

# Understanding the Resource Guide to the U. S. Foreign Corrupt Practices Act

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**T**he key to effective communication in the courtroom, and in business, can be summarized in one simple message: know your audience. The United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) had a target audience for their recently released guidance concerning the Foreign Corrupt Practices Act (FCPA); compliance officers.

On November 14, 2012, the DOJ and SEC released “A Resource Guide to the U. S. Foreign Corrupt Practices Act.”<sup>1</sup> The Resource Guide, which had been anticipated for over a year, represents the DOJ’s and SEC’s attempts to clarify key provisions of the FCPA and to provide operating principles for businesses confronted with FCPA compliance issues.

The Resource Guide provides no ground-breaking material. It combines materials from three sources: long-held SEC and DOJ positions about enforcement of the FCPA, case law highlighting previous FCPA decisions and a generous sprinkling of government victories detailing FCPA actions against violators. These sources highlight the legal minefield that is the Foreign Corrupt Practices Act.

## Definition Provided by Resource Guide

One of the most sought after and anticipated contributions of the Resource Guide is the clarification of definitions of key terms in the FCPA. These clarifications had been requested by the United States Chamber of Commerce and 30

other industry representatives in a 2010 Chamber Report<sup>2</sup> and a February 2012 letter to the DOJ and SEC.<sup>3</sup>

## Gifts, Travel, Entertainment and Other Things of Value

The Resource Guide confirms that items of nominal value, such as cab fare, reasonable meals and entertainment expenses and company promotional items are “unlikely to improperly influence an official and, as a result, are not,

## Foreign Officials

One of the most widely requested clarifications of the FCPA was what constitutes a “foreign official.” The DOJ and SEC says in the Resource Guide that the FCPA should be broadly applied to corrupt payments to any officer or employee of a foreign government and to those acting on the foreign government’s behalf.”<sup>8</sup> Therefore, the FCPA covers “low-ranking employees and high-level officials alike.”<sup>9</sup> While one factor is not dispositive or

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without more, items” that result in FCPA enforcement actions.<sup>4</sup> The DOJ/SEC did provide a warning that “widespread gifts of smaller items” may be part of a pattern of bribes and may violate the FCPA.<sup>5</sup>

The government confirmed that it would continue to investigate improper travel expenses, and that travel that has no apparent business purpose, could place individuals and corporations under FCPA review.<sup>6</sup> The Resource Guide specifically warns of situations where a company provides travel and entertainment expenses for foreign customers to popular tourist destinations in the United States when, in reality, no training occurred on the trips and where the company had no training facilities at those locations.<sup>7</sup>

more important than another when evaluating whether an individual is a foreign official, an entity is unlikely to qualify as an “instrumentality” of a foreign government if the government does not own or control a majority of the shares in that entity.<sup>10</sup> The Resource Guide list of factors that will be considered in determining whether an entity constitutes a “instrumentality” includes:<sup>11</sup>

- The foreign state’s extent of ownership of the entity;
- The foreign state’s degree of control over the entity (including key officers and directors);
- The foreign state’s characterization of the entity and its employees;
- The circumstances surrounding the entity’s creation;



- The purpose of the entity's activities;
- The exclusive or controlling power vested in the entity to administer its designated functions;
- The level of financial support by the foreign state, including subsidies, special tax treatment and loans;
- The entity's provision of services to the jurisdiction's residents;
- Whether the government end or purpose sought to be achieved is expressed in the policies of the foreign government; and
- The general perception that the entity is performing official government functions.

### Successor Liability.

The business community also sought clarification concerning successor liability. The DOJ/SEC advises that if a company subject to the FCPA acquires a foreign company, which was not previously subject to the FCPA's jurisdiction, the acquisition will not directly create liability for the purchaser.<sup>12</sup> The Resource Guide confirmed that there have been

a significant number of declinations of FCPA enforcement actions where an acquiring company voluntarily disclosed an FCPA violation by an acquired company, remediated the conduct, and integrated the acquired company into corporate compliance programs.<sup>13</sup>

### Significance of Compliance Programs Confirmed

The Resource Guide suggests that companies with robust compliance programs will find that their investments in compliance are justified. While recognizing that there is no "one size fits all" compliance program, the Resource Guide champions a risk-based assessment of the effectiveness of compliance programs and focuses on three basic questions for any compliance professional:<sup>14</sup>

- Is the company's compliance program well designed?
- Is it being applied in good faith?
- Does it work?

The SEC and DOJ admit that a company's failure to prevent every violation does not necessarily mean that a

compliance program is not effective.<sup>15</sup> Equally, "even when that program did not prevent the particular FCPA violation that gave rise to the investigation", the DOJ and SEC may decline to pursue charges against the company based on an ineffective compliance program and may even seek to reward a company for its program.<sup>16</sup> The importance of a vigorous compliance program is highlighted by the fact that of the nine factors considered by the DOJ/SEC in deciding whether to pursue FCPA enforcement actions, three relate to compliance program issues.<sup>17</sup>

The Resource Guide also provides a list of "hallmarks" of an effective compliance program including:<sup>18</sup>


- A commitment from senior management to a "culture of compliance.";
- A company code of conduct, which is clear, concise and accessible to all employees and those conducting business on the company's behalf.";
- Assigned responsibility for oversight and implementation of a compliance program to one or more specific senior executives including "adequate

autonomy from management.”;

- A mechanism to ensure that FCPA policies and procedures are communicated throughout the organization, including periodic training and certification for all of directors, officers and employees and where appropriate, agents and partners.;
- The existence of incentives, including personnel evaluations, promotions, rewards for improving and developing the company’s compliance program and a commitment that working in the compliance program’s organization is a way to advance an employee’s career.;
- Risk-based due diligence to determine the qualifications and associations of third-party partners, an understanding of the business rationale for including the third-party in the transaction and on-going monitoring of third-party relationships.;
- A commitment to providing confidential, internal reporting and investigation of misconduct or violations of company policy.;
- Pre-acquisition due diligence in the purchase of companies and post-acquisition integration of the purchased company into compliance programs.

- The company responded promptly upon discovery with vigorous internal investigations of the alleged misconduct.;
- The suspected violators self-reported the conduct and fully cooperated with the government investigation.;
- The violation resulted in an enhanced and/or reorganized compliance program within the offending entity.

## Conclusion

The clear message from the Resource Guide to business and compliance professionals is to establish and strengthen risk-based compliance programs. This 120 page Resource Guide has reached its audience and should be on the bookshelf, and possibly nightstand, of every compliance professional and business executive operating in the global market place. 

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- 1 A Resource Guide to the U.S. Foreign Corrupt Practice Act. <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>.
- 2 Restoring Balance — Proposed Amendments to the Foreign Corrupt Practice Act; U.S. Chamber Institute for Legal Reform, October 2010. [http://www.instituteforlegalreform.com/sites/default/files/restoringbalance\\_fcpa.pdf](http://www.instituteforlegalreform.com/sites/default/files/restoringbalance_fcpa.pdf).
- 3 [http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12\\_4\\_.pdf](http://www.instituteforlegalreform.com/sites/default/files/FCPA%20Guidance%20Letter-2-21-12_4_.pdf)
- 4 Resource Guide at 15.
- 5 *Id.*
- 6 *Id.* at 15-16.
- 7 *Id.* at 15-16.
- 8 *Id.* at 20.
- 9 *Id.*
- 10 *Id.* at 21.
- 11 *Id.*
- 12 *Id.* at 28.
- 13 *Id.*
- 14 *Id.* at 56.
- 15 *Id.*
- 16 *Id.*
- 17 *Id.*
- 18 *Id.* at 57-62.
- 19 *Id.* at 77-79.

## Factual Scenarios and Declinations Decisions

One of the most useful components of the Resource Guide is the inclusion of scenarios which might confront compliance officers. These hypothetical situations are in response to requests from industry for hard and fast rules that businesses could follow when confronted with FCPA questions.

In addition, the Resource Guide provides six examples of situations where the government has chosen to decline prosecution of suspected FCPA violations.<sup>19</sup> While the facts underlying each declination decision are unique, four common themes emerge from the declinations:

- The violation involved unlawful payments that were never made or the amount of the payments was small.;