

Client Alert

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FCPA “Resource Guide” Released by SEC and DOJ Consistent With Previous Guidance

On November 14th, the Securities and Exchange Commission (the “SEC”) and the Department of Justice (the “DOJ”) released their jointly developed “Resource Guide to the U.S. Foreign Corrupt Practices Act” (the “Guide”). Long awaited and much anticipated, the Guide brings together in a single, 120-page document the agencies’ interpretation of the FCPA and approach to enforcement activities. It was hoped that this Guide would illuminate and clarify some of the issues that have continued to cause difficulties from both a compliance and an enforcement perspective.

While the Guide is a welcome addition to the compliance literature in some respects, it largely restates the positions previously taken by the agencies in enforcing the FCPA, generally through case studies and hypothetical examples. Accordingly, the Guide may serve as a useful handbook for companies looking for a basic understanding of the FCPA and the perspective of the government in enforcing it.

But the Guide’s contents come as a disappointment to those expecting the agencies to clarify their stance on the unsettled aspects of FCPA law, which bedevil even companies with well-developed compliance programs. For instance, the Guide fails to shed new light on what constitutes a “foreign official” and the scope of “instrumentality” – an ambiguous term that is not defined in the FCPA and that has led to considerable confusion. Likewise, the Guide does not illuminate further the scope of gifts, travel and entertainment permissible under the FCPA. As a result, companies must continue to wonder whether certain transactions could expose them to liability. Nor does the Guide respond to many critics’ calls for the creation of affirmative defenses to FCPA violations, and for greater clarity and certainty that there are demonstrable and consistent benefits from self-reporting and implementation of robust compliance programs. Inasmuch as the Guide offers little change to government policy, it will be of limited value to companies whose compliance programs already integrate fully the advice previously promulgated by the agencies.

With the Guide’s failure to establish bright lines for FCPA liability, the compliance community must look to the Congress and the courts to bring greater clarity to the law. But legislative intervention appears unlikely, at least in the near term. And until that occurs, anyone relying on the Guide should take note of the government’s explicit statement that the guidance is “non-binding” and “does not in any way limit the enforcement intentions or litigating positions of the [DOJ], the [SEC], or any other U.S. government agency.”

The Guide can be downloaded in its entirety [here](#), while a fact sheet about the Guide disseminated by the DOJ can be found [here](#).

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