

DOJ and SEC Publish Updated FCPA Resource Guide

July 9, 2020

On Friday, July 3, 2020, the Department of Justice’s Criminal Division and the Securities and Exchange Commission’s Enforcement Division published the *Second Edition* of its *Resource Guide to the U.S. Foreign Corrupt Practices Act*. This is the first update since 2015, and it is comprehensive. The *Second Edition* of the Guide includes, for the first time, the DOJ’s FCPA Corporate Enforcement Policy, and contains other helpful updates, including case law developments and other clarifications of the law. The Guide remains an important resource for FCPA practitioners and their clients.

Background

The DOJ Criminal Division and the SEC Enforcement Division published the original Guide in November 2012 to provide guidance on the requirements of the FCPA and insight into DOJ and SEC enforcement practices, including discussions of hypotheticals, precedent, and declinations. Prior to last week’s publication of the *Second Edition*, the DOJ and SEC had only updated the Guide once since its original release, with an unannounced and relatively non-substantive revision in 2015.

The *Second Edition* truly is an update to, rather than a departure from, the prior version of the Guide. For example, the *Second Edition* retains the Guide’s original structure by updating eight substantive chapters addressing: the FCPA’s substantive provisions (chapters 2 and 3); related laws (chapter 4); the guiding principles of enforcement by the DOJ and SEC (chapter 5); penalties, sanctions, and remedies (chapter 6); resolutions (chapter 7); whistleblowers (chapter 8); and the DOJ Opinion Procedure (chapter 9). And, while the Guide provides detailed information, it continues to caution readers that it is “non-binding, informal, and summary in nature, and the information contained [t]herein does not constitute rules or regulations.”

That said, the *Second Edition* does reflect important developments in the case law and guidance across a variety of topics. Below is a summary of the *Second Edition*’s most notable updates.

DOJ and SEC Policies Applicable to the FCPA

The *Second Edition* incorporates DOJ’s FCPA Corporate Enforcement Policy (“CEP”), now located in the “Guiding Principles of Enforcement” section of the Guide. Helpfully, the *Second Edition* adds examples of DOJ declinations under the CEP, including in situations where companies voluntarily self-disclosed conduct. It also includes highlights from the following policies: Selection of Monitors in Criminal Division Matters; Coordination of Corporate Resolution Penalties (also known as the Anti-Piling-On Policy); and the DOJ’s Evaluation of Corporate Compliance Programs. And while the Guide is focused on FCPA enforcement, it serves in many ways as a helpful repository of policies relevant to all corporate enforcement matters.

The DOJ’s policy on Evaluation of Corporate Compliance Programs was itself recently updated on June 1, 2020. Although the *Second Edition* does not frequently cite to DOJ’s policy, the *Second Edition* sounds many of the same notes: the necessity of a “well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations”; the value of an investigations structure with “an established means of documenting the company’s response, including any disciplinary or remediation measures taken”; and the importance of integrating “lessons learned from any misconduct into the company’s policies, training, and controls.”

Design of a Company's Internal Accounting Controls

The *Second Edition* explains that “although a company’s internal accounting controls are not synonymous with a company’s compliance program, an effective compliance program contains a number of components that may overlap with a critical component of an issuer’s internal accounting controls.” This is a helpful reminder that while these two regimes may overlap, they should not be coterminous; after all, irrespective of corruption risks, a “financial services company would be expected to devise and employ different internal accounting controls than a manufacturer.”

Impact of Recent Case Law

The *Second Edition* acknowledges the limitations the Second Circuit’s ruling in *United States v. Hoskins* placed on “agent” liability under the FCPA, but makes clear that *Hoskins* does not apply to the FCPA accounting provisions. The *Second Edition* states that “[u]nlike the FCPA anti-bribery provisions, the accounting provisions apply to ‘any person,’ and thus are not subject to the reasoning in the Second Circuit’s decision in *Hoskins* limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions.” See our related client memoranda that can be found [here](#) and [here](#).

The *Second Edition* discusses the definition of “instrumentality” in light of the Eleventh Circuit’s decision in *United States v. Esquenazi*. There, the Eleventh Circuit concluded that an “instrumentality” is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own,” and added that this involves a fact-bound inquiry. The *Second Edition* endorses the Eleventh Circuit’s list of factors for conducting such a fact-based inquiry and advises that “[c]ompanies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs.”

The *Second Edition* also incorporates recent disgorgement case law following the Supreme Court’s decisions in *Kokesh v. Securities and Exchange Commission* and *Liu v. Securities and Exchange Commission*. In *Kokesh*, the Court held that SEC disgorgement claims in federal court actions are subject to a five-year statute of limitations, and in *Liu*, the Court upheld the SEC’s authority to obtain disgorgement as an equitable remedy in federal court.

The *Second Edition* does not address the limitations the Court imposed in *Liu*, including that disgorgement generally should be returned to investors. The SEC usually does not return funds to investors in FCPA cases, and the Court did not address whether disgorgement is appropriate if such a distribution is impractical. We note that the SEC’s disgorgement authority in administrative proceedings (as opposed to federal court) has not been challenged, and we expect the SEC to continue to file settled FCPA cases in administrative proceedings without distributing disgorged funds to investors. The issue may be the subject of litigation in future SEC FCPA actions that are contested in federal court. See our related client memoranda on [Kokesh](#) and [Liu](#).

Statute of Limitations for FCPA Violations

The *Second Edition* clarifies that “[f]or substantive violations of the FCPA anti-bribery provisions, the five-year limitations period set forth in 18 U.S.C. § 3282 applies. For violations of the FCPA accounting provisions, . . . under 18 U.S.C. § 3301, there is a limitations period of six years.” The *Second Edition* also touches on related topics, including situations in which the applicable limitations period is extended.

FCPA Mental State Requirement

The *Second Edition* now reflects that the mens rea requirement is *knowing and willful* for companies and individuals to face criminal liability for failure to comply with the FCPA’s books and records or internal controls provisions.

Successor Liability in the M&A Context

The *Second Edition* discusses recent enforcement actions connected to mergers and acquisitions and adds context on the principles of successor liability. In particular, consistent with the DOJ’s policy on the Evaluation of Corporate Compliance Programs, the Guide explains that the government recognizes that

pre-acquisition due diligence sometimes is not possible, and that the agencies will look at the timeliness and thoroughness of post-acquisition due diligence and compliance integration.

Examples Addressing Recurring FCPA Issues

The *Second Edition* adds examples that span a range of fact patterns, from travel and entertainment payments to charitable donations to hiring foreign officials' relatives. It includes new examples of FCPA enforcement actions involving third parties, including where third-party sales agents used commission payments to pay bribes.

The *Second Edition* of the Guide is available [here](#).

A comparison of the *Second Edition* to the prior edition is available [here](#).

Prior Davis Polk client memoranda discussing the Guide can be found [here](#).

Other materials of interest include the DOJ [press release](#) relating to the Guide.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

New York

Greg D. Andres	+1 212 450 4724	greg.andres@davispolk.com
Martine M. Beamon	+1 212 450 4262	martine.beamon@davispolk.com
Angela T. Burgess	+1 212 450 4885	angela.burgess@davispolk.com
Tatiana R. Martins	+1 212 450 4085	tatiana.martins@davispolk.com

Washington, DC

Robert A. Cohen*	+1 202 962 7047	robert.cohen@davispolk.com
Neil H. MacBride	+1 202 962 7030	neil.macbride@davispolk.com
Fiona R. Moran	+1 202 962 7137	fiona.moran@davispolk.com
Paul J. Nathanson	+1 202 962 7055	paul.nathanson@davispolk.com
Linda Chatman Thomsen	+1 202 962 7125	linda.thomsen@davispolk.com
Kenneth L. Wainstein	+1 202 962 7141	ken.wainstein@davispolk.com

*Mr. Cohen is admitted to practice in New York and Maryland, and is practicing in DC under the supervision of partners of the firm.

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