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***DOJ and SEC Release FCPA
Resource Guide: What Does
Your Company Do Now?***

January 8, 2013
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Speakers



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FCPA

Intended to deter bribery of foreign officials to obtain an improper business advantage

Two Parts:

Anti-Bribery Provisions (enforced by DOJ)
Books & Records Provisions and Internal Accounting Controls (enforced by SEC)





A Resource Guide to the U.S. Foreign Corrupt Practices Act

By the Criminal Division of the U.S. Department of Justice and
the Enforcement Division of the U.S. Securities and Exchange Commission



<http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>

Agenda

- Organization and Key Points of the Guidance
- Summary of Reactions from FCPA Bar
- Additional Observations of the Value of The Guidance
- Likely Next Developments
- Some Questions from the Audience

Organization and Key Points of the Guide

Chapter 1: Introduction

Chapter 2: The FCPA: Anti-Bribery Provisions

Chapter 3: The FCPA: Accounting Provisions

Chapter 4: Other Related U.S. Laws

Chapter 5: Guiding Principles of Enforcement

Chapter 6: FCPA Penalties, Sanctions, and Remedies

Chapter 7: Resolutions

Chapter 8: Whistleblower Provisions and Protections

Chapter 9: DOJ Opinion Procedure

Chapter 10: Conclusion

Appendices – the FCPA and Endnotes

What's Helpful?

- Serves as a primer for novices
- Much better than old “layperson’s” guide
- Useful to General Counsels, Executives, Boards, auditors and due diligence attorneys who want to gain an understanding of the FCPA from the enforcement agencies’ perspective
- Provides roadmap to reevaluate and revise compliance programs
- Provides useful insights into Government’s enforcement
- Provides examples of declinations

What's Helpful? (cont.)

- Sheds light on rationale for Government's statutory interpretations, including scope of acceptable gifts, entertainment and travel; definition of "foreign official" and "instrumentality"; the extent of successor liability in M&A context; and Government's jurisdiction to enforce FCPA
- Employs hypotheticals and examples and provides helpful hints
- Provides measuring stick for evaluating and updating compliance programs
- For FCPA practitioners, the Guidance citations can be used as evidence or a checklist of Government acknowledged "best practices" for compliance

What's Not So Helpful?

- Not binding and does not represent the law
- Represents DOJ's and SEC's interpretations and agencies' enforcement policies and procedures
- Criticized as an advocacy piece and not a well-balanced portrayal of the law
- Areas of concern:
 - *Jurisdiction as to foreign actors.*
 - *“Obtain or retain business” element to include payments made to secure “any improper advantage.” May be a stretch of the law as reflected by U.S. v Kay*
 - *Discussion of “foreign official” or “instrumentality” not very helpful and reflects broad construction. Fact-specific consideration.*
 - *Little attention to corrupt intent, although Guide reassures readers no liability for cups of coffee and taxi fares.*
- Much about FCPA enforcement still remains unclear

10 Hallmarks of an Effective Compliance Program

1. Commitment by senior management with clearly articulated policy against corruption
2. Code of conduct and compliance policies and procedures. Must be current and effective and outline responsibilities, detail internal controls, set forth auditing practices, documentation policies and disciplinary procedures
3. Oversight by senior management with sufficient autonomy and resources
4. Risk assessment and internal audit procedures
5. Regular training and continuing advice
6. Incentives and disciplinary measures
7. Comprehensive, risk-based due diligence for third parties and transactions
8. Mechanisms for employees to confidentially report potential violations and for internal investigations
9. Updating compliance program through periodic testing and review
10. Pre-acquisition due diligence and post-acquisition integration for mergers and acquisitions

Some Observations: “Best Practices” Citations

- OECD’s Anti-Bribery Recommendation and its Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*
- Asia-Pacific Economic Cooperation-*Anti –Corruption Code of Conduct for Business*
- International Chamber of Commerce-*ICC Rules on Combatting Corruption*
- Transparency International-*Business Principles for Countering Bribery*
- United Nations Global Compact-*The Ten Principles*
- World Bank-*Integrity Compliance Guidelines*
- World Economic Forum-*Partnering Against Corruption-Principles for Countering Bribery*

It's All About Risk

- Enterprise risk:
 - *Certain industries traditionally at risk, especially regulated industries*
 - *Recent cases against non-traditional industries such as logistics providers and retailer industry*
 - *Lesson: all industries at risk*
- Countries: Emerging Markets
 - *Transparency International's Corruption Perception Index*
- Third parties such as agents, distributors



What Will the Future Hold?

- Who is a “Government Official” (*Esquenazi* case)
- Political/ media drivers for stronger enforcement
 - *Wal-mart like cases*
- Will the Chamber take up its cause to Congress?
 - *To provide for a compliance defense*
 - *To limit a company’s liability for the prior actions of a company it has acquired*
 - *To add a “willfulness” requirement for corporate criminal liability*
 - *To limit a company’s liability for acts of a subsidiary*
 - *To define “foreign official” under the statute.*

Questions After the Program?



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