



Updated Guidance on the U.S. Foreign Corrupt Practices Act

On Nov. 14, 2012, the Criminal Division of the U.S.

Department of Justice (DOJ) and the Enforcement Division of the U.S. Securities and Exchange Commission (SEC) jointly released *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the *FCPA Guide*).¹ The *FCPA Guide* describes how these agencies currently approach enforcement of the U.S. Foreign Corrupt Practices Act of 1977 (FCPA),² as amended. While this article provides an overview of certain aspects of the FCPA and the new guidance, corporate counsel for any company currently engaged in or contemplating transacting business with foreign governments and/or corporations will want to familiarize themselves with the entire *FCPA Guide*.

Summary of the FCPA

The FCPA prohibits certain classes of persons and entities from making payments (bribes) to foreign government officials in order to obtain or retain business. It generally extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. This may include U.S. or foreign companies listed on a U.S. stock exchange (as either stock or American Depositary Receipts) or those that trade in the over-the-counter market in the United States which are required to file SEC reports.³ The FCPA has two primary provisions—anti-bribery and accounting. In the scope of attempting to influence a foreign official to secure business, the anti-bribery provisions prohibit offers, payments, promises, or authorizations to pay money or other valuable consideration to foreign officials, foreign political parties, or candidates for public office. Prohibited consideration includes cash and cash equivalents (including using charitable contributions to funnel bribes), but also could include non-cash items such as computer equipment, medical supplies, vehicles, and non-business-related travel payments or reimbursements. The *FCPA Guide* summarizes the intent of the anti-bribery provision by quoting a 1977 U.S. Senate report:

Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality, and service. Corporate bribery is fundamentally destructive of this basic tenet.

Corporate bribery of foreign officials takes place primarily to assist corporations in gaining business. Thus foreign corporate bribery affects the very stability of overseas business. Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business.⁴

The accounting provisions require that a covered entity make and keep books, records, and accounts that accurately and fairly reflect the transactions involving the company's assets. Additionally, companies are required to maintain a system of internal controls that meet the act's requirements. The *FCPA Guide* highlights the rationale behind the accounting provisions by again quoting the Senate report, which stated: "In the past, 'corporate bribery has been concealed by the falsification of corporate books and records' and the accounting provisions 'remove[] this avenue of coverup.'"⁵

Updated Guidance

While the *FCPA Guide* does not change the act itself or its interpretation, since it does reflect DOJ and SEC enforcement priorities, companies should take note of the areas highlighted. Some of the noteworthy examples include:

- *Recognizing Corporate Compliance Programs*: The *FCPA Guide* notes that "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."⁶ Companies are encouraged to have clear guidelines for gift-giving by the company's directors, officers, employees, and agents. The *FCPA Guide* also provides examples of how charitable contributions and inappropriate travel reimbursements can run afoul of the FCPA.
- *Guidance Related to Mergers and Acquisitions*: Companies contemplating potential merger and acquisition activities at any point in the future may benefit from the *FCPA Guide*'s "Practical Tips to Reduce FCPA Risk in Mergers and Acquisi-

John Okray is chair of the Federal Bar Association's Corporate & Association Counsel Division. He is deputy general counsel of American Beacon Advisors Inc. He may be reached at john.okray@ambeacon.com.

tions.”⁷ The first option described is to seek an opinion from the DOJ in anticipation of a potential acquisition when pre-acquisition due diligence information available to an acquiring company is severely limited. The *FCPA Guide* notes that this avenue is a special situation and such a DOJ opinion would likely contain stringent requirements. Therefore, risk-based FCPA due diligence and disclosure is suggested as the more likely avenue for most companies. This option includes (1) FCPA and anti-corruption due diligence related to the target company, (2) the acquiring company having an effective code-of-conduct and compliance policies and procedures, (3) training for directors, officers, employees, and agents of the acquired or combined entity on the FCPA and related laws, (4) conducting an FCPA-specific audit of the acquired or combined business, and (5) disclosure of any corrupt payments discovered during due diligence. The *FCPA Guide* states that “DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions.”⁸

- *Alternative Avenues for Prosecuting Commercial Bribery Not Necessarily Involving Foreign Officials:* The *FCPA Guide* offers a reminder that the Travel Act⁹ serves as an additional or alternative means for prosecuting corruption.¹⁰ The Travel Act prohibits travel in interstate or foreign commerce or using the mail to promote, manage establish, or carry on any unlawful activity. Unlike the FCPA, the Travel Act extends to state commercial bribery laws. The *FCPA Guide* warns “if a company pays kickbacks to an employee of a private company who is not a foreign official, such private-to-private bribery could possibly be charged under the Travel Act.”¹¹ Other U.S. legal regimes available for prosecution referenced include money laundering, mail and wire fraud, certification and reporting violations, and tax violations. Therefore, an effective corporate anti-corruption compliance program may need to take other relevant U.S. and foreign laws, such as the UK Bribery Act,¹² into consideration.
- *Avenues for Prosecuting Accounting Violations:* Companies are reminded that in addition to the Act’s accounting requirements, issuers may have reporting obligations arising under the Securities Exchange Act of 1934, as amended (Exchange Act) and the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley). For example, the *FCPA Guide* notes that an issuer could face anti-fraud and reporting violations under §§ 10(b) and 13(a) of the Exchange Act for failure to file an annual report disclosing material liabilities related to bribery of foreign officials, which could in turn result in the restatement of a company’s financial statements. Among other requirements, Sarbanes-Oxley (1) imposes obligations on chief executive officers and chief financial officers to certify in writing the integrity of the company’s financial statements, (2) requires companies and their auditors to assess the effectiveness of internal controls, and (3) prohibits the altering, destruction, or falsification of records.
- *Whistleblower Provisions and Protections:* In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹³ added § 21F to the Exchange Act to address whistleblower incentives and protections. The *FCPA*



Guide reminds companies that § 21F allows the SEC to provide monetary rewards to eligible individuals who provide information that leads to an SEC enforcement action with a sanction over \$1 million. Such an award could range between 10 and 30 percent of the amount recovered. Moreover, the Dodd-Frank Act prohibits employers from retaliating against whistleblowers and also provides employees who are retaliated against with a private right of action.

Companies may also find reviewing recent FCPA-related regulatory enforcement actions to be informative.¹⁴

The *FCPA Guide* offers valuable insights to corporations on how to avoid potential violations of the FCPA and other anti-corruption laws. Nevertheless, the first paragraph of the *FCPA Guide* cautions that enforcing the FCPA is a continuing priority at the DOJ and the SEC. ☉

Endnotes

¹U.S. DOJ & U.S. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012), available at www.justice.gov/criminal/fraud/fcpa/guide.pdf [hereinafter FCPA GUIDE].

²15 U.S.C. §§ 78dd-1.

³The SEC maintains a website to see if a company files SEC reports, U.S. SEC, *Search the Next-Generation EDGAR System*, www.sec.gov/edgar/searchedgar/webusers.htm (last modified Feb. 11, 2010).

⁴S. REP. NO. 95-114, at 4 (1977), available at www.justice.gov/criminal/fraud/fcpa/history/1977/senaterpt-95-114.pdf.

⁵*Id.* at 3.

⁶FCPA GUIDE, *supra* note 1, at 56. See also *id.* n.307.

⁷*Id.* at 29.

⁸*Id.*

⁹18 U.S.C. § 1952.

¹⁰FCPA GUIDE, *supra* note 1, at 48.

¹¹*Id.*

¹²Bribery Act, 2010, c. 23 (Eng.), available at www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf.

¹³H.R. Doc. No. 111-4173 (2010), available at www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

¹⁴These actions can be found on the Internet at the DOJ site, www.justice.gov/criminal/fraud/fcpa/cases/a.html and at the SEC site, www.sec.gov/spotlight/fcpa/fcpa-cases.shtml.