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Alert

Anti-Corruption Enforcement

The Wait is Over: DOJ and SEC Release Resource Guide to FCPA

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Yesterday, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) issued their long-awaited joint "Resource Guide to the US Foreign Corrupt Practices Act." As its name suggests, the hundred-plus page document is largely a compendium of existing pronouncements and publicly available information concerning the FCPA. As such, it usefully provides corporations with a single resource to consult when analyzing any FCPA issue. Unfortunately, the Resource Guide also leaves unanswered many questions regarding the statute's potential scope. Contrary to the hopes of many companies and practitioners, the Resource Guide leaves significant ambiguities in some crucial and contentious areas of FCPA enforcement.

Here is what the Resource Guide does right:

First, it comprehensively reviews the current state of the law and enforcement regarding all aspects of the FCPA. Separate chapters are devoted to, among other topics, the FCPA's anti-bribery provisions, the FCPA's accounting provisions, FCPA sanctions and remedies, the principles that guide enforcement decisions, and whistleblower provisions and protections.

Second, most chapters discuss illustrative enforcement actions, case studies, and hypotheticals. For example, Chapter 2, which explores the FCPA's anti-bribery provisions, includes several hypotheticals addressing successor liability and another devoted to the use of "facilitating payments." In Chapter 7, addressing "resolutions," the Resource Guide provides six anonymous examples of public and private company declinations, emphasizing the key facts influencing those decisions. While heavily caveated to prevent the reader from asserting rights based on these discussions, they nevertheless provide useful insights into enforcement priorities and approaches to the issues presented. These discussions also point the reader in the direction of other useful resources on the same topics.

Finally, the DOJ and the SEC make a serious effort to tackle a handful of important substantive issues. For example, the Resource Guide provides a relatively detailed discussion of the types of travel, training, and gift expenses that are likely to be viewed by the government as acceptable as well as those that will probably invite further scrutiny. There are no bright line rules or categorical pronouncements, but the examples discussed should provide corporations with some comfort regarding common expenditures and frequently asked questions.

Similarly, the Resource Guide includes a useful analysis of best practices for vetting third parties. Perhaps most importantly, the Resource Guide provides more information than we have seen in the past regarding compliance programs, including the welcomed recognition that companies should tailor their compliance programs to the specific risks they face and that “small- and medium-size enterprises likely will have different compliance programs from large multi-national corporations.”

Notwithstanding these strengths, there are issues as to which the Resource Guide regrettably provides little new information. Many of these are areas that practitioners and companies have identified as particularly problematic, and it is for this reason that calls for greater clarity concerning the statute and its enforcement are unlikely to abate.

Significantly, the Resource Guide offers virtually no new analysis on the question of state-owned enterprises and related issues. In particular, in addressing the question of whether a foreign entity constitutes an “instrumentality” subject to the FCPA, the Resource Guide merely summarizes factors that have been considered by courts – which is not new information – and ultimately notes that the inquiry is necessarily a fact-specific one. Thus, the challenge that corporations and practitioners face in assessing whether someone is a “foreign official” under the statute is hardly lessened by this guidance.

The Resource Guide also provides very little new information regarding due diligence in the context of mergers and acquisitions. This is another significant failing because even a small

risk of successor liability can cause companies to spend immense amounts of money to ferret out what may be relatively minor FCPA issues. More guidance and protection for companies making good faith efforts to identify and remediate FCPA problems are still needed.

In the end, the Resource Guide is a first step toward providing companies with greater clarity about enforcement priorities. It does not, however, address some of the critical issues facing corporations trying to comply in good faith with their obligations under the FCPA. These issues must, in all likelihood, await legislative action rather than further commentary by the SEC or the DOJ. We plan to provide further commentary on the Resource Guide in the coming weeks.

If you would like more information about the FCPA, please speak to your regular contact at Weil, or contact:

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