Litigation Update - How This Former Prosecutor Views the New FCPA Guidance

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The long awaited "Resource Guide to the U.S. Foreign Corrupt Practices Act (FCPA)," issued by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) on November 14th, predictably unleashed a torrent of blog posts and commentary by the corruption risk management community. Much of the discussion focused on what the 130-page document did not do; its release, not surprisingly coming after the current administration was assured of four more years in office, was routinely described as a "nonevent." From my perspective, here are a few things the guide does accomplish:

1. It May Help You Get Your Homework Done More Quickly
The "Resource Guide" is exactly that—a helpful resource that sets out all the basics, including the statute itself, descriptions of who is covered by the anti-bribery and the accounting provisions of the law, as well as how the DOJ and SEC define key terms relating to proving actionable conduct, such as acting "corruptly," and who is a "foreign official." Particularly for smaller companies who do business abroad, it is a great place for their compliance and legal counsel to start their analysis.

2. It Keeps The Common Sense in Your Compliance Work
The guide discusses the "Hallmarks" of compliance programs, i.e. the kind of proactive efforts that will put a company in a good position to avoid civil or criminal enforcement if something does go wrong. But the following language caught my eye: ". . . in evaluating compliance programs, the inquir[y] relate[s] to three basic questions:

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

My translation: quit tallying up how many bells and whistles your compliance program has and think more simply—Are we doing the right thing? Would I want my mother/priest/rabbi to know we do business this way?

3. It Is a Reminder—Prosecutors Don't Do "Bright Lines"
In advance of the Resource Guide's issuance, hope abounded that it would contain definitive information about such things as—When is an entity an "instrumentality" of a foreign government, triggering FCPA review of a transaction with that entity?—How much due diligence is enough prior to an acquisition?—How much credit will a company receive for voluntarily disclosing a potential FCPA violation? No such black and white pronouncements appeared, and I wouldn't have expected them to. No prosecutor wants to give up the ability to enforce conduct that may appear in a "grey zone." And companies rarely are well-served by walking right up next to a "bright line."

The Resource Guide is not the FCPA enforcement "crystal ball" that some had hoped for. But it is a whole lot better than a Ouija board. As a joint effort of the DOJ and the SEC, synthesizing information previously scattered among opinion releases, settlement documents, and case law, it is a rare peek into the mindset of enforcement authorities operating in a priority area of federal and international law. A practical gift, indeed.

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