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## The DOJ and SEC Release Important New FCPA Guidelines

On November 14, 2012, the Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) released A Resource Guide to the U.S. Foreign Corrupt Practices Act (the “Guide”). While the Guide sheds little new light on the sometimes obscure world of Foreign Corrupt Practices Act (“FCPA”) enforcement, the Guide for the first time aggregates a significant amount of previously scattered, practical information into a single source.

Through the Guide, the government hopes to provide business enterprises with insight into its FCPA enforcement approach and priorities and to improve their ability to comply with the law. According to Assistant Attorney General Lanny A. Breuer of the Justice Department’s Criminal Division, “[t]he Guide is an important illustration of our transparency and a useful reference for companies and individuals who wish to act responsibly and in compliance with the law.”

### THE GUIDE

The Guide, comprising 120 pages and addressing an array of FCPA topics, amounts to—in the agencies’ own words—an “unprecedented undertaking from DOJ and SEC.” While the Guide is non-binding and does not have the force of law, it does provide businesses with a centralized source of information and some general insights into the activities and behaviors that could lead to an enforcement action. Both the DOJ and SEC state in the Guide that enforcing the FCPA is a continuing priority.

Some of the key subjects in the Guide include the government’s interpretation

of who is considered a foreign official under the FCPA, the pillars of successful compliance programs, the limits of permissible gift-giving, and generic examples of instances where the government has declined to pursue an FCPA enforcement action.

Below are some of the highlights from the Guide, which can be accessed in full text at: <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.

### WHO IS CONSIDERED A FOREIGN OFFICIAL?

Businesses and their counsel have long wrestled with the government’s broad interpretation of the definition of a foreign official for the purposes of the FCPA. The government declined to use the Guide to narrow the scope of the definition. Instead, the Guide reiterates the government’s existing position that “the FCPA broadly applies to corrupt payments to ‘any’ officer or employee of a foreign government and to those acting on the foreign government’s behalf. The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.”

The Guide also explains that the definition of “foreign official” includes officers and employees of foreign-government instrumentalities, but the definition of what constitutes an “instrumentality” remains elusive, and the Guide draws no bright-line rule to resolve the question. Instead, the Guide states that “the term ‘instrumentality’ is broad and can include state-owned or state-controlled entities.” The Guide provides that the DOJ and SEC will continue

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to determine whether an entity is an instrumentality of a foreign government on a case-by-case basis by analyzing the entity's "ownership, control, status, and function."

However, the Guide does list several factors it considers when determining whether an entity could be considered an instrumentality of a foreign government. Further, the Guide notes that, "as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares," although the Guide provides examples when the government will make exceptions to that general rule.

### EFFECTIVE CORPORATE COMPLIANCE PROGRAMS

The Guide acknowledges that FCPA violations sometimes occur despite the existence of a company's preventative measures. In these instances, the Guide emphasizes that an effective corporate compliance program can significantly influence how the government pursues an FCPA enforcement action. The Guide states that the design and good-faith implementation of a compliance program constitute an "important part of the government's assessment of whether a violation occurred, and if so, what action should be taken." The Guide notes that while there is no "one-size-fits-all" solution, key components of well-run programs include good-faith commitment from senior management, a code of conduct and established compliance procedures, and appropriate resources devoted to risk management.

Companies and their counsel should not only structure their corporate compliance programs to address the components articulated in the Guide, but they should also ensure that the programs are tailored

appropriately to their unique structure and business activities. The Guide provides businesses some comfort by stating that a company's well-run compliance program may convince the DOJ and SEC not to pursue charges against it—even if its program did not prevent the behavior or activity giving rise to the FCPA violation.

### PERMISSIBLE GIFTS

The Guide specifically states that the FCPA does not prohibit gift giving, but that giving must be reasonable and free from any indicia of corruption. The Guide notes that small business gifts often are given to convey personal respect and may be appropriate in the business environment. Items of nominal value—"cab fare, reasonable meals and entertainment expenses, or company promotional items"—are unlikely to result in an enforcement action. Conversely, the Guide notes that the government might interpret as bribes the free conveyance of even small items when given repeatedly, and respond with an enforcement action. Further, even one conveyance of an extravagant or luxury gift, such as a sports car or fur coat, could give rise to an enforcement action. The Guide makes clear that regardless of the amount at issue, the DOJ and SEC will analyze the activity for signs of corrupt intent.

### NOT ALL FCPA VIOLATIONS RESULT IN ENFORCEMENT ACTIONS

A business' decision to self-disclose a potential FCPA violation is an incredibly complex decision with significant, sometimes "bet the company," ramifications. In an attempt to provide businesses with a better feel for the contours of FCPA enforcement, the Guide provides anonymized summaries of actual FCPA cases that the DOJ and SEC recently declined to pursue, as well as factors the agencies weighed in their decisions not to

pursue these cases.

Unsurprisingly, the matters shared some common factors. In each case, the violating companies promptly self-disclosed the matter to the agencies, the amounts at issue were small, the companies took immediate and substantial action upon learning of the violations to include compliance-program improvement and augmented employee training, and the companies cooperated fully with the government. Although the examples in the Guide may provide little utility for corporate officers attempting to assess the risk accompanying more complex FCPA violations, the examples shed light on how the government evaluates potential FCPA cases, and they improve the ability of businesses to determine an appropriate course of action based on a more precise risk exposure understanding.

### CONCLUSION

While the Guide represents neither a sea change in the world of FCPA enforcement nor any specific change in DOJ or SEC policy, it provides businesses a welcomed and more easily accessible framework from which to develop an informed response to FCPA matters. And the government's attempt at transparency is appreciated. Unfortunately, the necessarily broad and wide-ranging nature of the Guide provides little relief to companies evaluating options in the face of specific, complex, and nuanced FCPA scenarios. Following publication of the Guide and the acknowledgement from the government that enforcement of the FCPA is a priority, enforcement activities should only increase in 2013. Given these conditions, companies and their counsel would benefit from reviewing the Guide in full and proactively evaluating and augmenting their corporate compliance programs accordingly.

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