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The New FCPA Guide: The DOJ and the SEC Do Not Break New Ground But Offer Useful Guidance and Some Ominous Warnings

On November 14, 2012, the US Department of Justice and the Securities and Exchange Commission issued the long-promised guidance outlining their interpretation of critical elements of the US Foreign Corrupt Practices Act (FCPA), providing some helpful guidance concerning the design and application of anti-corruption compliance programs, and explaining some of their enforcement policies concerning prosecution and resolution. Although much of this information has been available through reading tea leaves of prior enforcement actions, the Guide provides some useful insight while also some ominous warnings of the aggressive nature of some of the government's interpretations and enforcement policies.

On November 14, 2012, the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) published their long-awaited Foreign Corrupt Practices Act guidance entitled, "A Resource Guide to the US Foreign Corrupt Practices Act". Although some commentators have suggested the agencies would take this opportunity to "amend" the statute, adopt suggested reforms, or otherwise "correct" perceived misinterpretation of the statute, the Guide instead reaffirms the government's previously stated enforcement policies and continues to enunciate its interpretations, whether right or wrong, of critical aspects of the statute relating to scope and breadth. The Guide does, however, provide valuable insight into the government's views, what factors it considers important in evaluating compliance programs and, in particular, on issues such as gifts and entertainment, due diligence on third parties, and risk management in M&A transactions. In this Note, we highlight some of the major areas of interest and provide analysis on how the Guide can affect and inform corporate compliance programs.

The Guide appears to serve a number of purposes for the DOJ and the SEC. First, it responds to specific recommendations coming out of the OECD Working Group on Bribery's peer review of the United States and is presumably intended to set a high bar for other parties to the OECD Convention to issue similar guidance. Second, it declares the agencies' enforcement policies, making it clear that many of the trends and patterns we have previously identified in enforcement actions represent the government's present view of the scope and application of the Act. Third, it responds, to some degree and with varying amounts of detail, to the private sector's demand for guidance on what factors the government considers in evaluating

compliance programs, deciding whether to impose an independent monitor, and choosing between the varying forms of resolution (from plea to deferred/non prosecution to declination). Fourth, and finally, it provides the government's rebuttal to the Chamber of Commerce's paper seeking fundamental reforms of the Act and its enforcement, often using the Chamber's own examples to demonstrate its view of the proper application of the statute.

I. Practical Application and Interpretation of Elements of the Statute

Although the spate of recent cases against individuals, both by the DOJ and the SEC, is slowly resulting in some judicial interpretation of the statute, the government has largely had free rein to interpret the statute, declaring its views in the forms of pleadings, settlements, and FCPA Opinions. In the Guide it seeks to ground its interpretations in these self-established precedents as well as some of the few judicial decisions. For the most part, these interpretations are not new, and we have previously commented on them in our *Trends & Patterns* and other articles. In our view, the government may well be right on many of these issues, but not all of them. It is thus important to remember that this paper is, indeed, only the views of the government and that the courts, and Congress, are the ultimate arbiters of the meaning and scope of the statute. Indeed, even the government does not view the views it sets out in the Guide as binding, including a disclaimer that the Guide is "non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations."

A. Business Purpose Test

The FCPA applies only to payments intended to induce or influence a foreign official to use his or her position "to assist . . . in obtaining or retaining business for or with, or directing business to, any person." The Guide refers to this as the "business purpose test" and sets out the government's broad interpretation of its scope, stating that it covers payments made to secure a "wide variety of unfair business advantages," including securing favorable tax treatment, reducing or eliminating customs duties, obtaining government action to prevent competitors from entering a market, or circumventing a licensing or permit requirement. All of these examples have been seen in previous enforcement actions, and the list of activities that fall under the "business purpose test" will only continue to grow.

From a compliance program perspective, this element is not necessarily critical, in that few compliance programs are designed to prohibit only those bribes that fall within the business purpose element, however interpreted. The government's approach here, however, is both interesting and somewhat disturbing. Although it cites and quotes extensively from the seminal *Kay* case, in which the court held that the FCPA was not limited to only those bribes related to government procurement, it gives only lip service to the limits the court did recognize. The *Kay* case carefully distinguished between bribes to reduce taxes to enable the company to compete in the relevant market, *i.e.*, obtain or retain business, and bribes that simply improved the bottom line. In contrast, the government wholesale categorizes virtually all bribes, including, *e.g.*, bribes to reduce tax penalties unrelated to current or future business, as somehow meeting the "assist in obtaining or retaining business" element. Thus, although we recognize that the government is loath to say that *any* bribe falls outside the statute, we view this as, to some extent, a missed opportunity for the government to address the limits of the Act, limits that are clearly present in the statutory language itself and recognized in the *Kay* decision.

B. Jurisdiction

The government repeatedly emphasizes the broad nature of its jurisdiction over non-U.S. companies, embracing a number of overlapping theories. First, the Guide vigorously affirms the government's recent expansive assertion of territorial jurisdiction over non-U.S. defendants, such as the so-called "correspondent bank jurisdiction" (as seen in the *Technip* and *Snamprogetti* cases, where jurisdiction is based on overseas financial transactions involving US dollars, premised on the fact that virtually all such transactions clear through correspondent banking accounts in the U.S.) and jurisdiction based on emails sent between foreign email addresses that were transmitted through U.S.-based servers (seen in the *Magyar Telekom* case). The Guide states that "placing a telephone call or sending an email, text message, or fax from, to, or through the United States . . . [or] sending a wire transfer from or to a US bank or *otherwise using the US banking system*, or traveling across state borders or intentionally to or from the United States" (emphasis added) all constitute conduct that falls under the jurisdiction of the FCPA.

The Guide also enunciates, in more detail perhaps than the government has done in previous enforcement actions, jurisdiction based on conspiracy, aiding and abetting, or agency theories. For example, the government asserts that foreign corporations and individuals may be held liable as co-conspirators when any of their conspirators take any act in the U.S, even if the foreign conspirator itself does not participate in the act, stating that this approach, used in part in the *TSKJ* cases, is "traditional application of conspiracy law" and application of the *Pinkerton* liability, "namely, being liable for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator in furtherance of the conspiracy." Similarly, the government suggests that foreign nationals or corporations who act overseas as *agents* of domestic concerns and issuers may be held liable "regardless of whether the foreign national or company itself takes any action in the United States." Although this latter theory may be consistent with existing agency principles, we are not sure it will work in the context of the FCPA, where the language of the statute, both in its original form and as amended in 1998, suggest that Congress carefully established different jurisdictional tests for US and non-U.S. nationals, including agents. That, however, is a topic for another article — the point here is that, as we have repeatedly noted in our *Trends & Patterns*, the US authorities have adopted, and will continue to apply in future enforcement actions, the broadest and most expansive theories of jurisdiction to reach non-U.S. nationals and corporations.

C. Thing of Value

The government properly emphasizes that "anything of value" encompasses more than direct payments of cash or benefits to a government official. The government, however, goes to great lengths in the Guide to attempt to reassure corporations and compliance professionals that it does not view the provision of all gifts or benefits as violations of the statute. Thus, the Guide recognizes that items and services of nominal value are unlikely to influence an official and, as a result, are not, without more, items that have resulted in enforcement actions by the DOJ or the SEC. The Guide goes on to provide several examples of what might constitute appropriate gifts, travel, and entertainment, as well as some examples of where such gifts, travel, or entertainment cross the line, mostly focusing on the existence (or suggestion) of corrupt intent.

The Guide is less useful when it comes to the concept of "indirect" benefits. Here, the government does not provide particularly illuminating examples of what an "indirect" benefit might be and in some cases seems to depart from the clear requirements of the statute. For example, it refers to "payment or gifts to third parties, like an official's family members, as an indirect way of corruptly influencing a foreign official." The statute, however, does not refer to "corruptly influencing an official," it requires payment of "money or anything of value" directly or indirectly *to* a government official. It is one thing, of course, if the gift to a family member benefits the official, *e.g.*, by paying his or her child's tuition or providing employment to

a sibling he or she would otherwise have to employ. On the other hand, the mere purchasing of influence, where the relative is selling his or her own ability to influence the official, although perhaps unseemly, is not necessarily a violation of the statute (although there are, of course, some countries that prohibit such "trading in influence" under their domestic laws).

Similarly, the government, in discussing charitable contributions, notes that in the *Schering-Plough* case, the donation was made to a charity that renovated and preserved Polish castles in which the relevant government official had an important role, but it does not explain how a contribution to curry favor with the official conveyed value *to* the official, the requirement set out in the statute. (On that point, it is perhaps instructive that the SEC in that case did *not* charge a violation of the anti-bribery provisions, just of the FCPA's accounting provisions relating to the inaccurate and misleading way in which the contributions were recorded on its books.) If, as some have speculated, the official lived in one of the castles, there would, of course, be clear value being conveyed to the official. The question, however, which the government does not answer in the Guide, is whether such value could be *intangible*, such as contributions, perhaps less egregious than the *Schering-Plough* example, that are intended to engender favorable attitudes toward the company by a particular official.

D. Instrumentality of a Foreign Government

Although some commentators, as well as some defendants, have argued that the FCPA's use of the term "instrumentality" of foreign governments is vague and ought to be interpreted narrowly or limited to government agencies, the government in the Guide strongly rejects that approach. Instead, the Guide re-asserts the government's position, supported by several courts, that the term "instrumentality" is broad and applies to state-owned and controlled entities. Thus, the Guide notes that determining whether a particular entity is an instrumentality will typically require a fact-specific analysis of the entity's ownership, control, status, and function. The Guide reiterates the fact-specific, factor-based analysis previously used by the enforcement authorities and the courts, highlighting the need for a flexible analysis that can take into account the variety of manners in which governments are organized and operate through state-owned or controlled entities. It also clarifies that, while no one factor is dispositive or necessarily more important than another, as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares. The Guide is careful to note exceptions to this, however, such as where the government holds status as a "special shareholder" or where most senior company officers were political appointees, but the fact of minority ownership appears to weigh against finding that an entity is an instrumentality, leaving other factors to attempt to tip the balance.

From a corporate compliance perspective, however, whether a particular entity is or is not an instrumentality is largely irrelevant. It would be a rare compliance program that would only prohibit public bribery of government officials but allow (or at least not disallow) payments of commercial bribes. In fact, the DOJ even recognized as much when it admonished companies that private-to-private commercial bribery also carries a risk of prosecution, whether that is under the FCPA accounting provisions or other US laws. Commercial bribery is also often outlawed by the corruption laws of the country in which the bribes are paid. Particularly for multi-national companies, parsing between public versus private bribery will only lead to headaches and complicated balancing acts, which can plague the effectiveness of a compliance program.

E. Facilitating Payments

The FCPA explicitly excepts facilitating payments from the scope of the anti-bribery provisions, although issuers may still be prosecuted for making such payments if they are not recorded accurately in their books and records. As we have noted in our *Trends & Patterns*, however, the government has, in recent enforcement actions, almost deliberately obfuscated the

distinction between facilitation and non-facilitation payments, charging both anti-bribery and books and records violations in some cases that appear to involve both types of payments without setting out which payments fell into which category.

The Guide does not advance the ball in this area either, and provides little guidance concerning the government's view of what constitutes a facilitation payment as opposed to a business purpose payment, which one would have thought was an important issue given that one violates the statute and the other does not. In the Guide, however, the government largely limits itself to listing the examples already set out in the statute. It does provide a hypothetical in which a payment qualifies as a facilitating payment because it was "a one-time, small payment to obtain a routine, non-discretionary governmental service that [the company] is entitled to receive." Although it is comforting to see this traditional formulation in writing, the Guide does not otherwise explain whether there are other factors, such as cumulative amounts and duration, that the government might view as relevant to distinguishing one type of payment from another.

Some commentators had hoped that the government would "amend" the FCPA by essentially rejecting the facilitation payments exception. This the government refused to do for obvious reason. The Guide cautions, however, that improperly recorded facilitating payments may still run afoul of the FCPA's accounting provisions and that facilitating payments may violate local law and other countries' foreign bribery laws which do not contain an exception for facilitating payments. The Guide also notes that, notwithstanding the FCPA exception, the United States has regularly encouraged companies to prohibit or discourage facilitating payments, in accordance with recommendations made by the OECD's Working Group on Bribery.

F. Statute of Limitations

The Guide briefly sets out the applicable statutes of limitations for criminal and civil enforcement actions, generally five years with the possibility of tolling under certain circumstances. It is worth noting, however, that the SEC, while recognizing that the five-year statute applies to suits seeking civil penalties, asserts that this period does *not* apply to actions seeking "equitable remedies such as an injunction or the disgorgement of ill-gotten gains." This statement is somewhat problematic, as it fails to recognize that the SEC would be hard-pressed to claim, at least if put to the test, that an injunction is necessary *if there is no ongoing conduct and has not been any for over five years*. Indeed, several courts have stated their disapproval of the SEC's seeking injunctions whose only mandate is to "obey the law," something that is required of all individuals and entities irrespective of whether they are subject to an injunction.

II. Parent and Successor Liability

A. Parent Liability for Subsidiaries

In the past, the government, most often the SEC, has occasionally held a parent corporation liable for the acts of its subsidiaries on an agency theory. We have criticized this approach in the absence of clearly pled facts establishing that the parent authorized, directed, or controlled the subsidiary's illegal conduct. The Guide, however, is uncompromising in its apparent departure from this recognized measure of parent liability and instead vigorously adopts an agency theory that turns not on the parent's control of the illegal conduct but on "the parent's control — including the parent's knowledge and direction of the subsidiary's actions, both generally and in the context of the specific transaction." Thus, the government seems to be saying that it will first determine whether the subsidiary is an agent of the parent, focusing not only on the formal relationship but also on the practical realities of how the parent and subsidiary actually interact, and then apply

"traditional principles of *respondeat superior*" to hold the parent liable for the acts of its subsidiary, whether or not specifically authorized, directed, or controlled by the parent. This would, in our view, be a significant departure from existing practice and indeed from generally applicable corporate principles. Although, of course, every corporation is subject to some degree of control by its shareholders, whether natural persons or parent corporations, that legal control is distinguishable from a principal-agent relationship. If, indeed, control through such factors as ownership, appointment of directors, and functional reporting lines is all that is required, it is difficult to see when the government would not be able to hold a parent liable for its subsidiary's actions.

B. Successor Liability

In contrast to the previous discussion, the government is probably on solider ground in holding that its application of successor liability is not unique to the FCPA but is grounded on generally applicable legal principles. Critics of the FCPA have at times attacked successor liability—that is, when a company merges with or acquires another company, the successor company assumes the predecessor company's liabilities. The Guide emphasizes, however, that successor liability (an "integral part of corporate law") applies to all kinds of civil and criminal liabilities, and that FCPA violations are no exception. It thus provides a vigorous rebuttal to the Chamber of Commerce's efforts to eliminate or limit successor liability in FCPA cases.

The government seeks to soften this blow by noting that it has almost never prosecuted the acquiring company for the pre-acquisition acts of the acquired company. Instead, it states that it has held an acquiring company only responsible for post-acquisition continuation of unlawful conduct that it failed to prevent after it took control of the acquired company. This is, however, cold comfort in that, the government repeatedly notes that it *did* charge the predecessor company, now a subsidiary of the acquiring company, for pre-acquisition conduct. The acquiring company, therefore, still bears the financial burden resulting from its new acquisition's pre-acquisition conduct even if it is not held directly liable.

III. Compliance Guidance

A. Improper Benefits and Reasonable Expenses

The Guide helpfully states, on several occasions, that the FCPA does not prohibit legitimate marketing, including giving reasonable gifts and providing reasonable hospitality to officials. While the Guide reiterates that the FCPA does not contain a minimum threshold amount for corrupt gifts and payments, it does appear to address concerns raised by some critics of the FCPA, that, for example, a taxi ride for a foreign official might trigger an FCPA investigation. The Guide specifically states the enforcement authorities have never pursued an investigation on the basis of conduct such as "the provision of cups of coffee, taxi fare, or company promotional items of nominal value" and notes that, as a practical matter, items such as those would not trigger an investigation not because of their *de minimis* value, but because it would be difficult to envision any scenario in which those items would ever evidence the requisite corrupt intent.

This is not to say, however, that such benefits are always without risk; the government notes that it has focused on minor benefits "when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business." From the examples provided by the government, it appears that it is referring to instances such as in the *ABB Vetco Gray* cases, where the company provided shopping sprees, rent, and other gifts to Nigerian officials over a lengthy period of time. Thus, as a compliance matter, corporations should, on the one hand, rest

easy when it comes to the provision of relatively minor and transparent small gifts and benefits to officials; on the other hand, they must be sensitive to the cumulative effect of the practice, lest it become evidence of corrupt intent.

Moreover, benefits in the form of reasonable expenses associated with the promotion of products or services are expressly protected under the FCPA as an affirmative defense. The Guide notes that whether any particular payment is a *bona fide* expenditure necessarily requires a fact-specific analysis and provides some examples of payments the government has previously blessed through FCPA Opinions, including travel to inspect facilities, for training, or for product demonstrations. In addition, it provides a "non-exhaustive list of safeguards" for corporations to evaluate "whether a particular expenditure is appropriate or may risk violating the FCPA." These include the obvious ones, such as "Do not advance funds or pay for reimbursements in cash" and "Do not condition payment of expenses on any action by the foreign official". It also includes some other safeguards that represent best practices that may not be widely followed, such as "Ensure the expenditures are transparent, both within the company *and to the foreign government*" and "Obtain written confirmation that payment of the expenses is not contrary to local law." These latter suggestions require additional compliance steps beyond the normal financial controls. Corporations should carefully consider how they may be adopted in an efficient and effective manner.

B. Gifts and Entertainment

The Guide gives specific factor-based guidance and tips for gifts, travel, entertainment, and charitable contributions. To be well within the boundaries set in this Guide, companies should strive to develop clear and effective compliance programs that contain clear and easily accessible policies and set clear monetary thresholds and annual limitations, with limited exceptions.

Gifts

The Guide recognizes that small promotional items, gifts, and tokens of esteem or gratitude are "often an appropriate way for business people to display respect for each other." To avoid the risk of violating the FCPA, individual gifts should be (1) made openly and transparently; (2) properly recorded in the company's books and records, (3) provided only to reflect esteem or gratitude, (4) permitted under local law, (5) customary where given, and (6) reasonable for the occasion. As with other items of value, these factors focus on the reasonableness of and the intent behind a gift. Thus, the Guide warns that companies should avoid large or extravagant gifts ("such as sport cars, fur coats, and other luxury items"), cash or cash equivalents, paying a customer's bills, and "gifts to third parties, like an official's family members." In contrast, legitimate hospitality (such as coffee and snacks), promotional items with company logos (such as "free pens, hats, t-shirts, and other similar promotional items"), and other items of nominal value "are unlikely to improperly influence an official" or "evidence corrupt intent."

Travel and Entertainment

The Guide also recognizes that travel and entertainment related to the promotion of products or services is a part of doing business, and, thus, "[r]easonable and bona fide promotional expenditures do not violate the FCPA." To avoid FCPA enforcement, travel expenditures should be (1) for a clear and "legitimate business purpose" (such as trainings or facility or goods inspections), (2) to a location that meets the needs of the legitimate business purpose (such as the location of company facilities or personnel), (3) reasonable, and (4) properly recorded in the corporate books and records. Companies are allowed to provide meals and entertainment during these legitimate business trips, but meals and entertainment should be (1) reasonable (such as taking current and prospective customers out for a drink and picking up the "moderate bar tab"),

(2) "only a small component of the business trip," and (3) properly recorded in the corporate books and records. Thus, companies may treat existing customers to moderately priced dinners, sporting events, theatrical performances, and even business class airfare when "reasonable under the circumstances," such as for "lengthy international flight[s]" to which a "company's own employees [would be] entitled." But companies should avoid offering extravagant and luxury vacations and paying the expenses of an official's spouse or family members.

Charitable Contributions

The Guide makes clear that "[l]egitimate charitable giving does not violate the FCPA." But companies "cannot use the pretense of charitable contributions as a way to funnel bribes to government officials." Thus, charitable donations should be (1) subject to proper due diligence measures and controls, (2) made to only "bona fide charitable organizations," and (3) consistent with the company's internal guidelines on charitable giving. In turn, companies should avoid making contributions (1) at the request of a foreign official, (2) to charities associated with a foreign official, especially when the official can make decisions affecting the company's business in a particular country, and (3) conditioned upon receiving business or other benefits.

C. Due Diligence on Third Parties

Under the FCPA, companies can be held liable for payments made to third parties knowing that the third party is or will be making unlawful payments. Such liability may be predicated not only on actual knowledge of wrongdoing but also imputed knowledge based on the concept of "willful blindness." The Guide gives a list of common red flags associated with third parties from which the government may infer willful blindness, such as excessive commissions to third-party agents, unreasonably large discounts to third-party distributors, third party "consulting agreements" that include only vaguely described services, or a third party's close association with a foreign official.

The Guide also notes that because FCPA liability can be predicated on *awareness of a high probability* that improper payments are being made (even by a third party on the company's behalf), proper due diligence on third-party agents is critical to any FCPA compliance program. The Guide acknowledges that due diligence should be "risk-based," and that risks vary by industry, country, the nature of the transaction, and historical relationship with the third party. However, the Guide provides several "guiding principles" applicable to all third-party due diligence:

- A third party's *qualifications and associations* should be determined, including its reputation and relationships with foreign officials.
- Companies must have an *understanding of the business rationale* for including a third party in a transaction, including the role of and need for the third party.
- Companies should engage in *ongoing monitoring* of third-party relationships, including documenting that the third party is actually performing the work; exercising rights to audit the third party; providing ongoing training; and ensuring the third party annually certifies its compliance.

The Guide clearly contemplates an ongoing conversation between companies and third parties on FCPA compliance. It provides that when considering an enforcement action, the DOJ and the SEC will assess whether a company has informed third parties of the company's compliance program and sought assurances from third parties of reciprocal commitments.

D. M&A Due Diligence

Following on its comments concerning successor liability, the Guide encourages companies to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition, for reasons such as accurate valuation and risk management. Of particular interest to companies, however, will be the possibility that the enforcement authorities might decline prosecution of successor companies on the basis of proper due diligence. The Guide expressly states that the SEC and the DOJ have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with the DOJ and the SEC in the M&A context.

From the corporate compliance perspective, perhaps the most useful guidance is found in the "Practical Tips to Reduce FCPA Risk in Mergers and Acquisitions." In that section, the Guide expressly states that those who undergo the following actions will be given "meaningful credit" and in appropriate circumstances, the enforcement authorities may consequently decline to bring enforcement actions:

- conduct thorough due diligence;
- ensure that the acquiring company's code of conduct and compliance policies and procedures regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities;
- train the directors, officers, and employees (as well as agents) of newly acquired businesses or merged entities on the FCPA and other anti-corruption laws and the company's code of conduct and compliance policies and procedures;
- conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and
- disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

IV. Enforcement and Settlement Policies

A. Voluntary Disclosure

The Guide provided the DOJ and the SEC with an opportunity to clarify their positions on voluntary disclosure and reaffirm the commonly held belief that the agencies place "a high premium on self-reporting." Discussed alongside a company's cooperation and remedial efforts, the DOJ and the SEC both explained that an effective voluntary disclosure not only requires timely notice of the FCPA violations, but must also include information concerning relevant persons as well as the nature and extent of the violations. The SEC further added that disclosure must be made not only to the relevant enforcement agency but to the public and self-regulatory agencies as well.

Nevertheless, little appears to have been added by the agencies' discussion of the possible benefits of voluntary disclosure. For its part, the DOJ simply highlighted the most relevant portions of the *Principles of Federal Prosecution of Business Organizations* and the US Sentencing Guidelines, unsurprisingly explaining that voluntary disclosure, if completed properly, may result in fine reductions. The SEC added that in the event a company engages in voluntary disclosure, along with maintaining an effective compliance program, taking proper remediation efforts following a violation, and cooperating with ongoing law-enforcement investigations, the SEC's response may range from reduced sanctions to "taking no enforcement action" at all.

B. Independent Monitors

The Guide includes a section entitled, "When Is a Compliance Monitor or Independent Consultant Appropriate?" noting that one of the primary goals of the enforcement actions against companies that violate the FCPA is ensuring that such conduct does not occur again. Recognizing that the government has previously issued guidance regarding the selection and use of corporate monitors, the Guide sets out the following factors that the government will consider when determining whether a compliance monitor or consultant will be appropriate:

- seriousness of the offense;
- duration of the misconduct;
- pervasiveness of the misconduct;
- nature and size of the company;
- quality of the company's compliance program at the time of the misconduct; and
- subsequent remediation efforts.

Meanwhile, we have observed a reduction in corporate monitors and a corresponding increase in self-monitoring in recent enforcement actions. The Guide addresses the availability of self-monitoring, explaining that it will typically occur where the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.

C. Enforcement Resolutions

As part of the Guide, the DOJ and the SEC both reiterated that they will consider a broad range of potential resolutions of FCPA enforcement actions, including through plea agreements, deferred prosecution agreements (DPAs), non-prosecution agreements (NPAs), and declination decisions. Nevertheless, with the exception of declination decisions, both agencies failed to truly elaborate on the factors underlying the Department's and the SEC's enforcement resolution decisions. In fact, in the case of the plea agreements, DPAs, and NPAs, the DOJ provided little more than a description of the various types of FCPA enforcement resolutions. The SEC was slightly more explicit, listing some factors it considers when offering DPAs and providing as a case example, the SEC's first DPA agreement in *In Matter of Tenaris, S.A.*, describing the factors evaluated as including discovery of the problem by the company through its own worldwide compliance review, voluntary disclosure, thorough internal investigation, "real-time" cooperation, and extensive remediation.[1]

[1] For an extensive critique of the *Tenaris* action, see Shearman & Sterling LLP, *A New Tool and a Twist? The SEC's first Deferred Prosecution Agreement and a Novel Punitive Measure* (May 24, 2011), available at http://fcpa.shearman.com.

D. Declinations

Although the DOJ and the SEC showed some reluctance to provide a great deal of new information concerning their declination decisions—choosing instead to repeat the various factors the agencies considered under their respective prosecution guidelines/manuals—the Guide's discussion of several case summaries provided some insight. Through these various case examples of former DOJ and the SEC declination decisions, the Guide demonstrated that the agencies frequently took into consideration, not surprisingly, the following factors: initiation of internal investigations; voluntary disclosures and cooperation with enforcement agencies; size of the bribes involved; termination of the employees involved; and effectiveness of company's internal controls at detecting the violation.

V. Conclusion

The US government's Guide does not break any particularly new ground. If anything it solidifies the government's position on some of the issues that have been the subject of intense criticism, some founded and some not, by commentators and the private sector. In other words, those who were hoping the government would back down or soften some of their positions will undoubtedly be disappointed and critical of the Guide.

That said, the Guide does provide valuable insight into the factors that the DOJ and the SEC use to evaluate a corporation's behavior, what they consider essential elements of a compliance program, and how they approach enforcement decisions. Although much of this may have been apparent through reading of the tea leaves in enforcement decisions, it is helpful, even if you don't agree with all of it, for the government to have consolidated and, in some cases, explained its position.

As the government emphasizes on numerous occasions, many of the critical factors that may make a difference between a prosecution or a declination (or something in between) are very dependent on facts and circumstances. Any of our partners and counsel in Shearman & Sterling's Global Anti-Corruption Practice would be happy to discuss the general guidance or specific concerns with you.

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