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DOJ and SEC Release Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

Updated FCPA Guide Announces Changes to Interpretation of FCPA Accounting Provisions and Incorporates Eight Years of Developments in FCPA Enforcement

SUMMARY

On July 3, 2020, the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the Securities and Exchange Commission published the Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, a detailed manual on the enforcement of the FCPA for companies and practitioners.¹ The First Edition was published in November 2012 and subject to slight revisions in 2015.² Although the updated FCPA Guide incorporates legal and policy developments from the last eight years and makes a few notable changes, the structure and content remain largely unchanged from the First Edition.

DISCUSSION

The Second Edition includes changes and corrections, along with more substantive updates regarding case law and DOJ policy pronouncements issued since publication of the First Edition, including [the FCPA Corporate Enforcement Policy](#),³ [the Anti-Piling On Policy](#),⁴ and [the Criminal Division's Evaluation of Corporate Compliance Programs guidance](#).⁵

- **Changes, Corrections, and Clarifications to the First Edition:**
 - ***Longer Six-Year Statute of Limitations for Criminal Violations of the Accounting Provisions.*** The First Edition stated that all FCPA violations were subject to a “general” five-year limitations period pursuant to 18 U.S.C. § 3282.⁶ The Second Edition affirms the five-year

limitations period for violations of the FCPA's anti-bribery provisions, but clarifies that a six-year limitations period applies to criminal violations of the accounting provisions because, according to the DOJ and the SEC, they constitute "securities fraud offenses" pursuant to 18 U.S.C. § 3301.⁷

- **Recognition of Heightened Mens Rea for Corporate Criminal Violations of the Accounting Provisions.** The Second Edition clarifies that the *mens rea* requirement for criminal violations of the accounting provisions by individuals *and* companies is both knowingly and willfully.⁸ For both types of defendants, the willfulness requirement obligates the government to prove that a defendant acted with a bad purpose, *i.e.*, knowing that his or her conduct was unlawful. The First Edition had stated incorrectly that only knowledge, and not willfulness, was required to establish criminal *mens rea* for violations of the accounting provisions by corporate defendants.⁹
- **Clarification Concerning Internal Accounting Controls.** Unlike the First Edition, the Second Edition states explicitly that internal accounting controls are not synonymous with a compliance program.¹⁰ However, it also states that there may be overlap in the key components of effective compliance programs and internal accounting controls, and that both compliance programs and accounting controls must be appropriately tailored to companies' operational risks.¹¹
- **Updates Regarding Developments in Case Law:** The Second Edition includes a number of substantive updates reflecting key developments in case law related to the FCPA and the SEC's enforcement authority. It also updates certain enforcement examples with more recent examples and FCPA-related facts and statistics. The key judicial decisions addressed in the Second Edition are described below.
- **United States v. Hoskins (co-conspirator liability).** The Second Edition discusses *Hoskins* and its effect on secondary liability under the FCPA, acknowledging that the law is now unsettled with respect to co-conspirator and aiding and abetting liability for persons and entities who are not directly covered by the anti-bribery provisions.¹² In *Hoskins*, the Second Circuit concluded that foreign nationals who take no action in furtherance of an FCPA violation within the United States cannot be prosecuted under the FCPA pursuant to conspiracy or aiding and abetting liability, while leaving open whether such persons could be prosecuted if they acted as an agent of a U.S. issuer or domestic concern.¹³ Consistent with the DOJ's position in *Hoskins*, the First Edition had stated that an individual could be liable as a co-conspirator under the FCPA regardless of whether the individual entered the United States.¹⁴ The Second Edition no longer takes this position. Instead, it describes *Hoskins*, but also notes that at least one district court in another circuit has rejected the limitation on secondary liability set forth in *Hoskins*, and that the *Hoskins* limitation may only apply in the Second Circuit.¹⁵ Further, the Second Edition states that the accounting provisions of the FCPA apply to "any person" and thus are not subject to *Hoskins*' limitation on secondary liability.¹⁶
- **United States v. Ng Lap Seng (local law affirmative defense).** The Second Edition addresses *Ng Lap Seng*,¹⁷ in which the district court rejected the defendant's request for a jury instruction directing an acquittal on FCPA-related charges in the event that the jury found that there was no law in the countries at issue prohibiting the defendant's actions.¹⁸ In denying the defendant's request, the court held that the proposed instruction was inconsistent with the plain meaning of the FCPA provision setting forth the "local law" affirmative defense, which requires the defendant to establish that a written foreign law explicitly authorizes the conduct at issue. The court further held that the proposed instruction would lead to impractical results.¹⁹ *Ng Lap Seng* thus reaffirms the statement in the FCPA's legislative history that "the absence of written laws in a foreign official's country [prohibiting the conduct] would not by itself be sufficient to satisfy [the local law] defense."²⁰
- **United States v. Esquenazi (definition of "foreign official").** The Second Edition includes an extensive discussion of the Eleventh Circuit's definition of "instrumentality" set forth in *Esquenazi*.²¹ Under the FCPA, foreign officials include officers or employees of a department, agency, or *instrumentality* of a foreign government.²² In *Esquenazi*, the Eleventh Circuit

concluded that an “instrumentality” under the FCPA is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own” and provided a list of factors to guide this “fact-bound inquiry.”²³ The updated FCPA Guide states that “Companies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs,” but notes that “an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.”²⁴

- ***Kokesh v. SEC and Liu v. SEC (disgorgement)***. In a new section entitled “Forfeiture and Disgorgement,” the Second Edition also describes the Supreme Court decisions in *Kokesh* and *Liu*, which addressed the SEC’s authority to seek disgorgement as a remedy in judicial enforcement actions.²⁵ These rulings are broadly applicable to SEC enforcement proceedings, including in the FCPA context. The Second Edition notes that under *Kokesh* the disgorgement remedy is a “penalty” for statute-of-limitations purposes, and SEC claims for disgorgement thus are subject to the five-year limitations period for civil penalty actions under 28 U.S.C. § 2462.²⁶ The Second Edition also cites *Liu*, which the Supreme Court decided on June 22, 2020, for its holding confirming that the SEC is authorized to seek disgorgement as a form of equitable relief when the amount to be disgorged does not exceed a wrongdoer’s net profits and is awarded to victims.²⁷
- **Incorporation of New DOJ Policies and Guidance**: The Second Edition also incorporates a number of relevant DOJ policies that were released after the publication of the First Edition. It incorporates the DOJ’s November 2017 FCPA Corporate Enforcement Policy, which sets forth incentives for companies to self-disclose, fully cooperate, and remediate, including the presumption of a declination under certain circumstances,²⁸ and the DOJ’s May 2018 Anti-Piling On Policy,²⁹ which concerns the coordination by the DOJ with other domestic and foreign agencies regarding corporate resolution penalties. The Second Edition also incorporates other relevant DOJ policies and guidance promulgated after the First Edition was published, including the guidance on the Criminal Division’s Evaluation of Corporate Compliance Programs,³⁰ memo regarding the Selection of Monitors in Criminal Division Matters,³¹ and statements and guidance regarding M&A (including the disclosure of violations discovered during due diligence) and successor liability reflected in these and other DOJ sources.³²

Although the Second Edition states that the SEC joins the DOJ in striving to avoid duplicative penalties for the same conduct and considers the same factors as the DOJ when determining whether a compliance monitor is appropriate, the language of the Anti-Piling On Policy and the memo regarding the Selection of Monitors in Criminal Division Matters are not attributed to the SEC.³³ Moreover, the updated FCPA Guide explicitly states that the FCPA Corporate Enforcement Policy does not bind or apply to the SEC.³⁴ In contrast, certain language from the DOJ’s Evaluation of Corporate Compliance Programs is expressly attributed to both the DOJ and the SEC.³⁵

- **Miscellaneous Updates**: As described below, the Second Edition also makes a number of less significant updates to the First Edition.
 - **Partnerships**: The Postal Inspection Service has been added to the list of law enforcement partners, and the Board of Governors of the Federal Reserve System and the Commodity Futures Trading Commission have been added to the list of U.S. agencies involved in “the fight against international corruption.”³⁶
 - **Increased International Enforcement**: The Second Edition describes increased international enforcement efforts, noting France’s new foreign bribery law and the introduction of deferred prosecution-like instruments in both France and the United Kingdom.³⁷
 - **Opinion Procedure**: The Second Edition also states that the DOJ’s opinion procedure, whereby companies and individuals may seek DOJ guidance regarding proposed conduct, “remains” a valuable mechanism,³⁸ perhaps hoping to revive interest in the procedure, which was last used in 2014.³⁹

IMPLICATIONS

Overall, the Second Edition makes few significant changes to the positions articulated by the DOJ and the SEC in the First Edition. The most significant changes in the Second Edition relate to the accounting provisions. Both the corrected *mens rea* standard for corporate criminal violations and the clarification that internal accounting controls are not synonymous with compliance programs appear to reflect a response to criticism in recent years that the DOJ's and the SEC's enforcement of those provisions was overly broad. These revisions, however, fall short of providing meaningful guidance on the DOJ's and the SEC's views of the limits of the FCPA's accounting provisions. The Second Edition's statement that there is overlap between internal accounting controls and compliance, combined with its lack of articulation of any meaningful distinction between the two, ultimately leaves unanswered the question of exactly what the DOJ and the SEC believe constitutes "internal accounting controls." Moreover, the newly announced position that a six-year statute of limitations governs criminal violations of the accounting provisions, and the assertion that the accounting provisions are not subject to the limitation articulated in *Hoskins*, demonstrate that the DOJ and the SEC intend to continue to enforce the accounting provisions expansively.

The remaining revisions primarily reflect legal and policy developments over the past eight years. In addition, the compilation in the Second Edition of the various relevant DOJ policies and guidance promulgated since the publication of the First Edition highlights the significant amount of DOJ guidance related to FCPA (and overall corporate) enforcement in recent years, and the corresponding lack of similar guidance from the SEC. The numerous references in the Second Edition to developments in international enforcement reaffirm the increase in international cooperation seen in many recent FCPA resolutions. Finally, the release of the Second Edition makes clear that FCPA enforcement remains a key priority of both the DOJ and the SEC, and the FCPA Guide remains a useful resource in understanding the agencies' enforcement positions.

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ENDNOTES

- 1 U.S. Department of Justice, Criminal Division, and U.S. Securities and Exchange Commission, Enforcement Division, “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (2nd ed. July 3, 2020) (hereinafter, “Second Edition” or “updated FCPA Guide”). Although the Second Edition is non-binding on attorneys in offices within the DOJ’s Criminal Division and the SEC’s Enforcement Division, such attorneys may use the updated FCPA Guide in their enforcement actions.
- 2 U.S. Department of Justice, Criminal Division, and U.S. Securities and Exchange Commission, Enforcement Division, “A Resource Guide to the U.S. Foreign Corrupt Practices Act” (1st ed. Nov. 14, 2012) (hereinafter, “First Edition”).
- 3 See also Sullivan & Cromwell LLP (“S&C”), Foreign Corrupt Practices Act Alert: Deputy Attorney General Rod Rosenstein Announces Revised FCPA Corporate Enforcement Policy (Nov. 29, 2017), <https://www.sullcrom.com/foreign-corrupt-practices-act-alert-deputy-attorney-general-rod-rostenstein-announces-revised-fcpa-corporate-enforcement-policy>.
- 4 See also S&C, DOJ Announces New Policy to Encourage Coordination Among DOJ and Agencies Imposing Penalties for the Same Conduct (May 10, 2018), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_DOJ_Announces_New_Policy_to_Encourage_Coordination_Among_DOJ_and_Agencies_Imposing_Penalties_for_the_Same_Conduct.pdf.
- 5 See also S&C, DOJ Updates Guidance on the Evaluation of Corporate Compliance Programs (June 3, 2020), <https://www.sullcrom.com/files/upload/SC-Publication-DOJ-Updates-Guidance-Evaluation-Corporate-Compliance-Programs.pdf>.
- 6 First Edition at 34.
- 7 Second Edition at 36.
- 8 *Id.* at 45.
- 9 First Edition at 44.
- 10 Second Edition at 40 (see section titled “Internal Accounting Controls Provisions”); First Edition at 40 (see section titled “Internal Controls Provisions”).
- 11 Second Edition at 40.
- 12 Second Edition at 36.
- 13 *United States v. Hoskins*, 902 F.3d 69, 76-97 (2d Cir. 2018) (hereinafter, “*Hoskins*”); see also S&C, *United States v. Hoskins*—Second Circuit Rejects DOJ’s Attempt to Expand the Extraterritorial Reach of the FCPA Through Conspiracy and Complicity Doctrines (Aug. 27, 2018), <https://www.sullcrom.com/files/upload/SC-Publication-Second-Circuit-Limits-Extraterritorial-Reach-of-FCPA.pdf>.
- 14 First Edition at 12.
- 15 *United States v. Firtash*, 392 F. Supp. 3d 872 (N.D. Ill. 2019); Second Edition at 36.
- 16 *Id.* at 46.
- 17 *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 25, 2017) (hereinafter, “*Ng Lap Seng*”); Second Edition at 24.
- 18 Trial Transcript 715-18, *Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 25, 2017).
- 19 *Id.*
- 20 Second Edition at 24 (quoting H.R. Rep. No. 100-576, at 922).
- 21 Second Edition at 20.

ENDNOTES (CONTINUED)

- 22 15 U.S.C. §78dd-2(h)(2)(A).
- 23 *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (hereinafter, “*Esquenazi*”).
- 24 Second Edition at 20-21.
- 25 Second Edition at 71; see also S&C, *Kokesh v. SEC*: U.S. Supreme Court Holds That a Five-Year Statute of Limitations Applies When the SEC Seeks Disgorgement in Enforcement Actions (June 6, 2017), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Kokesh_v_SEC_US_Supreme_Court_Holds_That_a_Five_Year_Statute_of_Limitations_Applies_When_the_SEC_Seeks_Disgorgement_in_Enforcement_Actions.pdf; S&C, *Liu v. SEC* – Supreme Court Upholds (but Limits) SEC’s Authority to Seek Disgorgement in Civil Enforcement Actions (June 23, 2020), <https://www.sullcrom.com/files/upload/sc-publication-supreme-court-upholds-sec-authority.pdf>.
- 26 *Kokesh v. SEC* (hereinafter, “*Kokesh*”), 137 S. Ct. 1635, 1644 (2017); First Edition at 35; Second Edition at 37.
- 27 *Liu v. SEC*, 591 U.S. ___, 1 (2020) (hereinafter, “*Liu*”); Second Edition at 71.
- 28 Second Edition at 51.
- 29 Second Edition at 71.
- 30 Second Edition at 56.
- 31 Second Edition at 73; see also S&C, DOJ Releases New Memorandum on Standards and Policies for Retention of Corporate Compliance Monitors (Oct. 22, 2018), <https://www.sullcrom.com/files/upload/SC-Publication-DOJ-Releases-New-Memo-on-Retention-of-Monitors.pdf>.
- 32 Second Edition at 29; see also S&C, Foreign Corrupt Practices Act Alert: Deputy Assistant Attorney General Matthew Miner Announces that FCPA Corporate Enforcement Policy Will Apply to Mergers and Acquisitions (July 26, 2018), <https://www.sullcrom.com/doj-announces-that-fcpa-corporate-enforcement-policy-will-apply-to-mergers-and-acquisitions>.
- 33 Second Edition at 71, 74.
- 34 Second Edition at 71.
- 35 Second Edition at 57.
- 36 Second Edition at 5.
- 37 Second Edition at 7, 76.
- 38 Second Edition at 84.
- 39 No. 14-02, Foreign Corrupt Practices Act Review Opinion Procedure Release (Nov. 7, 2014), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/11/14/14-02.pdf>.

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