

DOJ and SEC Release Updated FCPA Resource Guide

July 9, 2020

Introduction

On July 3, the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) published the second edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (“FCPA Guide” or “Guide”),¹ which provides key guidance and information on the interpretation and enforcement of the Foreign Corrupt Practices Act (“FCPA”).² Although non-binding, the FCPA Guide includes detailed hypotheticals, discussions of recent case law, and insights into the considerations made by DOJ and SEC in their criminal and civil enforcement of the statute and their advice on compliance, M&A diligence and other matters.

In the eight years since the FCPA Guide was originally released on November 14, 2012, there have been important legal and policy developments that clarify both the scope of the law and DOJ’s and SEC’s focus in their enforcement. While the second edition does not represent a significant departure from the first or make new pronouncements, it provides numerous updates to the guidance, including the noteworthy revisions discussed below that largely account for these developments.

This Alert Memorandum was prepared with the assistance of Cleary Gottlieb associate Sabrina Singer.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Joon H. Kim
+1 212 225 2950
jkim@cgh.com

Jonathan S. Kolodner
+1 212 225 2690
jkolodner@cgh.com

Lisa Vicens
+1 212 225 2524
evicens@cgh.com

James Corsiglia
+1 212 225 2427
jcorsiglia@cgh.com

¹ U.S. Dep’t of Justice and U.S. Sec. and Exch. Comm’n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2d ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> [hereinafter *FCPA Guide*].

² 15 U.S.C. §§ 78dd-1, et seq.



Incorporation of DOJ and SEC Policies and Practices

The second edition of the FCPA Guide contains updates based on the subsequent policies and practices implemented by DOJ and SEC regarding the resolution of FCPA investigations and matters.

DOJ FCPA Corporate Enforcement Policy

The second edition incorporates DOJ's FCPA Corporate Enforcement Policy ("CEP"), which formalizes the presumption that if a company voluntarily self-discloses misconduct, fully cooperates with the government, and remediates its misconduct, DOJ will decline prosecution of the company absent aggravating circumstances.³ The FCPA Guide now provides a few examples of CEP declinations whereby DOJ declined to prosecute three different companies that met the standards set forth in the CEP.⁴

The FCPA Guide notes that CEP declinations to prosecute are one way that FCPA matters are resolved by DOJ, along with deferred prosecution agreements, non-prosecution agreements, or the bringing of criminal charges.

Forfeiture and Disgorgement

The second edition of the FCPA Guide includes a new section on forfeiture and disgorgement, which are equitable remedies that may be brought in addition to criminal and civil penalties. The FCPA Guide states the primary purpose of forfeiture and disgorgement is to "return the perpetrator to the same position as before the crime" to ensure the company does not profit from its misconduct.⁵ The FCPA Guide cites to the U.S. Supreme Court decisions in *Kokesh v. SEC*,

137 S. Ct. 1635 (2017) and *SEC v. Liu*, No. 18-1501, 2020 WL 3405845 (U.S. June 22, 2020) in which the Court ruled that civil disgorgement is permissible equitable relief.⁶

DOJ Anti-Piling On Policy

The second edition of the FCPA Guide also incorporates DOJ's 2018 Policy on Coordination of Corporate Resolution ("Anti-Piling On Policy"), which seeks to avoid the imposition of duplicative penalties from multiple authorities for the same misconduct.⁷ The FCPA Guide notes that, consistent with the Policy, DOJ and SEC will attempt to credit fines, forfeiture, or disgorgement paid by a company to foreign authorities in connection with the same investigation. The Guide states that when determining whether and how much to credit the sanctions imposed by another authority, DOJ will consider several factors including the egregiousness of the conduct, statutory mandates, the risk of unwarranted delay in achieving a final resolution, and the company's disclosure and cooperation.⁸

To demonstrate U.S. authorities' willingness to collaborate with foreign governments in anticorruption efforts (and the need for the Anti-Piling On Policy), the Guide refers to 10 cases where DOJ has coordinated settlements with foreign authorities and five coordinated settlements by the SEC. The Guide cites with approval the implementation of new foreign bribery laws and increased enforcement efforts by foreign governments.⁹

Compliance Procedures

Elaborating on the compliance program guidance in the first edition, the updated FCPA Guide expands its

³ CEP was first announced by DOJ in November 2017 and was updated and extended in April 2019. For more information and analysis of CEP, please review our prior alerts available on Cleary's Enforcement Watch blog <https://www.clearyenforcementwatch.com/>.

⁴ These declination letters, and others, are available on DOJ's website at <https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations>.

⁵ *FCPA Guide* at 71.

⁶ For more information and analysis on the *Kokesh* and *Liu* decisions please review our prior alerts available on

Cleary's Enforcement Watch blog

<https://www.clearyenforcementwatch.com/>.

⁷ Rod J. Rosenstein, Deputy Attorney General, Letter to Heads of Department Components on Policy on Coordination of Corporate Resolution Penalties (May 9, 2018),

<https://www.justice.gov/opa/speech/file/1061186/download>.

⁸ *FCPA Guide* at 71 (quoting the Anti-Piling On Policy).

⁹ *FCPA Guide* at 7, 71.

analysis of an effective compliance program by incorporating DOJ's 2020 Evaluation of Corporate Compliance Programs.¹⁰ This updated guidance, which was first promulgated in 2017, provides a framework for DOJ's analysis of the effectiveness of a company's compliance program at the time of the offense and charging decision for the purpose of determining: "(1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate and the length and nature of any reporting obligations)."¹¹ The Guide notes that the SEC also focuses on the company's self-policing prior to the discovery of the misconduct in assessing the effectiveness and adequacy of a company's compliance program.¹² Robust compliance programs are a pillar of both editions of the Guide.

The second edition of the FCPA Guide also incorporates 2018 guidance regarding the appointment of an independent corporate monitor that would assess and monitor a company's adherence to compliance requirements.¹³ The Guide confirms that appointment of a monitor is not appropriate in all circumstances and should not be imposed for punitive purposes. It also identifies several factors that will be considered to determine whether a monitor should be appointed including the pervasiveness of the company's misconduct, whether remediation has occurred, whether corporate compliance procedures have been improved, and the impact of a monitor on the operations of the company.¹⁴

¹⁰ U.S. Dep't. of Justice, Crim. Div., Evaluation of Corporate Compliance Programs, at 1 (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

¹¹ *FCPA Guide* at 57.

¹² *Id.*

¹³ Brian A. Benzckowski, Assistant Attorney General, Memo to All Criminal Division Personnel on Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.

¹⁴ See *New DOJ Guidance on the Imposition and Selection of Corporate Monitors*, Cleary Enforcement Watch (Oct. 16,

Substantive Highlights

The second edition of the FCPA Guide also elaborates on certain substantive areas of the FCPA that have changed or received new emphasis since the first edition.

FCPA in M&A

While the first edition of the FCPA Guide examined corporate successor liability, the updated edition recognizes that "robust pre-acquisition due diligence may not be possible."¹⁵ In such instances, the Guide states, "DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts."¹⁶ The Guide further notes that the authorities most often pursue actions "against the predecessor company (rather than the acquiring company)" when the "acquiring company uncovered and timely remedied the violations or when the government's investigation of the predecessor company preceded the acquisition."¹⁷ These new statements align with the Guide's emphasis on compliance procedures, cooperation, and disclosure, as well as with recent DOJ guidance on the application of the CEP in the M&A context.¹⁸

FCPA Accounting Provisions

The Guide is now careful to state that the accounting provisions refer not simply to internal controls but to internal *accounting* controls. The Guide highlights that "a company's internal accounting controls are not synonymous with a company's compliance program,"¹⁹ and that compliance programs may contain procedures that overlap with internal

2018),

<https://www.clearyenforcementwatch.com/2018/10/new-doj-guidance-imposition-selection-corporate-monitors/>.

¹⁵ *FCPA Guide* at 29.

¹⁶ *Id.*

¹⁷ *FCPA Guide* at 30.

¹⁸ *DOJ Updates FCPA Corporate Enforcement Policy*, Cleary Enforcement Watch (April 3, 2019), <https://www.clearyenforcementwatch.com/2019/04/doj-updates-fcpa-corporate-enforcement-policy/>.

¹⁹ *FCPA Guide* at 40.

accounting controls.²⁰ This now explicit distinction in the Guide between accounting controls and broader compliance programs raises a question long discussed by commentators: whether a company can have weak compliance measures that do not amount to a violation of the internal accounting controls provisions. For example, a failure to screen new hires for past misconduct may be imprudent but it is not clear that it is a failure of *accounting* controls. Nonetheless, the Guide indicates that an adequate compliance program should encompass more matters than those covered by internal accounting controls.

Updates to the FCPA Guide also include an update to the statute of limitations for criminal violations of the FCPA's accounting provisions. The FCPA Guide provides that criminal violations of the accounting provisions, which are defined as "securities fraud offenses" pursuant to 18 U.S.C. § 3301, carry a six-year statute of limitations, whereas substantive criminal violations of the FCPA's anti-bribery provisions and civil enforcement actions brought by the SEC carry a five-year statute of limitations.²¹ This update may influence the "look back" provisions of FCPA representations in M&A, joint venture, and underwriting agreements, which now often use five years prior to the date of signing as the period covered by FCPA representations, including representations concerning the criminal accounting provisions.

Instrumentality, Conspiracy, and the Local Law Defense Under the FCPA

As case law has changed the scope of the FCPA, the second edition of the Guide reflects these updates.

First, the Guide states that the Eleventh Circuit has 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."²² The Guide adopts the non-exhaustive factors that the court considered in *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014) in determining whether the government "controls" an entity and whether the entity performs a government function.²³

Second, the Guide provides the guidance from the Second Circuit in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), explaining the narrow circumstances in which individuals not directly covered by the statute can nonetheless be liable under theories of conspiracy or complicity.²⁴ However, the Guide also explicitly states that "at least one district court from another circuit" has rejected the limitations contained in *Hoskins* and its reasoning.²⁵ The Guide further claims that the *Hoskins* decision is limited to the FCPA's anti-bribery provisions, and therefore does not apply to the broader statutory language contained in the accounting provisions, which apply to "any person."²⁶

Finally, the Guide updates the Local Law Defense, which applies if the defendant proves that the prohibited conduct under the FCPA's anti-bribery provisions was lawful under written, local law.²⁷ The Guide cites to Hearing Transcript, *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. July 26, 2017), in which the court denied defendant's request for the affirmative defense instruction thereby narrowing the scope of the defense.

Conclusion

The 2020 updates to the FCPA Guide provide important insights into DOJ and the SEC's areas of focus in enforcing the FCPA. Largely, the second edition of the Guide reflects existing emphases such as on voluntary disclosure by companies, robust corporate compliance programs, and the pursuit of forfeiture and disgorgement as tools of enforcement.

(Aug. 29, 2018),

<https://www.clearyenforcementwatch.com/2018/08/second-circuit-issues-rare-decision-interpreting-fcpa/>.

²⁵ *FCPA Guide* at 36.

²⁶ *FCPA Guide* at 46.

²⁷ *FCPA Guide* at 24.

²⁰ *Id.*

²¹ *FCPA Guide* at 25.

²² *FCPA Guide* at 20 (quoting *U.S. v. Esquenazi*, 752 F.3d 912, 920-33 (11th Cir. 2014)).

²³ *FCPA Guide* at 20. The Guide notes that courts in other jurisdictions have approved similar factors.

²⁴ *FCPA Guide* at 36. See also *Second Circuit Issues Rare Decision Interpreting the FCPA*, Cleary Enforcement Watch

The second edition also suggests increased interest in bringing actions under the accounting provisions. Finally, while perhaps not unexpected, the Guide suggests that the authorities disapprove of the Second Circuit's narrowing of conspiracy and aiding and abetting jurisdiction under the FCPA and implicitly endorse the Eleventh Circuit's "instrumentality" test and the Southern District of New York's limitation of the Local Law Defense.

...

CLEARY GOTTlieb