



doj/sec guide to foreign corrupt practice act – part 1

MSK Client Alert

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On November 14, 2012, the Criminal Division of the Department of Justice (DOJ) and the Enforcement Division of the Securities and Exchange Commission (SEC) released "A Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA)" (Guide). See <http://www.justice.gov/criminal/fraud/fcpa/guidance/>. The following is the first of three Alerts outlining key portions of the new Guide.

The business community had hoped the Guide would clear up many grey areas within the FCPA, or at least give practical guidance about certain issues. The 34-country Organisation for Economic Co-operation and Development (OECD) enacted a Convention on Combating Bribery of Foreign Officials in International Business Transactions in 1997 that called for an audit of member countries' anti-bribery efforts which lauded the U.S. for many best practices but found that U.S. anti-bribery law was not easily found. To satisfy both business and the OECD, the DOJ and SEC cleared a monumental hurdle simply by consolidating the current thinking of the two agencies in the one document. That would satisfy the OECD, but leaves business wanting more.

Definition of Foreign Official

In the years since it was originally enacted in 1977, increasing litigation has clarified many critical issues in the FCPA, but significant ones remain, such as the definition of a foreign official. It is easy to determine whether the individual is a foreign official if he or she works for the government. But what if he/she works for a state-owned enterprise (SOE)? The Guide states a foreign entity is not likely to be considered state-owned if the government does not have a controlling share. However, even if the government does not own the controlling shares, if it is the final decision-maker or otherwise exercises dominion or control, you are likely dealing with a foreign official. By not considering this contradiction, the Guide fails to clear up the confusion surrounding this critical term.

The Guide is helpful in listing factors to consider when trying to determine if an SOE employee is a foreign official or, in the words of the FCPA, an "instrumentality" of a foreign government:

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1. The foreign state's extent of ownership of the entity;
2. The foreign state's degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
3. The foreign state's characterization of the entity and its employees;
4. The circumstances surrounding the entity's creation;
5. The purpose of the entity's activities;
6. The entity's obligations and privileges under the foreign state's laws;
7. The exclusive or controlling power vested in the entity to administer its designated functions;
8. The level of financial support provided by the foreign state (including subsidiaries, special tax treatment, government-mandated fees, and loans);
9. The entity's provision of services to the jurisdiction's residents;
10. Whether the governmental end or purpose sought to be achieved is expressed in the politics of the foreign government; and
11. The general perception that the entity is performing official or government functions.

Limits on Gifts

Another area rife with confusion concerns the permissibility of gifts to foreign officials. Here the Guide provides some examples that seem reasonable, if not obvious, but is silent about actual dollar values that may fall within "moderate" or "not extravagant" parameters.

The Guide starts by saying mundane trade booth giveaways, such as pens, hats, t-shirts, and similar branded promotional items, are okay. Providing free coffee, beverages, and snacks at a trade show booth is also acceptable. Taking customers, even foreign officials, out for dinner and drinks is all right, provided the tab is "not extravagant." If the company has a long-standing relationship with a government official who gets married, a "moderately" priced gift as a wedding present is also considered permissible.

The Guide states: "FCPA enforcement would not be needed if the travel and expenses were for the foreign official to visit company facilities or operations; travel and expenses for training; and product demonstrations or promotional activities, including travel and expenses for meetings." The Guide confirms it is permissible for the company to pay for business class air fare, hotel and travel expenses, plus training, for visiting dignitaries as long as business class air fare is also available to company employees for lengthy flights. While visiting the company, the delegation may be taken to dinner (if "moderately" priced), a baseball game, and a play. Curiously, no distinction is made between the divergent values of baseball tickets in the grandstand and seats in a luxury box, or theatre seats in the balcony and orchestra seats in the fifth row, center.



At the other end of the gift spectrum, the Guide asks whether an all-expenses-paid week-long trip to Las Vegas, where the company had no facilities, would be an FCPA violation. This question seems rhetorical, since the obvious answer is yes.

Yet another example with an obvious outcome concerns inside information. Say the company's contract with the foreign government was about to expire, and an employee of the government agency offered insider information to aid in securing its renewal in exchange for a vacation to Paris for the official and his girlfriend. If the company agreed, would such actions violate the FCPA? We likely do not need the Guide to know the answer is yes.

Charitable Donations

Another area where companies have sought guidance is with charitable donations in foreign countries. The Guide lists five (5) questions to consider that are helpful:

1. What is the purpose of the payment?
2. Is the payment consistent with the company's internal guidelines on charitable giving?
3. Is the payment at the request of a foreign official?
4. Is the foreign official associated with the charity, and, if so, can the foreign official make decisions regarding your business in that country?
5. Is the payment conditioned upon receiving business or other benefits?

Payments to Third Parties

The Guide also highlights payments to third parties that are likely to raise red flags in the eyes of the DOJ and SEC:

- Excessive commissions to third-party agents or consultants;
- Unreasonably large discounts to third-party distributors;
- Third-party "consulting agreements" that include only vaguely described services;
- The third-party consultant is in a different line of business than that for which it has been engaged;
- The third party is related to or closely associated with the foreign official;
- The third party became part of the transaction at the express request or insistence of the foreign official;
- The third party is merely a shell company incorporated in an offshore jurisdiction; and
- The third party requests payment to offshore bank accounts.



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Expense Guidelines

The Guide does provide a nonexhaustive list of safeguards:

1. Do not select the particular officials who will participate in the party's proposed trip or program, or else select them based on predetermined, merit-based criteria;
2. Pay all costs directly to travel and lodging vendors and/or reimburse costs only upon presentation of a receipt;
3. Do not advance funds or pay for reimbursements in cash;
4. Ensure that any stipends are reasonable approximations of costs likely to be incurred and/or that expenses are limited to those that are necessary and reasonable;
5. Ensure the expenditures are transparent, both within the company and to the foreign government;
6. Do not condition payment of expenses on any action by the foreign official;
7. Obtain written confirmation that payment of the expenses is not contrary to local law;
8. Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses incurred; and
9. Ensure that costs and expenses on behalf of the foreign officials will be accurately recorded in company's books and records.

The Guide allows that some expenses are likely to raise red flags, but will not give rise to prosecution as long as they are "reasonable," "bona fide," and directly related to "the promotion, demonstration or explanation of products or services or the execution or performance of a contract." Regretfully, none of these terms are defined.

Coming next week: DOJ/SEC Guide to Foreign Corrupt Practice Act – Part 2: Bribes, Successor Liability, and Criminal Liability

If you have any questions concerning the DOJ/SEC Guide, the FCPA, or other matters addressed in this Alert, please contact Susan Kohn Ross.