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On November 14, 2012, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) issued long-anticipated guidelines to the U.S. Foreign Corrupt Practices Act (FCPA). A Resource Guide to the U.S. Foreign Corrupt Practice Act is the first document summarizing the U.S. government's enforcement of the FCPA.

While the Guide does not announce major shifts in the government's FCPA policy, it does provide useful guidance on where the government is likely to focus its expanding enforcement efforts. Noteworthy sections of the Guide include:

Nominal Gifts Do Not Create Liability – The Guide confirms that Gifts of nominal value, such as reasonable meals, company promotional items, and cab fare on their own do not likely violate the FCPA and will not likely be subject to an investigation. Larger gifts or a pattern of smaller gifts will continue to be the focus of FCPA enforcements efforts. The Guide notes that companies should have clear guidelines in place governing all such expenses.

Facilitation Payments Discouraged – The Guide reaffirms facilitation payments are lawful under the FCPA but highlights the fact that such payments may not be unlawful under other countries' laws (most notably, the UK Anti-Bribery Act prohibits all facilitation payments). The Guide recommends that companies prohibit facilitation payments in order to avoid confusion surrounding these conflicting laws.

Self-Reporting and Cooperation– The Guide encourages companies to self-report potential FCPA violations, noting that DOJ and SEC place a "high premium on self-reporting, cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters."

Compliance Programs Are Critical- The Guide emphasizes the need for companies conducting international business to maintain an anti-corruption compliance program. The Guide sets forth nine "hallmarks of an effective compliance program":

1. A commitment from senior management and a clearly articulated policy against corruption;
2. A code of conduct and policies and procedures that are accessible to all employees (i.e., translated into local languages as necessary);
3. Oversight, autonomy and adequate resources for the compliance team;

4. Risk assessments;
5. Training;
6. Incentives and disciplinary measures;
7. Third party due diligence procedures;
8. Confidential reporting mechanisms and internal investigation resources; and
9. An accountability function such as periodic audits or reviews.

Significantly, the Guide acknowledges that an effective compliance program can minimize or eliminate corporate liability for FCPA violations. The Guide highlights a recent DOJ decision not to pursue an enforcement action against a company that had an effective compliance program in place, instead prosecuting the individual employee who violated the FCPA.

Conclusion

While the Guide does not announce a major shift in FCPA enforcement, DOJ and SEC place a spotlight on the importance of maintaining an "effective anti-corruption compliance program." Corporate counsel should review their existing compliance program to ensure it meets the enforcement expectations set forth in the Guide. Anti-corruption programs designed by Holland & Hart exceed the standards set forth in the Guide and continually capture "defensive data," which enables the company to prove corporate compliance.

Please contact Trip Mackintosh (tmackintosh@hollandhart.com; 303-295-8186) or Jon Anderson (jmanderson@hollandhart.com; 303-295-8566) if you have any questions related to anti-corruption matters.

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