Recent DOJ FCPA Guidance: Overview and Practical Implications

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January 31, 2013
What was expected?

Suggested Reforms from Chamber of Commerce
- Adding Compliance Defense
- Limiting Successor Liability
- Adding Willfulness Requirement for Corporate Liability
- Limiting Liability for Acts of Subsidiaries
- Defining “Foreign Official”

Anticipated Additional Topics Based on Recent Cases
- Third-Party Liability
- Clarifying Affirmative Defenses and Exception
- Due Diligence Requirements
- Use of Corporate Monitors
- Cooperation Credit

DOJ’s Goal:
- Reinforced Scope of the FCPA
- Clarity on Charging Decisions and Scope of Corporate Liability
- Emphasis On Compliance Programs
- Remediation
Anticipated DOJ Principles to be Reinforced

**Reinforced Scope of the FCPA**
- Courts and the DOJ define “Foreign Official” Broadly
- *Mens Rea* of the FCPA

**Clarity on Charging Decisions and Scope of Corporate Liability**
- Parents Have Broad Responsibility for Criminal Conduct of Subsidiaries
- Successor Liability: Significant risk of FCPA exposure
- Liability for Third Parties: Significant risk of FCPA exposure from the actions of Third Parties
- Both Affirmative Defenses and Exceptions Provide Narrow Grounds for Relief

**Emphasis On Compliance Programs**
- The DOJ Credits a Company’s Compliance Program; No Compliance Defense is Necessary
- Enhanced Third Party Due Diligence
- Compliance programs should be risk-based and industry specific

**Remediation**
- Corporate Monitors: An Important Tool For Ensuring Ongoing Corporate Compliance
- Cooperation Tools: Voluntary Disclosure and Opinion Procedure Release
Assessing the Guidance
Overview of DOJ & SEC FCPA Guidance

- FCPA’s anti-bribery provisions
- FCPA’s accounting provisions
- Other related laws
- Guiding principles of enforcement
- FCPA penalties, sanctions and remedies
- Resolutions
- Whistleblower provisions and protections
- DOJ’s opinion procedure
Overview: The Good

- Comprehensive review of enforcement positions and corporate compliance program expectations
- Provides additional detail on best practices in developing and maintaining a compliance program
- Useful hypotheticals provide assistance to companies on day-to-day challenges of creating, implementing, and enforcing robust corporate compliance program
Overview: The Bad

– Breaks little new ground; reaffirms prior pronouncements and policy positions in government speeches and legal briefs
– Caveat makes clear that the guidance is not binding
– Addresses general issues but does not provide clarity on many of the “challenging real life scenarios” that many companies face
– Lacks clarity on important issues such as criminal and civil distinctions in assessing parent-subsidiary liability
Highlights From the Guidance
DOJ’s Reach Significant

- Affirms that the FCPA’s anti-bribery provisions can be triggered by a:
  - telephone call
  - email
  - text message, fax to or through the U.S.
  - wire transfer from or to a U.S. bank or otherwise using the U.S. banking system; or
  - traveling across a state border or internationally to or from the U.S.
DOJ’s Reach Significant (cont’d)

– FCPA also covers any person or entity who engages in any act in furtherance of a corrupt payment while in the U.S. territory, regardless of whether they use the U.S. mail or a means or instrumentality of interstate commerce

– Highlights 1998 amendments that removed the requirement of the use of interstate commerce for acts in furtherance of a corrupt payment by U.S. individuals or entities when outside the U.S.
Our Take: DOJ’s Reach Significant

- Guidance appears to confirm indirectly the use of correspondent bank accounts as a basis for jurisdiction (Technip, Snamprogetti, Siemens, Halliburton/KBR)

- Methods of reaching foreign (non-U.S.) persons or entities
  - U.S. Issuer
  - Agent of U.S. company
  - Aiding and abetting violation of U.S. company
  - Conspiracy involving U.S. person/entity
  - Customer pressure
  - “Act in furtherance” of a violation while in U.S.
    - Use of U.S. dollars/correspondent bank account?
Business Purpose Test

- FCPA applies to payments made to gain a business advantage
- This includes bribe payments:
  - for favorable tax treatments
  - to eliminate customs duties
  - to drive a competitor from entering a market or
  - to circumvent a licensing requirement
- Even if they are not directly related to the award of specific business
“Corruptly” and “Willfully”: “Corruptly”

- Payor must have intent or desire to wrongfully induce the recipient to misuse official position
- Corrupt act does not have to succeed; attempt sufficient
- If offer, promise, or authorization for a corrupt payment made, actor does not need to know the identity of the recipient
  - If executive authorizes payment saying “pay whoever you need to in order” to obtain a government contract, violation occurred even if no bribe is ultimately paid
“Corruptly” and “Willfully”: “Willfully”

- Requires defendant to know that he is committing an act for a “bad purpose” and in violation of the law
- Not necessary that the government prove defendant is either aware of the FCPA or specifically knows that he is violating the FCPA in order to establish criminal liability
Gifts, Travel, and Entertainment

- Requires corrupt intent of giver
- Unlikely cup of coffee, taxi fare, or nominal company promotional item would “ever evidence corrupt intent”
- Lavish gifts and/or entertainment expenses “more likely” to indicate improper purpose
- Companies encouraged to develop “easily accessible” guidelines and consider automated approval processes with “clear monetary thresholds” along with annual restrictions, and limited above-threshold exceptions (that require managerial approval)
Our Take: Gifts, Travel, and Entertainment

“Hard cases” require extra diligence, but enforcement actions still provide some practical guidance on what would not be “reasonable” and “bona fide”:

- **Metcalf & Eddy (1999):** Hospitalities, such as excessive travel which included Disney World and Paris as destinations; the upgrading of airline tickets to first class; the payment of 150 percent of an official’s estimated per diem; and the payment of the travel expenses of the official’s wife and children.

- **Lucent Technologies Inc. (2007):** 24 presale trips for government customers, of which at least 12 were mostly sightseeing trips. Between 2000 and 2003 Lucent spent over $1.3 million on at least 65 presale visits that were primarily for entertainment purposes and involved travel to Disneyland and the Grand Canyon.

- **UTStarcom (UTSI) Inc. (2009):** Travel and other things of value were provided to foreign officials by USTI for the supposed purpose of training oversees were, in actuality, primarily to sightseeing locations such as Hawaii, Las Vegas, and New York City. Most of the trips lasted two weeks and cost $5,000 per customer employee.

- **International Business Machines Corporation (IBM) (2011):** Gifts to government officials of cash, cameras, computers, and computer equipment as well as overseas trips, entertainment, and gifts. Contracts contained provisions requiring IBM to provide training to customer employees that sometimes required travel.
Charitable Donations: Questions to Ask

- Affirms legitimacy; encourages due diligence and controls

- Five questions to ask:
  - Purpose of payment
  - Is payment consistent with corporate charitable giving guidance
  - Is payment at request of foreign official
  - Is foreign official associated with charity; can official make decisions regarding company business in country
  - Is payment conditioned upon receiving business or other benefits
Charitable Donations: Due Diligence

- Suggests the following due diligence and controls:
  - Certifications regarding compliance with FCPA
  - Confirm no recipients/officers affiliated with foreign government
  - Require audited financial statements
  - Written agreement to restrict use of funds
  - Ensure funds transferred to valid bank account
  - Confirm charity’s commitments met before funds disbursed
  - Ongoing monitoring of efficacy of program
Who is a Foreign Official?

- Underscores the inclusion of “low-ranking employees and high-level officials alike”
- References recent court opinions that “instrumentality” turns on factors such as “degree of control,” “level of financial support by the foreign state,” and “entity’s provision of services to the jurisdiction’s residents”
- Not likely an “instrumentality” if foreign government’s ownership in entity’s shares less than 50 percent
  - Exception where foreign government with minority ownership stake maintains veto power and/or control over important operational decisions
Available Affirmative Defenses

- Confirms that the defendant has the burden of proving both:
  (1) a payment that is lawful under the laws of the foreign country; or
  (2) money spent to promote, demonstrate, or explain a company’s products or services, or perform a contractual obligation
Affirmative Defenses: Local Law

- Payment must be permissible under written laws and/or regulations of foreign country at time of offense.
- Country’s customary or unwritten practices, including “the fact that bribes may [simply] not be prosecuted under local law,” are inadequate to establish the defense.
- “Local law” defense infrequently applied given that written laws and regulations of foreign nations seldom allow corrupt payments.
Affirmative Defenses: Promotion, Contract

- Company should distinguish between trips “primarily for personal entertainment,” which could very well violate the FCPA’s anti-bribery provisions, and “reasonable” hospitality expenditures that are legitimately associated with the promotion of a company’s business, products and services.

- Regarding “reasonable” expenses, the government references prior DOJ FCPA opinion releases wherein it lists various categories of expenditures that did not warrant FCPA enforcement.
Affirmative Defenses: Promotion, Contract

- Includes travel to visit a company’s facilities, expenses for training, and expenses for business meetings
- Lists several additional “safeguards” for companies to consider in evaluating whether a certain disbursement is a bona fide business expense, such as:
  - importance of paying costs directly to travel and hospitality vendors (rather than the foreign official),
  - avoidance of cash reimbursement payments, and
  - obtaining written confirmation that the expense is not contrary to local law
Payments to Third Parties

- Cites to several recent corporate resolutions involving different types of third-party arrangements that resulted in approximately USD $2 billion in monetary penalties:
  - agents of a joint venture involved in the Nigerian “Bonny Island” matter
  - a distributor of AGA Medical
  - an agent of Innospec in Iraq; and
  - the Panalpina freight forwarding matters where the U.S. subsidiary of a Swiss company was an “agent” of several U.S. issuers and was thus charged directly with violating the FCPA
Payments to Third Parties (cont’d)

- Liability may apply for actual knowledge of wrongdoing and purposeful avoidance of actual knowledge

- Because the FCPA covers the “willful blindness” (or “deliberate indifference”/“head-in-the-sand”) problem, red flags, if consciously avoided, can provide the basis for forming criminal knowledge of corruption-related activity

- Affirms that due diligence questionnaires and anti-corruption representations insufficient when clear risks are present
Third-Party Red Flags

- Suggests the following red flags requiring heightened FCPA-related due diligence:
  - Market (high-risk country)
  - Size and significance of deal to company
  - Whether company’s first timing using particular consultant
  - Consultant has strong ties to political and government leaders
  - Success fee structure of contract
  - Vaguely-defined services to be provided
Third-Party’s Government Relationships

- Acknowledges potential for corruption if third-party has relationships with government officials
- Suggests additional due diligence and controls:
  - Background and reference checks
  - Specific contract terms referencing services and deliverables third-party is to provide
  - Mandate anti-corruption training, certifications and audit rights
  - Require supporting documentation before payment of fees
Distributors and Local Partners

- Require local partner or distributor to verify no role in government entity’s decision to award contract
- If government official has relationship with local partner or distributor:
  - Require official to verify no role in decision to award contract
  - Notify official’s agency and contracting agency of official’s proposed involvement
  - Require official to certify intent to comply with anti-corruption laws and that involvement in transaction permitted under local law
Facilitating Payments

- Continues to narrow the application of the facilitating payments exception
- Whether payment characterized as facilitating payment depends on purpose of the payment, not its size
- Cases in which purpose of the payment was to clear goods, avoid inspection, or reduce or eliminate customs duties – rather than merely expedite a routine, non-discretionary government action – were considered bribes, not facilitating payments
Facilitation Payments (cont’d)

– Clearly discourages use of payments even if the exception is properly invoked
– Notes that the payments violate local law in most countries, violate the UK Bribery Act, and that the U.S. has discouraged their use regularly pursuant to the recommendations of the OECD’s Working Group on Bribery
Our Take: Facilitation Payments

What does the FCPA say is a “routine governmental action?”

- obtaining **permits**, **licenses**, or other official documents to qualify a person to do business in a country;
- processing governmental papers, such as **visas** and work orders;
- providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- providing phone service, power and water supply, **loading and unloading cargo**, or **protecting perishable products or commodities from deterioration**; or
Our Take: Facilitation Payments

- Expediting a visa – it’s in the law
  - DOJ Fraud Deputy Chief: Paying to expedite a visa gives you a business advantage, maybe not appropriate
- Facilitating payments for customs clearance – it’s in the law
  - FCPA defines a “routine governmental action” to include “providing inspections related to transit of goods across country”
  - Recent customs-related settlements demonstrate that small payments of a recurring nature that are voluminous when taken in the aggregate will not be viewed as “facilitating payments” under the law
- Noted in the guidance, but is there any practical facilitating payment exception left?
Prosecutions for Small, Cumulative Payments

- **Panalpina (2010):** Numerous small payments paid to clear customs, obtain visas, and move goods across borders;

- **Natco Group (2010):** Subsidiary alleged to have paid numerous extorted immigration fines and fees to obtain visas in Kazakhstan;

- **Con-way (2008):** Hundreds of small payments to Philippines customs totaling $417,000 over three years to store shipments and negotiate fines;

- **Westinghouse (2008):** Indian subsidiary made payments to railway and customs officials as small as $31.50 – totaling $40,000 over one year – to facilitate product inspections and certificates;

- **Delta & Pine (2007):** Numerous small payments to multiple officials of the Turkish Ministry of Agricultural and Rural Affairs to obtain government reports and certifications that were required to operate its business;

- **York Int’l (2007):** Third parties made hundreds of arguably “routine” payments -- many under $1000 -- to employees of government customers; and

Payments Made Under Duress

- Notes that payments made under extortion or duress will not give rise to FCPA liability because no corrupt intent for the purpose of obtaining or retaining business.

- Payments made as a price for gaining entry into a market or obtaining a contract do not constitute payments made under duress because, in those situations, the bribe payor “could have turned his back and walked away,” while one who is physically threatened cannot do so.
Our Take: Personal Safety Payments

- Payments made to avoid imminent bodily harm or illegal detention
- Not simply convenience payments
  - Did you violate the law?
  - Close call: Yellow Fever shots at the Nigerian border
  - Closer call: A night in an Ecuadorian jail
Parent-Subsidiary Liability

– No distinction between civil and criminal law

– Parent may be liable for bribes paid by a subsidiary if a parent participated sufficiently in the activity to be directly liable, or if the parent sufficiently controlled the subsidiary to be liable under traditional agency principles

– Subsidiary’s actions and knowledge are imputed to the parent if an agency relationship exists

– Likely to face considerable scrutiny
Successor Liability

- Reaffirms that, in general, successor companies assume the liabilities of their predecessor companies after merger or acquisition
- Discusses instances in which the DOJ and SEC have declined to take action against companies that voluntarily disclosed and remedied covered conduct in the merger and acquisition context
Successor Liability (cont’d)

- The DOJ and SEC also state that they take action against successor companies in “limited” contexts, involving "egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct”

- The DOJ and SEC note that they have confined liability to the predecessor company, particularly where the acquiring company uncovered and remedied violations or where the government’s investigation of the predecessor occurred pre-acquisition
Successor Liability (cont’d)

- Discusses instances in which successors have been granted assurances that they will not be the subject of an enforcement action

- Factors weighing in favor of limiting liability for post-acquisition conduct to a predecessor company where pre-acquisition diligence was not possible include:
  - voluntary disclosure by the successor;
  - due diligence; and
  - implementation of a compliance program
Successor Liability (cont’d)

– Acknowledged that in prior Halliburton advisory opinion, there were practical limits on the ability to conduct pre-deal due diligence so the DOJ necessarily had to “impose demanding standards and prescriptive time frames” to give the specific assurances that the acquirer sought.

– Asserts that an advisory opinion can be a “good way to address” the challenges of due diligence, but because of the nature of such an opinion, “it will likely contain more stringent requirements than necessary in all circumstances.”
Hallmarks of Effective Compliance Programs

- Commitment from Senior Management and a clearly articulated policy against corruption
- Code of Conduct and compliance policies/procedures
- Oversight, autonomy, and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence
- Confidential reporting and internal investigation
- Continuous improvement: periodic testing and review
- M&A: Pre-deal due diligence and post-deal integration
Benefits of Compliance Program Confirmed

- Confirms adequacy of a company’s compliance program will be taken into account when the DOJ and SEC consider what action to take against a company

- Includes whether to resolve the matter through a deferred prosecution agreement (DPA) or a non-prosecution agreement (NPA), the length of a DPA or NPA, or the term of corporate probation

- Can also impact penalty amount and whether retention of a monitor is required or the regular submission of reports to DOJ
Risk-Based Compliance Programs

- Compliance programs should be risk-based: “tailored to an organization’s specific needs, risks and challenges”
- Encourages companies to undertake their “own assessment of the corporate compliance program most appropriate for that particular business organization”
Risk-Based Compliance Programs (cont’d)

- Confirms that “meaningful credit” will be given to companies that implement “in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because great attention and resources had been devoted to a high risk area”
Thank You

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