
foreign corrupt practices act lawflash

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Long-Awaited FCPA Guidance Offers Clarity But Few Revelations

Interagency guide provides a blend of statutory interpretation, case analysis, and practice recommendations for corporations and their advisors but lacks definitive answers to many FCPA questions.

On November 14, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released “A Resource Guide to the U.S. Foreign Corrupt Practices Act”¹ (Guidance)—the regulators’ long-anticipated guide to the Foreign Corrupt Practices Act’s (FCPA’s) criminal and civil enforcement provisions.

Although the Guidance—which Assistant Attorney General Lanny Breuer championed as “the boldest manifestation of [the DOJ’s] transparent approach to enforcement”²—is essentially a nonbinding compilation of past positions taken by the regulators,³ it does blend statutory interpretation, case analysis, and practice recommendations in a comprehensive and teachable manner. Key Guidance takeaways are summarized below.

Key Takeaways from the Guidance

Definition of “Foreign Official” – Focus on Ownership and Control for “Instrumentalities”

The focus of the Guidance’s section on “foreign officials” concerns when a government “instrumentality” constitutes a foreign official for the purposes of the FCPA. The Guidance provides the following assistance for making this determination:

- Whether a particular entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function.⁴
- A nonexclusive list of factors to be considered in determining whether a foreign entity is an “instrumentality,” which includes the following:

1. Crim. Div. of the U.S. Dep’t of Justice & Enforcement Div. of the U.S. Sec. & Exch. Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Nov. 14, 2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter *FCPA Guidance*]. See also U.S. Dep’t of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act Fact Sheet* (Nov. 14, 2012), available at <http://www.justice.gov/iso/opa/resources/85120121114101420662750.pdf>.

2. Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep’t of Justice, Remarks at the American Conference Institute’s 28th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1211161.html>.

3. A disclaimer on an unnumbered page toward the front of the Guidance reads, in relevant part, as follows:

[The Guidance] is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations. As such, it is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, that are enforceable at law by any party, in any criminal, civil, or administrative matter. It is not intended to substitute for the advice of legal counsel on specific issues related to the FCPA. It does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.

4. *FCPA Guidance*, *supra* note 1, at 20.

- The foreign state's extent of ownership or control of the entity
- The foreign state's characterization of the entity and its employees
- The circumstances surrounding the entity's creation
- The level of financial support by the foreign state⁵
- No one factor is dispositive, but, 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 past enforcement actions have demonstrated that an entity may qualify as an "instrumentality" even absent 50% ownership by a foreign government.⁶

Gifts and Expenses – Focus on Intent

The Guidance reiterates that the critical element in giving a thing of value is a finding of corrupt intent—the intent to improperly influence a government official.⁷ However, the Guidance offers the following new practical guidance as to what gift-giving may be considered corrupt intent:

- Appropriate gift-giving practices include transparency, proper recordation in the giver's books and records, and gifts that are provided only to reflect esteem and are permitted under local law.⁸
- Provision of items of nominal value, such as cups of coffee, taxi fare, and company promotional items are unlikely to ever evidence corrupt intent, and neither the DOJ nor the SEC has pursued an enforcement action on the basis of such conduct. Reasonable meal and entertainment expenses, without more, also are unlikely to influence government officials.⁹
- Examples of improper travel and entertainment expenses include the following:
 - A \$12,000 birthday trip for a government decisionmaker from Mexico that included visits to wineries and dinners
 - A trip to Italy for eight Iraqi government officials that consisted primarily of sightseeing and included \$1,000 in "pocket money"
 - A trip to Paris for a government official and his wife that consisted primarily of tourist activities and involved a chauffeur-driven vehicle¹⁰

Charitable Contributions

The Guidance makes clear that charitable contributions are often a hallmark of legitimate community outreach and are not prohibited by the FCPA. Such contributions, however, may trigger scrutiny by regulators. The following are explained in the Guidance:

- Charitable contributions should not be used as a pretense for funneling bribes to foreign officials or as a vehicle to conceal corrupt payments to foreign officials.¹¹
- Proper due diligence and controls for charitable giving are critical, and, in the past, the DOJ has approved charitable giving in foreign countries where appropriate diligence is implemented.¹²
- Questions companies should consider when making charitable contributions in foreign countries include, among others, the following:

5. *Id.*

6. *Id.*

7. *Id.* at 15.

8. *Id.*

9. *Id.*

10. *Id.* at 16.

11. *Id.* at 18, 19.

12. *Id.* at 19.

- What is the purpose of the payment?
- Is the payment at the request of the foreign official?
- Is a foreign official associated with the charity, and, if so, can the foreign official make decisions regarding a company's business in the country?¹³

Affirmative Defenses – Bona Fide Expenditures

The Guidance provides advice regarding both the local law and bona fide business expenditure affirmative defenses, with a particular focus on safeguards that will help to ensure that expenses are appropriate (bona fide). Such safeguards include:

- Not selecting the particular officials who will participate in the proposed trip or program, or selecting them using predetermined, merit-based criteria
- Paying all costs directly to travel and lodging vendors and/or reimbursing costs only upon presentation of a receipt
- Not advancing funds or paying for reimbursements in cash¹⁴

Corporate Liability – Parents, Successors, and Agents

The Guidance provides a lengthy discussion of corporate liability and reaffirms the regulators' long-held positions that general principles of corporate criminal and civil liability apply to the FCPA, including principles of successor liability and agency liability under a theory of respondeat superior. Highlights of these discussions include the following:

- Proof of "willfulness" is not required to establish corporate criminal or civil liability, although proof of corrupt intent is.¹⁵
- A company will remain liable for the acts of its agents, including employees, for acts undertaken within the scope of their employment and intended, at least in part, to benefit the company.¹⁶
- Regulators have taken action in the past against successors in interest generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop them from continuing postacquisition.¹⁷

In listing what is critical to determining successor liability, the Guidance places emphasis on preacquisition due diligence adequately designed to detect improper conduct and implement remedial steps to ensure that such conduct does not continue.¹⁸

Payments to Third Parties

The Guidance reiterates that corrupt payments made to third parties or intermediaries are prohibited under the FCPA and provides that common red flags include excess commissions to third parties, unreasonably large discounts to distributors, "consulting agreements" that only vaguely describe the terms of service, and third parties that are closely affiliated with a foreign government official.¹⁹

13. *Id.*

14. *Id.* at 24.

15. *Id.* at 14.

16. *Id.* at 27.

17. *Id.* at 28.

18. *See id.* at 28, 62.

19. *Id.* at 22.

The Guidance emphasizes the need for appropriate due diligence and vetting before engaging third parties. Guiding principles for such programs include the following:

- Companies should understand the qualifications of their third-party business partners, including their reputations and relationships with government officials.
- Companies should have an understanding of the business rationale for including the third party, including its role and the services to be performed, and ensure their payment terms compare to typical terms in the industry and country.
- Companies should monitor third-party relationships, such as by updating due diligence, exercising audit rights, providing training, and requesting annual compliance certifications.²⁰

Hallmarks of Effective Compliance Programs

The Guidance emphasizes the importance of effective anticorruption compliance programs and notes that regulators often consider the adequacy of a company's program when determining what action, if any, to take. Recognizing there is no "one size fits all" approach,²¹ a message that was recently reinforced by Kara Brockmeyer, the chief of the SEC's FCPA Unit, and Charles Duross, the deputy chief of the DOJ's Fraud Section,²² the Guidance provides a list of elements for an effective program:

- Commitment from senior management and clearly articulated policy against corruption²³
- An updated code of conduct and compliance policies and procedures that outline internal control requirements, audit practices, and disciplinary procedures²⁴
- Dedicated executives with oversight responsibilities of the compliance program who are vested with sufficient authority, autonomy, and resources to ensure the program is implemented effectively²⁵
- Programs that may be tailored for relative risk of a given transaction²⁶
- Steps to ensure relevant policies and procedures have been communicated, including through periodic training for employees and business partners²⁷
- Implementation through appropriate disciplinary procedures and incentives for ethical and lawful behavior²⁸
- Third-party due diligence and the extent to which third parties and agents are informed of the company's program and commitment to ethical conduct²⁹
- Mechanism for confidential reporting and effective procedures for investigating whistleblower tips when made³⁰
- Programs that evolve and are updated based on the company's business model, its industry, and the environment in which it operates³¹

20. *Id.* at 60.

21. *Id.* at 57.

22. Kara Brockmeyer, Chief, Foreign Corrupt Practices Unit, U.S. Sec. & Exch. Comm'n. & Charles Duross, Deputy Chief, Foreign Corrupt Practices Unit, U.S. Dep't of Justice, Panel Discussion at the American Conference Institute's 28th National Conference on the FCPA: The U.S. DOJ and SEC Speak on the Key FCPA Cases of 2012 and Current Enforcement Priorities (Nov. 15, 2012).

23. *FCPA Guidance*, *supra* note 1, at 57.

24. *Id.* at 58.

25. *Id.*

26. *Id.* at 59.

27. *Id.*

28. *Id.* at 59–60.

29. *Id.* at 60.

30. *Id.* at 61.

31. *Id.* at 62.

In addition to these hallmarks, the Guidance also endorses compliance program advice issued by other federal agencies, including the U.S. Departments of Commerce and State, as well as those published by international agencies and multinational organizations.³²

Declinations Decisions – Real-World Examples

One of the Guidance's distinctive features is its presentation of six anonymized cases in which regulators declined to take enforcement action.³³ In each of those cases, the companies in question either self-reported the offending conduct or voluntarily disclosed that the conduct had occurred. In addition, all of the companies conducted thorough internal investigations, revised their compliance programs, and proactively remediated the violations by terminating employees, severing third-party relationships, and/or withdrawing bid proposals. In several of the cases, declinations were attributed in part to existing robust compliance programs and effective internal controls.

For further discussion on the highlights discussed above, as well as analysis of the Guidance's impact on FCPA reform efforts and recent FCPA actions, please visit <http://www.morganlewis.com/pubs/SummaryDOJ-SECResourceGuidetoFCPA.pdf>.

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32. *Id.* at 63.

33. *Id.* at 77–79.

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