haynesboone
Setting precedent.

Haynes and Boone's Newsroom

DOJ and SEC Release Long-Awaited FCPA Resource Guide

11/20/2012

Ronald W. Breaux, Kit Addleman, David Siegal, Emily Westridge Black

On November 14, 2012, the Department of Justice and the Securities and Exchange Commission released the much-anticipated Resource Guide to the U.S. Foreign Corrupt Practices Act (the "Guide" According to the Foreword, signed by the DOJ's Assistant Attorney General Lanny Breuer and the SE Director of Enforcement Robert Khuzami, the Guide is intended to be a desk reference for companies "all shapes and sizes" that provides "detailed information about our FCPA enforcement approach an priorities." However, the DOJ and SEC state that the Guide is "non-binding, informal, and summary ir nature" and "does not constitute rules or regulations."

In advance of the publication, there was much speculation about whether the DOJ and SEC would st back from what the Chamber of Commerce, among others, criticized as overly-aggressive interpretations of the FCPA statute. In particular, public companies hoped to see that the governmer would recognize a compliance-based defense like the UK Bribery Act's "adequate procedures" defen The SEC and DOJ have done neither and held firm on many controversial issues. Specifically, the agencies used the Guide to clarify and support their previously expressed positions – many of which have never been tested before a court. Nevertheless, the Guide is still significant because, as described below, it provides the clearest explanation to date of the enforcement approach and prosecution decisions by the DOJ and SEC. This lengthy Guide provides information on a number of areas of interest to companies seeking to ensure compliance with the FCPA:

- Definition of "foreign official:" The FCPA prohibits making or offering bribes to foreign officials, including "low ranking employees and high-level officials" of foreign government instrumentalities. Companies and lawyers alike have long been plagued by uncertainty about what entities qualify a instrumentalities – and the Guide does little to relieve the problem here. The DOJ and SEC reiterat that to determine whether a state-owned or partially state-owned enterprise qualifies as a government instrumentality requires a fact-specific determination. They offer a list of non-specific factors to consider, including the foreign state's extent of ownership, degree of control, and level financial support of the entity. They caution, however, that no one factor is dispositive. For examp although "an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares," it may if the government is a "special shareholder" or if most of th senior officers are political appointees.

- Permissible payments: The DOJ and SEC reiterated that the FCPA only prohibits payments given to foreign officials "in order to assist … in obtaining or retaining business." Although there is no statutory exception for *de minimis* payments, they concede in the Guide that it is "difficult to envis any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent." Other gifts may also be appropriate, dependin on the circumstances. A gift is likely to be permissible if it is (1) given openly and transparently, (2) properly recorded in the books and records, (3) provided only to reflect esteem or gratitude, a (4) permissible under local law.

  Also, facilitating payments – that is, small payments to ensure the performance of non-discretiona

duties – continue to be permissible under the FCPA. Examples of non-discretionary duties include issuing permits and licenses, processing governmental papers (*e.g.,* visas or work orders), or providing mail pickup or utility connections. However, the Guide cautions that facilitating payments may be prohibited by local laws or other global anti-corruption laws, such as the U.K. Bribery Act.

- Successor liability: Although some have argued that FCPA successor liability has chilled merger an acquisition activity, the DOJ and SEC made clear that, in their opinion, it is "an integral component corporate law" that "applies to all kinds of civil and criminal liabilities," including FCPA violations. Th tempered this stance by noting that they have never prosecuted an acquiring company for the pre acquisition conduct of an acquired company; they have, however, frequently targeted the acquire company post-acquisition. The Guide encouraged acquiring companies to conduct thorough FCPA d diligence on any potential targets, to promptly disclose FCPA concerns to the agencies, and to incorporate the acquired company into their control systems as quickly as possible after acquisitio are completed.

- Compliance Programs: The Guide emphasized that a company may reduce – or even escape – liab for FCPA violations by enacting a control system that is tailored to the risks the company faces. Companies are free to develop controls systems appropriate to their market and industry. The DO and SEC do not have specific controls requirements, but rather consider whether the compliance program (1) is well designed, (2) is applied in good faith, and (3) works. Primarily, the DOJ and SE look for compliance programs that are not a "one size fits all" package plan but are designed to address each company's primary risk areas. The Guide notes that "risk-based due diligence is particularly important with third parties." A company should only engage a third party if they understand the third party's qualifications and associations, there is a business justification for th relationship, and if they perform ongoing monitoring of the third party's work and competence.

- Self-Reporting: The Guide also stressed that when the DOJ and SEC consider whether to offer a company a negotiated resolution – or even a declination – they place a "high premium" on self-reporting violations and full cooperation in government investigations. Companies should be relie to know that, when assessing cooperation, prosecutors may not request attorney-client privilege materials unless (1) the company or one of its employees asserts an advice-of-counsel defense, o (2) the attorney-client communications were made in furtherance of the fraud.

Although the Guide does not change the FCPA enforcement landscape, it does provide important insight into the DOJ and SEC's interpretation of the specific provisions and their approaches to enforcement. Companies would be well advised to study it closely. A copy of the Guide can be found **here**.

Any of the counsel in Haynes and Boone's FCPA Group would be happy to discuss general guidance specific compliance concerns with you. For more information, please contact one of the Haynes and Boone attorneys below.

Ronald W. Breaux 214.651.5688 ron.breaux@haynesboone.com	Kit Addleman 214.651.5783 kit.addleman@haynesboone.com	David Siegal 212.659.4995 david.siegal@haynesboc
Alberto de la Pena 214.651.5618 alberto.delapena@haynesboone.com	Barry F. McNeil 214.651.5580 barry.mcneil@haynesboone.com	Bill Morrison 214.651.5018 bill.morrison@haynesboc
Bradley J. Richards 713.547.2028 brad.richards@haynesboone.com		Emily Westridge Bla 214.651.5221 emily.black@haynesboo