WILMERHALE

Foreign Corrupt Practices Act Alert

November 19, 2012

LITIGATION/CONTROVERSY

DOJ and the SEC Issue Much-Anticipated FCPA Guidance

On November 14, 2012, the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) published their long-awaited joint guidance on the US Foreign Corrupt Practices Act (FCPA or the Act). The guidance, entitled *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the Guide), is not an FCPA watershed that pronounces revamped enforcement priorities or alters the government's previously stated positions on some more controversial issues, as some may have hoped. And, to be sure, the Guide is non-binding—a fact highlighted in the Guide's opening disclaimer. The courts will continue to have the final word on interpreting the Act.

It is, however, unprecedented in federal law enforcement that DOJ and the SEC have provided the public with such detailed information on their joint FCPA enforcement approach and priorities. In that regard, the Guide is a welcome publication that will no doubt serve as a useful resource, particularly for those who need a plain-language understanding of the Act and its relevance to international business and corporate compliance programs. In certain areas, however, the Guide leaves open difficult issues that face compliance officers and practitioners. This client alert provides our observations on key issues discussed in the Guide.

Jurisdiction

The Guide reiterates the government's expansive interpretation of the FCPA's interstate commerce element but does little to shed light on the jurisdictional necessities for prosecuting non-US persons or companies under § 78dd-3. Under § 78dd-1 (relating to US and non-US "issuers") and § 78dd-2 (relating to domestic concerns), the statute provides that certain conduct involve "use of the mails or any means or instrumentality of interstate commerce." The Guide observes that "placing a telephone call or sending an email, text message or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a US bank or otherwise using the US banking system."[1]

Section 78dd-3, which applies to others who are not issuers or domestic concerns, has an additional requirement that the person commit an act "while in the territory of the United States." Thus, the statute can be read to require something more than emails, bank transfers, or the usage of other means of interstate commerce for those foreign companies or persons. In the hypothetical example relating to this issue, the Guide describes a relatively easy case in which all the relevant participants are physically present in the United States. What the Guide does not clearly address, is whether the government views activities such as phone calls, emails, or banking transactions as sufficient to satisfy the "in" the United States element. While the hypothetical addresses an instance involving physical US presence, it would likely be a mistake to assume the government has adopted the view that physical presence is always required to charge foreign companies or persons with substantive violations of § 78dd-3. The Guide does reiterate that, under a conspiracy theory, if any participant in the conspiracy engages in a relevant act in the United States, all the conspiracy's participants may be charged whether they act in the United States or not.

[1] Guide at 11.

Corrupt Intent, Knowledge and Willfulness

The Guide does not provide new direction on the issues of what constitutes corrupt intent, knowledge, or willfulness. The Guide reminds readers that the FCPA's intent element does not require "successful" bribes or actual receipt of payment by a foreign official. The Guide also states that the payor need not know the identity of the recipient. Concerning the knowledge requirement, the Guide highlights the Second and Fifth Circuits' holdings that the FCPA does not require proof of specific knowledge of the FCPA's elements or knowledge that the conduct violated the FCPA.

On the issue of willfulness, the Guide restates the FCPA's language and legislative history regarding the meaning of "willful blindness," notes that FCPA liability can be imposed not only on those with actual knowledge of wrongdoing but also on those who "purposefully avoid actual knowledge," and briefly summarizes the Second Circuit's ruling in the *United States v. Kozeny* case, where the definition of willfulness was at issue.[2] The Guide, however, neither delves deep into the controversies in recent cases regarding the specific nature of "willful blindness" nor reflects that this issue is a complicated—and emerging—one.

Business Purpose

The FCPA covers only payments to foreign officials that meet the so-called "business purpose test"—payments must be intended to induce or influence an official to use his or her position "in order to assist . . . in obtaining or retaining business for or with, or directing business to, any person." Enforcement actions have shown that the government considers this test to be expansive. Reflective of that position are the examples listed in the Guide, which include influencing the procurement process, evading taxes or penalties, and obtaining exceptions to regulations. And, indeed, courts, such as the Fifth Circuit in the *Kay* decision, cited in the Guide, have also interpreted this requirement broadly. The Guide, however, glosses over *Kay*'s nuanced holding.[3] In *Kay,* the Fifth Circuit found that the FCPA *could* apply to bribes to evade customs duties and sales taxes but only if the government could show that the bribery was intended to produce an effect that would assist in obtaining or retaining business.[4] The FCPA's business purpose limitation, as recognized by *Kay*, is still very much alive despite the government's (unsurprisingly) expansive position set forth in the Guide.

Gifts, Travel and Entertainment Expenses

The provision of gifts, travel, and entertainment to government officials is a perennial concern for businesses; the Guide attempts to draw some useful lines between permitted conduct and conduct that may violate the FCPA. The Guide notes that there is no minimum threshold amount for corrupt gifts or payments and cautions that "what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country."[5]

The Guide distinguishes minor travel and entertainment expenses from other gifts and payments that would evidence a corrupt intent to influence an official, and it attempts to provide some reassurance that reasonable expenses would not likely violate the FCPA. The Guide notes that "cups of coffee, taxi fare, or company promotional items of nominal value" are unlikely to demonstrate corrupt intent.[6] Moreover, the Guide states that: "[i]tems of nominal value" such as "reasonable meals and entertainment expenses, or company promotional items, are unlikely to improperly influence an official, and as a result, are not, *without more*, items that have resulted in enforcement action by DOJ or SEC."[7] Efforts in the Guide to

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[2] *See United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011).
[3] *See United States v. Kay*, 359 F.3d 738, 755-56 (5th Cir. 2004). The government does recognize that the "FCPA does not cover every type of bribe paid around the world for every purpose." Guide at 14.
[4] *Kay*, 359 F.3d at 756.
[5] Guide at 15.
[6] The SEC's Robert Khuzami elucidated this point further at a November 14, 2012 press briefing following the release of the Guide: "We also hope that it will clear up some myths about the type of conduct that gets prosecuted under the FCPA — that it is not the $5 cup of coffee, or the one-off $50 gift to a public official, that companies need to be concerned about, but payments of real and substantial value that clearly represent an unambiguous intent to bribe a foreign official to obtain or retain business." *SEC's Khuzami: We're Not Interested in Small Potatoes*, THE FCPA BLOG (Nov. 15, 2012), *available at* http://www.fcpablog.com/blog/2012/11/15/secs-khuzami-were-not-interested-in-small-potatoes.html#.
[7] Guide at 15 (emphasis added).

reassure readers that the government is not focused on *de minimis* items are helpful, but some ambiguity remains in the government's position. The Guide points out that the government has "focused on small payments and gifts only 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."[8] It is unclear whether the government would consider pursuing a long-standing or systemic practice of making small payments to one individual (which might arguably suggest a corrupt relationship with that official) or a long-standing or systemic practice of making small payments to various individuals (for which it is harder to see corrupt intent or effect).

The Guide provides examples of "larger or more extravagant" gifts, travel and entertainment that are more likely to demonstrate corrupt intent. For example, the Guide cites impermissible scenarios in which government officials were paid $500 to $1000 per diems in addition to meal, lodging, and transportation expenses on primarily sightseeing trips.[9] In contrast, the Guide describes as permissible a bar tab for a dozen current and prospective customers (including government customers), a crystal vase for a wedding gift, and moderately priced entertainment expenses (such as baseball and theater tickets) on a legitimate training trip. These are distinguished from an all-expenses-paid trip to Las Vegas for executives and spouses without any business purpose.[10]

Several themes reoccur throughout the Guide's section on gifts and other items of value. First, expenses must be "reasonable." In evaluating an expenditure, it is useful to consider how an expense might be perceived by an outside observer. Second, companies can reduce risk by maintaining accurate, detailed records and implementing an effective compliance program. According to the Guide, an "effective compliance program" should have "clear and easily accessible guidelines and processes in place for gift-giving."[11] The Guide lists safeguards compiled from Opinion Releases that will assist companies in evaluating expenditures, such as paying travel costs directly to the vendor and ensuring the expenditures are transparent, both within the company and to the foreign government. In addition, entertainment should generally be only a small component of expenses for business trips.

Interestingly, the government suggests that gifts should be provided "only" where "appropriate" under local law.[12] This appears to be a different standard than what is required under the FCPA's affirmative defense for conduct that is lawful under the written laws of the relevant country. It is unclear what the Guide means by "appropriate" under local law (not expressly prohibited? not prohibited to give? not prohibited to receive? customary?). Moreover, it is unclear why the FCPA analysis would *require* an analysis of foreign law, an approach that is expressly not taken by the government in connection with other aspects of the statute (for example, a payment can qualify for the FCPA's facilitating payment exception even if it is not permitted under local law).

Charitable Contributions

Although the FCPA permits legitimate charitable contributions, charitable giving may run afoul of the FCPA when it is merely a pretext for concealing bribes. The Guide suggests a series of due diligence measures and controls, many of which are familiar from well-known enforcement actions and Opinion Releases, as well as five questions to consider in evaluating proposed charitable contributions in foreign countries:

1. What is the purpose of the payment?
2. Is the payment consistent with the company's internal guidelines on charitable giving?
3. Is the payment at the request of a foreign official?

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[8] Guide at 15.
[9] Guide at 16.
[10] At a November 14, 2012 press briefing following the release of the Guide, Assistant Attorney General Breuer and Director Khuzami addressed concerns about how compliance dollars are being spent to guard against travel and entertainment concerns. "Khuzami said that he was 'interested in companies spending compliance dollars in the most sensible way' and he hoped that the [Guide] and the hypotheticals provided would help companies as to where they can 'minimize investment and where they can maximize it.'" Mike Koehler, *The Guidance Press Conference*, FCPA PROFESSOR (Nov. 15, 2012), *available at* http://www.fcpaprofessor.com/the-guidance-press-conference.
[11] Guide at 16.
[12] Guide at 17.

4. Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
5. Is the payment conditioned upon receiving business or other benefits?[13]

Definitions of Foreign Officials and Instrumentalities

Not surprisingly, the Guide does not resolve the numerous issues related to the definition of who is a "foreign official" and what is an "instrumentality" of a foreign government, such that its employees might be considered "foreign officials" under the FCPA.

The Guide fails to provide the bright line definition of state-owned entities that some commentators had hoped to see. Instead, perhaps not surprisingly, the Guide, reflecting recent case law, notes that whether a specific entity is an instrumentality "requires a fact-specific analysis of an entity's ownership, control, status, and function."[14] The Guide helpfully notes that generally "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."[15] However, the Guide goes on to explain that entities in which a foreign government owns or controls less than a 50% stake may yet qualify as an instrumentality where the government has "substantial control" over the company. As an example, the Guide refers to a settled case, where despite having only a minority ownership in a telecommunications company, the Malaysian government held "special shareholder" status, "had veto power over all major expenditures," "controlled important operational decisions," and most of the senior officers of the company were political appointees of the government.[16]

The Guide also notes that "[c]ompanies also may violate the FCPA if they give payments or gifts to third parties, like an official's family members, as an indirect way of corruptly influencing a foreign official," and cites the *Liebo* case, where personal bills and airline tickets were provided to a foreign official's cousin and close friend.[17] This application of the FCPA to situations where the benefit is given directly to the official's friends or family rather than to the official, is arguably an extension of the FCPA beyond its statutory language, which requires that the item of value be given directly or indirectly *to* a foreign official.

Third Parties

The Guide touches lightly on the issue of third parties, which is a key risk area for most companies doing business overseas. The Guide recognizes that many companies engage local individuals or companies to help them conduct business in foreign countries and that many of these third parties may "provide entirely legitimate advice" and "may help facilitate business transactions." However, the Guide notes that engaging third parties presents certain risks because, under the FCPA, a company may violate the law even without specific knowledge of a corrupt payment when a company is aware of a high probability that a corrupt payment may be made. The Guide enumerates common red flags for third-party transactions, such as unreasonably large discounts to third-party distributors, vaguely described services in consulting agreements, the third party's relation or close association to a foreign official, the fact that the third party is an offshore shell corporation, and the third party's request for payments to offshore accounts.

Facilitating Payments

The Guide does not provide much new direction on facilitating payments but restates the existing law in this area, emphasizing that the FCPA's facilitating payments exception is only available "when a payment is made to further 'routine governmental action' that involves *non-discretionary* acts" and hinges on a payment's *purpose*.[18] Notably, the Guide states that "[w]hether a payment falls within the exception is not dependent on the size of the payment, though size can be telling, as a large payment is more suggestive of a corrupt intent to influence a non-routine governmental action."[19] The Guide provides examples of "routine governmental action," which mirror those codified in the FCPA itself. In a hypothetical, the Guide

[13] Guide at 19.
[14] Guide at 20.
[15] Guide at 21.
[16] Guide at 21.
[17] Guide at 16 (citing *United States v. Liebo*, 923 F.2d 1308, 1311 (8th Cir. 1991)).
[18] Guide at 25 (emphasis added).
[19] Guide at 25.

distinguishes between a payment to ensure permit applications are stamped and processed and a payment to obtain approval for a permit that required the exercise of an official's discretion. The Guide also notes that improperly recording facilitating payments may violate the FCPA's books and records provision.

Interestingly, while the Guide notes that the FCPA still permits genuine facilitating payments, the Guide also points to the OECD's Working Group on Bribery's recommendation that all countries discourage facilitating payments. The Guide also notes that facilitating payments may violate local law and other countries' foreign bribery statutes, such as the UK Bribery Act, which does not contain an exception for facilitating payments.

Extortion/Duress

In a welcome development, the Guide clarifies the government's position on payments made under threat of extortion and duress. The Guide acknowledges that "[b]usinesses operating in high-risk countries may face real threats of violence or harm to their employees, and payments made in response to imminent threats to health or safety do not violate the FCPA."[20] Citing a New York federal district court decision, the Guide distinguishes such situations from those involving "[m]ere *economic* coercion," which do not constitute extortion of the kind that would vitiate the corruptness element under the Act.[21]

Many corporate policies address the extortion/duress, or "life and limb" concept, in the context of facilitation payments. The Guide—appropriately—treats this concept in a separate section, making clear that the two are not necessarily related. The Guide notes that a payment made under duress—for example, under an imminent threat of physical harm—cannot be said to have been made with corrupt intent under such circumstances. The amount of the payment, or whether the government official is acting with discretionary authority, is not necessarily relevant to that analysis.

Successor Liability

The Guide offers useful guidance regarding successor liability in the context of mergers and acquisitions and the hypothetical scenarios in this section are among the most extensive in the Guide. In summarizing commonalities among transactions in which enforcement officials declined to take action, they emphasize voluntary disclosure, remediation of corrupt conduct, and cooperation with the government. In contrast, an enforcement action against a successor company is likely in cases involving "egregious and sustained violations" or a successor's direct participation in or failure to stop post-acquisition misconduct.[22]

The Guide provides clearer direction on the government's views as to how it treats pre-acquisition conduct. This topic has generated much discussion in the business world, with numerous commentators suggesting that the government has overreached and charged corporate buyers for conduct committed by target companies. These comments at times have seemed at odds with the actual approach in these cases. A buyer may suffer the consequences of acquiring an asset that is saddled with pre-existing liability, but the Guide generally distinguishes pre-close conduct (which, under general corporate law principles may still exist and be chargeable against a company irrespective of that company being purchased by another company) from post-close conduct (for which a buyer might be charged, if the buyer has the requisite knowledge of, or participates in, that conduct or allows it to continue post-close). The Guide states that in most cases, DOJ and the SEC "have pursued enforcement actions against the predecessor company (rather than the acquiring company)."[23] This is consistent with our experience representing companies in the M&A context. All that said, at one point in a parenthetical in an example in the Guide, the government says that in "unusual circumstances" it might be appropriate to charge an acquirer with the pre-acquisition conduct of an acquired company.[24] The Guide does not specify what those circumstances might be.

[20] Guide at 27.
[21] *See United States v. Kozeny*, 582 F. Supp. 2d 535, 540 n.31 (S.D.N.Y. 2008).
[22] Guide at 28.
[23] Guide at 29.
[24] Guide at 33 (Scenario 2).

The Guide outlines several risk-based due diligence procedures that will aid companies engaging in mergers and acquisitions.[25] The Guide acknowledges that pre-acquisition due diligence may not be possible in certain circumstances and that even extensive due diligence may not uncover corruption. In such circumstances, the key actions by the successor that will decrease the likelihood of an enforcement action are "voluntary disclosure, appropriate due diligence, . . . implementation of an effective compliance program" and cessation and remediation of the offending conduct.[26]

FCPA's Accounting Provisions

The Guide addresses the applicability of the accounting provisions to publicly traded companies (i.e., "issuers" are required to maintain accurate books and records and internal accounting controls), while also demarcating DOJ's and the SEC's expansive interpretation of the provisions.

As a threshold matter, the Guide reminds readers that the accounting provisions are not tethered to the anti-bribery provisions on two critical fronts. First, accurate books and records and internal controls extend to a range of corporate activities beyond foreign governmental bribery—the Guide specifically refers to commercial bribery, financial fraud, and employee embezzlement. Second, as for foreign governmental bribery, the Guide makes clear that, where appropriate, DOJ and the SEC will (and indeed have) charged violations of the accounting provisions when the anti-bribery provision's jurisdictional and other statutory elements are lacking.

Further underscoring DOJ's and the SEC's enforcement priorities, the Guide clearly signals that both agencies will continue to aggressively enforce the accounting provisions against officers and employees of issuers, as well as against subsidiaries and affiliates of issuers whose financial statements are consolidated with an issuer's books and records. To this end, the Guide details at length the menu from which DOJ and the SEC can pursue such charges, including under a mouthful of theories such as conspiracy, aiding-and-abetting, control-person liability, filing false Sarbanes-Oxley certifications, failing to properly disclose material information in SEC filings, misleading internal auditors, and circumventing internal controls.

The Guide recognizes that proportionality principles undergird the accounting provisions, such that books and records need only reasonably reflect the disposition of corporate assets and that internal controls systems should be designed to fit the circumstances and risks of particular companies. For example, the Guide specifically states that a financial services company's internal controls may differ from a manufacturing company's. While we applaud this recognition, the Guide does not offer any concrete guideposts for companies as to ways in which internal controls might—in DOJ's and the SEC's eyes—reasonably differ based on a company's anti-corruption risk profile. Similarly, the Guide does not extend any assurance, as some had hoped, that well-intentioned and well-structured internal controls system will absolve a company of corporate charges.

Finally, and somewhat regrettably, the Guide bypasses thornier legal issues under the accounting provisions, such as the SEC's authority to disgorge ill-gotten gains in settlements that only allege violations of the accounting provisions (and thus lack a direct linkage to the profits the SEC seeks to disgorge); the SEC's intentions to enforce the accounting provisions, as first established by the Panalpina settlement, against companies that are not themselves issuers or subsidiaries/affiliates thereof, but

[25] DOJ and the SEC recommend the following practices for companies engaging in mergers and acquisitions:

1) conduct thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions;
2) 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 business or merged entities;
3) train the directors, officers, and employees of newly acquired businesses or merged entities, and when appropriate, train agents and business partners, on the FCPA and other relevant anti-corruption laws and the company's code of conduct and compliance policies and procedures;
4) conduct an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and
5) disclose any corrupt payments discovered as part of its due diligence of newly acquired entities or merged entities.

Guide at 29.

[26] Guide at 30.

merely carry-out business tasks for issuers; and the statutory authority by which "internal accounting controls" have come to be synonymous with a company's ethics and compliance program.

Compliance Programs

The Guide conveys some detailed information on what the government views as an adequate compliance program, most of which appears to be drawn from previous settlements. The Guide explains that "DOJ and SEC have no formulaic requirements regarding compliance programs" but instead seek to employ a "common-sense and pragmatic approach to evaluating compliance programs" by evaluating them on the basis of three questions[27]:

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

Recognizing that companies' varied sizes and markets necessitate different compliance programs, the Guide denotes what DOJ and the SEC view as hallmarks of effective compliance programs, again all of which are taken from the elements of compliance programs required to date in various DOJ and SEC settlements. Adequate and effective programs, the Guide states, will be programs that:

- are supported by a commitment from senior management to maintaining a culture of compliance;
- are available in local languages for ease of access and understanding;
- are current and periodically reviewed and updated;
- have an assigned senior executive responsible for oversight and implementation, who possesses sufficient autonomy from management and the resources necessary to implement the program;
- are based on risk assessment, including assessment of target markets, third-party due diligence and monitoring of third-party relationships;
- have third-party due diligence and monitoring programs that ensure that companies (1) understand the qualifications and associations of their third-party partners; (2) inform third-party partners of the company's compliance requirements; (3) understand the business rationale for including the third party in the transaction, including ensuring that contract terms specifically describe the services to be performed; and (4) continually monitor third-party relationships, including updating due diligence and providing periodic training;
- provide for training and communication throughout the organization;
- provide for disciplinary measures for violations and/or incentivizes compliance; and
- permit confidential reporting and internal investigation.

Citing a 2009 survey, the Guide emphasizes that "64% of general counsel whose companies are subject to the FCPA say there is room for improvement in their FCPA training and compliance programs."[28] And if general counsel believe there is room for improvement, it is a sure bet that DOJ and the SEC will feel similarly. In sum, efforts undertaken in advance to develop and update compliance programs are sound investments in the government's eyes.

Compliance Monitors

In recent years, DOJ and the SEC have been less reflexive in requiring outside compliance monitors in FCPA resolutions. Of note, after observing that "enhanced compliance and reporting requirements may be part of criminal and civil resolutions of FCPA matters," the Guide sets forth six factors that DOJ and the SEC consider when determining whether a compliance monitor is warranted.[29] These six factors are:

- seriousness of the offense;
- duration of the misconduct;
- pervasiveness of the misconduct, including whether the conduct cuts across geographic and/or product lines;

[27] Guide at 56.
[28] Guide at 62.
[29] Guide at 71.

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

The Guide reminds that the "amount of enhanced compliance and kind of reporting required varies according to the facts and circumstances of individual cases," but it is clear that a strong compliance program will always be viewed positively by DOJ and the SEC.[30]

Prosecution, Resolution, and Declination Decisions

The Guide explains that DOJ's FCPA investigation and enforcement decisions are guided by the *Principles of Federal Prosecution* and the *Principles of Federal Prosecution of Business Organizations*, which are set forth in the US Attorneys' Manual.[31] The Guide reinforces the importance placed on companies' own efforts to combat corruption—strong compliance programs, internal controls, and self-policing—in DOJ's and the SEC's enforcement and resolution decision-process.

The Guide explains that prosecutors will recommend or pursue federal prosecution if they have sufficient evidence to sustain a conviction for a federal offense unless "(1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) an adequate non-criminal alternative to prosecution exists."[32] The Guide then lists the nine factors from the *Principles of Federal Prosecution of Business Organizations*, which are considered in conducting investigations, making charging decisions, and negotiating plea or other agreements.[33] The Guide highlights that pre-indictment conduct—including voluntary disclosure, cooperation, and remediation—is a central theme in these factors and is often considered by prosecutors in their charging decisions.

For its part, the SEC explains that it considers the following factors, among others, in assessing whether to open an investigation:

- the statutes or rules potentially violated;
- the egregiousness and magnitude of the potential violation;
- whether the potentially harmed group is particularly vulnerable or at risk;
- whether the conduct is ongoing;
- whether the conduct can be investigated efficiently within the statute of limitations period; and
- whether other authorities might be better suited to investigate the conduct.

The factors considered by DOJ and the SEC are generally very similar. The Guide, however, does suggest that the SEC may favor opening investigations where it believes there are industry-wide problems or opportunities for the SEC to increase its visibility in communities unfamiliar with the SEC's mission.[34]

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[30] Guide at 71.
[31] U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-27.000, 9-28.000 (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_rooom/usam/.
[32] Guide at 52.
[33] Guide at 52-53. *See also* U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-28.300. These nine factors are:

1) the nature and seriousness of the offense;
2) the pervasiveness of the wrongdoing;
3) the corporation's history of similar misconduct;
4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
5) the existence and effectiveness of the corporation's compliance program;
6) remedial actions taken by the corporation;
7) collateral consequences, including harm to shareholders and employees;
8) the adequacy of prosecution of individuals responsible for the corporation's malfeasance; and
9) the adequacy of civil or regulatory enforcement actions.

[34] *See* Guide at 53-54.

Likely in response to calls for further transparency on when the government declines to prosecute, the Guide states that DOJ has "in the past two years alone . . . declined several dozen cases against companies where potential FCPA violations were alleged."[35] It then goes on to provide six anonymized examples of instances in which DOJ and the SEC declined to take enforcement action. These six examples share several factors:

- an internal investigation undertaken by the company;
- immediate steps taken to stop the wrongdoing;
- voluntary disclosure;
- full cooperation with government investigators; and
- either remedial compliance training or enhancements to a compliance program (such as increasing compliance controls, reviewing third-party relationships, and restructuring compliance departments) if a company's prior program was deemed lacking.

Since these are all features of many FCPA cases in which the government did, in fact, bring an enforcement action, it is somewhat disappointing that the Guide does not explain what aspects of these cases were determinative of the different treatment. In several of the examples, the bribes paid were apparently small (see Examples 2, 3, 6), which may have been an important factor. It is also disappointing that some of the examples do not make clear that the conduct met each of the elements of a statutory violation, since the concept of a declination is supposed to be reserved for instances in which the offense is chargeable but the government declines in its own discretion to bring a case. In Example 1, the Guide notes that company employees received competitor information from a third party with connections to a foreign government, but the example does not say that any payments were in fact made or offered by the company – only that there were "red flags," including "prior concerns" about the third party. In Example 4, the conduct is described as a "potential" bribe by an agent of a foreign subsidiary that was ultimately prevented from being paid by the company's management (Example 5 likewise refers only to "potential" bribes). Example 3 describes conduct at a foreign subsidiary but does not state that there was a jurisdictional nexus to the United States or that anyone at the parent/issuer company level knew about or participated in the conduct. Relatedly, Example 2 notes that subsidiary employees had knowledge of relatively small bribes but does not say whether the subsidiary or its employees were domestic concerns or otherwise subject to the statute. The Guide implies that the companies in the examples did in fact commit FCPA violations but were not prosecuted. If that is true, it would have been more useful to make clear that the conduct met each of the elements of the statute rather than leaving a potential ambiguity.

Conclusion

In many respects, the Guide answers the call of the OECD Working Group on Bribery , which recommended that the United States "make a clear public statement, in light of the OECD Convention, identifying the criteria applied in determining the priorities both of the [DOJ] and of the [SEC] in prosecuting FCPA cases,"[36] as well as calls from the compliance community for more help in line drawing. And, although it misses some opportunities to clarify some of the more controversial aspects of the government's enforcement approach, it will no doubt be a much cited document for years to come.

[35] Guide at 75.
[36] OECD, Report on The Application of The Convention of Combating Bribery of Foreign Public Officials (Oct. 15, 2010), *available at* http://www.oecd.org/unitedstates/46213841.pdf.

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