KIRKLAND ALERT

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Long-Awaited Foreign Corrupt Practices Act Guidance Issued by DOJ and SEC

On November 14, 2012, the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. The comprehensive, 120-page guide emphasizes at the outset that FCPA enforcement remains a priority for U.S. authorities. While non-binding on the government, the guide provides companies with a valuable window into the government's thinking on the interpretation and enforcement of the FCPA. As the enforcement actions cited in the guide make clear, the stakes in this area are high. And the importance of understanding and complying with the FCPA has only increased with the enactment of the Dodd-Frank Act's whistleblower provisions, which provide substantial monetary incentives for individuals to report suspected FCPA violations to the SEC.

Unfortunately the new guidance does not provide the bright line rules for which practitioners and compliance professionals had (perhaps somewhat unrealistically) hoped, given the high stakes, the paucity of judicial interpretation of the FCPA, and the limited judicial oversight of FCPA enforcement actions. Rather, apart from summarizing the law, the scant judicial guidance, and settled enforcement actions, the guide sets forth fairly simple hypotheticals that will more-often-than-not provide meaningful assistance only to smaller companies and those with limited international touch points, as larger companies with well-established and sophisticated compliance programs are routinely faced with more complex scenarios in their day-to-day businesses. With key areas remaining unsettled, companies and their counsel must continue to forecast enforcement expectations when assessing the most difficult fact patterns, including when developing compliance programs, conducting M&A due diligence, and weighing key decisions such as whether to voluntarily disclose potential violations to the government.

Below are summaries of the treatment of several key topics in the guide:

Anything of Value [Pages 14-18]

The FCPA contains no *de minimis* exception—textually it extends to "anything of value" if the requisite corrupt intent can be established. This strict standard has led FCPA practitioners (and especially compliance professionals) to contemplate scenarios whereby modest gifts and business entertainment could trigger substantial FCPA liability (or at the very least investigative costs). The guidance tempers this dreaded scenario to some degree, recognizing that — in practice — a degree of reasonableness is applied by DOJ and SEC when evaluating small-value items:

> [I]t is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct. Moreover, as in all areas of federal law enforcement, DOJ and SEC exercise discretion in deciding which cases promote law enforcement priorities and justify investigation. Certain patterns, however, have emerged: DOJ's and SEC's anti-bribery enforcement actions have 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. These assessments are necessarily fact specific.

(*Guide* at 15.) The guidance goes on to provide several hypotheticals illustrating acceptable gifts, travel, and entertainment, including taking foreign officials traveling to the U.S. for a facilities inspection to a moderately priced dinner, a baseball game, and a play. The guidance does not, however, provide any enforcement thresholds or safe harbors.

Foreign Officials [Pages 19-21]

The guide notes that "[f]oreign officials under the FCPA include officers or employees of a department, agency, or instrumentality of a foreign government." (*Guide* at 20.) Companies and practitioners (and to a much lesser extent, the courts) have wrestled with the question of who is a "foreign official" for purposes of the FCPA, especially as that question relates to the definition of a foreign instrumentality. While the guidance sets forth factors from jury instructions that have been used in assessing this question, ultimately, it does not provide a clear path for companies to follow, noting instead:

> The term "instrumentality" is broad and can include state-owned or state-controlled entities. Whether a particular entity constitutes an "instrumentality" under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function.

(Guide at 20.) Even where the guidance provides further detail regarding one of those factors — government ownership — this narrower issue also remains open to interpretation in the post-guidance enforcement world, as the guide states:

> 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. However, there are circumstances in which an entity would qualify as an instrumentality absent 50% or greater foreign government ownership, which is reflected in the limited number of DOJ or SEC enforcement actions brought in such situations.

(*Guide* at 21.) Perhaps recognizing the uncertainty that a multi-factored, fact-specific inquiry breeds, the guidance seeks to downplay the significance of the question by pointing out that other laws (such as the Travel Act and anti-money laundering laws) cover commercial bribery—i.e., corrupt payments to individuals who may not qualify as "foreign officials" under the FCPA. (*See Guide* at 21, 48-49.)

Successor Liability and M&A Due Diligence [Pages 27-33, 79]

The guide discusses FCPA risks in the context of mergers and acquisitions but rejects the notion that there should be any exception to corporate law principles of successor liability for FCPA violations. To minimize FCPA risks, the guide encourages companies to conduct thorough risk-based pre-acquisition due diligence and to incorporate new acquisitions into their compliance programs and system of internal controls as quickly as practicable. In a section entitled "Practical Tips to Reduce FCPA Risk in Mergers and Acquisitions," the guide encourages companies to disclose to the government any corrupt payments discovered during due diligence, indicating that "DOJ and SEC will give meaningful credit to companies who undertake these actions, and, in appropriate circumstances, DOJ and SEC may consequently decline to bring enforcement actions." (*Guide* at 29.) While providing several examples of declinations issued to acquiring companies, and multiple hypotheticals covering the topic, the guidance does not take the next step of articulating a standard for when acquiring companies that take the recommended actions, including making voluntary disclosures, will be rewarded with declinations. Nor does it offer any specifics about what would constitute a "practicable" amount of time for the acquiring company to institute compliance reforms, an issue that has long vexed U.S. companies considering acquiring foreign entities with potentially sub-par compliance practices. Particularly in situations in which business impediments, as opposed to legal ones, limit the due diligence an acquiring company is able to conduct, some form of policy-based "safe harbor" that acknowledges the real world practicalities facing well-intentioned companies would have been welcome.

Aiding & Abetting and Conspiracy Liability of Foreign Companies [Page 34]

By its terms, the FCPA only applies to foreign companies that do not qualify as "issuers" (or as "agents" of

an issuer or domestic concern) to the extent that, "while in the territory of the United States," they take an act in furtherance of the corrupt conduct. (15 U.S.C. § 78dd-3.) The guidance, however, explicitly states DOJ's position that general principles of conspiracy and aiding and abetting law expand the FCPA's reach over foreign companies (and individuals) past the bounds of territorial jurisdiction:

> A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern, or commits a reasonably foreseeable overt act within the United States. . . . The same principle applies to aiding and abetting violations.

(*Guide* at 34.) Thus, the DOJ has put foreign companies on notice that, notwithstanding their exclusion from the coverage of the FCPA unless they are issuers (or agents of issuers or domestic concerns), they need to pay attention to the FCPA.

Self-Reporting, Cooperation, and Remedial Efforts [Pages 54-56]

The discussion of self-reporting, cooperation, and remedial efforts summarizes the DOJ and SEC policies on these topics—the DOJ's *Principles of Federal Prosecution of Business Organizations* and the SEC's *Seaboard Report*—but does not provide any additional information as to how much "credit" a company may earn from such efforts. Thus, companies and their counsel will continue to struggle with the difficult questions of whether to voluntarily disclose and what level of remediation the government expects.

One helpful metric confirming that these efforts can prove beneficial for a company is included in a later portion of the guidance—specifically, the pronouncement that "in the past two years alone, the Department of Justice has declined several dozen cases against companies where potential FCPA violations were alleged." (*Guide* at 75.) The guide goes on to list six brief, anonymized descriptions of matters that the government has declined. All of these declinations involved voluntary disclosures, thorough internal investigations, and substantial remedial actions—suggesting that such measures may, at least in some circumstances, lead to outright declinations. (*Guide* at 77-79.) But all of the listed declinations also involved "small" bribes or isolated conduct, raising the question of how much the voluntary disclosures (or cooperation or remediation), as opposed to the nature of the underlying conduct, contributed to the outcome.

Corporate Compliance Programs [Pages 56-65]

As noted with several other sections, the discussion of corporate compliance programs in the guide does not include any new standards of evaluation; instead, the document underscores the point that "DOJ and SEC have no formulaic requirements regarding compliance programs. Rather, they employ a common-sense and pragmatic approach to evaluating compliance programs, making inquiries related to three basic questions:

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

(*Guide* at 56.)

The guide emphasizes the importance of a risk assessment to a well-designed program, indicating that "DOJ and SEC will give meaningful credit to a company that implements in good faith a comprehensive, risk-based compliance program, even if that program does not prevent an infraction in a low risk area because greater attention and resources have been devoted to a higher risk area." (*Guide* at 59.) And to underscore the point that, even if it does not prevent all violations, an effective compliance program can be an important factor in how the government decides to resolve an FCPA matter, the guidance specifically cites the April 2012 Morgan Stanley matter. In that matter, Morgan Stanley's compliance program and system of internal controls were recognized as a basis for the government's decision to issue a declination to the company and proceed solely against the individual wrongdoer.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following attorneys or your regular Kirkland contact.

Kirkland & Ellis LLP, 655 Fifteenth Street, N.W., Washington, D.C. 20005

William J. Stuckwisch
www.kirkland.com/wstuckwisch
+1 (202) 879-5023

Laurence A. Urgenson
www.kirkland.com/lurgenson
+1 (202) 879-5145

W. Neil Eggleston
www.kirkland.com/negglestone
+1 (202) 879-5016

Charles J. Clark
www.kirkland.com/cjclark
+1 (202) 879-4858

Laura Fraedrich
www.kirkland.com/lfraedrich
+1 (202) 879-5990

Robert W. Pommer III
www.kirkland.com/rpommer
+1 (202) 879-5950

Brigham Q. Cannon
www.kirkland.com/bcannon
+1 (202) 879-5977

Matthew J. Alexander
www.kirkland.com/malexander
+1 (202) 879-5907

Kirkland & Ellis LLP, 601 Lexington Avenue, New York, NY 10022

Michael J. Garcia
www.kirkland.com/mgarcia
+1 (212) 446-4810

Henry J. DePippo
www.kirkland.com/hdepippo
+1 (212) 446-4780

Andrew M. Genser
www.kirkland.com/agenser
+1 (212) 446-4809

Michael C. Keats
www.kirkland.com/mkeats
+1 (212) 446-4804

Mitra Hormozi
www.kirkland.com/mhormozi
+1 (212) 446-4864

Kirkland & Ellis LLP, 333 South Hope Street, Los Angeles, CA 90071

Mark Holscher
www.kirkland.com/mholscher
+1 (213) 680-8190

Kirkland & Ellis LLP, 300 North LaSalle, Chicago, IL 60654

Mark Filip
www.kirkland.com/mfilip
+1 (312) 862-2192

Kirkland & Ellis International LLP
11th Floor, HSBC Building, Shanghai IFC, 8 Century Avenue, Pudong New District, Shanghai 200120, P.R. China

Samuel G. Williamson
www.kirkland.com/sgwilliamson
+8621-3857-6300

Kirkland & Ellis International LLP, 30 St Mary Axe, London EC3A 8AF, United Kingdom

Satnam Tumani
www.kirkland.com/stumani
+44 20 7469 2390

Chris Colbridge
www.kirkland.com/ccolbridge
+44 20 7469 2010