# Securities Litigation Alert:
## DOJ and SEC Issue Joint Guidance on FCPA

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The past several years have seen a dramatic increase in the number of enforcement actions brought by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) under the Foreign Corrupt Practices Act (FCPA). On November 14, 2012, the DOJ and SEC issued their long-awaited guidance on the FCPA entitled "*A Resource Guide to the U.S. Foreign Corrupt Practices Act*" (the "Guide"). The Guide does not provide the FCPA reform some in the business community were hoping for and is largely in line with prior government commentary. Nevertheless, and despite the caveat that the Guide is "non-binding, informal, and summary in nature" and that FCPA enforcement actions are evaluated on a case-by-case basis; the Guide provides useful insight into the regulators' views on commonly-encountered issues, enforcement priorities, and best practices for FCPA compliance programs. For that, the Guide will become a go-to resource for understanding the principles applied by the DOJ and SEC in evaluating and prosecuting FCPA cases.

Following are summaries of the Guide, much of which reiterates the principles from the DOJ Layperson's Guide and prior statements by regulators:

**Meaning of Foreign "Instrumentality"**

- Determining whether an entity constitutes a foreign "instrumentality" is fact specific. However, as a practical matter, an entity is unlikely to qualify as a foreign instrumentality if a government does not own or control a majority of its shares.

**Gifts, Travel and Entertainment**

- Small payments and gifts – such as cab fare, reasonable meals and entertainment expenses, or company promotional items – are unlikely to trigger an enforcement action unless they are part of a systemic or long-standing course of conduct indicative of a scheme to bribe foreign officials.

- The following type of expenditures generally do not warrant an FCPA enforcement action: (i) travel and expenses to visit company facilities or operations; (ii) travel and expenses for training; and (iii) product demonstration or promotional activities, including travel and expenses for meetings.

- An effective compliance program should have clear and easily accessible guidelines and processes in place for gift-giving, including, if appropriate, annual monetary limitations on gifts.

**Reasonable and Bona Fide Expenditures**

- Expenditures on behalf of foreign officials are less likely to trigger an enforcement action if they are (1) reasonable, (2) bona fide, and (3) directly related to (4) the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.

**"Facilitating" or "Expediting" Payments**

- Payments to facilitate or expedite "routine governmental action," which do not violate the FCPA, include payments to: (i) obtain permits,

licenses, or other official documents to qualify a person to do business; (ii) process governmental papers, such as visas and work orders; (iii) provide police protection, mail pickup and delivery, or schedule inspections associated with contract performance or inspections related to transit of goods across country; (iv) provide phone service, power and water supply, load and unload cargo, or protect perishable products or commodities from deterioration; or (v) actions of a similar nature.

- Facilitating payments may violate local laws, including the UK Bribery Act, and are against the recommendations of the OECD Working Group on Bribery.

**Avoiding Successor Liability**

- In general, the DOJ and SEC are more likely to pursue enforcement actions against a corporate predecessor rather than an acquiring company. However, the DOJ and SEC have taken action against successor companies, where there are egregious and sustained violations, or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition.

- The DOJ and SEC recommend that acquiring companies (i) conduct thorough risk-based FCPA and anti-corruption due diligence on potential acquisitions; (ii) apply the acquiring company's code of conduct and FCPA-compliance procedures as quickly as practicable; (iii) provide FCPA training to any newly-acquired personnel; (iv) conduct an FCPA-specific audit as soon as practicable; and (v) disclose any corrupt payments discovered as part of the due diligence on newly-acquired entities. The DOJ and SEC will give meaningful credit to companies who undertake these actions and, in appropriate circumstances, may decline to bring enforcement actions against the acquiring company.

- A successor company's voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program may decrease the likelihood of an enforcement action regarding an acquired company's post-acquisition conduct if pre-acquisition due diligence is not possible.

**Books and Records**

- Enforcement of the books and records provision has typically involved misreporting of either large bribe payments or widespread inaccurate recording of smaller payments made as part of a systemic pattern of bribery.

**Effective Internal Controls**

- The FCPA's internal controls provision allows companies the flexibility to develop and maintain a set of controls tailored to their own needs and circumstances. Among the factors a company should consider are: (i) the nature of its products or services; (ii) how the products or services get to market; (iii) the nature of its work force; (iv) the degree of regulation; (iv) the extent of its government interaction; and (v) the degree to which it operates in countries with a high risk of corruption.

**Enforcement Priorities**

- The DOJ considers nine factors in conducting an investigation and evaluating a potential enforcement action: (i) the nature and seriousness of the offense; (ii) the pervasiveness of wrongdoing within the corporation; (iii) the corporation's history of similar misconduct; (iv) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents; (v) the existence and effectiveness of the corporation's pre-existing compliance program; (vi) the corporation's remedial actions; (vii) collateral consequences; (viii) the adequacy of prosecuting

individuals responsible for the corporation's malfeasance; and (ix) the adequacy of other remedies such as civil or regulatory enforcement actions.

- The SEC considers a number of factors in determining whether to open an investigation or initiate an enforcement action: (i) the statutes or rules potentially violated; (ii) the egregiousness of the potential violation; (iii) the potential magnitude of the violation; (iv) whether the potentially-harmed group is particularly vulnerable or at risk; (v) whether the conduct is ongoing; (vi) whether the conduct can be investigated efficiently and within the statute of limitations period; (vii) whether other authorities might be better-suited to investigate the conduct; (viii) whether the case involves a widespread industry practice that should be addressed; (ix) whether the matter involves a repeat offender; and (x) whether the matter provides an opportunity to educate the community about the SEC and protections provided by the securities laws.

**Self-Reporting, Cooperation and Remedial Efforts**

- In determining how to resolve a corporate criminal case, prosecutors consider whether the company timely and voluntarily disclosed the violation, as well as the company's willingness to provide relevant information and evidence, including identifying relevant actors inside and outside the company. Prosecutors may also consider whether the company took meaningful remedial measures, including efforts to improve existing compliance programs or discipline wrongdoers.

- The SEC relies on four broad measures of a company's cooperation in determining whether to grant leniency: (i) self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top; (ii) self-reporting of misconduct when it is discovered, including a thorough review of the misconduct and timely disclosure to the public, regulators and self-regulatory organizations; (iii) remedial measures, including improvements to internal controls, punishment of wrongdoers and appropriate compensation for those adversely affected; and (iv) cooperation with law enforcement, including providing relevant information to the SEC.

**Best Practices for Effective Compliance Programs**

- An effective compliance program may affect whether the DOJ and SEC bring an enforcement action, as well as the severity of any penalties imposed. Although there is no one-size-fits-all approach to compliance programs, the Guide stresses the following elements: (i) a commitment from senior management and a clearly-articulated policy against corruption; (ii) whether the code of conduct and compliance policies and procedures undergo periodic review and remain current and effective; (iii) whether the company devotes adequate staffing and resources to the compliance program given the company's size, structure and risk profile; (iv) whether the company has assessed potential risks and devoted adequate attention and resources to high-risk areas; (v) whether the company provides periodic training and certification for all directors, officers, and relevant employees, and, where appropriate, agents and business partners; (vi) whether the company has appropriate and clear disciplinary procedures that are commensurate with the violation and that are applied reliably and promptly; (vii) appropriate due diligence on third parties and third-party payments; (viii) mechanisms for confidential reporting, internal investigation, and documentation of the company's response; and (ix) periodic testing and review.

**Third-Party Due Diligence and Payments**

- The Guide stresses the following principles with respect to third-party due diligence and payments: (i) companies should understand the qualifications and associations of any third-party partners, including their business reputation and relationship, if any, with foreign officials; (ii) companies should understand the business rationale for including third parties in any transactions; (iii) companies should undertake ongoing monitoring of third-party relationships; (iv) companies should inform third parties of their compliance program, their commitment to ethical and lawful business practices and, where appropriate, request an assurance of reciprocal commitments.

- Common red flags associated with payments to third parties include: (i) excessive commissions to third-party agents or consultants; (ii) unreasonably large discounts to third-party distributors; (iii) third-party "consulting agreements" that include only vaguely-described services; (iv) a third-party consultant in a different line of business than that for which she has been engaged; (v) a third party who is related to or closely associated with a foreign official; (vi) a third party who becomes part of the transaction at the express request or insistence of a foreign official; (vii) a third party who is merely a shell company incorporated in an offshore jurisdiction; and (viii) a third party who requests payment to offshore bank accounts.

**(Endnotes)**

1 The Guide is available free of charge at http://www.justice.gov/criminal/fraud/fcpa/guidance/ and www.sec.gov/spotlight/fcpa.shtml.

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