

U.S. Enforcement Agencies Release Second Edition of FCPA Resource Guide

July 8, 2020

On July 3, 2020, DOJ and the SEC released a new edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Second Edition”).¹ Long rumored to be in the works, the Second Edition updates the landmark FCPA guidance first published in 2012 (the “First Edition”). While much of the Guide remains the same, the Second Edition addresses developments in the interpretation of the FCPA from the past eight years, including recent case law, enforcement actions, and updated policies and guidance from the U.S. agencies (DOJ and the SEC). Like its predecessor, the Second Edition is not binding on these agencies, but provides valuable insights into their current views regarding FCPA enforcement.

Of particular note, the Second Edition includes updated guidance regarding:

- The availability of conspiracy and aiding-and-abetting theories under both the FCPA’s anti-bribery and accounting provisions;
- The statute of limitations applicable for both the SEC and DOJ, including a new discussion of the six-year period that DOJ says applies to criminal violations of the accounting provisions;
- Recent case law involving the definition of an “instrumentality”;
- The distinction between “internal accounting controls” and a company’s compliance program;
- The *mens rea* required for corporate criminal liability under the accounting provisions, which is the same as for individuals—“knowing and willful”;

¹ U.S. Dep’t of Justice, Criminal Div. and U.S. Sec. & Exch. Comm’n, Enft Div., *A Resource Guide to the U.S. Foreign Corrupt Practices Act: Second Edition* (July 2020), <https://www.justice.gov/criminal-fraud/fcpa-resource-guide> [hereinafter “Second Edition”].

- Updates on relevant case law and DOJ policies, including the Corporate Enforcement Policy, Selection of Monitors, Anti-Piling On Policy, and Evaluation of Corporate Compliance Programs; and
- Successor liability and related best practices in the M&A context.

At the same time, there are no significant changes to the First Edition's discussion of facilitation payments, charitable donations, or hypothetical examples of true declinations, and there is surprisingly little added regarding hiring practices.

Conspiracy and Aiding-and-Abetting Theories in the Wake of *Hoskins*

The Second Edition's most significant change addresses the impact of *United States v. Hoskins* on FCPA enforcement. In *Hoskins*, the Second Circuit held that, because the FCPA specifically identifies those who are subject to its anti-bribery jurisdiction, the government cannot use the conspiracy or aiding-and-abetting statutes to expand the extraterritorial reach of the anti-bribery provisions over foreign nationals.²

The First Edition of the Guide had a blanket statement that foreign non-issuers and individuals were subject to the FCPA through the conspiracy and aiding-and-abetting statutes, even when they had not taken any relevant action in the United States.³ The Second Edition recognizes the impact of *Hoskins* by noting that, "at least in the Second Circuit, an individual can be criminally prosecuted for conspiracy to violate the FCPA anti-bribery provisions or aiding and abetting an anti-bribery violation *only if* that individual's conduct and role fall into one of the specifically enumerated categories expressly listed in the FCPA's anti-bribery provisions."⁴ The Second Edition also deletes any reference to conspiracy theory from the "FCPA Jurisdiction" hypothetical, the most substantive change to any hypothetical in the updated Guide.⁵

However, DOJ has not given up on the use of conspiracy and aiding-and-abetting theories to broaden the reach of the FCPA statute. The Second Edition specifically notes that one district court in another circuit already has rejected the *Hoskins* decision, a

² *United States v. Hoskins*, 902 F. 3d 69, 71-72 (2d Cir. 2018); see also Kara Brockmeyer, Colby A. Smith, Bruce E. Yannett, Philip Rohlik, Jil Simon & Anne M. Croslow, "Second Circuit Curbs FCPA Application to Some Foreign Participants in Bribery," FCPA Update, Vol. 10, No. 1 (Aug. 2018), <https://www.debevoise.com/insights/publications/2018/08/20180830-fcpa-update-august-2018>.

³ U.S. Dep't of Justice, Criminal Div. and U.S. Sec. and Exch. Comm'n, Enft Div., A Resource Guide to the U.S. Foreign Corrupt Practices Act (Nov. 2012) at 12, 34, <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [hereinafter "First Edition"].

⁴ Second Edition, *supra* note 1, at 36 (emphasis added).

⁵ *Id.* at 11-12.

reminder that this is not settled law.⁶ In addition, the revamped Guide now explicitly states that conspiracy and aiding-and-abetting theories are still in play for the books and records and internal controls portions of the statute, because those provisions apply by their terms to “any person.”⁷

Statute of Limitations and Disgorgement

The Second Edition updates the Guide’s statute-of-limitations section in two important ways:

First, as expected, the Guide reflects the U.S. Supreme Court’s ruling in *SEC v. Kokesh*⁸ that the SEC is subject to a five-year statute of limitations for both penalties and disgorgement claims, but not injunctions.⁹

Second, and perhaps most surprisingly, the Second Edition now states that DOJ will employ a six-year statute of limitations for criminal violations of the FCPA’s accounting provisions on the ground that those claims “are defined as ‘securities fraud offense[s]’ under 18 U.S.C. § 3301.”¹⁰ (We plan to take a closer look at this in the July edition of our *FCPA Update*.)

The updated Guide also makes passing reference to the recent U.S. Supreme Court decision in *SEC v. Liu*,¹¹ which, as the Second Edition notes, held that disgorgement is permissible equitable relief “when it does not exceed a wrongdoer’s net profits and is awarded for victims.”¹² There is no discussion in the Second Edition of how this will work in FCPA cases, where generally there is no identified “victim” to whom disgorgement could be awarded.

⁶ *Id.* at 36.

⁷ *Id.* 46 (emphasis added).

⁸ 137 S. Ct. 1635 (2017).

⁹ Second Edition, *supra* note 1, at 37.

¹⁰ *Id.* at 36.

¹¹ No. 18-1501, 2020 WL 3405845, at *1 (U.S. June 22, 2020); see also Kara Brockmeyer, Andrew J. Ceresney, Arian M. June, Robert B. Kaplan, Andrew M. Levine, David A. O’Neil, Julie M. Riewe, Paul D. Rubin, Jonathan R. Tuttle, Bruce E. Yannett, Mary Jo White, Ada Fernandez Johnson, Valerie A. Zuckerman, “Supreme Court Liu Decision Upholds SEC Disgorgement Power While Suggesting Potential Limits and May Impact FTC Enforcement” (June 23, 2020), <https://www.debevoise.com/insights/publications/2020/06/supreme-court-liu-decision-upholds-sec>.

¹² Second Edition, *supra* note 1, at 71.

Definition of “Instrumentality”

As expected, the Second Edition updates the Guide’s discussion of what constitutes an “instrumentality” under the FCPA to incorporate the Eleventh Circuit’s multifactor test in *United States v. Esquenazi*.¹³ The Guide lists the “non-exhaustive” factors that the Eleventh Circuit reviewed and then recommends that companies consider these factors when evaluating their compliance programs.¹⁴

Internal Accounting Controls vs. Compliance Programs

The Second Edition provides some additional clarification regarding internal controls and the intersection between those controls and a company’s compliance program. The updated Guide acknowledges that the statute refers to internal *accounting* controls, which are not necessarily synonymous with a company’s FCPA compliance program.¹⁵

The Second Edition then notes, however, that there may be “critical” overlap between the two, stating that “the design of a company’s internal controls must take into account the operational realities and risks attendant to the company’s business”¹⁶ Unfortunately, the Second Edition does not provide any further guidance on how DOJ and the SEC distinguish between a failure of a company’s compliance program that results in an internal accounting controls violation and one that does not.

Clarification of the Accounting Provisions’ *Mens Rea* Requirement

The Foreword to the Second Edition notes that it will address issues including the *mens rea* requirement and statute of limitations for criminal violations of the accounting provisions. While the latter update (discussed above) adds to the guidance in the First Edition, the former mostly deletes from it.

The First Edition stated that companies and individuals can be criminally liable for “knowingly failing to comply with the [accounting provisions],” but that, “[a]s with the FCPA’s anti-bribery provisions, individuals are only subject to the FCPA’s criminal

¹³ 752 F.3d 912 (11th Cir. 2014). For a more detailed discussion of the *Esquenazi* factors, see our prior article “U.S. Appellate Court Defines Government ‘Instrumentality’ Under the FCPA,” FCPA Update, Vol. 5, No. 10 (May 2014), <https://www.debevoise.com/insights/publications/2014/05/fcpa-update>.

¹⁴ Second Edition, *supra* note 1, at 20.

¹⁵ *Id.* at 40-41.

¹⁶ *Id.* at 40.

penalties for violations of the accounting provisions if they acted willfully.”¹⁷ The Second Edition removes this additional language regarding individuals and is amended to state that “[c]riminal liability can be imposed on companies and individuals for knowingly *and* willfully failing to comply with the FCPA’s books and records or internal controls provisions.”¹⁸

Other Updates on Case Law, Case Examples, and DOJ Policies

The Second Edition provides updates on a number of cases and policies decided or adopted since 2012. Relevant case law encompasses both conspiracy theory and the definition of “instrumentality,” as discussed above, in addition to a brief reference to a defendant’s unsuccessful attempt to assert the local law affirmative defense in *United States v. Ng Lap Seng*.¹⁹ Throughout the Guide, the Second Edition also updates or replaces various case examples with more current ones.

Apart from judicial decisions resulting from individual defendants’ willingness to litigate, the Second Edition includes sections describing various DOJ policies and related guidance, including some that otherwise exist in memoranda and speeches that can be more difficult to locate. Of particular note, the Second Edition provides short descriptions of DOJ’s Corporate Enforcement Policy (including three examples of Corporate Enforcement Policy declinations), guidance as to whether a corporate monitor will be necessary, Anti-Piling On Policy (to avoid duplicative penalties), and, most recently, the Evaluation of Corporate Compliance Programs.²⁰

Additional Commentary Regarding Successor Liability

The First Edition already noted that the U.S. agencies, absent aggravating circumstances, rarely take action against successor companies in M&A transactions following voluntary self-disclosure, remediation, and cooperation with DOJ and the SEC.²¹ The Second Edition goes somewhat further in providing comfort in the transactional context.

Similar to past speeches by DOJ personnel, the updated Guide expressly recognizes “the potential benefits of corporate mergers and acquisitions, particularly when the acquiring

¹⁷ First Edition, *supra* note 4, at 44.

¹⁸ Second Edition, *supra* note 1, at 45 (emphasis added).

¹⁹ See Trial Transcript 715-18, *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 26, 2017), ECF No. 609.

²⁰ *Id.* at 51-54, 67, 71, 73-74.

²¹ First Edition, *supra* note 4, at 28.

entity has a robust compliance program in place.”²² It reiterates that, under the DOJ FCPA Corporate Enforcement Policy, “in appropriate cases, an acquiring company that discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.”²³ As we previously have observed, DOJ is thereby underscoring the importance of anti-corruption due diligence (preferably pre-, but also post-transaction), albeit without guaranteeing a transactional free pass and notwithstanding that a declination under the Corporate Enforcement Policy remains less attractive than a traditional declination without any charges or settlement.²⁴

Additional Points of Note

Another change reflected in the Guide bears mention: The First Edition noted that, “[i]n fiscal year 2009, the U.S. government provided more than \$1 billion for anti-corruption and related good governance assistance abroad.”²⁵ According to the Second Edition, that same number ten years later amounted only to \$112 million.²⁶ During this time, of course, numerous jurisdictions have adopted their own anti-corruption laws and demonstrated an increased willingness to enforce these laws and to cooperate with U.S. and other authorities in conducting investigations and coordinating resolutions.

Additionally, a number of noteworthy topics interestingly changed little from the First Edition. For example, despite their prominence, the hiring practices cases are given relatively short shrift as a two-sentence example of “gifts” in the Second Edition.²⁷ There is also no substantive update to the discussion of charitable contributions or facilitation payments, despite those being areas of keen interest among compliance professionals.

Conclusion

While the statutory language of the FCPA has remained the same over the last eight years, the Second Edition highlights the numerous significant developments in the

²² Second Edition, *supra* note 1, at 29.

²³ *Id.* at 32.

²⁴ Andrew M. Levine, Philip Rohlik & Kamy B. Mehta, “Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond,” FCPA Update, Vol. 10, No. 5 at 2 (Dec. 2018), <https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018>.

²⁵ First Edition, *supra* note 4, at 6.

²⁶ Second Edition, *supra* note 1, at 6.

²⁷ *Id.* at 16.

interpretation and application of the law during this time through relevant case law, enforcement actions, and policies.

Like its predecessor, the Second Edition is a useful and thorough resource that provides valuable perspective on the U.S. agencies' latest views regarding the interpretation and enforcement of the FCPA. This updated version ensures that the Guide continues to be a worthwhile compendium of information for practitioners and companies alike. Indeed, the Second Edition undoubtedly will drive conversations at anti-corruption conferences (even virtual ones) in the months and years to come.

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