

ClientAlert

White Collar

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FCPA Reform Efforts and Anti-Corruption Enforcement

Highlights

- New Department of Justice (DOJ) guidance on the FCPA expected later this year to address a range of issues important to corporate compliance programs.
- Lawmakers appear content to await the new guidance before introducing legislative reforms.
- A period of repose in which post-acquisition due diligence could be conducted would facilitate economic growth at home and abroad while ensuring improper conduct is discovered and corrected.

A growing number of US businesses, attorneys and lawmakers have called for reforms to the US Foreign Corrupt Practices Act ("FCPA") and the current anti-corruption enforcement regime over the past two years. Despite the broad range of advocates and bipartisan interest for reform on Capitol Hill, whose consideration of possible reform included a hearing in June 2011 before the House Subcommittee on Crime, Terrorism, and Homeland Security, legislation to amend the FCPA has yet to be introduced. Instead, lawmakers appear content to await the DOJ's new guidance on the Act, which was announced in November 2011 and is expected to be released later this year.¹ Senators Amy Klobuchar (D-MN) and Chris Coons (D-DE), members of the Senate Judiciary Committee, nevertheless wrote Attorney General Eric Holder in February 2012, urging the DOJ to provide US companies with clear rules by issuing guidance that addresses, among other areas, ambiguous terms used in the FCPA, the requisite level of intent to impute liability to a corporation, the expectations for corporate compliance programs, and the benefits for cooperating with investigations of the DOJ and Securities and Exchange Commission ("SEC").²

Attorney General Eric Holder provided few details when he recently addressed the DOJ's forthcoming guidance, but he did note that it will cover, at least in part, the DOJ's view of the criminal intent requirement, the definitions of "foreign official" and facilitation payments, conspiracy and aiding and abetting liability in the FCPA context, penalties and enforcement, the benefits of effective compliance programs, successor liability, and due diligence.³



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Although observers remain hopeful that the forthcoming DOJ guidance will clarify many of the issues related to FCPA compliance faced by many US companies, White & Case partners George Terwilliger and Matthew Miner described in a recent *National Law Journal* article the advantages of congressional action as compared to simply deferring to the interpretive guidance of the DOJ—guidance which will have no effect in court.⁴ Mr. Terwilliger, who testified at the June 2011 House Subcommittee hearing on possible FCPA reform, and Mr. Miner note the ambiguity in the law resulting from the current enforcement regime and the disincentives for US businesses to seek clarification of the law by testing the US enforcement authorities' legal theories. The uncertainty faced by companies attempting to navigate FCPA compliance and enforcement efforts would be better resolved, they argue, with guidance from lawmakers, rather than prosecutors, as to the bounds of permissible conduct.

One specific reform discussed in Messrs. Terwilliger and Miner's recent article is to provide US companies with a period of repose in which they could make a studied compliance review of the books, records and operations of a newly acquired subsidiary and avoid exposure to prosecution if, on the discovery of any wrongdoing, the company discloses that information to the government and takes immediate and effective remedial steps to correct bad conduct. Under the current regime, US authorities maintain that US companies can inherit the corruption liability of foreign acquisitions—most of whom are beyond the reach of the FCPA before being acquired. Due to the extremely limited opportunity for a US acquirer to determine if there is covert corrupt misconduct during the pre-acquisition due diligence phase, an expanded opportunity for more thorough review with greater access to a target company's books would serve the dual purposes of helping US companies and the government achieve a corruption-free level playing field for international commercial competition while also encouraging economic development by US companies abroad. Encouraging US acquisitions abroad could in turn help the global and US economies and create new jobs at home.

It remains to be seen what effect the DOJ's new guidance on the FCPA will have for US companies' ability to implement cost-effective FCPA compliance programs and to accurately anticipate enforcement actions when improper conduct is uncovered. While it is possible that the new guidance will clarify the current ambiguities in provisions of the FCPA, congressional action may still be necessary to provide US businesses with the certainty required to foster full participation in the global marketplace. The extent of such a need will only be fully appreciated once the new guidance is released.

To read the recent *National Law Journal* article by George Terwilliger and Matthew Miner on the need for congressionally driven reform to the FCPA and anti-corruption enforcement efforts, please [click here](#).

1 Lanny A. Breuer, Assistant Attorney General, Criminal Division, Dep't of Justice, Address at 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011) available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html> (stating the DOJ expects to issue new guidance on the FCPA in 2012).

2 Letter from Sens. Amy Klobuchar and Chris Coons to Eric Holder, Attorney General of the United States (Feb. 15, 2012) available at <http://www.scribd.com/doc/81899022/Letter-to-AG-Holder-From-Senators-Klobuchar-and-Coons-Regarding-FCPA-Guidance>.

3 Rachel G. Jackson, *Holder Reveals Contours of Forthcoming FCPA Guidance*, JUST ANTI-CORRUPTION (MAINJUSTICE) (June 13, 2012), <http://www.mainjustice.com/justanticorruption/2012/06/13/holder-reveals-contours-of-forthcoming-fcpa-guidance/> (sub. req'd).

4 George J. Terwilliger III & Matthew Miner, "Reform is needed in anti-corruption enforcement," *The National Law Journal* (June 25, 2012) available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560493301&Reform_is_needed_in_anticorruption_enforcement&slreturn=1 (sub. req'd).

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