Bank and Corporate Governance Law Reporter

1601 Connecticut Avenue, N.W., Suite 701, Washington, D.C. 20009 • 202-462-5755 • Fax 202-328-2430

DOJ and SEC Issue Joint Resource Guide on the FCPA

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We have written on prior occasions about whether companies can realistically expect to receive fair credit from law-enforcement agencies for the time, energy, and money they devote to developing internal compliance programs. This has remained a vexing and difficult question, and companies and their boards have had good reason to ask whether their efforts will be adequately acknowledged and rewarded when compliance problems arise. Yesterday,[1] the Department of Justice and the Securities and Exchange Commission jointly issued a Resource Guide on the Foreign Corrupt Practices Act that represents the government's latest—and most emphatic—effort to assure companies that effective internal compliance programs are worth the effort. As Robert Khuzami, Director of the SEC's Division of Enforcement, stated during a news briefing about the Guide's release, "We want to make it clear how we reward companies to adopt compliance programs that are effective in preventing [FCPA] violations in the first place." (http://www.sec.gov/news/speech/2012/spch111412rk.htm)

We welcome the FCPA Resource Guide. At a minimum, it reflects the government's plain-spoken effort to allay these concerns and to assure corporations that internal compliance efforts will be given appropriate credit. But has the "carrot" really been made more attainable? A close reading of the 120-page report offers reason for cautious optimism. First, the Guide sets forth in detail what it calls the "hallmarks" of an effective compliance program, and it states quite plainly that implementation of such a program will contribute significantly to DOJ's and SEC's determination of an appropriate resolution, including potential declination of any enforcement action. These "hallmarks" include a "commitment from senior management and a clearly articulated policy against corruption," a code of conduct that is "clear, concise, and accessible to all employees," compliance oversight by senior executives with sufficient authority and autonomy, a risk-based approach to program design and implementation, training and certification for relevant personnel, "appropriate and clear disciplinary procedures" and positive incentives, risk-based due diligence regarding third-party relationships, a mechanism to report misconduct on a confidential basis, and periodic testing and review.

Second, the Guide offers specific examples of corporate efforts that will lead to reduced sanctions and it reveals, for the first time, the factual particulars of cases where the government has declined to take any enforcement action. As these cases illustrate, the government places a heavy emphasis on self-identification and voluntary disclosure, full cooperation, and swift remedial actions, including measures to terminate the misconduct, to discipline employees involved, and to improve internal controls and compliance programs.

Third, the Guide offers a series of hypotheticals setting forth specific facts and circumstances that do not constitute violations of the FCPA. For example, the Guide clarifies through a series of examples that providing "[i]tems of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items," would not typically be viewed as FCPA violations, as such items "are unlikely to improperly influence an official" and thus do not generally reflect corrupt intent. However, "single instances of large, extravagant gift-giving," as well as a pattern of "widespread gifts of smaller items," may trigger enforcement action. The Guide also offers guidance and examples regarding the definition of "foreign official" and "instrumentality," as well as avoiding successor liability, the limits of the facilitation payment exception, and appropriate due diligence in the M&A context.

[1] This memo was originally released November 15, 2012.

While the Guide and its many hypotheticals are informative, it is important to remember that these are only guidelines. Important questions and concerns still remain. For example, unlike the U.K. Bribery Act, the FCPA does not contain an affirmative defense to corporate liability when a company has put in place an effective compliance program. Even with the Guide's welcome assurances that robust programs will be given credit, the weight to be given such factors remains a matter of prosecutorial discretion. The business community had also urged DOJ to formally narrow its view of what constitutes a "foreign official," particularly in the context of state-owned or state-controlled entities, but the Guide, while providing a helpful list of relevant factors, refuses to adopt a blanket rule that such enterprises are not governmental instrumentalities. While the Guide did not go as far on these issues as some would have hoped, it did make efforts to clarify the government's position on them to allow companies to have somewhat greater certainty on how the government will react to various fact patterns.

Consistent with the Guide's emphasis on the importance of a robust FCPA compliance program, DOJ recently announced that it was moving to terminate one year earlier than originally contemplated a deferred prosecution agreement entered into with Pride International, in specific recognition of its efforts to fully implement the remedial undertakings called for by the DPA (http://www.justice.gov/criminal/fraud/fcpa/cases/pride-intl/11-02-12-pride-international-motion-to-dismiss.pdf). DOJ found that Pride had adhered to its compliance undertakings by, among other things, instituting and maintaining a compliance and ethics program designed to prevent and detect FCPA violations, maintaining internal controls and procedures to ensure that books and records were accurately made and kept, and subjecting third-party business partners to appropriate due diligence requirements. Pride was also acquired by a company with an established FCPA compliance program that applied to Pride after the merger.

In the end, we continue to recommend careful, periodic analysis by companies of their existing compliance programs. There simply is no "one size fits all" approach. Each of the elements listed in the Guide's thoughtful account of the "hallmarks" of effective compliance programs are important. But how each such element will in fact move the dial within a particular company depends critically upon the industry, the markets in which the company operates, the nature of its relationships with governmental bodies, its corporate culture, and the competitive environment. There remains no substitute for a thoughtful, probing, and self-critical review of these factors, which should be done at least annually, and reported at an appropriate level of detail to the board.

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