



doj/sec guide to foreign corrupt practice act – part 2

MSK Client Alert

December 11, 2012

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/>. This Alert, the second in a series of three outlining key portions of the new Guide, addresses authorized facilitation payments, payments in response to threats, successor liability in M&As and criminal liability.

The first Alert in this series reviewed the Guide's definition of a foreign official, limits on gifts and charitable donations, payments to third parties, and expense guidelines. It can be found at DOJ/SEC Guide to Foreign Corrupt Practice Act Part 1. The third installment will deal with enforcement.

Authorized Facilitation Payments

The U.S. does permit facilitation payments, although most other jurisdictions do not. Routine government actions or those commonly or ordinarily performed by foreign officials for which some facilitation payments may be charged or paid include:

- Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- Processing governmental papers, such as visas and work orders;
- Providing police protection and mail pickup and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- Providing phone service, power or water supply, loading and unloading of cargo, or protection of perishable products or commodities from deterioration; and the catchall,

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practice areas

corporate & business
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■ Actions of a similar nature.

If the payment being made seeks an outcome based on a discretionary act, it is no longer an authorized facilitation payment. We already knew this, of course. Additionally, even if the facilitation payment were permissible under U.S. law, it could still be a violation of the local foreign law.

The hypotheticals presented in the Guide regarding facilitation payments focus only on obvious fact patterns. In one scenario, the foreign agent is going to pay a nominal sum for a clerk to stamp some papers, which is deemed a permissible payment. At the other end of the spectrum, in a second scenario, the foreign agent wants to pay an environmental official to “make the problem go away” when certain permits are being held up, which obviously would not be permissible. Absent are scenarios illustrating some of the grey areas in between.

Payments in Response to Threats

The Guide acknowledges that making a payment in response to imminent threat of physical harm is not a violation as there is no corrupt intent. That said, companies have learned the hard way that making such a payment may lead to other violations, depending on to whom that payment is made: e.g., an organization identified by the U.S. government as “terrorist” may constitute violation of the laws administered by the Office of Foreign Assets Control and may also lead to SEC books and records violations, depending on how the payment is recorded on the company’s books.

Successor Liability in M&As

The Guide points out circumstances wherein a parent company may be held liable for the actions of its subsidiary, either as the result of the parent’s direct involvement with those illegal activities or as the result of how the two companies interact, such as the amount of oversight the parent exercises over the subsidiary. Regarding successor liability, the Guide recommends adequate due diligence. However, court cases and agency actions have already made clear that if you acquire a company, discover FCPA violations, and promptly disclose and put in place appropriate remedial actions, any resulting enforcement imposed by the DOJ and/or the SEC is levied against the individuals and entities involved in those illegal activities and not the new owners. Not surprisingly, the Guide recommends either obtaining an opinion from the DOJ prior to an acquisition or submitting a voluntary disclosure. Either way, an effective and timely compliance plan is a must.

To illustrate, the Guide presents a scenario in which a U.S. company/acquirer conducts thorough due diligence in which it discovers, preclosing, that the company it is acquiring has paid improper bribes. The acquirer terminates the implicated staff, the foreign entity is incorporated into the acquiring company, new internal controls are instituted at the foreign entity, and the acquiring company takes all the reasonable steps a prudent buyer would be expected to implement in such an acquisition. The Guide confirmed that, in such circumstances, there would be no prosecution of the acquiring company. Moreover, the foreign entity is not subject to U.S. jurisdiction for deeds occurring preacquisition as it was neither an issuer nor a domestic concern or otherwise subject to U.S. territorial jurisdiction. What might happen to the ex-employees is unsaid and would obviously turn, in part, on their geographic location.



At the other extreme, a second hypothetical presents a set of facts where minimal due diligence occurs, accompanied by lax internal controls and training. In that case, after the deal closes, it is discovered that a large portion of the acquired company's business is directly tied to overly inflated commissions being paid to a third-party agent. Since stopping those payments would likely cause the business to close, the payments continue for two years post-acquisition. A whistleblower brings the bribery to light. Predictably, the Guide states that, under such circumstances, the DOJ and SEC would prosecute and take action against both the acquired company and the parent, since the parent allowed the payments to continue.

By contrast, in another hypothetical, the acquirer takes extensive steps to ferret out the illegal payments and, as a condition of the merger, requires the acquired company to disclose the illegal payments. The acquirer then merges the acquired company into its processes and procedures and requires all third-party distributors and agents to comply with those same processes and procedures, which includes anticorruption certifications and training. In addition, all new contracts incorporate anticorruption representations and warranties and audit rights. The Guide says no prosecution will follow.

Finally, a scenario is presented involving a proper due diligence that nevertheless does not uncover the illegal payments until after closing, followed by prompt reporting and proper remedial action. The Guide again says no prosecution. Compare this with what happens when two merging companies are each paying extensive bribes, which was known to high-level management at both companies at the time of the merger. In such a case, forming a new company that combines the two old companies will not insulate the new company from prosecution tied to the activities of both of the old companies which made illicit payments.

Criminal Liability

The Guide points out what is obvious to those of us who follow court cases and administrative enforcement actions, namely, that bribes have been deliberately mischaracterized in company books and records as:

- Commissions or royalties;
- Consulting fees;
- Sales and marketing expenses;
- Scientific incentives or studies;
- Travel and entertainment expenses;
- Rebates or discounts;
- After-sales service fees;
- Miscellaneous expenses;
- Petty cash withdrawals;



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- Free goods;
- Intercompany accounts;
- Supplier/vendor payments;
- Write-offs; and
- "Customs intervention" payments.

The Guide cautions that criminal liability attaches in situations where actions are "willful." For example, if individuals fail to comply with the FCPA's books and records and/or internal controls provisions, they can be prosecuted. Similarly, companies and individuals can be prosecuted for conspiring in or aiding and abetting these same types of violations. It is also worth noting the Securities and Exchange Act provisions dealing with how independent auditors are to report bribe payments, first to the company and then, if the company fails to take appropriate action, to the SEC.

As we know, the FCPA applies to U.S. issuers, domestic companies, or when activities otherwise take place in the U.S. Transmitting illegal payments through the U.S. mail, using interstate commerce (such as telephone calls, emails, text messages, or faxes), banking (e.g., transmitting wire transfers to or from a U.S. bank), and traveling across state borders or internationally each gives jurisdiction to the DOJ/SEC to take criminal or civil enforcement action.

The Guide points out "Other Related U.S. Laws" under which enforcement action could be taken:

- The Travel Act, 18 U.S.C. § 1952, which "prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of unlawful activity or to promote, manage, establish, or carry on any unlawful activity."
- Money Laundering.
- Mail and Wire Fraud.
- False Declarations, such as certifications due to a government agency, including loans or loan guarantees with the Export-Import Bank; certifications under government contracts; and the laws and regulations administered by the Directorate of Defense Trade Controls, Bureau of Industry and Security/Department of Commerce, Office of Foreign Assets Controls, and so on.
- Violations of U.S. Tax Laws.

The FCPA frames liability by combining the bribe payments with company efforts to further a business purpose, such as those mentioned in the Guide:

- To obtain favorable tax treatment;



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- To circumvent a licensing or permit requirement;
- To obtain government action to prevent competitors from entering the market;
- To reduce, evade, or eliminate customs duties;
- To improperly expedite the importation of goods and equipment;
- To extend drilling contracts and lower tax assessments;
- To obtain false documentation related to temporary import permits for drilling rigs; and
- To enable the release of drilling rigs and other equipment from customs officials.

The Guide champions the online compliance programs many companies have developed, which is a tacit hint for companies whose programs are less electronically advanced.

Coming next week: DOJ/SEC Guide to Foreign Corrupt Practice Act – Part 3: Enforcement

Part one of this series can be found at DOJ/SEC Guide to Foreign Corrupt Practice Act Part 1.

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