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FCPA Alert

Justice Department & SEC Release New Foreign Corrupt Practices Act Guidance

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On November 14, 2012, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) released the agencies' highly-anticipated new guidance on the Foreign Corrupt Practices Act (FCPA), a 120-page *Resource Guide* (the Guide) compiling lessons from past case law and DOJ-issued Opinion Releases, and offering a view into the reasoning of federal criminal prosecutors and SEC enforcement attorneys behind FCPA case resolution. Read the Guide here. The Guide replaces the previously-available *Lay Person's Guide*, which provided guidance only regarding the anti-bribery provisions, and for the first time provides guidance on the so-called "accounting provisions" in the statute.

Through explanation, examples, hypotheticals and anonymized case studies from recent corporate declinations of prosecution, the Guide summarizes established principles of FCPA prosecution, but also offers some new thinking, particularly in the area of corporate compliance:

- **Accounting provisions.** The Guide dedicates a chapter to the applicability and requirements of the accounting provisions, which require U.S. issuers and SEC-reporting companies, their subsidiaries and affiliates to maintain: (1) books and records that accurately and fairly reflect the transactions of the corporation and (2) adequate internal accounting controls. Significantly, the Guide provides that "[i]n instances where all the elements of a violation of the anti-bribery provisions are not met – where, for example, there was no use of interstate commerce – companies nonetheless may be liable if the improper payments are inaccurately recorded." In other words, the accounting provisions may be a fall-back position for prosecutors and enforcement attorneys who do not have sufficient evidence to pursue a company for anti-bribery violations.

  Significantly, companies facing enforcement under the accounting provisions face more severe penalties than for violations of the anti-bribery provisions – fines up to $25 million per accounting violation versus $2 million per anti-bribery violation. Individuals who violate the accounting provisions face similar increased penalties – 20 years imprisonment and a $5 million fine versus five years and a $100,000 fine per violation.

- **Parent/subsidiary/successor liability**. Offering extensive explanation and six hypothetical scenarios, the Guide helps clarify prosecutors' and enforcement attorneys' thinking regarding this complicated area of elevated risk for companies. The Guide explains that a corporate parent may be directly liable for violations of the FCPA, but may also incur liability for its subsidiary's acts or the acts of the subsidiary's employees where the parent exercises control over the subsidiary.

  In the merger or acquisition context, the successor company will assume the predecessor's FCPA liability, although the corporate combination will not create liability "where none existed before." By way of example, the Guide states that a U.S. company's acquisition of a foreign company will not create U.S. enforcement jurisdiction over the foreign company's prior activity if the foreign company was not subject to U.S. jurisdiction at the time of the activity. The Guide explains that DOJ and SEC may pursue a predecessor company for FCPA violations, but generally will not pursue successor companies, even where the predecessor's conduct is not discovered until after the acquisition, unless there is involvement by the successor company in the violations. Most often, "when the acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition," DOJ and SEC have not pursued enforcement actions against the acquiring company.

- **Facilitating payments.** It is well-established that under the FCPA – unlike many other countries' anti-bribery laws, including the UK Bribery Act – payments to facilitate or expedite performance of a "routine governmental action" are permissible. The Guide outlines this exception to the anti-bribery prohibitions, provides examples of allowable routine payments and provides a hypothetical to illustrate the contours of the exception. For the first time, the Guide reveals that the inquiry focuses on the recipient official's level of discretion in taking the requested official action and explicitly states that payments "that are within an official's discretion" are disallowed. Accordingly, "paying an official a small amount to have the power turned on at a factory might be a facilitating payment; paying an inspector to ignore the fact that the company does not have a valid permit to operate the factory would not be a facilitating payment."

- **Hospitality.** The Guide includes a list of nine factors that DOJ and SEC consider when determining that a particular expenditure is a bona fide expenditure for (1) the promotion, demonstration, or explanation of products or services, or (2) the execution or performance of a contract. These factors are certain to assist corporate compliance officers or other employees charged with supervising these expenses and ensuring FCPA compliance in this area. The factors are drawn from a number of DOJ Opinion Releases and collected for easy reference for Guide users.

The FCPA, enacted in 1977, aims to prohibit bribery of foreign government officials by making it unlawful for persons and entities subject to the act's expansive jurisdiction to make corrupt payments to foreign officials to obtain or retain a business advantage or to direct business to any person. The FCPA's anti-bribery and accounting provisions work in tandem to prevent corruption and promote transparency. In recent years, both the DOJ and SEC have more aggressively enforced the act, initiating 48 enforcement actions in 2011, nearly a ten-fold increase from the five enforcement actions initiated in 2004. So far in 2012, the DOJ and SEC have initiated 21 enforcement actions.

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