CLAYTON UTZ

New guidance on the US FCPA

On 14 November 2012 the US Department of Justice (**DOJ**) and Securities and Exchange Commission (**SEC**) released their long-awaited joint guidance on the U.S. Foreign Corrupt Practices Act (**FCPA**).

Given the influence of the DOJ and SEC in global efforts to address corruption the Guidance will inevitably be influential in setting global standards for addressing corruption.

What is the FCPA Guidance?

Since 2002 the need for FCPA compliance guidance has been a recurring theme of OECD reviews of US enforcement practice. Finally, in November 2011 Assistant Attorney General Lanny Breuer announced that the DOJ would issue such guidance. This demonstrates how the OECD review process, which recently focussed upon Australian enforcement efforts, can encourage developments in target countries.

Described as an "unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities" the final joint DOJ/SEC Guidance document, A Resource Guide to the U.S. Foreign Corrupt Practices Act, was issued almost exactly a year later.

For those who have followed US enforcement trends the Guidance breaks little new ground: in preparing the Guidance DOJ and SEC have drawn upon the extensive body of decided cases and regulatory Opinions in the US (something that serves to highlight the lack of such jurisprudence in Australia).

The Guidance is a useful resource on the statutory requirements for FCPA offences, which given the DOJ's aggressive approach to jurisdiction can affect Australian companies (see below), and provides valuable insight into enforcement issues common to both the US and Australia.

The Guidance may also prove a useful resource for Australian companies through its description of the characteristics which DOJ and SEC consider to be the hallmarks of an effective compliance program.

General observations

A comprehensive discussion of the 130 page Guidance is beyond the scope of this Alert. However, a number of general observations may be made:

- The Guidance makes it clear that Australian companies with the slightest US connection are not beyond the reach of the DOJ, which continues to take the broadest possible view of jurisdiction under the FCPA. Among other things, the Guidance clearly states that the DOJ and SEC will regard certain types of conduct which have only a transitory connection with the US as falling within their jurisdiction including, for example, travelling, making a telephone call, sending an email or sending a text message through the US.
- The Guidance reinforces the DOJ and SEC's broad view of the meaning of "foreign official", which will include employees of government owned or controlled entities, as well as the meaning of the undefined term "instrumentality of a foreign government".
- More encouragingly, the Guidance confirms that a limited facilitation payment defence remains under the FCPA and will be applied in a commonsense manner. Regard will be had to whether the nature of any payment evidences corrupt intent, in addition to a continued focus on whether the services are routine and the company ordinarily entitled to them.
- The Guidance provides useful guidance in respect of the provision of gifts, travel, entertainment and other things of value to public officials. The Guidance overtly acknowledges that it will be difficult to prove corrupt intent in cases of items of nominal value, such as cups of coffee, reasonable meals, taxi fares or company promotional items.
- Finally, the Guidance reiterates that a payment made under an imminent threat of physical harm will not attract FCPA liability (ie. such a payment lacks the requisite corrupt intent), but mere economic coercion will not protect against liability.

Compliance Programs

The Guidance emphasises that companies must have an effective compliance program, which needs to be dynamic, constantly evolving and tailored to the company's specific business risks. The DOJ and SEC will take a commonsense and pragmatic approach to evaluating compliance programs and will consider whether a regime is:

- well designed;
- applied in good faith; and
- works in practice.

Mergers and acquisitions: new guidance on successor liability

The Guidance contains a detailed discussion on the critical issue of "successor liability".

The expectation is that companies must engage in due diligence of relevant risks and activities in the context of mergers and acquisitions to expose historic corruption issues, disclose payments and take appropriate remedial action to prevent future offences. Failure to do so expeditiously means a company will inherit the liabilities of the predecessor.

The Guidance states that the DOJ and the SEC will favourably view companies that act quickly and proactively to disclose any evidence of breaches discovered after acquisition and to implement effective anti-corruption measures post acquisition. In appropriate circumstances they may decline to bring enforcement actions for prior acts of a predecessor.

Enforcement: A US perspective

The broad approach to jurisdiction means that Australian companies should be aware of the DOJ and SEC's approach to the FCPA and its enforcement in comparison to the Australian position.

In both jurisdictions timely and voluntary disclosure and co-operation with the authorities can be taken into account as mitigating factors during sentencing and may result in reduced penalties.

The DOJ and SEC will also consider these factors when deciding whether or not to prosecute or enter into a plea agreement. Indeed the Guidance goes to some length to provide recent examples of matters the DOJ and SEC declined to pursue (declinations) because of, among other things, the proactive conduct of the company in disclosing and remedying potential corrupt conduct.

A decision to voluntarily disclose in Australia should only be made after obtaining independent legal advice from a firm with specialist expertise in foreign bribery issues, and performance under their direction of an appropriate and thorough investigation protected by legal professional privilege to ensure that there is an issue that warrants disclosure.

For more information, please contact:

Gary Berson
Partner
T +61 8 9426 8420
gberson@claytonutz.com

Greg Williams
Partner
T +61 2 9353 4798
gwilliams@claytonutz.com

Andrew Morrison
Partner
T +61 3 9286 6537
amorrison@claytonutz.com

Ross Perrett
Partner
T +61 7 3292 7011
rperrett@claytonutz.com

Tobin Meagher
Partner
T +61 2 9353 4842
tmeagher@claytonutz.com

Dr Michael Maxwell
Special Counsel
T +61 8 9426 8295
mmaxwell@claytonutz.com

Sydney
Level 15
1 Bligh Street
Sydney NSW 2000
+61 2 9353 4000

Melbourne
Level 18
333 Collins Street
Melbourne Vic 3000
+61 3 9286 6000

Brisbane
Level 28
Riparian Plaza
71 Eagle Street
Brisbane Qld 4000
+61 7 3292 7000

Perth
Level 27
QV1 Building
250 St. Georges Terrace
Perth WA 6000
+61 8 9426 8000

Canberra
Level 8
Canberra House
40 Marcus Clarke Street
Canberra ACT 2600
+61 2 6279 4000

Darwin
17-19 Lindsay Street
Darwin NT 0800
+61 8 8943 2555

Hong Kong
703 - 704
The Hong Kong Club Building
3A Chater Road
Central Hong Kong
T +852 3980 6868

www.claytonutz.com