

DOJ and SEC Jointly Release Their Resource Guide to the U.S. Foreign Corrupt Practices Act

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On November 14, 2012, the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) jointly released their 120-page “Resource Guide to the U.S. Foreign Corrupt Practices Act”¹ (the “Guide”). The Guide provides insight into the *Foreign Corrupt Practices Act*² and DOJ/SEC enforcement practices through the use of: (a) hypotheticals; (b) examples of actual enforcement cases that the DOJ and SEC declined to pursue; and (c) summaries of applicable case law and DOJ opinion releases.

Although it does not contain any ground-breaking new policy, the Guide consolidates FCPA law and policy into a single resource and provides insight into DOJ and SEC enforcement policies. As such, it should be extremely useful for small-and medium-sized businesses, which may be less familiar with the FCPA as large multinational corporations. However, the Guide itself makes clear that it does not in any way limit the enforcement intentions or litigating positions of the DOJ or SEC; in other words, it is not a legally binding document.

Among other things, the Guide addresses the following key issues:

a) It includes a discussion of when gifts, travel and entertainment may be considered a bribe, and provides a hypothetical illustration of the relevant issues. The Guide mentions that DOJ and SEC have not focused their enforcement efforts on the payment of reasonable travel and entertainment expenses. Instead, they have concentrated on cases where the corrupt payment of travel and entertainment expenses occurred in conjunction with other conduct reflecting systemic bribery or other clear indicia of corrupt intent.

b) It includes a discussion of who falls within the meaning of “foreign official” and what constitutes a “department, agency or instrumentality of a foreign government.” The Guide

clarifies that, as a practical matter, an entity is unlikely to qualify as an instrumentality of a foreign government if a government does not own or control a majority of its shares. It also explains that, in the limited cases where enforcement actions involved foreign officials employed by entities in which a foreign government has less than 50% ownership, there were clear indicia demonstrating that the foreign government controlled the entity.

c) It includes a discussion of successor liability (including two hypotheticals) and offers tips to reduce the risk of FCPA violations in the context of mergers and acquisitions. In addition, the Guide clarifies that DOJ and SEC only take action against successor companies in limited circumstances, generally in cases involving 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. DOJ and SEC usually only bring enforcement actions against the predecessor company.

d) It includes a discussion of how to develop an effective corporate compliance program. The Guide specifically states that there is no one-size-fits-all program and that effective compliance programs are usually tailored to a company's specific business and to the risks associated with that business. It also includes a discussion of factors that DOJ and SEC consider when evaluating a company's compliance program.

There are numerous instances where Canadian companies may be required to comply with the FCPA; the Guide should be a valuable resource for those companies³. The Guide's discussion of effective corporate compliance programs should also be somewhat relevant to compliance under the Canadian *Corruption of Foreign Public Officials Act*⁴; this is because the 2011 probation order in the *Niko Resources* case borrowed liberally from the plea agreement in *Securities and Exchange Commission v. Siemens Aktiengesellschaft*⁵, effectively adopting DOJ/SEC policies (at least with respect to compliance programs) in Canada⁶.

¹ <http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf>.

² 15 U.S.C. §§78dd-1, et seq.

³ <http://www.blaney.com/articles/application-united-states-anti-corruption-laws-canadian-companies>.

⁴ S.C. 1998, c.34.

⁵ Civil Action No. 08 CV 02167 (D.D.C.).

⁶ <http://www.blaney.com/articles/establishing-anti-corruption-compliance-program-canada>.