JONES DAY

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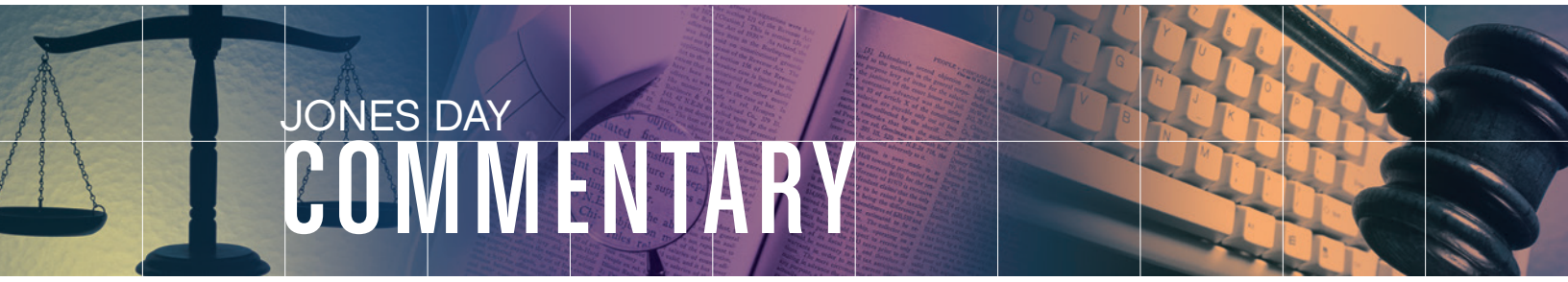

U.S. DEPARTMENT OF JUSTICE AND SECURITIES AND EXCHANGE COMMISSION GUIDANCE ON THE FOREIGN CORRUPT PRACTICES ACT: WHAT TO EXPECT

For the past 10 months,[1] the U.S. Department of Justice and the Enforcement Division of the Securities and Exchange Commission have advised the public that they are in the process of drafting guidance for companies regarding the requirements of, and prohibitions within, the U.S. Foreign Corrupt Practices Act. Recently, the DOJ and SEC have indicated that such guidance will be released soon.[2] This *Commentary* highlights areas that, we expect, will be addressed by the DOJ and SEC in their upcoming publication.

BACKGROUND

Multinational companies with headquarters or operations in the U.S. have struggled for the past decade with how to create effective anticorruption compliance programs that address the prohibitions contained in the FCPA. One of the greatest difficulties in creating such programs is that several key provisions of the FCPA have rarely been defined or clarified through litigation, and counsel are left to interpret even basic items like the definition of "foreign official." To date, compliance programs have focused on the learning that lawyers have been able to glean from settlements announced by the DOJ and SEC in cases involving alleged FCPA violations, as well as the experience of attorneys who served as prosecutors and/or who regularly appear before the DOJ and SEC in these cases, and thereby develop a sense of the government's approach and views on particular issues. Now, the business community and the attorneys that serve these companies await more detailed, written descriptions of what, in the view of the U.S. government, does and does not constitute a violation of U.S. law.

1 Assistant Attorney General Lanny Breuer announced that guidance would be provided during a speech to the National Conference on the Foreign Corrupt Practices Act in November 2011. *See* http://blogs.wsj.com/corruption-currents/2011/11/08/breuer-teases-fcpa-guidance-to-come-in-2012/.

2 "FCPA Guidance to Be Released by October," C.M. Matthews, Wall St. Journal, August 29, 2012, http://blogs.wsj.com/corruption-currents/2012/08/29/fcpa-guidance-to-be-released-by-october/.

There are several topics on which, we expect, the DOJ and SEC's guidance will provide clarity for businesses—areas that frequently become points of contention or disagreement during DOJ and SEC inquiries, and ultimately in federal complaints and settlement materials. These include:

TRAVEL AND ENTERTAINMENT

One of the most frequently discussed areas for corporations and their counsel in an anticorruption context involves the permissible scope and limitations in providing travel and entertainment to foreign government personnel or employees of companies owned or controlled by foreign governments. There is, of course, a defense to liability related to product demonstration,[3] but there have been numerous settlements announced in which the DOJ and SEC have charged companies for providing excessive travel and entertainment to government officials.

Numerous large companies have received fines and penalties as a result of settled actions involving travel and entertainment for foreign government officials, and the inaccurate accounting of travel and entertainment to government officials, in an excessive way. According to settlement materials, these payments were often made with the pretextual reason of product demonstration. But on the other hand, DOJ opinion releases permit very narrow allowances for certain activities. For instance, under DOJ opinion release No. 07-02, the DOJ determined that a modest bus tour of the city being visited was permissible (as long as the remaining factual requirements of the opinion were also met).[4] However, there is a wide gap between what the DOJ has deemed permissible in its opinion releases and the description of the types of leisure travel provided (and the inaccuracies noted in the books) in the settled cases.

In addition to being measured and practical, the upcoming guidance will need to provide greater clarity with respect to travel and entertainment so that companies will be better able to develop and adjust their policies and practices accordingly. We expect, for instance, that the government's new guidance will clarify when meals and entertainment provided in connection with routine business activity (i.e., product demonstration, training, sales meetings, or discussions) rise to a violation of the FCPA. As the DOJ has noted in its opinion release, some modest hosting cannot always amount to bribery. But the key question for the government to address is where it draws the line between modest hosting and an FCPA violation.

Robert Khuzami, the director of the SEC's Division of Enforcement, has suggested in public statements that the government is not interested in prosecuting bottles of wine being provided to government officials.[5] While it is helpful to know that the government agrees that certain gratuities are de minimis and, therefore, do not violate the law, questions remain as to where the line will be drawn. What about, for instance, a "rare" bottle of wine? What about a case of wine? As many attorneys who participate in trainings overseas know well, company employees often have detailed and specific questions about what limits are and are not appropriate when engaging in standard business activities involving government officials. To date, our guidance to clients on this subject involves creating a reasonable program that permits modest activities related directly to the business. We also frequently discuss with clients a prudent approach, such as that part of the program should involve an approval process for expenses for government officials that mandates advance approval of the expenses by competent persons who understand the FCPA and requires complete documentation of the expenses incurred so that such expenses can be audited to ensure compliance.

The new guidance will be greatly enhanced if it provides specific details that will help companies understand what they can and cannot do, and does not simply focus on broad provisions that fail to clarify the wide gap between the opinion releases and settled cases. While the government is cautious about condoning certain behavior through

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3 15 U.S.C. §§ 78dd-1(c)(2)(A) and 78dd-2(c)(2)(A).

4 DOJ Opinion Release No. 07-02, http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0702.pdf.

5 "Boards Will Soon Get FCPA Guidance," Amanda Gerut, agendaweek.com, September 17, 2012 (quoting Mr. Khuzami at a Practicing Law Institute panel discussion on September 12, 2012 as stating, "There's lots of consternation out there and a genuine belief that we prosecute [buying] a cup of coffee or a bottle of wine or [picking up the check] at lunch. I hope the guidance will clarify that is not what we do.").

guidance for fear that the guidance will be misapplied and wrongful conduct will be shielded, the failure to give specific guidance will continue the current situation where companies either must severely curtail common business courtesies or run the risk that those employees on the ground will misapply more permissive standards.

GIFTS

Similar to travel and entertainment, many U.S. companies around the world face regular questions from international employees about gift giving pursuant to local customs or holidays. Company policies that are so rigid that they prohibit a local custom of de minimis gift giving, and in so doing offend their business partners who expect this cultural display of respect and goodwill, frustrate employees in a well-meaning but misguided effort to comply with the FCPA. Although these types of small gifts do not begin to approach bribery, due to the lack of clarity on when the government views a small, token gift to be a bribe, some companies have prohibited all gifts to government officials no matter how small.

When the DOJ and SEC release their guidance, to be useful, they must address, at the very least, the bounds of acceptable behavior related to de minimis gift giving around holidays and customs such as Diwali in India, the Chinese New Year, funerals and weddings in Korea, and other similar circumstances that involve some level of gift giving that is not at all a bribe.

ACQUISITION DUE DILIGENCE

The Halliburton case is often cited as an example of the pitfalls in performing inadequate due diligence and failing to respond to red flags indicating FCPA issues in international deal making.[6] While good pre-acquisition due diligence is a necessity in today's business environment, there is great fear that companies will be held liable for the pre-acquisition conduct of acquired companies. There is also a fear that the U.S. government expects the acquiring company to reveal and disclose any and all pre-acquisition conduct that might be relevant before proceeding with a deal.

We are interested in hearing from the DOJ and the SEC regarding the appropriate steps that should be taken by companies in the acquisition context. It would be particularly useful for confirmation that the fact that a robust compliance program was in place immediately after acquisition will be deemed sufficient to address concerns identified prior to the deal.

COOPERATION AND SELF REPORTING

Numerous studies, including a recent study from New York University,[7] have proclaimed loudly that there is no discernible difference in the outcome of fines and penalties for companies that have self-reported potential FCPA violations versus situations where the government identified potential problems on its own. This has created true confusion among multinational companies about whether and when to report possible anticorruption issues to the authorities.

To be widely utilized, the guidance will need to provide a detailed description of how and in what way self-disclosure and cooperation will benefit a company, through lower fines and penalties or otherwise. The lack of guidance on this topic leaves companies and their outside counsel unable to demonstrate with specificity how self-reporting and/or cooperation will benefit the company. Some commentators have argued that self-disclosure should be awarded with a specific percentage reduction from the fine or penalty that would typically be assessed in the case and that cooperation should be awarded with another specific percentage reduction. Others have argued that companies that self-disclose and cooperate should receive a negotiated agreement that does not include a guilty plea. Regardless of the form, clarity on this issue would greatly assist both the business community and the government.

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6 DOJ Opinion Release No. 08-02, http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0802.pdf.

7 *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, Stephen J. Choi and Kevin E. Davis, New York University, July 20, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract__id=2116487.

PRIVILEGE WAIVER

Both the DOJ and SEC have taken the position that they will not require a company to waive the attorney–client privilege to secure cooperation credit. But frequently, the amount of cooperation credit hinges on the disclosure of facts related to the corruption that are collected and assessed by in-house and outside counsel. The government's guidance needs to provide concrete direction about how it expects a company to provide the basic facts that the government needs to learn, while also allowing the company to protect its own work product and privileged communications.

UPCOMING DOJ AND SEC FCPA GUIDANCE: WHAT TO LOOK FOR

It is the job of a prosecutor to make charging decisions, and to decide in the first instance what does and does not violate the law. As prosecutors and enforcement attorneys assess the facts to make charging decisions, they are compelled to view the world, therefore, in binary terms: black and white, right and wrong. As defense counsel, settlement discussions with our counterparts in the DOJ and SEC frequently hinge on which side of the line the conduct sits. Particularly for those of us who served as prosecutors, we acknowledge in these discussions the difficult mission of the enforcement officials to draw and defend lines.

The world of business, however, frequently operates in territory that is somewhat grey: a world in which business persons strive to grow the company ethically in situations where the application of the existing rules are not entirely clear. For instance, in the current era of FCPA enforcement, international businesses struggle with their responsibilities to monitor and control the conduct of third parties with whom they do business: distributors and sub-distributors, joint venture partners, dealers, and resellers. Even for companies that are firmly dedicated to compliance with the FCPA, is not always clear when a third party amounts to an agent whose improper conduct might someday be ascribed to the company and its employees. Good and ethical companies struggle, every day, with the concept of defining an agent of the company as opposed to an independent customer who engages in an arm's-length transaction to purchase the company's products.

Because of this difference—the line-drawing mission of the DOJ and SEC and the frequently difficult and sometimes grey world of international business—we do not expect the pending guidance to settle, once and for all, every possible question that might arise in the context of FCPA compliance. We do expect, however, that the DOJ and SEC will provide additional clarity on the subjects listed above, and perhaps others.

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