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Revised FCPA Resource Guide Leaves Major Gaps

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The U.S. Department of Justice and U.S. Securities and Exchange Commission recently revised its manual "A Resource Guide to the U.S. Foreign Corrupt Practices Act." The revisions, which were made without fanfare and initially noticed by only a handful of practitioners, are the first changes to the resource guide since it was originally released in November 2012.

Highly anticipated when it was first published, the resource guide provides consolidated guidance reflecting past positions taken by the DOJ and SEC regarding enforcement policies and their interpretation of the Foreign Corrupt Practices Act, in what then-Assistant Attorney General Lanny Breuer called “the boldest manifestation of [the DOJ’s] transparent approach to enforcement.”[1] However, it proved to offer little in the way of new information on DOJ and SEC enforcement policies or practices. The resource guide also failed to settle long-standing questions regarding the scope and reach of the FCPA, such as the nexus to the territory of the United States required to reach nonissuers or domestic concerns under 15 U.S.C. § 78dd-3, and what exactly defines an “instrumentality” of a foreign government.

Moreover, while the resource guide purported to set forth the government’s expectations with regard to corporate compliance programs by enumerating what the government considers to be the “hallmarks” of an effective program, those “hallmarks” simply mirrored the elements set forth in Chapter 8 of the sentencing guidelines, which are well known to sophisticated businesses. The resource guide did not address the government’s view of the impact of compliance issues that arise even within the context of a compliance program that satisfies the enumerated “hallmarks,” such as how those issues affect ongoing investigations, the government’s decisions with regard to charging, and the

imposition of compliance monitors.

The revised resource guide does not address these issues, nor do the changes represent any significant change in policy or enforcement by the DOJ or SEC. Instead, the changes are more technical than substantive in nature, conforming the language used in the resource guide to that used in the FCPA, as amended in 1988 and 1998.[2]

However, the revisions offer clarity for some accounting and criminal penalties provisions. A summary of the revisions are below, and the complete, revised resource guide can be found here.

Changes to Chapter 3, "The FCPA: Accounting Provisions"

- In reference to an issuer's responsibility for the books and records of affiliated entities, the revised resource guide now refers only to "joint ventures" under the issuer's control. The prior version made reference to issuers' liability for the books and records of their "joint venture partners" (p. 43). Although it is unclear what precipitated this change, it is likely that by dropping "partners," the resource guide's authors clarified that issuers are only responsible for the books and records of entities over which they have some degree of ownership, control, or influence, including joint ventures. By referring to "joint venture partners," the prior version of the resource guide suggested that issuers may be liable for the books and records of third-party business partners with whom they enter joint venture arrangements — a proposition that would have far-reaching implications and could have potentially ground transnational commerce to a halt if enforced.

- The prior version of the resource guide stated that the FCPA required issuers to use "best efforts" (p. 43) to influence minority-owned affiliates to devise and maintain a system of internal accounting controls consistent with the issuers' obligations, which contrasts with the vicarious liability that issuers face for accounting provision violations committed by majority-owned subsidiaries. The "best efforts" requirement was undefined and exceeded the requirement set forth in the statute. The revised resource guide now better tracks the statute, stating that the FCPA requires issuers to use "good faith efforts" to cause their minority-owned subsidiaries or affiliates to implement adequate accounting systems.[3] Neither the statutory language nor the resource guide defines "good faith efforts" or set forth examples of what enforcement authorities consider to meet the standard.

- The prior version of the resource guide defined a "minority-owned subsidiary or affiliate" of an issuer as one where the parent "owns less than 50% of a subsidiary or affiliate" (p. 43). The revised resource guide now defines a "minority-owned subsidiary or affiliate" of an issuer as a company where the parent owns "50% or less of [the] subsidiary or affiliate." This revision also modifies the resource guide's language to align with the 1988 amendments to the FCPA.[4]

Changes to Chapter 6, "FCPA Penalties, Sanctions, and Remedies"

- The revised resource guide notes that individuals are subject to a maximum fine of $250,000, an increase from the maximum of $100,000 discussed in the prior version (p. 68). Although the FCPA imposes a statutory maximum of $100,000, individuals may be fined up to $250,000 under the Alternative Fines Act, 18 U.S.C. §3571.

- The revised resource guide also notes that, when calculating pecuniary gain under the Alternative Fines Act, a fine of up to twice "the benefit that the defendant obtained" may be imposed (p. 68). The prior version of the resource guide stated that the maximum penalty under the Alternative Fines Act was twice the benefit "the defendant sought to obtain."

As with the prior version, the revised resource guide remains "nonbinding, informal, and summary in nature" and is offered to provide information to individuals and businesses seeking to comply with the law, not to be "relied upon to create any rights, substantive or procedural, that are enforceable at law." Accordingly, while the revision's technical fixes may help align the resource guide more closely with the FCPA's statutory language, the resource guide continues to offer only the DOJ's and SEC's interpretation of the law.

Further, the extent to which the recently announced internal compliance counsel position at the DOJ will supplement the guidance set forth in the resource guide's chapter on corporate compliance programs remains to be seen. The purpose of the new position, announced by Andrew Weissmann, chief of the Criminal Division's Fraud Section, is to assist the DOJ in evaluating and assessing the effectiveness of an entity's compliance program in connection with charging decisions and to provide companies with greater clarity and guidance about the DOJ's expectations for compliance programs.

As noted, a significant gap in the resource guide pertains to how compliance issues that arise within an existing effective compliance program affect charging, penalty and monitorship decisions. According to the resource guide, the DOJ and SEC claim to take a "common-sense and pragmatic approach to evaluating compliance programs," evaluating three "basic questions": (1) "Is the company's compliance program well designed?"; (2) "Is it being applied in good faith?"; and (3) "Does it work?" (p 56). However, it is not unusual for the government to take the position that the mere existence of compliance issues renders the answers to those questions, no, even if the face of substantial compliance resources and activities. Perhaps the DOJ compliance counsel will do what the resource guide does not; that is, set forth a principled approach as to how the identification of compliance issues affects the government's assessment of a program's effectiveness.

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[1] 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).

[2] See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 (1988); The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (1998).

[3] See 15 U.S.C. § 78m(b)(6) (emphasis added) ("Where an issuer . . . holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) [requiring that issuers keep accurate books and records and maintain a system of internal accounting controls] require only that the issuer proceed in good faith to use its influence, to extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2).").

[4] See id.

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