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Client Alert

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Inside the U.S. Government's Highly-Anticipated FCPA Resource Guide

By Paul J. McNulty, Joan E. Meyer, Robert W. Kent, Jr., John P. Cunningham, Crystal R. Jezierski, Peter B. Andres, and Erica C. Spencer

On November 14, 2012, a new Resource Guide to the U.S. Foreign Corrupt Practices Act ("Guidance") was issued by the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). The Guidance presents a comprehensive review of the government's enforcement positions and expectations for corporate compliance programs. While it is a must-read for U.S. FCPA practitioners and compliance officers who deal with corruption issues, the Guidance breaks little new ground analytically and, for the most part, seems to reaffirm prior pronouncements and policy positions contained in the government's speeches and legal briefs. The Guidance lacks clarity on some important issues that needed to be addressed, such as criminal and civil distinctions in assessing parent-subsidiary liability. On the positive side, however, it gives some additional, important detail on best practices in developing and maintaining a compliance program. These details, set forth primarily in hypothetical examples inserted throughout the Guidance, provide useful assistance to companies grappling day-to-day with the challenges of creating, implementing, and enforcing a robust corporate compliance program.

In this client alert, Baker & McKenzie provides a short synopsis of some of the most important provisions of this ten chapter, 120 page document. This is intended to be a summary of the high points with additional analysis to be provided later in a supplemental report.

Chapter 1: Introduction

The Costs of Corruption

In its introduction, the Guidance highlights the significant costs of corruption to national economies and governments, as well as individual businesses and industries. Corruption diverts resources from public services like health, education, and infrastructure, which impedes economic growth. Where corruption goes unchecked, it undermines democratic values, weakens the rule of law, and threatens stability by facilitating criminal activity. International corruption impedes efforts to promote democracy and end poverty and terrorism. Corruption also harms business because it is anti-competitive, disadvantages honest dealers, increases the cost of doing business, and introduces significant uncertainty into business transactions. Within a business, corruption undermines employee confidence and creates an environment that encourages self-dealing, embezzlement, fraud, and anti-competitive behavior. Thus, bribery and corruption significantly undermine the long-term interests of businesses and governments.

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Chapter 2: The FCPA: Anti-Bribery Provisions

Who Is Covered by the Anti-Bribery Provisions?

The substance of the Guidance in this Chapter begins by reaffirming the categories of persons and entities that are subject to the jurisdiction of the FCPA and setting forth definitions found in the statute. The FCPA's anti-bribery provisions apply to "issuers," "domestic concerns," and certain persons or entities acting while in U.S. territory. An "issuer" is defined as any foreign or domestic company listing a class of securities on a U.S. national exchange, any foreign or domestic company with a class of securities quoted in the U.S. over-the-counter market and required to file periodic SEC reports, and any foreign company with American Depositary Receipts that are listed on a U.S. exchange. The government notes that, as of December 31, 2011, 965 foreign companies were registered with the SEC. A "domestic concern" is a U.S. citizen, national, or resident, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the law of the U.S. or a state, territory, possession, or commonwealth thereof, or with a principal place of business in the U.S. FCPA anti-bribery provisions also apply to foreign persons and entities that engage in any act in furtherance of a corrupt payment, either directly or through an agent, while in the territory of the U.S. The FCPA anti-bribery provisions also cover officers, directors, employees, agents, and stockholders acting on behalf of covered persons or entities. A co-conspirator of those covered by these provisions may also be prosecuted.

What Jurisdictional Conduct Triggers the Anti-Bribery Provisions?

Issuers and domestic concerns may be prosecuted under the FCPA for using the U.S. mail or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. Interstate commerce is defined as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof." The term also covers *intrastate* use of interstate instrumentalities. The Guidance explains that the anti-bribery provisions can be triggered by a telephone call, email, text message, or fax to or through the U.S., as well as a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across a state border or internationally to or from the U.S. This broad language seems to confirm indirectly the use of correspondent bank accounts as a basis for jurisdiction. The FCPA also covers any person or entity who engages in any act in furtherance of a corrupt payment while in the U.S. territory, regardless of whether they use the U.S. mail or a means or instrumentality of interstate commerce. In addition, the Guidance highlights 1998 amendments that removed the requirement of the use of interstate commerce for acts in furtherance of a corrupt payment by U.S. individuals or entities when outside the U.S.

The Business Purpose Test

The Guidance reminds companies that the FCPA applies not only to those corrupt payments made to obtain or retain business, but also to payments made to gain a business advantage. It cites the Fifth Circuit in *United States v. Kay* for the proposition that the FCPA covers a wider scope of payments that includes bribery paid to improve business opportunities, irrespective of whether the bribe applies to a specific action such as the execution of an agreement or an award of a contract. Therefore, bribe payments for favorable tax treatments, to eliminate customs duties, to drive a competitor from entering a market, or to circumvent a licensing requirement will satisfy the business purpose test even if they are not directly related to the award of specific business.

What do “Corruptly” and “Willfully” Mean?

To violate the FCPA, a payment to a government official must be made “corruptly,” which means that the payor must have an intent or desire to wrongfully induce the recipient to misuse his official position. The corrupt act does not have to succeed. The bribe payor may still be liable if the foreign official does not actually accept or receive the corrupt payment. As long as an offer, promise, or authorization for a corrupt payment is made, the actor does not even need to know the identity of the recipient. An attempt is sufficient to establish liability. Thus, if an executive authorizes a payment by saying “pay whoever you need to in order” to obtain a government contract, a violation occurred even if no bribe is ultimately paid.

Also, the Guidance affirms that, in order for a defendant to be criminally liable under the FCPA, he or she must act willfully. While this term is not defined in the FCPA, the DOJ and SEC explain that it requires a defendant to know that he is committing an act for a “bad purpose” and in violation of the law. The Guidance cites to decisions from the U.S. Courts of Appeals for the Second and Fifth Circuits to support the proposition that it is not necessary that the government prove the defendant is either aware of the FCPA or specifically knows that he is violating the FCPA in order to establish criminal liability.

Gifts, Travel, and Entertainment

The Guidance acknowledges Congress’ recognition in enacting the FCPA that bribes come in many forms – beyond mere cash, for example. Therefore, for purposes of statutory interpretation, the FCPA’s reference to “anything of value” in its anti-bribery provisions includes other items of value, such as gifts, travel, and entertainment. According to the DOJ and SEC, these three “hospitality” expenses are frequently used by companies (and their employees and agents) to bribe foreign officials. To constitute a bribe under the FCPA, each requires that the giver have corrupt intent—this, according to the Guidance, “protects companies that engage in the ordinary and legitimate promotion of their businesses while targeting conduct that seeks to improperly induce officials into misusing their positions.”

Indeed, the Guidance states that it is unlikely that the provision of a cup of coffee, taxi fare, or nominal company promotional item, for example, would “ever evidence corrupt intent.” As a result, small gift expenditures are rarely pursued by U.S. regulators except where they are part of an extended pattern of conduct indicating an arrangement to corruptly influence foreign officials to obtain (or retain) business. In contrast, the Guidance indicates that lavish gifts and/or entertainment expenses are “more likely” to indicate an improper purpose and, thus, create potential FCPA liability. The Guidance encourages companies to develop “easily accessible” gift and entertainment guidelines and consider automated approval processes with “clear monetary thresholds” for such expenses—along with annual restrictions, and limited above-threshold exceptions (that require managerial approval).

Who is a Foreign Official?

The Guidance generally restates the positions that the government has taken in various proceedings as to the definition of "foreign official" in the FCPA and the application of that definition to foreign government "instrumentalities," such as state-owned or state-controlled entities. After outlining the common FCPA interpretation of "foreign officials" (i.e., officers or employees of a foreign government), the Guidance underscores the inclusion of "low-ranking employees and high-level officials alike" in the definition. It also points out, importantly, that the FCPA prohibits payments to foreign *officials* (i.e., individuals) rather than foreign *governments*. The Guidance then goes on to describe, in some detail, the government's position on the ownership and/or operational attributes that qualify an entity as an "instrumentality" of a foreign government for FCPA purposes.

The "instrumentality" analysis, according to the DOJ and SEC, is premised on a fact-specific evaluation of "an entity's *ownership, control, status, and function*." Referencing recent court opinions, the Guidance cites factors such as "degree of control," "level of financial support by the foreign state," and the "entity's provision of services to the jurisdiction's residents" as specific considerations that companies must account for in determining whether the entities they are conducting business with in foreign countries create heightened FCPA risk as state "instrumentalities." More intriguing, perhaps, is the government's assertion in the Guidance that, while no individual factor is dispositive of an entity's classification as a government "instrumentality," an entity is unlikely to qualify as an "instrumentality" when the foreign government's ownership in the entity's shares is less than 50 percent. The principal exception to this general rule, however, is where the foreign government, while perhaps only holding a minority ownership stake in the entity, maintains veto power and/or control over important operational decisions.

What Affirmative Defenses are Available?

The Guidance highlights the two well-established affirmative defenses contained in the FCPA, confirming that the defendant has the burden of proving both: (1) a payment that is lawful under the laws of the foreign country, or (2) money spent to promote, demonstrate, or explain a company's products or services, or perform a contractual obligation. With respect to the first defense, the government affirms in the Guidance that the payment must be permissible under the *written* laws and/or regulations of the foreign country at the time of the offense. Therefore, a country's customary or unwritten practices, including "the fact that bribes may [simply] not be prosecuted under local law," are inadequate to establish the defense. Furthermore, the Guidance emphasizes the infrequent application of the "local law" defense, given that the written laws and regulations of foreign nations seldom allow corrupt payments.

With respect to the second affirmative defense, the interpretation in the Guidance focuses on the importance of a company's ability to distinguish between trips "primarily for personal entertainment," which could very well violate the FCPA's anti-bribery provisions, and "reasonable" hospitality expenditures that are legitimately associated with the promotion of a company's products and services. Regarding "reasonable" expenses, the government references prior DOJ FCPA opinion releases wherein it lists various categories of expenditures that did not warrant FCPA enforcement, including travel to visit a company's facilities, expenses for training, and expenses for business meetings. In addition, the Guidance lists several additional "safeguards" for companies to consider in evaluating whether a certain disbursement is a bona fide business expense, such as the importance of paying costs directly to travel and hospitality vendors (rather than the foreign official), the avoidance of cash reimbursement payments, and obtaining written confirmation that the expense is not contrary to local law.

How are Payments to Third Parties Treated?

While acknowledging the frequent business necessity for engaging third parties in foreign countries, the Guidance cautions readers about the criminal and civil liability risks involved with engaging third parties. To illustrate the lack of insulation from liability that third parties provide, the Guidance cites to several recent corporate resolutions involving different types of third-party arrangements that resulted in significant monetary penalties. Included in the litany of enforcement actions involving third parties, with total sanctions of approximately USD $2 billion, are cases involving agents of a joint venture involved in the Nigerian "Bonny Island" matter, a distributor of AGA Medical, an agent of Innospec in Iraq, and the Panalpina freight forwarding matters where the U.S. subsidiary of a Swiss company was an "agent" of several U.S. issuers and was thus charged directly with violating the FCPA.

The Guidance emphasizes the requisite level of knowledge to find liability for the acts of third parties. In laying out the applicable "knowledge" standard, the Guidance hews closely to the statute and its legislative history, making clear, through lengthy quotations, that liability may apply for both actual knowledge of wrongdoing and purposeful avoidance of actual knowledge. Because the FCPA covers the "willful blindness" (or "deliberate indifference"/"head-in-the-sand") problem, the Guidance points out that an important aspect of any knowledge standard analysis involves red flags that, if consciously avoided, can provide the basis for forming criminal knowledge of corruption-related activity. To this end, the Guidance sets out eight red flags commonly associated with third parties that generally relate to potential concerns with payment terms, scope of services, and government official relationships.

Notably, however, in discussing the FCPA's "knowledge" standard in this section of the Guidance, the DOJ and SEC omit any reference in the text to a recent influential U.S. Supreme Court opinion that, while civil in nature, definitively addresses the scope of the criminal "willful blindness" doctrine. In that case, *Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court opined that, in order for "willful blindness" to attach, the defendant must (1) subjectively believe that there is a high probability that a fact exists, *and* (2) take deliberate actions to avoid learning of that fact. This direction provided by the *Global-Tech* Court on "willful blindness," while dicta, effectively narrows the scope of the doctrine and should have implications for FCPA matters involving the question of "deliberate indifference."

Facilitating Payments

The Guidance continues to narrow the application of the facilitating payments exception. It reasserts the well-recognized definition that such payments are statutorily limited to routine government actions involving non-discretionary acts of government officials. Whether the payment can properly be characterized as a facilitating payment does not depend on its size, but rather on the purpose of the payment. The Guidance cites examples of cases in which the payment was deemed a bribe, and not a facilitating payment, where the purpose of the payment was to clear goods, avoid inspection, or reduce or eliminate customs duties – rather than merely expedite a routine, non-discretionary government action. Moreover, the Guidance clearly discourages the use of these payments even if the exception is properly invoked. It notes that the payments violate local law in most countries, violate the UK Bribery Act, and that the U.S. has discouraged their use regularly pursuant to the recommendations of the OECD's Working Group on Bribery.

Payments Made Under Duress

The Guidance also provides express direction to those who face "true extortionate demands" under the threat of imminent physical harm. It notes that payments made under extortion or duress will not give rise to FCPA liability because there is no corrupt intent for the purpose of obtaining or retaining business. The Guidance recognizes that businesses often operate in high-risk countries and they may face real threats of violence or harm to their employees. If an individual is subject to the threat of imminent harm, any payment made is truly compelled. However, the government emphasizes that these payments are limited in scope and distinguishes a safety threat from a threat of "mere *economic* coercion." Citing *U.S. v. Kozeny*, the government notes that payments made as a price for gaining entry into a market or obtaining a contract do not constitute payments made under duress because, in those situations, the bribe payor "could have turned his back and walked away," while one who is physically threatened cannot.

Parent-Subsidiary Liability

The Guidance's treatment of parent-subsidiary liability does not provide a distinction between civil and criminal law. The Guidance notes that a parent may be liable for bribes paid by a subsidiary if a parent participated sufficiently in the activity to be directly liable, or if the parent sufficiently controlled the subsidiary to be liable under traditional agency principles. The DOJ and SEC state that they look at the relationship between the entities both generally and in the context of the transaction, including consideration of the parent's knowledge and direction of the subsidiary's actions.

The Guidance also states that a subsidiary's actions and knowledge are imputed to the parent if an agency relationship exists. This position is likely to face considerable scrutiny, as the Guidance cites to a case that does not clearly support the proposition that an agency relationship alone can impute criminal liability from a subsidiary to a parent corporation. The Guidance also states that, under the theory of *respondeat superior*, a company is liable for the acts of agents within the scope of their employment and intended, at least in part, to benefit the company. The Guidance concludes that a parent is liable for bribery by a subsidiary's employees where an agency relationship exists between a parent and a subsidiary.

There has been much debate, however, about the reach of *respondeat superior* liability and whether a parent company can be held criminally liable under that concept for the actions of the *subsidiary's* employee. The Guidance cites an example in the SEC civil enforcement context in which the SEC held a parent company liable, deeming it had sufficient knowledge and control of its subsidiary's actions. In that case, the president of the company's wholly-owned subsidiary, who reported directly to the Chief Executive Officer ("CEO") of the parent and was identified as a member of the parent's senior management in annual SEC filings, paid bribes. The Guidance also notes that the parent's legal department approved use of the third-party agent, which facilitated the bribes, despite insufficient due diligence and in spite of an agency agreement that clearly violated corporate policy. Additionally, an official of the parent actually approved one of the payments to the agent.

Successor Liability

The Guidance reaffirms that, in general, successor companies assume the liabilities of their predecessor companies after merger or acquisition. The DOJ and SEC stressed that pre-acquisition due diligence is encouraged because (1) it allows accurate valuation of a target, (2) reduces the risk that an acquired company will pay bribes post-acquisition, (3) increases the efficiency by which parties can negotiate costs associated with investigating and remediating conduct, and (4) demonstrates a company's commitment to complying with the law. The Guidance discusses instances in which the DOJ and SEC have declined to take action against companies that voluntarily disclosed and remedied covered conduct in the merger and acquisition context.

The DOJ and SEC also state that they take action against successor companies in "limited" contexts, involving "egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct." The DOJ and SEC note that they have confined liability to the predecessor company, particularly where the acquiring company uncovered and remedied violations or where the government's investigation of the predecessor occurred pre-acquisition. In a cited example, the company discovered violations by its target during due diligence and disclosed them prior to the merger. The DOJ and SEC also mention that they have confined liability to a predecessor where FCPA violations were discovered post-acquisition. In the cited example, the successor company disclosed the violations, conducted an internal investigation, cooperated fully, and took remedial action.

The Guidance also discusses instances in which successors have been granted assurances that they will not be the subject of an enforcement action. In one instance, a successor company gained the certainty of conditional release from criminal liability through signing a deferred prosecution agreement including a commitment to cooperation and improved compliance. Only the predecessor company was actually charged. In another example, after voluntary disclosure by the predecessor and successor, the predecessor resolved criminal liability through a non-prosecution agreement with the DOJ and a settlement with the SEC. The successor company completed the acquisition and entered into its own non-prosecution agreement with the DOJ, agreeing to ensure performance by the predecessor company. Factors weighing in favor of limiting liability for post-acquisition conduct to a predecessor company where pre-acquisition diligence was not possible include the following: voluntary disclosure by the successor; due diligence; and implementation of a compliance program.

Finally, the Guidance includes a special insert giving practical tips on FCPA risk in mergers and acquisitions. This insert is important because the DOJ seems to partially retract its aggressive stance in Opinion Procedure Release No. 08-02. That 2008 Opinion involved a request by Halliburton for direction regarding the acquisition of a UK company. The Guidance acknowledged that the acquirer in this opinion was severely limited in its pre-acquisition due diligence, so the DOJ necessarily had to "impose demanding standards and prescriptive time frames" to give the specific assurances that the acquirer sought. The Guidance asserts that an advisory opinion can be a "good way to address" the challenges of due diligence, but because of the nature of such an opinion "it will likely contain more stringent requirements than necessary in all circumstances."

It acknowledges that most acquisitions will typically not require the type of assurances it found necessary for that acquisition in 2008. As long as an acquirer: (1) conducts a thorough risk-based FCPA and anti-corruption due diligence on a potential acquisition; (2) ensures that the acquiring company's code of conduct and compliance policies apply as quickly as practicable to the newly-acquired or merged entity; (3) trains directors, officers, and employees and, where appropriate, agents and business partners on the FCPA; (4) conducts an FCPA-specific audit of the newly-acquired or merged businesses as quickly as practicable; and (5) discloses any corrupt payments discovered as part of its due diligence, the DOJ and SEC will give "meaningful credit to companies" and, in appropriate circumstances, may decline to prosecute. So while the merger-acquisition checklist the government expects remains stringent, the government does not appear as committed to the specific due diligence tasks and time frames found in Opinion Procedure Release No. 08-02.

Aiding and Abetting and Conspiracy

The Guidance affirms the well-established theories of conspiracy and aiding and abetting in the FCPA context, which form the cornerstone of a prosecutor's criminal charging authority. It advises that foreign nationals and companies can be liable for either aiding and abetting another to commit an FCPA violation, or as part of a conspiracy. For example, the DOJ notes that a foreign, non-issuer could be convicted if it conspired with a domestic concern to violate the FCPA. It could also be liable for the domestic concern's substantive violations under a theory that imposes liability for reasonably foreseeable crimes committed in the course of the conspiracy. Moreover, criminal conspiracy law is so broad that a foreign company or national may be liable even if they did not take an act in furtherance of the conspiracy while in the U.S., as long as one of their co-conspirators committed such an act.

With respect to civil actions, the SEC can bring an action for aiding and abetting an FCPA violation if the subject knowingly and recklessly provided assistance to a violator. In the administrative context, companies and individuals can be held liable for "causing" an FCPA violation, a theory of liability that has been held to extend to subsidiaries and agents of U.S. issuers.

Chapter 3: The FCPA: Accounting Provisions

The Guidance includes a section explaining the FCPA's accounting provisions noting, first and foremost, that they are primarily designed to "strengthen the accuracy of the corporate books and records and the reliability of the audit process which constitute the foundations of our system of corporate disclosure." Predictably, the Guidance divides its discussion of the accounting provisions by the two relevant sections in the statute—commonly referred to as "books and records" and "internal controls." There are no real surprises here. The Guidance begins by noting the applicability of the accounting provisions to "issuers" (as defined above in this Alert) and their consolidated subsidiaries and affiliates. It highlights the fact that many of the FCPA enforcement actions involving accounting improprieties relate to the mischaracterization of expenses in a company's books and records.

With specific respect to the "books and records" section of the FCPA, the Guidance stresses the importance of a company's commitment to reflecting the disposition of its assets in "reasonable detail." "Reasonable detail," according to the Guidance, is that level of detail that would "satisfy prudent officials in the conduct of their own affairs." The Guidance also notes that bribes "are often concealed under the guise of legitimate payments," including, but not limited to, commissions, consulting fees, petty cash withdrawals, and rebates. Finally, the DOJ and SEC point out that enforcement of the books and records section of the

FCPA often involves flagging a company's "misreporting" of significant bribe payments or, alternatively, inaccurate recording of smaller payments involving a "systemic" pattern of bribery.

Regarding "internal controls," the Guidance emphasizes the "reasonable assurances" requirement, and, as with the books and records section, describes this standard as the level of "detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." Importantly, the Guidance also affirms that the FCPA does *not* contain a specific set of controls that companies must implement to be FCPA-compliant. Instead, according to the Guidance, issuers have latitude to create, maintain, and manage a system of controls that is "appropriate to their particular needs and circumstances" and considers "operational realities and risks attendant to the company's business." As one might expect, DOJ and SEC state that a robust compliance program is a "critical component" of a company's internal controls. Also notable is the Guidance's confirmation that a parent company owning less than 50 percent of a subsidiary is only required to use its "best efforts" to cause the subsidiary to devise and maintain a system of internal accounting controls consistent with the issuer's own obligations.

Chapter 4: Other Related U.S. Laws

Broadly speaking, in this section, the Guidance confirms that conduct violating the FCPA can also violate the Travel Act, anti-money laundering statutes, and mail and wire fraud statutes. Such conduct may also constitute certification and reporting violations, and even tax violations.

Specifically, bribery involving commercial enterprises may trigger the Travel Act, and the DOJ has previously charged both individual and corporate defendants under both the Travel Act and the FCPA. The Guidance also highlights the fact that money laundering is a significant component of many FCPA cases. Indeed the DOJ has taken the position that FCPA violations are unlawful activities that may serve as predicate offenses under U.S. money laundering laws. Mail and wire fraud issues may also apply in an FCPA context based on the nature of the schemes used to disguise payments. Finally, certification and reporting violations can be present in corruption cases where, for example, false certifications are made to the U.S. government. Significantly, the Guidance notes that, even where all elements of an FCPA violation are not present, payments to foreign officials and intermediaries may violate these statutes.

Chapter 5: Guiding Principles of Enforcement

Enforcement and Self-Reporting

The Guidance breaks no new ground in articulating well-established charging principles of prosecution by the DOJ and SEC. It catalogues the corporate charging factors found in the U.S. Attorney's Manual that have been the subject of multiple memoranda of successive Deputy Attorneys General and cites to similarly well-established criteria in the SEC's Enforcement Manual. Not surprisingly, both the DOJ and SEC "place a high premium on self-reporting, cooperation and remedial efforts" in resolving an FCPA matter. The Guidance cites to the Principles of Federal Prosecution, the United States Sentencing Guidelines, the Seaboard Report, and the SEC's 2010 Cooperation Program for Individuals as its analytical framework for evaluating cooperation by companies and individuals for criminal and civil resolution. The section summarizes these sources without any elaboration, merely emphasizing that cooperation and timely disclosures are key to any analysis.

Corporate Compliance Program

The Guidance confirms that the adequacy of a company's anti-corruption compliance program will be taken into account when the DOJ and SEC consider what action, if any, to take against a company. This includes whether or not to resolve the matter through a deferred prosecution agreement ("DPA") or a non-prosecution agreement ("NPA"), the length of a DPA or NPA, or the term of corporate probation. The adequacy of a compliance program will also affect the penalty amount and whether a company is required to retain a monitor or submit regular reports to DOJ on the progress of any compliance program enhancements. The Guidance also points out that the DOJ and SEC may decline to pursue charges against a company based on the company's effective compliance program or may otherwise seek to reward a company for its program – even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.

While stating that there are "no formulaic requirements," the Guidance clarifies that, in evaluating a compliance program, the DOJ and SEC will address three basic questions:

- Is the company's compliance program well run?
- Is it being applied in good faith?
- Does it work well?

The Guidance then proceeds to discuss the "hallmarks of effective compliance programs":

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption – Clearly articulated company standards, communicated in unambiguous terms, adhered to "scrupulously" by senior management, and disseminated throughout the organization;
- Code of Conduct and Compliance Policies and Procedures – Code of Conduct remains current and effective and is periodically reviewed and updated; policies and procedures should be based on the size and nature of the business and its associated risks;
- Oversight, Autonomy, and Resources – At least one senior executive with adequate autonomy from management, sufficient resources, and direct access to the organization's governing body such as the Board of Directors or its committees;
- Risk Assessment – Company analyzes and addresses the particular risks it faces;
- Training and Continuing Advice – Training includes company policies and procedures, instruction on applicable laws, and practical advice, presented in manner appropriate for targeted audience including in local language when appropriate; provision of guidance and advice on complying with the company's compliance program;

- Incentives and Disciplinary Measures – Clear disciplinary procedures, reliably and promptly applied, and commensurate with the violation; incentives such as personnel evaluations and promotions, rewards for improving a developing company's compliance program, and rewards for ethics and compliance leadership;

- Third-Party Due Diligence and Payments – Understand the qualifications and associations of third-party partners and increase scrutiny as red flags surface; understand business rationale for including a third party in transaction; consider inclusion of contract terms; ongoing monitoring of third-party relationships including periodic due diligence updates, exercising auditing rights, periodic training of third parties and annual compliance certifications; informing third parties of the company's compliance program and commitment to ethical and lawful business practices;

- Confidential Reporting and Internal Investigation – Confidential reporting process with anti-retaliation policy; incorporate any "lessons learned" from reported violations;

- Continuous Improvement: Periodic Testing and Review – Review and test controls and assess potential weaknesses and risk areas;

- Mergers and Acquisitions (Pre-Acquisition Due Diligence and Post-Acquisition Integration) – FCPA due diligence on acquisition targets.

Chapter 6: FCPA Penalties, Sanctions and Remedies

Collateral Consequences

The Guidance broadly addresses the significant collateral risks associated with FCPA violations and the potential for collateral penalties with other U.S. agencies and multilateral banks. These include suspension or debarment from procurement with the U.S. federal government, cross-debarment by multilateral development banks, and the loss of U.S. export privileges.

Authorized by the federal guidelines governing procurement, debarment can be a particularly debilitating sanction. Although the DOJ may be consulted, the ultimate decision about whether to debar or suspend a company from doing business with the federal government is discretionary and one made by independent debarment authorities within the individual U.S. federal agencies (e.g., Department of Defense). If cause for debarment does indeed exist, the Guidance explains that the contractor has the burden of demonstrating that it is "presently responsible and that debarment is not necessary." Moreover, if one agency debars or suspends a contractor, the sanction may apply to the entire executive branch of the federal government. Likewise, multilateral banks have the capacity to debar companies for certain improprieties relating to corruption, based on each bank's individual criteria for assessing the alleged corruption in connection with funded projects. And finally, FCPA violations can lead to other regulatory consequences, most notably the suspension, revocation, or denial of export licenses under the authority of the Arms Export Control Act and/or the International Traffic in Arms Regulations.

Corporate Monitors

The Guidance also acknowledges that the appointment of a corporate monitor is not appropriate in all circumstances, but may be required where a company does not have an effective compliance program. In addition, companies may be allowed to self-report, but, according to the DOJ and SEC, that is typically in instances where the company has made a voluntary disclosure, been fully cooperative, and has demonstrated a genuine commitment to reform.

Chapter 7: Resolutions

The Different Types of Resolutions with DOJ and SEC

The Guidance lays out the well-established means of resolving FCPA matters with the DOJ, including plea agreements, DPAs, NPAs, and declinations. Notably, the possibility of a trial in an FCPA matter is acknowledged, but not discussed. The SEC has additional resolution options, including civil injunctive action, civil administrative actions, DPAs, NPAs, and declinations. Little information is provided beyond the mechanics of the resolution mechanisms.

Although not generally publicized, the DOJ and SEC have provided six examples of recent declinations in FCPA matters, made anonymous for the Guidance. The DOJ relies extensively on the Principles of Federal Prosecution and Principles of Federal Prosecution of Business Organizations for describing the considerations used in reaching a declination decision. The SEC applies the principles set out in the SEC Enforcement Manual when making an analogous declination decision.

Chapter 8: Whistleblower Provisions and Protections

The Guidance highlights Sarbanes-Oxley's prohibition against retaliation against whistleblowers, the Dodd-Frank Act's incentives and protections for whistleblowers, and the SEC's requirements for whistleblowers to be eligible for awards and how such awards are calculated, which are articulated in the August 12, 2011 final rules for the SEC's Whistleblower Program. The Guidance also provides instructions on how to report FCPA violations.

Chapter 9: DOJ Opinion Procedure

The Guidance defends the DOJ's FCPA advisory opinion procedure as a "valuable mechanism" for companies and individuals to determine whether proposed conduct would be prosecuted. Under this process, the parties submit information to the DOJ and the DOJ, in turn, will issue an opinion about whether the conduct would be prosecuted. As a threshold matter, the conduct at issue must be actual and prospective, not historical or hypothetical. Second, the company or individual must be an issuer or domestic concern as only those two categories are entitled to an opinion. Third, the request must be in writing and include all material and relevant information for which an opinion is requested. Fourth, the request must be signed and, if submitted for a company, the signatory should be the senior officer with operational responsibility for the conduct that is the subject of the request. In some circumstances, the DOJ may require the CEO to sign the request. Finally, the Guidance informs the requester as to how the request should be transmitted. The DOJ will then issue an opinion in 30 days, which will deal with the matters detailed in the request. (The DOJ may also take other positions in the opinion, as it considers appropriate.) To the extent the DOJ concludes in its opinion that the conduct does not constitute a violation, a rebuttable presumption is created that the requester's conduct is in compliance with the FCPA. The Guidance does not provide further detail regarding this little-used procedure.

Conclusion

For the most part, the Guidance does not provide any significant, new details regarding the application and enforcement of the FCPA. The most important and positive takeaway, however, is that the Guidance underscores the importance of an effective compliance program for global companies.

The Guidance acknowledges that individual companies have different compliance needs depending on their size and the particular risks associated with their businesses and that they will change over time as companies and markets evolve and change. The government expressly recognizes that a company may not prevent every single violation and acknowledges that the discovery of a violation does not mean that a compliance program was not effective. If a compliance program is carefully and thoughtfully constructed under the parameters found in this Guidance, the DOJ and SEC will clearly and substantially credit that effort in deciding what action to take. Also, when a company does have to disclose a violation, the efficacy of a compliance program will often determine the type and length of the agreement required by the government and whether a monitor is required, as well as the size of any penalty.

The Guidance expressly states that in appropriate circumstances the DOJ and SEC may actually decline to pursue charges based on a company's effective compliance program, as they did recently in the case of Morgan Stanley, or may otherwise reward a company for its program, even when the company did not prevent the particular underlying FCPA violation that gave rise to the investigation. Companies that do not continually monitor or enhance their programs, or those that employ a "check the box" or "one size fits all" approach, take the risk that when a problem does occur, it will prove to be much more expensive in the long run. With the additional specific detail provided in this Guidance, companies should now take the opportunity to reexamine their current compliance programs, consider any appropriate enhancements, and make certain that their programs continue to evolve.