

# CLIENT ALERTS

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## DOJ and SEC publish updated resource guide on the Foreign Corrupt Practices Act

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The Foreign Corrupt Practices Act is a federal law that prohibits overseas bribery and attempts to hide such payments through improper accounting practices. The U.S. Department of Justice and the Securities and Exchange Commission are responsible for enforcing this statute.

DOJ and the SEC first published the resource guide in November 2012. The new, second edition has been updated to reflect policy changes, recent court decisions, and revised hypotheticals that reflect the fact patterns and issues that the Government has seen over the last seven years. A copy of the updated resource guide can be found here: <https://www.justice.gov/criminal-fraud/file/1292051/download>.

Notable updates in the second edition include:

- Detailed guidance on key statutory terms, including *foreign official*, *instrumentality*, and *agent*, to better reflect how those terms have been defined by the courts.
- More robust explanations about DOJ's FCPA Corporate Enforcement Policy, which formalized the process for obtaining leniency in investigations. The explanations come with examples of when DOJ declined to prosecute a company, providing key guidance on how to minimize the risk of prosecution even when a violation occurred.
- Brand new guidance on corporate successor liability following mergers and acquisitions. Acquiring companies that engage in robust due diligence have improved odds of dodging enforcement activity, even when FCPA violations are discovered and disclosed. Quickly assimilating the acquired company into the acquirer's compliance procedures can also pay dividends if FCPA violations are discovered after the acquisition is complete.

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- Guidance on compliance programs. It's well known by now that paper plans don't carry much weight; DOJ and the SEC want to see how well a plan fairs in practice: "The truest measure of an effective compliance program is how it responds to misconduct." The updated guide refers to DOJ's updated Evaluation of Corporate Compliance Programs, which guides federal prosecutors in evaluating the effectiveness of a company's compliance program.
- A new anti-"piling on" provision that outlines the Government's policy of coordinating resolutions in appropriate cases to avoid duplicative penalties, forfeitures, and disgorgements for the same conduct. The guide notes that the Government coordinates not only between DOJ and the SEC, but also with foreign governments undertaking parallel investigations.

Although this guide is geared toward publicly-traded corporations subject to the FCPA, its guidance is helpful for all companies, as even privately held companies and their employees can face civil and/or criminal liability under the FCPA.

Therefore, all companies can benefit from an anti-bribery compliance plan. Having a robust compliance plan will help companies prevent conduct that may run afoul of the FCPA in the first place, but it can also help companies mitigate their liability should they ever come under scrutiny from the DOJ or the SEC. Even if you already have a plan, regularly auditing the plan and updating it to account for discovered weaknesses, and evolving guidance, are key considerations for prosecutors.

Our team can help you prepare a plan if you don't have one, and help you audit and update your plan if you already have one. Remember, crime is often countercyclical, and corporate enforcement usually upticks during recessions. Contact our team to make sure your company is protected before trouble strikes.

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