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Memorandum

DOJ and SEC Update FCPA Resource Guide

July 6, 2020

Introduction

In early July 2020, the U.S. Department of Justice ("DOJ") and U.S. Securities and Exchange Commission ("SEC") released the second edition of their joint guidance on the U.S. Foreign Corrupt Practices Act ("FCPA"), *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "updated *Resource Guide*"). The updated *Resource Guide* is the first new edition since the initial release of the joint guidance in November 2012 and the first update since June 2015.[1] While much of the updated *Resource Guide* remains the same, DOJ and SEC have revised the guidance to reflect recent case law, DOJ policies and enforcement actions. Perhaps most notable are changes made to account for the Second Circuit's 2018 decision (in *United States v. Hoskins*[2]) relating to anti-bribery jurisdiction over non-U.S. nationals based on conspiracy or accomplice liability. The updated *Resource Guide* also references a number of recent DOJ policies related to corporate compliance programs and enforcement; provides guidance with respect to anti-corruption compliance in the context of merger-and-acquisition due diligence; and makes several other changes that companies, individuals and compliance professionals may find helpful in addressing potential FCPA compliance risks.

The *Resource Guide*: Background

Although the FCPA was enacted in 1977, the number of enforcement actions brought by DOJ and SEC remained relatively low for nearly 25 years. Calls for guidance on the FCPA from the business community and the defense bar grew as enforcement actions ramped up between 2007 and 2010, leading to the DOJ's announcement in 2011 that a "lay person's guide" to the FCPA would be released the following year.[3] The result was the first edition of the *Resource Guide*, issued on November 14, 2012.

The July 2020 *Resource Guide* updates the existing guidance. The updates do not appear to mark any significant change in DOJ's and SEC's approach to FCPA enforcement, but they nevertheless provide useful updated guidance. Notable changes include the following:

[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, *Resource Guide*].

[2] *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018).

[3] Assistant Attorney General Lanny A. Breuer, Address at 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-26th-national-conference-foreign-corrupt.

Case Law

UNITED STATES V. HOSKINS – CONSPIRACY / AIDING AND ABETTING LIABILITY

Lawrence Hoskins was a U.K. national charged with FCPA and other violations in connection with his work as an executive for a French company, Alstom S.A. ("Alstom"). DOJ alleged that Hoskins helped to engage third parties who funneled bribes to Indonesian officials to help win a USD 118 million contract for Alstom's Connecticut-based subsidiary, Alstom Power, Inc. ("API"). Hoskins never worked for API, and he did not fall into any delineated category of persons subject to the FCPA anti-bribery provisions: He was not a U.S. national or an employee of a U.S. issuer or domestic concern, and he did not take any actions in furtherance of a bribe while in the territory of the United States. DOJ nevertheless charged Hoskins with FCPA violations based on conspiracy and aiding and abetting theories of liability.

After the district court dismissed the FCPA charge against Hoskins prior to trial, DOJ appealed. In 2018, the Second Circuit affirmed in part and reversed in part, holding that the government could not expand the scope of the statute beyond the categories specifically enumerated in the statute by charging Hoskins with conspiracy to violate the FCPA or aiding and abetting a violation, but that the government could pursue a theory that Hoskins acted as an agent for a U.S. domestic concern (API).[4] At trial, Hoskins was convicted on all counts except one of the money laundering counts. Hoskins subsequently renewed his Rule 29 motion, which the trial court granted as to all FCPA-related counts. In a highly factual and nuanced analysis, the trial court concluded that the government had not presented evidence of API's authority to control Hoskins' actions, thereby precluding a rational jury from concluding that Hoskins was acting as API's agent.[5]

Reflecting this outcome, the updated *Resource Guide* now provides that—"at least in the Second Circuit"—an individual not directly covered by the FCPA anti-bribery provisions cannot be guilty of conspiring to violate, or aiding and abetting a violation of these provisions.[6] The updated *Resource Guide* notes that *Hoskins* does not limit conspiracy or aiding and abetting liability for the FCPA's accounting provisions, which apply to "any person" rather than the specific categories of covered persons and activities enumerated in the FCPA anti-bribery provisions.[7] It also notes that at least one court outside of the Second Circuit, a district court in the Northern District of Illinois, has rejected the reasoning of *Hoskins* and held that persons may be criminally liable for violations of the FCPA anti-bribery provisions under conspiracy or aiding and abetting theories of liability even if

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[4] *Hoskins*, 902 F.3d at 97 ("[T]he FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern.").

[5] *United States. v. Hoskins*, Ruling on Defendant's Rule 29(c) and Rule 33 Motions, No. 3:12-cr-238-JBA, 2020 WL 914302, at *7 (D. Conn. Feb. 26, 2020). The trial court found that no evidence had been presented that API had a "right of interim control" over Hoskins's actions to retain consultants, or the ability to terminate its relationship with Hoskins, or that Hoskins had agreed or understood that API would control his actions with respect to the project in Indonesia.

[6] *Resource Guide* at 36 ("Therefore, 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 FCPA 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.").

[7] *Resource Guide* at 46 (quoting 15 U.S.C. § 78ff(a)).

they are not members of "the class of individuals capable of committing a substantive FCPA violation."[8] These observations in the updated *Resource Guide* suggest that the government may continue to pursue cases against foreign nationals for conspiring to violate, or aiding and abetting the violation of, the FCPA's accounting provisions—and might even do so outside of the Second Circuit for violations of the FCPA's anti-bribery provisions.[9]

KOKESH V. SEC AND LIU V. SEC – DISGORGEMENT

The updated *Resource Guide* includes brief updates on its forfeiture and disgorgement guidance relating to the *Kokesh* and *Liu* cases. In *Kokesh*,[10] the Supreme Court ruled that SEC's disgorgement remedy constitutes a "penalty," and is thus subject to the five-year statute of limitations under 28 U.S.C. § 2462. In *Liu*,[11] the Supreme Court limited the amount that the SEC can seek as disgorgement to an individual wrongdoer's net profits.

UNITED STATES V. NG LAP SENG – "LOCAL LAW DEFENSE"

The *Ng* case is another example of a failed attempt by a defendant to raise the "local law defense" under the FCPA.[12] The FCPA provides an affirmative defense if a bribe paid to a foreign government official would violate the FCPA but is "lawful under the written laws and regulations of the foreign official's . . . country."[13] In *Ng*, the district court denied Ng's request for a jury instruction that his payments to Antiguan and Dominican government officials did not violate the FCPA so long as the conduct was not expressly *prohibited* by written local laws or regulations. DOJ argued, conversely, for an instruction stating that a local law defense required proof that Ng's conduct was expressly *lawful* under the written laws of Antigua and/or the Dominican Republic. The court sided with DOJ, finding that Ng's proposed instruction was inconsistent with the statutory language of the FCPA and would lead to impractical results.[14] The updated *Resource Guide* now mentions *Ng* in its section on the local law defense.

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[8] *Resource Guide* at 36 (quoting *United States v. Firtash*, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019)).

[9] The updated *Resource Guide* also includes a number of deletions which seem to acknowledge the limits that *Hoskins* places on DOJ's ability to charge foreign nationals with FCPA violations under conspiracy and accomplice theories of liability. *Compare, e.g.*, 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* at 12 (1st ed. 2012) (deleting language in the first edition of the *Resource Guide* which provided that a "foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States").

[10] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

[11] *Liu v. SEC*, 591 U.S. _____, 2020 WL 3405845 (June 22, 2020).

[12] *United States v. Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. 2017); *see also United States v. Kozeny*, 582 F. Supp. 2d 535, 537-40 (S.D.N.Y. 2008) (finding that a provision under Azeri law precluding prosecution of bribe payors if they were extorted did not make the bribe payments legal).

[13] 15 U.S.C. §§ 78dd-2(c)(1), 78dd-3(c)(1).

[14] *See Ng*, trial transcript at 715-18.

DOJ Policies

The updated *Resource Guide* incorporates four DOJ departmental policies relevant to FCPA enforcement.

FCPA CORPORATE ENFORCEMENT POLICY

The updated *Resource Guide* includes a new section summarizing DOJ's FCPA Corporate Enforcement Policy (the "CEP") and providing three examples of related DOJ declinations. The CEP began with a 2016 pilot program designed to incentivize companies to self-report FCPA violations. It was formalized in the U.S. Attorneys' Manual in late 2017 and updated in mid-2019; it provides a presumption that DOJ will decline to prosecute FCPA violations (absent aggravating circumstances) if a company "voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates."[15] If a company is not eligible for a full declination—for example, if aggravating factors are present—voluntary disclosure can still result in substantial cooperation credit under the CEP. Potential favorable outcomes under the CEP include a 50% reduction from the low end of the U.S. Sentencing Guidelines fine range and the possibility that DOJ will not require an independent compliance monitor if the company can show that it has implemented an effective compliance program at the time of resolution.[16]

EVALUATION OF CORPORATE COMPLIANCE PROGRAMS

DOJ's Evaluation of Corporate Compliance Programs (the "ECCP") was introduced in 2017 and updated in 2019 and 2020.[17] The ECCP describes how prosecutors evaluate a company's compliance program in the context of corporate charging and settlement decisions. The updated *Resource Guide* incorporates references to the ECCP, including its 2020 updates, focusing in particular on the three "fundamental questions" that the ECCP instructs prosecutors to use in evaluating a company's FCPA compliance program: (1) Is the corporation's compliance program well designed?; (2) is the corporation's compliance program adequately resourced and empowered to function effectively?; and (3) does the corporation's compliance program work in practice?[18]

SELECTION OF MONITORS IN CRIMINAL DIVISION MATTERS

Between 2008 and 2010, DOJ issued three memoranda that address the appointment of independent compliance monitors. These memoranda primarily address the selection of monitors, the scope of their duties and the duration of monitorships.

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[15] *Resource Guide* at 51 (citing FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download).

[16] For more information about the CEP, please review one of our prior alerts, available at http://www.stblaw.com/docs/default-source/memos/firmmemo_12_01_17.pdf.

[17] For more information about DOJ's Evaluation of Corporate Compliance Programs, please review our prior alerts, available at https://www.stblaw.com/docs/default-source/Publications/regulatoryenforcementalert_05_06_19.pdf and at https://www.stblaw.com/docs/default-source/Publications/regulatoryenforcementalert_06_04_20.pdf.

[18] *Resource Guide* at 56-57.

In October 2018, then-Assistant Attorney General Brian Benczkowski issued a memorandum (the "Benczkowski Memo") that offered specific guidance on the factors prosecutors should consider in deciding whether to implement a monitor.[19] The Benczkowski Memo highlights four factors: whether (1) "the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal controls systems"; (2) "the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management"; (3) "the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems"; and (4) "remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future."[20]

The four Benczkowski Memo factors have been incorporated into the updated *Resource Guide*, which also notes that a company may be required to retain an independent compliance consultant or monitor in a civil case. The updated *Resource Guide* further notes that historically DOJ and SEC "have been able to coordinate their requirements" so that a company can retain a single monitor.[21]

POLICY ON COORDINATION OF CORPORATE RESOLUTION PENALTIES (AVOIDING "PILING ON")

The updated *Resource Guide* also incorporates DOJ's 2018 Policy on Coordination of Corporate Resolution Penalties. This policy instructs prosecutors to avoid the "unnecessary imposition of duplicative fines, penalties, and/or forfeiture," in part by coordinating with "other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct."[22] In addition to providing an overview of the policy, the updated *Resource Guide* explicitly references the factors prosecutors should consider in deciding whether and how much to consider penalties imposed by other authorities, including: (1) the egregiousness of a company's misconduct; (2) statutory mandates regarding penalties fines and/or forfeitures; (3) the risk of unwarranted delay in achieving a final resolution; and (4) the adequacy and timeliness of a company's disclosures, and its cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities.[23]

FCPA Compliance in the M&A Context

The updated *Resource Guide* includes brief but noteworthy updates concerning FCPA compliance in the context of mergers and acquisitions. The guidance now emphasizes that "DOJ and SEC recognize the potential benefits of

[19] Assistant Attorney General Brian A. Benczkowski, Memorandum, Selection of Monitors in Criminal Division Matters (Oct. 11, 2018), available at https://www.justice.gov/opa/speech/file/1100531/download [hereinafter, Benczkowski Memo].

[20] Benczkowski Memo at 2.

[21] *Resource Guide* at 73-74 (section titled "When Is a Compliance Monitor or Independent Consultant Appropriate?").

[22] Deputy Attorney General Rod J. Rosenstein, Memorandum, Policy on Coordination of Corporate Resolution Penalties (May 9, 2018), available at https://www.justice.gov/opa/speech/file/1061186/download [hereinafter, Rosenstein Memo].

[23] *Resource Guide* at 71 (section titled "Coordinated Resolutions and Avoiding 'Piling On,'" quoting Rosenstein Memo at 1).

corporate mergers and acquisitions," especially when a target is incorporated promptly into the robust compliance program of the acquirer. It further acknowledges that robust pre-acquisition due diligence cannot always be conducted; and that in such situations, DOJ and SEC will evaluate the timeliness and thoroughness of the acquirer's post-acquisition due diligence and compliance integration efforts in determining whether successor liability is appropriate.[24]

Six-Year Statute of Limitations for Criminal Violations of the Accounting Provisions

The updated *Resource Guide* now states that there is a six-year statute of limitations for criminal violations of the FCPA's accounting provisions, as those are defined as "securities fraud offense[s]" under 18 U.S.C. § 3301.[25] This statute of limitations stands in contrast to the five-year limitations period for substantive violations of the FCPA's anti-bribery provisions, as set forth in 18 U.S.C. § 3282, as well as the five-year limitations period for civil cases brought by SEC.

Conclusion

The *Resource Guide* has long been an important resource for the defense bar, compliance professionals, companies and individuals who are faced with the complexities of FCPA application and enforcement in the context of global business. While the second edition will be very familiar to existing users of the *Resource Guide*, it nevertheless represents a continuing effort by DOJ and SEC to update their guidance in light of case law, DOJ policies and large-dollar FCPA resolutions from the last eight years.

For further details regarding the updated *Resource Guide*, *see* https://www.justice.gov/criminal-fraud/file/1292051/download.

[24] *Resource Guide* at 29.

[25] *Resource Guide* at 36.

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