Foreign Corrupt Practices Act Guidance Released

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The US Department of Justice released its long-awaited guidance regarding the Foreign Corrupt Practices Act ("FCPA") consisting of a 120-page Resource Guide to the U.S. Foreign Corrupt Practices Act along with a two-page "Fact Sheet". Acknowledging the significance of a broad-based and growing international anti-corruption effort, the Guide includes references both to other countries' laws and international compliance best practices from inter-governmental and non-governmental organizations.

Although much of the guidance walks through established DOJ and SEC positions and practices, the Guide does, through the use of real-world examples and detailed hypotheticals, provide more concrete direction than was previously available. The guidance reminds companies of:

- **The jurisdictional reach of the FCPA**: Extending not only to (1) issuers (including their officers, directors, employees, agents and shareholders), (2) domestic concerns (and their officers, directors, employees, agents and shareholders), (3) persons and entities who act while in the territory of the United States, but, importantly, also (4) any co-conspirators or aiders or abettors who are not operating at all in the United States but who have assisted a company in violating the FCPA.
- **The breadth of the FCPA**: Someone may violate the FCPA without knowing the identity of the recipient of a bribe. A statement such as "pay whoever you need to" is enough, according to the Guide, to violate the FCPA even if no bribe is ultimately paid or even offered.
- **Definition of "foreign official"**: The Guide emphasizes a multi-factor analysis of individual facts and circumstances, and highlights, for example, that a foreign government instrumentality may exist even where the government does not own or control a majority of the shares if it has significant influence over the operations of the entity.

The Guide also provides additional guidance into a number of key areas.

- **Gifts and entertainment expenses**: The Guide emphasizes that enforcement will focus on whether gifts and entertainment involve an improper purpose - are the gifts of modest value and given in an open and transparent manner, are they properly recorded, and are they a reflection of esteem or gratitude rather than an effort to influence a decision. The Guide confirms that small tokens and items of nominal value (e.g., cab fare, reasonable meals and entertainment expenses or company promotional items) are generally not alone enough to prompt enforcement action.
- **Facilitation payments**: The Guide acknowledges that payments to further routine governmental action that involves non-discretionary acts remain lawful under the FCPA. The Guide does, however, recognize that such payments are often unlawful under other countries' laws (most importantly the UK Anti-Bribery Act), and affirmatively discourages such payments, advising companies to work to eliminate them.
- **Mergers & acquisitions**: The Guide places a significant emphasis on the importance of due diligence. Companies should conduct due diligence prior to an acquisition to the greatest extent possible, and if effective diligence is not possible prior to the acquisition, it should be done as quickly after acquisition as possible in order to try to protect the successor company. Nevertheless, the Guide indicates that an enforcement action may still be brought against the predecessor company even if it exists now only in its new form as a subsidiary of the acquirer. Although acquiring a company that was not previously subject to the FCPA does not make the FCPA apply to the target retroactively, an acquirer should make sure to implement effective compliance controls and training to ensure that there is no unlawful activity following the acquisition.

- **Compliance programs**: Not surprisingly, the Guide did not endorse any compliance program "safe-harbor." Instead, the Guide continued to emphasize a practical approach to giving credit to compliance efforts, first looking to determine if the compliance program is well designed, done in good faith, and whether it works. The Guide acknowledges that there may be a violation of the FCPA even in the face of a well-designed, good faith compliance program, and highlights one recent prominent example where, finding an effective enforcement program, the government declined to undertake enforcement action against a company and instead prosecuted only an individual. The Guide highlights the government's expectation that an effective compliance program will include:
    - a commitment from senior management and a clearly articulated policy against corruption;
    - a code of conduct and policies and procedures that are accessible to all employees (i.e., translated into local languages as necessary);
    - oversight, autonomy and adequate resources for the compliance team;
    - comprehensive risk assessments;
    - accessible training (again in the local language);
    - incentives and disciplinary measures;
    - third party due diligence of intermediaries and of mergers and acquisitions;
    - confidential reporting mechanisms and internal investigation resources; and
    - a commitment to continuous improvement.
- **Self-disclosure**: Finally, the Guide emphasizes the potential benefits to be gained by self-disclosure and cooperation. As expected, the DOJ and SEC were unwilling to quantify the potential benefit from self-disclosure, but the Guide highlights particular examples, especially in the merger and acquisition context, where such disclosures helped companies to avoid or mitigate enforcement actions. On the other hand, beyond those examples, the Guide does not provide any more concrete response which might quiet the chorus of questions regarding whether there is a real benefit to self-disclosure. That said, aggressive government enforcement resulting in massive penalties, coupled with the recently-enacted whistleblower bounty provisions creating significant financial incentives for reporting, provide powerful incentives for self-disclosure.

Background on the FCPA

First enacted in 1977, the FCPA was designed to prevent and criminalize bribery of foreign officials, including employees at state-owned enterprises. Specifically, the FCPA prohibits U.S. individuals, private and public companies, other companies operating in the U.S., including non-U.S. companies that are traded on U.S. stock exchanges, certain foreign subsidiaries and joint ventures, as well as agents and intermediaries, from making payments to foreign officials in order to secure any favorable business treatment. The FCPA also requires U.S. public companies to keep accurate books and records.

After the first two decades of relatively rare prosecutions under the Act, over the past dozen years the Department of Justice and the Securities and Exchange Commission have been making up for lost time, initiating literally hundreds of investigations and criminal or civil enforcement actions, with efforts steadily increasing. In 2004, the SEC and DOJ initiated a mere 5 new civil or criminal FCPA cases. By 2011, that number had increased ten-fold, with more than 250 enforcement actions initiated in the intervening years.

In 2012 alone, the SEC and DOJ have charged:

- Tyco International with violating the FCPA when subsidiaries arranged unlawful payments to foreign officials (settled with a criminal guilty plea and over $26 million in civil and criminal penalties);
- Marubeni Corp. for payments to Nigerian officials to win engineering and construction contracts in connection with a massive Nigerian LNG project (settled for $54.6 million in civil and criminal penalties);
- Orthofix International for paying routine bribes to Mexican officials in order to obtain sales contracts with government hospitals (settled for over $7 million in criminal and civil penalties); and
- Biomet for paying commissions and travel and entertainment expenses through subsidiaries to public health system doctors in Brazil, Argentina and China to increase medical device sales ($22.5 million criminal and civil settlement).

All of these companies also entered into onerous compliance agreements involving ongoing supervision as part of their settlements.

Prosecutions and enforcement actions under the FCPA have ranged in size, scope, and industry. Some of the most expensive settlements have included:

- Siemens' $800 million settlement in 2008 for making illicit payments to government officials in exchange for contracts or other favorable business treatment (Siemens also settled with law enforcement agencies and regulators elsewhere in the world; its total penalties exceeded $1.6 billion);
- KBR/Halliburton's $579 million settlement in 2009 for, in the case of KBR, paying bribes to obtain and retain contracts, and in the case of Halliburton, failing to detect or prevent the bribery;
- BAE's $400 million settlement in 2010 for bribing officials in order to get lucrative defense contracts;
- Daimler AG's $185 million settlement in 2010 for paying foreign officials in at least 22 countries to buy Daimler vehicles; and
- Alcatel-Lucent's $137 million in 2010 for paying foreign officials through subsidiaries and consultants in order to get business.

In the most recent years, enforcement efforts have been targeted at the healthcare industry, including pharmaceutical and medical device companies, and in the financial services industry, focusing on banks, private equity firms and hedge funds. But the enforcement actions have run the gamut in terms of industries, including gas and oil (Willbros Group and certain executives charged with bribing officials in Nigeria and Ecuador to obtain contracts); defense (Armor Holdings charged with bribing UN officials to obtain body armor contracts); telecommunications (Magyar Telekom/Deutsche Telekom charged along with three of its former top executives with bribing government and political party officials in Macedonia and Montenegro); manufacturing (Bridgestone charged with improper payment of "commissions" to officials at state-owned entities in Mexico and elsewhere); information technology (IBM charged with providing improper gifts, travel and entertainment to government officials in China and South Korea in order to secure the sales of IBM products); and financial services (Aon charged with providing improper payments and other benefits to employees of government-owned customers).

Nor have DOJ and the SEC limited their enforcement efforts to corporations. There have been a number of high profile prosecutions of individuals as well. For example, in December 2011, DOJ charged nine individuals (seven former employees and two former third-party agents) in connection with the Siemens charges that had been settled with the company in 2008. While DOJ has had mixed results in some cases, it has succeeded in obtaining significant number of guilty pleas and convictions resulting in substantial prison terms. The former CEO and Chairman of the Board of KBR is presently serving a sentence in connection with two counts of conspiracy to violate the FCPA and wire and mail fraud. And in November 2011, the former president of Terra Telecommunications Corporation was sentenced to 15 years in prison and its former vice-president sentenced to 7 years in prison.

Conclusion

The guidance underscores that FCPA enforcement remains a high priority, and that global anti-corruption efforts are only increasing. Given this aggressive enforcement of the FCPA and the potential whistleblower bounties, companies must continue to act very carefully when operating around the globe, by implementing effective compliance programs, conducting careful due diligence and prompt investigation, and taking corrective action where necessary.

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