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Reprinted from Volume 36, Issue 7 of the *International Enforcement Law Reporter*

U.S. Department of Justice and Securities & Exchange Commission Issue 2nd Edition of FCPA Resource Guide

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On July 3, 2020, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released the 133-page *A Resource Guide to the U.S. Foreign Corrupt Practices Act (*hereafter "Guide*") (*Second Edition 2020).[1] The guide contains detailed information and analysis regarding the Foreign Corrupt Practices Act (FCPA) and related enforcement. Experts at the DOJ and SEC have worked extensively on the guide. Professionals at the Departments of Commerce and State have also contributed to the guide. The Guide tries to provide useful information to the public, including practitioners and enterprises of all shapes and sizes—from small businesses transacting abroad for the first time to multinational corporations with subsidiaries around the world.

Originally released in November 2012 and updated in July 2020, the Guide addresses a wide variety of topics, including who and what are covered by the FCPA's anti-bribery and accounting provisions; the definition of a "foreign official"; the jurisdictional reach of the FCPA; types of proper and improper payments; application of successor liability in the mergers and acquisitions context; the hallmarks of an effective corporate compliance program; and the different types of civil and criminal resolutions available in the FCPA context.

The Guide also has criteria considered by the DOJ and SEC when deciding to open an investigation or bring charges, such as inter alia voluntary self-disclosure, full cooperation, and timely and appropriate remediation, including implementation of an effective compliance and ethics program. The Guide provides detailed information about the statutory requirements for its investigations, as well as insight into DOJ and SEC enforcement policies and practices through hypotheticals, examples of enforcement actions and declinations, and summaries of applicable case law.

The second edition builds upon the original 2012 guide through several important developments in governmental guidance, relevant case law, and enforcement activity. The new material provides a definition for "foreign official" and delineates the scope of the SEC's disgorgement power, the scope of the term "agent" for assessing corporate liability, the statute of limitations applicable to violations of the accounting provisions, and the requirements for criminal violations of the books and records and internal controls provisions.

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[1] Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* Second Edition (2020) https://www.justice.gov/criminal-fraud/file/1292051/download.

The Anti-Bribery Provisions
The Prohibition of Gifts of "Anything of Value"

A top priority for companies is complying with the FCPA's prohibition on making 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. The Guide sets forth a framework to evaluate gifts, travel, and entertainment. It states: "(i)tems of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and, as a result, are not, without more, items that have resulted in enforcement action by DOJ or SEC."[2]

The Guide sets forth indicia of appropriate hospitality and gifts, such as accurately recording these expenses in its corporate books and records, implementing appropriate internal controls to monitor the provision, the purpose of the hospitality (e.g., visiting the factory or undergoing training vs. sightseeing jaunts for both the official and his or her family and enticing the official to award and/or continue a contract or benefit.)

The Guide advises an effective compliance program at a given corporation should include clear and easily accessible guidelines and processes for gift-giving by the company's directors, officers, employees, and agents. It cites approvingly the "automated gift-giving clearance processes" that many larger companies utilize. These programs have "clear monetary thresholds for gifts along with annual limitations, with limited exceptions for gifts approved by appropriate management."[3]

Affirmative Defenses
The Local Law Defense

To successfully interpose the local law defense requires a defendant to establish that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country."[4] The defendant must prove that the payment was lawful under the foreign country's written laws and regulations at the time of the offense. The Guide summarizes two cases in which defendants unsuccessfully tried to invoke the local law defense.

Reasonable and Bona Fide Expenditures

Under the FCPA, companies can provide reasonable and bona fide travel and lodging expenses to a foreign official. Companies have an affirmative defense where expenses are directly related to the promotion, demonstration, or explanation of a company's products or services, or are related to a company's execution or performance of a contract with a foreign government or agency.[5]

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[2] *Id.* at 14-15.

[3] *Id*. at 16.

[4] Section 30A(c)(1) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(1); 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

[5] Section 30A(c)(2)(A), (B) of the Exchange Act, 15 U.S.C. § 78dd-1(c)(2); 15 U.S.C. §§ 78dd-2(c)(2), 78dd-3(c)(2).

The Guide has ample hypotheticals and elements to consider. Are the trips primarily for personal entertainment purposes? If so, they are not bona fide business expenses and may run afoul of the FCPA's anti-bribery provisions. Are expenditures, bona fide or not, mischaracterized in a company's books and records? If unauthorized or improper expenditures occur due to a failure to implement adequate internal controls, they may also violate the FCPA's accounting provisions.[6]

The DOJ and SEC have long recognized that businesses may pay for reasonable expenses associated with the promotion of their products and services, or the execution of existing contracts. The DOJ has frequently provided guidance about legitimate promotional and contract-related expenses, addressing travel and lodging expenses through several opinion procedure releases. Whether any particular payment is a bona fide expenditure necessarily requires a fact-specific analysis. The Guide offers a non-exhaustive list of safeguards: select the officials to participate in a trip based on predetermined, merit-based criteria; pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt; do not use cash to advance funds or pay reimbursements; do not condition payment of expenses on any action by the foreign official; obtain written confirmation that payment of the expenses does not violate local law; furnish no additional money beyond what is necessary to pay for actual expenses incurred; and ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in the company's books and records.

The conclusion is that, while certain expenditures are more likely to raise red flags, they will not give rise to prosecution if they are: (1) reasonable, (2) bona fide and (3) directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract.[7]

Facilitating or Expediting Payments

The FCPA's bribery prohibition has a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action. The facilitating payments exception applies only when a payment is made to facilitate "routine governmental action" that involves non-discretionary acts. Examples of "routine governmental action" include processing visas, providing police protection or mail service, and furnishing utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party.[8] It does not include acts that are within an official's discretion or that would constitute misuse of an official's office.

Importantly, the UK Bribery Act 2010 does not make an exception for facilitation payments.

Books and Records Requirements

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[6] Guide, at 24.

[7] *Id*. at 25.

[8] Section 30A(f)(3)(B) of the Exchange Act, 15 U.S.C. § 78dd-1(f)(3)(B); 15 U.S.C. §§ 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

The "books and records" provision requires issuers to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."[9]

The Guide clarifies that a company's internal accounting controls are not synonymous with a company's compliance program, but effective compliance programs have components that may overlap with a critical element of an issuer's internal accounting controls.

The Guide states the need to record transactions with reasonable detail. It sets forth examples of bribes that were mischaracterized on a company's books and records. Such mischaracterizations could cover commissions or royalties, consulting fees, and sales and marketing expenses.

Corporate Compliance Program

In addition to considering whether a company has self-reported, cooperated, and taken appropriate remedial actions, the DOJ and SEC also consider the adequacy and effectiveness of a company's compliance program at the time of the misconduct and at the time of the resolution when they determine what, if any, action to take. In criminal resolutions, the compliance program considers three key areas of decision: (1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate, and the length and nature of any reporting obligations.)

The DOJ and SEC ask three basic questions when evaluating compliance programs: (1) is the company's compliance program well designed?; (2) is it applied in good faith (e.g., is the program adequately resourced and empowered to function effectively?); and (3) does it work in practice?

The Guide provides hallmarks of effective compliance programs. The compliance needs of companies depend on their size and the particular risks associated with their businesses, among other factors. There is no one-size-fits-all program. Therefore, compliance programs that employ a "check-the-box" approach may be inefficient and, more importantly, ineffective.[10]

FCPA compliance must start at the top. The DOJ and SEC evaluate whether senior management has clearly articulated company standards, communicated them well, adhered to them scrupulously, and disseminated them throughout the organization.[11]

FCPA compliance depends on the company's reviewing and updating its code to ensure that it is current and effective.

The evaluation of a compliance program considers whether a company has assigned responsibility for the oversight and implementation of a company's compliance program to one or more specific senior executives within an organization. Such executives must have appropriate authority within the organization, adequate autonomy from management, and sufficient resources to ensure that the company's compliance program is implemented

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[9] Section 13(b)(2)(A) of the Exchange Act (15 U.S.C. § 78m(b)(2)(A)). H.R. Rep. No. 94-831, at 10.

[10] Guide, at 58.

[11] *Id*. at 58-59.

effectively. Adequate autonomy generally includes direct access to an organization's governing authority, such as the board of directors and committees of the board of directors (e.g., the audit committee.)

The DOJ and SEC evaluate whether a company has taken steps to ensure that relevant policies and procedures are updated. These steps include periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners.

Assessment of risk is fundamental to developing a strong compliance program. The risk assessment and the compliance program must constantly evolve to reflect the changes to the company's business over time. Management should conduct a formal review of the program's effectiveness and remediate any weaknesses at least once a year.[12]

Analysis

The Guide provides a very readable and comprehensive guide to how the U.S. government interprets the FCPA. It contains all the latest cases, and law enforcement policies, such as the DOJ FCPA Corporate Enforcement Policy; Criminal Division's Evaluation of Corporate Compliance Programs; and the Selection of Monitors in Criminal Division matters. The reader can see the various components of policy guidance in one place. While the Guide has some anecdotal information on prior cases and declinations, it does not appear to set any new policies. It is well annotated, so that the reader can ascertain the precise basis for the guidance and find additional information. The DOJ and SEC state the Guide is "non-binding, informal, and summary in nature." Nevertheless, it will be a useful starting point for many practitioners and policy professionals. Following the June 1, 2020 issuance by the DOJ of its revision of its guidance on the Evaluation of Corporate Compliance Programs,[13] which also emphasizes the need to regularly reassess the risks to an entity and update the compliance program accordingly, companies may want to consider conducting the reassessment of both the overall compliance programs and especially its FCPA/anti-corruption component.

[12] Id. at 61-62.

[13] For the guidance, *see* https://www.justice.gov/criminal-fraud/page/file/937501/download.