent of the

³¹ *Id.* at 23.

³² *Id.* at 24.

³³ *Id.*

³⁴ *Id.* at 25.

³⁵ *Id.*

³⁶ *Id.* at 27.

³⁷ *Id.*

³⁸ *Id.*

parent, including “the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction.”³⁹ If an agency relationship exists under this evaluation, a subsidiary’s actions and knowledge are attributed to the parent company.⁴⁰

The Guide also highlights that under the doctrine of *respondeat superior*, the government may impose liability on an employer for the acts of its employees that are “undertaken within the scope of their employment and intended, at least in part, to benefit the company.”⁴¹ Thus, if an agency relationship exists between a parent company and its subsidiary, the parent company is also liable for any bribery committed by the subsidiary’s employees.⁴²

Successor Liability

Generally, when a company merges with or acquires another company, the successor company assumes the predecessor company’s liabilities.⁴³ This successor liability applies to both civil and criminal liabilities, including FCPA violations. However, successor liability does not create liability where none existed before.⁴⁴ For example, if an issuer buys a foreign company that was not previously subject to the FCPA’s jurisdiction, the mere acquisition of that company would not retroactively create FCPA liability for the acquiring issuer.⁴⁵

The DOJ and SEC encourage acquiring companies to conduct thorough due diligence, take appropriate remedial actions (such as dismissing the individuals responsible for violations), integrate the acquired company into a strong and effective compliance program, and voluntarily disclose any FCPA violations uncovered during due diligence to the government.⁴⁶ The Guide notes that the DOJ and SEC have declined to bring enforcement actions against “companies who voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context.” The Guide further observes that DOJ and SEC have taken

action against successor companies only in limited situations, particularly where there were “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.”⁴⁷

The Guide also indicates that although the DOJ and SEC may decline to bring action against a successor company (if the acquiring company took actions to decrease the likelihood of enforcement including due diligence, disclosure and remedial action), they may still bring action against a predecessor company where the acquiring company uncovered FCPA violations in pre-acquisition or post-acquisition due diligence.⁴⁸

Where pre-acquisition due diligence is not possible, a successor company can decrease the likelihood of an enforcement action through appropriate post-acquisition due diligence, implementation of an effective compliance program, and voluntary disclosure.⁴⁹ The Guide also says that where pre-acquisition due diligence is severely limited, the companies may request an Opinion from the DOJ. However, such a request involves demanding standards and a rigid time frame in return for certain assurances by the DOJ concerning prospective conduct, which is also honored by the SEC.⁵⁰

GUIDING PRINCIPLES OF ENFORCEMENT

The Guide offers insight into the factors that the government considers when determining whether to pursue any actions against an organization.

The DOJ considers nine factors when conducting an investigation, determining whether to bring action against a company, and negotiating pleas or agreements: (1) the nature and seriousness of the offense; (2) the pervasiveness of misconduct within the corporation; (3) the corporation’s history of similar wrongdoing; (4) the corporation’s prompt and voluntary disclosure of wrongdoing and its willingness to cooperate with the investigation; (5) existence and effectiveness of the corporation’s compliance program; (6) the corporation’s remedial actions, including improving compliance program

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 28.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 28-30.

⁴⁷ *Id.* at 28.

⁴⁸ *Id.* at 28-30.

⁴⁹ *Id.* at 30.

⁵⁰ *Id.* at 29.

and disciplining or terminating wrongdoers; (7) collateral consequences; (8) adequacy of the prosecution of responsible parties; and (9) adequacy of remedies such as civil enforcement actions.⁵¹

The SEC also considers a number of factors in determining whether to bring an enforcement action or open an investigation, including: (1) the egregiousness of the potential violation; (2) whether the conduct is ongoing; (3) whether the conduct can be investigated efficiently within the limitations period; (4) the potential magnitude of the violation; and (5) whether other authorities might be better suited to investigate the conduct.⁵²

While the underlying conduct in an FCPA investigation is fundamental to the consideration in whether any action will be taken by the DOJ or SEC, the Guide notes that the DOJ and SEC place “a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”⁵³

HALLMARKS OF AN EFFECTIVE COMPLIANCE PROGRAM

In an international marketplace, an effective compliance program is critical to a company’s internal controls and vital to preventing and detecting FCPA violations. As the Guide states, “there is no one-size-fits-all” compliance program, as individual companies may have different compliance needs

based on their size and the particular risks associated with their businesses.⁵⁴ The Guide stresses that companies should not use general “check-the-box” programs, but should instead shape the program to the company’s particular needs, risks, and challenges.⁵⁵

While the DOJ and SEC have no formulaic requirements regarding compliance programs, the Guide identifies the hallmarks of an effective compliance program as: (1) commitment from senior management and a clearly articulated policy against corruption; (2) code of conduct and compliance policies and procedures; (3) oversight of the compliance program by senior executives who have autonomy from management, appropriate authority within the organization, and sufficient resources to ensure that the compliance program is effectively implemented; (4) a comprehensive risk assessment process; (5) effective communication of the compliance policies throughout the organization through training and continued advice; (6) implementation of the program through the use of incentives and clear disciplinary measures; (7) risk-based due diligence and ongoing monitoring of third-party partners; (8) effective confidential reporting and internal investigation processes; (9) continuous improvement through periodic testing and review of the compliance program; and (10) pre-acquisition due diligence and post-acquisition integration in the mergers and acquisitions context.⁵⁶

⁵¹ *Id.* at 53.

⁵² *Id.*

⁵³ *Id.* at 54.

⁵⁴ *Id.* at 57.

⁵⁵ *Id.*

⁵⁶ *Id.* at 57-62.

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