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New Foreign Corrupt Practices Act Resource Guide Provides Useful Guidance

In the last 3 years, the Foreign Corrupt Practices Act (FCPA) has been more stringently enforced than ever before. As a result, U.S. business has had many questions about the FCPA and how rules are enforced, and some provisions of the law have been characterized as ambiguous. On November 14, 2012, the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) responded to these concerns by releasing their joint *Resource Guide to the U.S. Foreign Corrupt Practices Act*. The lengthy *Guide* provides a wealth of information and practical examples on anti-corruption compliance for U.S. companies doing business internationally.

The *Guide* outlines the basics of FCPA law, including who is covered, what conduct is covered, and the meaning of terms used by the Act including "corruptly", "willfully", and "anything of value". It gives guidance and practical examples on issues that companies often have difficulty navigating, such as payments to third parties, intermediaries and distributors, and the line between proper and improper payments, gifts, and travel or entertainment expenses paid to foreign officials. The *Guide* discusses affirmative defenses to FCPA laws, including compliance with local law, payment of reasonable and bona fide travel and lodging expenses to a foreign official, and facilitation payments made in furtherance of routine government action. It also covers the issues of parent-subsidiary liability and successor liability in the mergers and acquisitions context, giving several hypotheticals.

The *Guide* discusses the FCPA's accounting provisions---who and what is covered by the books and record keeping requirements and the internal accounting control requirements. It provides an interesting list of the way bribes have been mischaracterized in book keeping, for example as consulting fees, rebates, and "customs intervention" payments.

The *Guide* outlines potential penalties both civil and criminal in detail. It discusses the various ways cases can be resolved within both agencies, including non-prosecution or deferred prosecution agreements (known as NPAs and DPAs). It discusses the use of "compliance monitors" in situations of either a criminal sentencing or settlement of charges by way of an NPA or DPA. A monitor is an independent third party who assesses and monitors a company's adherence to the compliance requirements of the sentence or agreement. The *Guide* lists the

factors that DOJ and SEC consider in deciding whether a monitor is appropriate. It also gives several real-life examples of instances where FCPA cases were resolved and the factors relevant thereto.

The *Guide* covers whistleblower laws in the context of FCPA violations, and the procedure on getting an opinion if the DOJ would consider conduct to be within its enforcement policy. The *Guide* is not exhaustive and there are areas such as mitigation where further guidance would be warranted. However, the *Guide* provides much-needed clarification on a variety of issues and companies doing business internationally would be wise to ensure their compliance personnel familiarize themselves with it.

If you have further questions, please contact Barnes Richardson attorneys Helena Sullivan at (212) 725-0200 ext. 119, hsullivan@barnesrichardson.com, or Rick Van Arnam at (212) 725-0200 ext 126, rvanarnam@barnesrichardson.com.