

CLIENT ALERT

Top Five Takeaways From the New FCPA Guide

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Initial commentary on the recently issued *Resource Guide to the U.S. Foreign Corrupt Practices Act* ("the *FCPA Guide*") is nearly unanimous: it is a useful resource that presents the views of the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") in one place, but it breaks little new ground. Publication of the *FCPA Guide* offers an opportunity to focus on some of the key areas of concern for companies facing the daily challenge of FCPA compliance. Thus, rather than simply reminding you to "hire experienced counsel" we offer here our top five takeaways:

The FCPA Guide Sets Forth DOJ And SEC Policy, Not Settled Law

DOJ and SEC take care to note that the *FCPA Guide* does not "create any rights" and readers should also bear in mind that it does not create any law either. In several places, the agencies set forth their interpretations of the law almost as though those interpretations were widely accepted or reflect settled precedent. For example, the *FCPA Guide* states that the term "instrumentality" in the "foreign official" definition "can include state-owned or state-controlled entities," and that "[w]hether a particular entity constitutes an 'instrumentality'" under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function." These are DOJ's views, to be sure, but they have been challenged in recent prosecutions and have been ruled on by only a few district courts.

Voluntary Disclosure Of Small Payments May Lead To Declination, But The Benefits Of Self-Reporting Remain Uncertain In Many Cases

In an apparent response to complaints about the lack of transparency regarding charging decisions, the *FCPA Guide* provides anonymized examples of cases the government has declined to pursue. This information should be taken with a grain of salt as it tends to promote blindly the government's oft-repeated encouragement of swift and thorough investigations of potential violations, robust compliance program improvements, and, above all, voluntary disclosures. Those are certainly steps that would behoove any company hoping for a free pass despite a provable FCPA violation, but all of the above are not necessarily required at every hint of a problem. Another interesting element in the declination examples is the size of the payments at stake. Despite the government mantra that it is "the purpose and not the value" of the payment that counts, it appears that small and relatively isolated payments will not always lead to enforcement action, at least where the company has dutifully investigated, made improvements to its compliance program, and voluntarily disclosed the misconduct. That does not mean, however, that the rewards of voluntary disclosure are sufficiently certain to justify self-reporting in all cases, given the substantial expense it often entails for matters that present little or no enforcement risk.

The FCPA Guide Provides Little Guidance On A Key Element Of The "Foreign Official" Definition

There are two elements to the "foreign official" definition: (1) whether the individual in question can be said to be an employee or officer of the alleged foreign government or agency, department, or instrumentality thereof, *or* can be said to be "acting in an official capacity on or behalf of" the alleged foreign government or agency, department or instrumentality thereof (the

"individual element"); and (2) whether the particular entity in question is itself the "foreign government" or an "agency, department, or instrumentality" thereof (the "entity element"). Two pages of the *FCPA Guide* are devoted to the entity element, but the *FCPA Guide* gives short shrift to the individual element, saying only that it applies broadly to "any" such individual. The guidance goes on to say that "[t]he FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike." It is usually not difficult to determine whether an individual is an "employee" or "officer" of a government or one of its agencies, departments, or instrumentalities. But whether an individual can be said to be "acting in an official capacity on or behalf of" such an entity is less clear. DOJ implicitly analyzed this phrase in a recent FCPA Opinion Release concerning members of a royal family ([discussed here](#)), but the overly broad statement in the *FCPA Guide* adds little to the analysis and this issue deserves more attention and analysis.

Facilitating Payments May Be Permissible, But Companies Should Nevertheless Stay Away

The DOJ has long signaled that the FCPA's exception for "facilitating payments" for routine governmental action is an extremely narrow one. The *FCPA Guide* at first blush suggests a little more flexibility on the government's part, providing the example that a small payment to a government clerk to ensure the timely stamping and filing of a permit application to build a new road would not violate the statute. However, a close reading the *Guide* and the accompanying footnotes makes clear that the "facilitating payments" exception provides little cover or comfort. The *Guide* stresses that such payments may still violate local law, that facilitating payments are not permitted by the UK Bribery Act, that the U.S. government has regularly discouraged facilitating payments notwithstanding their allowance under the FCPA, and that failing to accurately record a facilitating payment could violate the FCPA's books and records exception.

Compliance Programs Need to be Dynamic, Evolving, and Regularly Tested and Improved

The *Guide* details the characteristics or "hallmarks" of an effective anti-corruption compliance program. The overarching theme is the notion that an effective compliance program is not static, but rather is dynamic, self-critical, and marked by "continuous improvement and sustainability." Corruption risk assessment should not be a one-time occurrence, but should evolve along with a company's business model and target markets. Companies should periodically review, update, and adjust their codes of conduct and compliance policies. Internal controls should be regularly tested through "targeted audits." Anti-corruption training and certification for directors, officers, and relevant employees should include both initial training and regular refresher sessions, which should be carefully documented.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Stephen M. Byers

Partner – Washington, D.C.
Phone: +1 202.624.2878
Email: sbyers@crowell.com

Alan W. H. Gourley

Partner – Washington, D.C.
Phone: +1 202.624.2561
Email: agourley@crowell.com

Thomas A. Hanusik

Partner – Washington, D.C.
Phone: +1 202.624.2530
Email: thanusik@crowell.com

Kelly T. Currie

Partner – New York
Phone: +1 212.895.4257
Email: kcurrie@crowell.com

Daniel L. Zelenko

Partner – New York
Phone: +1 212.895.4266
Email: dzelenko@crowell.com