Clients&FriendsMemo

DOJ and SEC Update FCPA Resource Guide for 2020 – What's New and What Does It Mean?

On July 3, 2020, the Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") updated their 2012 joint guidance on the Foreign Corrupt Practices Act ("FCPA") in the SEC and DOJ's FCPA Resource Guide ("Resource Guide").[1] The updated 2020 Resource Guide mainly incorporates updated guidance memoranda from both organizations issued since the last update, as well as the results of case law from recent FCPA-related decisions. While these updates and FCPA-related opinions have been available contemporaneously, the comprehensive updates to the Resource Guide provide compliance professionals with a great opportunity to ensure they are up to date with DOJ and SEC guidance and modify their own compliance programs as necessary. As in the previous edition, the Resource Guide remains somewhat nuanced and open to interpretation. Where necessary, compliance professionals and other practitioners should consult with experienced anti-corruption/anti-bribery attorneys to address any uncertainties in the applicability of the Resource Guide to their own operations. Key updates to the Resource Guide include the following.

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Instrumentalities of Foreign Governments

The updated 2020 Resource Guide includes guidance regarding the definition of "instrumentalities" of foreign governments with respect to the FCPA's prohibition on providing anything of value to improperly influence such entities. Following the 2014 Eleventh Circuit decision in *United States v. Esquenazi*,[2] the Resource Guide now defines an "instrumentality" of a foreign government as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[3] The Resource Guide further incorporates the Eleventh Circuit's factors to assess whether an entity is an instrumentality, including considering the classification of the entity by the foreign government and the amount of profits from the entity that flow to the foreign

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1 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (updated Nov. 2, 2015), *available at* https://www.justice.gov/criminal-fraud/fcpa-guidance.

2 752 F.3d 912, 920-33 (11th Cir. 2014).

3 *Id.* at 925.

government.[4] Even though the *Esquenazi* decision was reached over six years ago, its inclusion in the Resource Guide indicates the significance of defining instrumentalities by the DOJ and SEC—especially because it was not previously included in the Resource Guide's 2015 revision. Compliance professionals would be well advised to consider whether or not their businesses engage in transactions with entities that are instrumentalities of foreign governments and ensure that appropriate anti-bribery/anti-corruption policies and procedures are in place to govern those transactions.

Jurisdictional Reach

2018 decision in *United States v. Hoskins*,[5] which held that individuals may not be liable for conduct prohibited by the FCPA's anti-bribery provisions unless they are agents, employees, officers, directors, or shareholders of a U.S. issuer or domestic concern, or if they act in furtherance of a bribery scheme while in the territory of the United States. In other words, under *Hoskins*, if an individual who participates in conduct prohibited by the FCPA's anti-bribery provisions does so solely in a foreign country, and if that individual is also completely unrelated to a U.S. issuer or domestic concern, he or she would not be liable for prohibited conduct. The updated Resource Guide includes the same language from the previous edition regarding the liability of unrelated foreign nationals:

> A foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States.[6]

The 2020 Resource Guide reflects the SEC and DOJ's apparent view that *Hoskins*' jurisdictional reach limitations apply only in the Second Circuit and notes that "at least one district court from another circuit has rejected the reasoning in *Hoskins*. . . ."[7]

SEC Disgorgement Power

Following the Supreme Court decisions in *Kokesh v. SEC*[8] and *SEC v. Liu*,[9] the Resource Guide has been updated to reiterate the SEC's power to seek disgorgement as a remedy for FCPA

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4 *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (updated July 3, 2020), *available at* https://www.justice.gov/criminal-fraud/fcpa-guidance.

5 902 F.3d 69, 76-97 (2d Cir. 2018).

6 2012 Resource Guide, *supra* note 1.

7 2020 Resource Guide, *supra* note 4.

8 137 S. Ct. 1635 (2017).

9 591 U.S. _____(2020).

violations. Disgorgement is sought not to punish or deter conduct, but to "return the perpetrator to the same position as before the crime, ensuring that the perpetrator does not profit from the misconduct."[10] The Resource Guide also notes that although disgorgement is a remedy separate and apart from those that seek punishment or deterrence under *Kokesh*, it is still subject to the same statute of limitations—five years under 28 U.S.C. § 2462.

Local Law Defense

The 2020 Resource Guide includes further clarification on the rarely used "local laws" affirmative defense. The "local laws" affirmative defense was added to the FCPA in 1988 and provides a defense where a payment is made to a foreign official whose country explicitly allows such payments. Specifically, the 2020 Resource Guide now cites *United States v. Ng Lap Seng*,[11] where a defendant sought to include jury instructions that a "finding by the jury that the payments at issue were *not unlawful* under the written laws and regulations" of the foreign country where the conduct occurred (emphasis added).[12] The court explicitly rejected the defendant's request, finding that the conduct was inconsistent with the "local laws" affirmative defense provision in the FCPA because that provision requires that a defendant must show that the payments in question are explicitly lawful as opposed to just "not unlawful." This requirement makes the use of the "local laws" affirmative defense rare—very few countries, if any, have explicitly legalized corrupt payments.

Successor Liability

FCPA due diligence has become more and more important ahead of mergers and acquisitions. Corporations have rightly been fearful of underlying anti-corruption/anti-bribery issues at acquired entities for fear of being punished for another entity's transgressions once a merger is complete. The 2020 Resource Guide clarifies the DOJ and SEC's view on successor liability, noting that the regulators "recognize the potential benefit of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements the program as quickly as practicable at the merged or acquired entity."[13] Further, the regulators also note that fulsome pre-acquisition due diligence is not always possible and that they will instead focus on post-acquisition compliance efforts. The 2020 Resource Guide adds discussion of *United States v. Alstom S.A.*,[14] noting that no successor liability was sought against General Electric for Alstom S.A.'s violations of the FCPA where the violations and the related government investigation occurred *prior* to the acquisition. The DOJ and SEC are strongly suggesting that acquiring entities can avoid FCPA liability where they perform good-faith-effort pre-merger due diligence, engage in

[10] 2020 Resource Guide, *supra* note 4.

[11] No. 15-cr-706 (S.D.N.Y. July 26, 2017), ECF No. 609; Jury Instructions at 21-27.

[12] *Id.* (emphasis added).

[13] 2020 Resource Guide, *supra* note 4.

[14] No. 14-cr-246 (D. Conn. Dec. 22, 2014), ECF No. 1.

post-acquisition compliance integration and are transparent in reporting any problems that are found later.

Accounting Provisions

Legal Standard Updates

The 2020 Resource Guide provides updates as to the statutes of limitations with respect to the accounting provisions of the FCPA. Unlike the anti-bribery provisions, which have a five-year limitations period, the accounting provisions are considered "securities fraud offenses" under 18 U.S.C. § 3301, and have a six-year limitations period.

Internal Controls

In the previous addition of the Resource Guide, last updated in 2015, the regulators stated that "[a]n effective compliance program is a critical component of an issuer's financial accounting controls."[15] This statement appeared to suggest that compliance programs were, in a way, subordinate to or dependent on a company's internal control environment. Recognizing the interplay, but separate nature and sometimes different goals, of compliance and internal audit in modern companies, the 2020 Resource Guide clarifies that although "internal controls are not synonymous with a company's compliance program," both a company's internal control environment and compliance program may contain "a number of components that overlap."[16] Where the regulators engage in review or investigation of a company's compliance program or internal controls environment—such as during somewhat frequent SEC enforcement actions—companies should be prepared to have their compliance programs and internal control environments scrutinized both in how they interplay and how they operate on standalone bases.

Incorporation of New Guidance and Programs

Finally, the 2020 Resource Guide also incorporates guidance from several DOJ and SEC memoranda and policy guidance documents issued since the last update, including the following.

Evaluation of Corporate Compliance Programs

Just over a month prior to the release of the 2020 Resource Guide, on June 1, 2020, the DOJ released an updated version of its guidance on developing and implementing effective corporate compliance programs.[17] As noted in the 2020 Resource Guide, the memorandum is designed to

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[15] 2012 Resource Guide, *supra* note 1.

[16] 2020 Resource Guide, *supra* note 4.

[17] *See Evaluation of Corporate Compliance Programs*, by the Criminal Division of the U.S. Department of Justice (updated June 1, 2020), *available at* https://www.justice.gov/criminal-fraud/page/file/937501/download.

assist prosecutors in "making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate" charging and penalty decisions.[18] In other words, the guide is used by prosecutors to determine the efforts of a corporation in strengthening its compliance program as a result of some failure by providing a benchmark of the best practices of effective corporate compliance programs.

Corporate Enforcement Policy

The 2020 Resource Guide now references the November 2017 DOJ Corporate Enforcement Policy.[19] The Policy is used to explain how the DOJ makes charging decisions, specifically with respect to declinations. The 2020 Resource Guide notes that, with respect to FCPA violations, "where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances."[20]

"Anti-Piling On" Policy

Regulators all around the world have drastically stepped up their efforts to prosecute corrupt payments to government officials since 2012 when the first Resource Guide was published. Multiple regulators in multiple countries raise the potential concern that each regulator would be "piling on" by adding charges to a multinational corporation's misconduct in each country where the corporation operated—punishing the same misconduct many times over. In 2018, the DOJ announced its position that prosecutors should "endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[21] The policy, colloquially known as the "anti-piling on" policy, is described in the 2020 Resource Guide, along with specific examples where the DOJ and SEC have credited fines, penalties, forfeitures and disgorgement imposed by foreign governments when resolving the misconduct in the United States.

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[18] 2020 Resource Guide, *supra* note 4.

[19] *See FCPA Corporate Enforcement Policy*, by the Criminal Division of the U.S. Department of Justice (updated November 29, 2017), *available at* https://www.justice.gov/criminal-fraud/file/838416/download.

[20] 2020 Resource Guide, *supra* note 4.

[21] *See* Rod J. Rosenstein, Deputy Attorney General, U.S. Department of Justice, *Letter to Heads of Department Components on Policy on Coordination of Corporate Resolution Penalties* (May 9, 2018), *available at* https://www.justice.gov/opa/speech/file/1061186/download.

Overall, the changes to the 2020 Resource Guide are mostly reflective of the changes in FCPA enforcement since the 2012 Resource Guide was published. It incorporates changes in case law and policy and now stands, once again, as a comprehensive reference for FCPA-related issues. It remains the most detailed and authoritative guidance for FCPA practitioners. Similar comprehensive guidance is now being sought in a number of jurisdictions as multinational companies face multiple enforcement actions around the world. While this is yet to be provided, in an attempt to encourage companies to self-report, in August 2019 the U.K.'s Serious Fraud Office ("SFO") issued a new section of its Operational Handbook, titled "Corporate Cooperation Guidance."[22] The guidance provides some procedural clarity. However, most international firms had already adopted those procedures. Unlike the U.S. guidance, there is no presumption that early self-reporting will lead to a declination, absent aggravating factors. Therefore, it is likely to have limited benefit for corporate entities. Issuing the guidance together with subsequent enforcement actions has still sent a clear message from the SFO that companies that uncover misconduct are expected to self-report at an early stage. France is also sending a similar message after the settlement with Airbus SE earlier this year. In June 2020, the French Ministry of Justice sent a memo to prosecutors detailing its plans to investigate and prosecute bribery, which are similar to those in the United States. With a more cohesive approach, and similar mechanisms for a corporate entity to settle bribery allegations (Deferred Prosecution Agreements in the U.S. and U.K. and a CJIP in France), it is likely there will be a greater degree of information sharing and collaboration among prosecutors in the future.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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[22] *See* Operational Handbook – Corporate Cooperation Guidance (August 19, 2019), *available at* https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/.