

DOJ and SEC Release Second Edition of FCPA Resource Guide

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On July 3, 2020, the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) released the Second Edition of their *Resource Guide to the U.S. Foreign Corrupt Practices Act* (the “Resource Guide”). As reported on previously [here](#), the Resource Guide was originally released in November 2012. The second edition consists of a compilation of information and analysis regarding the Foreign Corrupt Practices Act (“FCPA”), including the statutory requirements of the FCPA, and uses hypotheticals, examples of enforcement actions and case law summaries to give updated insight into the DOJ’s and SEC’s FCPA enforcement policies and practices.

Even though the second edition of the Resource Guide was released without much fanfare at the start of a holiday weekend, it reflects several key FCPA-related updates and developments from the past eight years. These include:

Post-2012 Policies Applicable to the FCPA:

The second edition summarizes and includes references to several policies applicable to the FCPA that have been adopted by the DOJ and SEC since 2012, including the DOJ’s *FCPA Corporate Enforcement Policy*, *Selection of Monitors in Criminal Division Matters*, *Coordination of Corporate Resolution Penalties (or Anti-Piling On Policy)*, and the Criminal Division’s *Evaluation of Corporate Compliance Programs*.

Additional Guidance on Successor Liability in the M&A Context:

The second edition also includes additional guidance regarding successor liability in the M&A context. Along with including summaries of recent case law, the second edition also incorporates a reference to DOJ’s FCPA Corporate Enforcement Policy, reinforcing the point that an acquiring company that uncovers misconduct through effective pre-acquisition due diligence, post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct, may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity.

Clarification Regarding Statute of Limitations Applicable to FCPA Violations:

The second edition clarifies that for substantive violations of the FCPA anti-bribery provisions, the five-year limitations period set forth in 18 U.S.C. § 3282 applies, whereas for violations of the FCPA’s accounting provisions, which are defined as “securities fraud offense[s]” under 18 U.S.C. § 3301, the limitations period is six years.

Clarification on the Definition of “instrumentality of a foreign government”:

The second edition now includes a reference to the Eleventh Circuit’s 2014 decision in *United States v. Esquenazi*, which held that under the FCPA, an “instrumentality” of a foreign government is “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.”

Clarification Regarding Liability for Conspiracy and Aiding and Abetting Violations of the FCPA:

The second edition also includes a discussion of the Second Circuit decision in *United States v. Hoskins* along with contrary case law. In *Hoskins*, the Second Circuit held that 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. Our detailed coverage of the *Hoskins* case can be found in client alerts from [August 2018](#), [December 2019](#) and [March 2020](#).

The second edition notes, however, that the reasoning adopted by the Second Circuit in *Hoskins* does not apply to the FCPA's accounting provisions, which, pursuant to their express terms, apply to "any person."

New Case Law on Disgorgement

The second edition incorporates recent case law concerning disgorgement of illicit proceeds by the SEC. In particular, it includes a discussion of the 2017 Supreme Court decision in *Kokesh v. SEC*, in which the Court held that because disgorgement constitutes a "penalty," it is subject to the five-year statute of limitations under 28 U.S.C. § 2462. The second edition also includes a brief discussion of *SEC v. Liu*, a more complete analysis of which can be found [here](#).

Clarification Regarding Mens Rea Requirement for Criminal Liability for Violations of FCPA's Books and Records or Internal Controls Provisions

The second edition also provides additional clarification regarding the *mens rea* requirement for criminal liability for the FCPA's books and records or internal controls provisions. Specifically, the second edition provides that criminal liability can attach where companies and individuals "knowingly and willfully" fail to comply with these provisions.

The second edition of the Resource Guide can be found [here](#).

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