To Our Clients and Friends

Memorandum

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DOJ and SEC Issue FCPA Guidance

Finally, more than a year after promising new guidance on various aspects of the Foreign Corrupt Practices Act ("FCPA"), yesterday the DOJ and SEC jointly issued their much-anticipated 120-page "resource guide" to the FCPA ("Guide").[1] The Guide covers a range of "hot button" issues, including the definition of a "foreign official"; the scope of permissible gifts, travel, and entertainment expenses; successor liability; third-party due diligence; and facilitating payments. While the Guide breaks little new ground – indeed, the Guide is largely a compilation of prior positions that the government has articulated in enforcement actions, opinion procedure releases, and speeches – it does contain some useful insights that will be important for companies and their anti-corruption advisors to know.

The Guide plainly sets forth the basic structure of the FCPA, including its parameters and prohibitions. The Guide also stresses the importance of assigning responsibility for oversight of an organization's anti-corruption compliance program to senior executives with sufficient resources to ensure effective implementation, with adequate autonomy from management and with a direct reporting line to the Board. Given the breadth of the Guide, however, this Client Memorandum is only intended to highlight certain key topics and hot-button issues.

The Definition of "Foreign Official"

The crux of the FCPA is its prohibition of giving (or promising to give) anything of value to a "foreign official" in order to obtain or retain business. The FCPA's definition of "foreign official" includes employees of an "instrumentality" of a foreign government. The term "instrumentality" is undefined, and the government has applied extremely broad interpretations that can encompass even low-level employees of companies partially owned by a foreign government. The lack of a bright-line test for determining when an entity is an instrumentality of a foreign government has triggered debate as well as recent litigation.

Unfortunately, the Guide does not solve this problem. Instead, the Guide provides a non-exhaustive list of factors (collected from jury instructions) that should be considered when assessing whether an entity is

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1 The Guide can be accessed at http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf
The U.K. Ministry of Justice recently issued similar guidance on the U.K. Bribery Act. *See* James Kitching, Fried Frank Client Memorandum, Ministry of Justice Issues Final Guidance on "Adequate Procedures" Under the UK Bribery Act (available at http://www.friedfrank.com/siteFiles/Publications/3-30-2011%20-%20TOC%20-%20UK%20Bribery%20Act.pdf).

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an instrumentality of a foreign government, including the foreign state's extent of ownership and degree of control, and whether the entity is performing official or governmental functions.

While the Guide attempts to provide some practical advice by acknowledging that an entity is unlikely to be an instrumentality if a foreign government does not own or control a majority of its shares, the Guide then cautions – with examples – that other factual circumstances could exist that lead the government to conclude differently. Thus, the debate and corresponding ambiguity on this topic will continue.

The Scope of Permissible Gifts, Travel, and Entertainment Expenses

The FCPA permits reasonable and bona fide expenditures of foreign officials, including travel and lodging expenses, incurred in connection with promotion or demonstration of a company's products or services. Determining where the DOJ and SEC draw the line on such expenditures has always been challenging.

The Guide gives some examples of permissible and impermissible payments. Unfortunately, most of the examples provided in the Guide (i.e., giving away pens at a trade show, first-class travel to Las Vegas, etc.) are at the extreme ends of the spectrum, which is rarely where guidance is needed. Similarly, with respect to paying for travel expenses of foreign officials, the Guide simply repeats factors that the government has previously articulated in prior enforcement actions and opinion procedure releases.

Nevertheless, the Guide provides some helpful insight by emphasizing the importance of having "clear and easily accessible" policies and procedures in place for both employees and agents. The Guidance notes with approval that some larger companies have automated gift-giving clearance procedures and annual limitations. This underscores the importance of process: having a thoughtful policy that is consistently applied and enforced is likely to minimize the chances of the government deciding that arguably permissible conduct crosses the line into an FCPA violation.

Successor Liability

Under general principles of corporate liability, companies can inherit FCPA liability through mergers and acquisitions, and there are numerous examples where the DOJ and SEC have utilized this theory against acquiring companies. Successor liability is a significant issue as companies seek to expand their foreign operations by buying existing businesses, particularly in high-risk countries where exhaustive due diligence is not always feasible or practical.

The Guide attempts to provide acquirers with some comfort by stating that the DOJ and SEC have only utilized the successor liability theory in limited circumstances that have generally involved egregious and sustained violations or where the successor company failed to stop the misconduct from continuing after the acquisition.

The Guide says that the DOJ and SEC will give "meaningful credit" to companies that, among other things, perform thorough pre-acquisition due diligence, perform a post-closing FCPA-specific audit, and disclose to the government any corrupt payments that are found. The Guide, however, neither provides a safe harbor if such steps are taken nor elaborates on what constitutes "meaningful credit."

Moreover, the Guide does not address the circumstances in which the DOJ and SEC may seek to hold significant minority investors responsible for FCPA violations. Notably, unlike an acquirer, a minority investor rarely has the type of access that is required to conduct a comprehensive due diligence investigation into the target company.

Third-Party Due Diligence

Companies often retain the services of third parties (e.g., agents, consultants, distributors, etc.) when doing business in a foreign country. As companies can be held liable for the conduct of their agents, it is important for companies to conduct appropriate anti-corruption due diligence on third parties before retaining them.

While the need for conducting such due diligence is well known, it is easy for companies to get caught up in simply obtaining answers to questions on questionnaires or checking boxes on forms while losing sight of the overall goal for obtaining the information. The Guide provides a helpful framework for thinking about anti-corruption due diligence on third parties. Specifically, the Guide reminds companies of the need to understand not only the third party's qualifications, but also the rationale for including the third-party in the transaction. Importantly, the Guide explains that the anti-corruption risk assessment of third-party representatives should be an ongoing process. As a result, companies should monitor their third-party representatives for continued anti-corruption compliance, which should include periodically updating the due diligence.

Facilitating Payments

Although the FCPA permits "facilitating payments" (also known as "grease payments") that are for the purpose of securing the performance of routine, non-discretionary tasks (e.g., mail delivery), the DOJ and SEC view reliance on that exception with great skepticism.

The disfavor with which the government views facilitation payments is clear in the Guide, which warns that such payments may be illegal in other countries. Indeed, it notes that the U.K. Bribery Act prohibits such payments and that the OECD Working Group on Bribery recommends that countries prohibit or discourage them. Thus, it is not safe for companies to rely upon the facilitation payment exception when analyzing whether to make a particular payment to foreign official.

Conclusion

While the Guide could have provided more specific guidance on a variety of important issues (some of which were noted above), it does contain some helpful insights and will undoubtedly serve as an important tool for those who advise companies on anti-corruption matters. We are hopeful that the Guide is just the first step in making the DOJ's and SEC's FCPA enforcement practices and decisions more transparent.

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