Was It Worth the Wait? The Department of Justice / Securities and Exchange Commission Guidance on the FCPA

Today, the U.S. Department of Justice ("**DOJ**") and the U.S. Securities and Exchange Commission ("**SEC**") (collectively, the "**Agencies**") released "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the "**Guide**"). This Guide comes over a year after Assistant Attorney General Lanny Breuer announced that the DOJ would issue guidance clarifying what many consider to be the murky world of U.S. Foreign Corrupt Practices Act ("**FCPA**") compliance and well over three decades since the FCPA was enacted in 1977.

The 120-page Guide is certainly the most comprehensive overview of the FCPA ever provided by the U.S. government. The Guide addresses a wide variety of topics, including who and what is covered by the FCPA's anti-bribery and accounting provisions; the definition of a "foreign official"; what constitute proper and improper gifts, travel and entertainment expenses; facilitation payments; successor liability; the hallmarks of an effective corporate compliance program; and the types of civil and criminal resolutions available in the FCPA context.

Still, the question remains - was it worth the wait?

The vast majority of the information in the Guide is not new but instead reflects a compilation of previous positions taken by the Agencies in various enforcement actions. Anyone looking for a change in position or concrete guidance on existing positions from the Agencies will be disappointed. Nonetheless, it does provide valuable information and a central resource to companies dealing with FCPA compliance on a day-to-day basis.

We describe below some highlights from the Guide, and will provide additional analysis in the weeks to come. The full Guide is available at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf and at http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

Gifts, Travel, and Entertainment

Of particular interest to companies grappling with FCPA compliance, the Guide specifically addresses the provision of gifts, travel, entertainment and other things of value, with several hypothetical examples that demonstrate where the Agencies would draw the line between expenses that are permissible and those that are not.

Providing some comfort, the Guide notes that nominal gifts are permissible under certain circumstances. In this regard, it is permissible not only to provide reasonably priced gifts bearing the company logo, but also to provide "reasonable gifts to foreign officials as tokens of esteem or gratitude," where the gifts are given openly and transparently, appropriate under local law, customary in the jurisdiction, and reasonable for the occasion. The Guide provides numerous examples of impermissible gifts,

including, in one case, a country club membership fee and a generator, as well as payment of household maintenance expenses and cell phone bills, an automobile worth $20,000, and limousine services.

The Guide also provides clarity regarding the travel and entertainment expenses that would be considered "reasonable and bona fide" promotional expenditures permitted under the FCPA. For example, the Guide states that business class airfare for a lengthy international trip to visit a company's facilities, which includes a moderately priced dinner, a sporting event and a play, would not violate the FCPA, provided that the meals and entertainment are only "a small component of the business trip." In contrast, the Guide states that purchasing a first class ticket for an official and his spouse, to a city where the company has no facilities, and providing payment for expenses for the spouse would violate the FCPA. The gulf between these two examples is vast. However, companies receive welcome guidance in the express statement that the expenses set forth in the first example are permissible.

Facilitation Payments

Facilitation payments, or "facilitating or expediting payments made in furtherance of routine governmental action," also have been an opaque compliance area. To address these payments, the Guide summarizes two useful points from previous guidance or FCPA actions:

1. whether a payment is considered a facilitation payment does not depend on the size of the payment, although a larger payment may be more suggestive of corrupt intent; and
2. a payment is a facilitation payment only if the official receiving the payment has limited discretion to make a decision.

The Guide also notes that facilitation payments are prohibited under various non-U.S. laws, including, most notably, the UK Bribery Act. The Guide provides little direction as to what companies should do when faced with conflicts of law except to say that companies that make facilitation payments may still be subject to sanctions. The Guide also reminds companies that facilitation payments must be recorded as such in their books and records. Thus, companies that make facilitation payments, but are also subject to other laws that prohibit these payments, should not be comforted by the Guide.

Corporate Liability

Of particular significance for non-U.S. subsidiaries of U.S. companies, the Guide restates the Agencies' position that a parent company may be liable for improper payments made by its subsidiaries (1) if the parent participated sufficiently in the activity to be directly liable for the conduct, or (2) under traditional agency principles, which turn upon control.

If an agency relationship exists between a parent and subsidiary, "a subsidiary's actions and knowledge are imputed to its parents." As an example of what would constitute such "control," the Guide describes a direct reporting relationship between a subsidiary's president and the CEO of its parent company, where the issuer routinely referred to the president of the subsidiary as a member of its senior management in its annual SEC filings. The Guide further notes that if an agency relationship exists, the company also will be liable for the acts of the subsidiary's agents and employees within the scope of their employment.

Successor Liability

To address the difficult question of successor liability, the Guide focuses on pre-acquisition due diligence as the means of reducing the potential for FCPA liability in connection with acquisitions. The Guide recommends pre-acquisition due diligence in all instances – for acquiring companies that are issuers and domestic concerns, and for targets that, but for the acquisition, were beyond the jurisdictional reach of the FCPA. The Guide "encourage[s] companies to conduct pre-acquisition due diligence and improve compliance programs and controls after acquisition" for various reasons, including (1) accurate valuation of the target company, (2) to reduce the risk of post-acquisition bribes being paid, (3) to negotiate the consequences of potential violations by

the parties in an orderly and efficient manner, and (4) because "comprehensive due diligence demonstrates a genuine commitment to uncovering and preventing FCPA violations."

The Agencies further note that they "encourage" and will "give meaningful credit" to companies that do the following:

1. conduct thorough risk-based FCPA and anti-corruption due diligence in connection with transactions;
2. ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities;
3. train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;
4. conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and
5. disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

Although these actions do not provide an absolute safe harbor against FCPA liability, the Agencies note that they have declined to take action in a "significant number" of cases where companies voluntarily disclosed and remediated conduct and cooperated with the Agencies in the context of M&A transactions. In addition, the Agencies note that they have "pursued enforcement actions against the predecessor company (rather than the acquiring company), particularly when the acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition."

Declinations

The Guide provides six useful examples in which the Agencies have declined to pursue enforcement actions against potential FCPA violations, which have not been publicized previously. The circumstances of these declinations vary, but they generally include instances where:

1. the companies self-reported the activity to the Agencies;
2. the improper payments were identified by the companies' existing internal controls;
3. the companies engaged in remediation, including training and enhancing of their policies, procedures and controls;
4. the companies cooperated fully with the Agencies' investigations;
5. the employees associated with the improper payments were terminated or disciplined; and
6. third-party relationships associated with the improper payments (if any) were terminated.

We will provide additional analysis on the Guide in the weeks to come.

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