



## FCPA Resource Guide revisions signal DOJ focus on books and records and internal controls charges

### White Collar Alert

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On Friday, July 3, the US Department of Justice (DOJ) Criminal Division and the Securities and Exchange Commission (SEC) Enforcement Division published a revised Second Edition of its Resource Guide (Guide) to the US Foreign Corrupt Practices Act (FCPA). The Guide is a key resource for companies and individuals operating internationally.

First published in 2012, the Guide is intended “to provide helpful information to the public, including practitioners and enterprises of all shapes and sizes – from small businesses transacting abroad for the first time to multinational corporations with subsidiaries around the world.” This is the first update to the Guide.

Key among the revisions are new guidance on (i) the definition of “foreign official”; (ii) the scope of conspiracy and aiding and abetting liability under the FCPA; and (iii) DOJ’s newly stated reliance on a six-year statute of limitations for criminal violations of the FCPA’s accounting provisions. These key revisions are based in part on legal developments since the Guide was first published and each of the key revisions stand to have a meaningful impact on how FCPA cases are investigated and charged. Accordingly, companies should prepare to mitigate a potential expansion in liability.

The Second Edition of the Guide largely tracks the original version, maintaining the same format and substance. Many of the revisions are simply updates that refresh legal citations and enforcement metrics or incorporate more recent case

examples. These revisions reflect a significant amount of enforcement activity over the past eight years, particularly recent criminal trials involving FCPA charges.

## I. Current state of FCPA enforcement

The stated purpose for revising the Guide is to reflect the past eight years of FCPA policy making and court decisions. Among the more significant of these changes is the Guide's discussion of the definition of a "foreign official" under the FCPA, which has been the subject of court rulings, as well as the scope of conspiracy and aiding and abetting liability in light of the decision in *US v. Hoskins*. The revised Guide also addresses the jurisdictional reach of the FCPA and sets out the DOJ's position of a six-year limitations period for criminal violations of the accounting provisions based on the Dodd–Frank Wall Street Reform and Consumer Protection Act, enacted by Congress in 2010.

### 1. The definition of "foreign official" in keeping with the Eleventh Circuit's ruling in *US v. Esquenazi*

As a law aimed at combating foreign bribery, the FCPA's definition of who counts as a "foreign official" goes to the heart of the statute's reach. While it is perhaps intuitive that certain types of officials ( eg, foreign ministers, elected officials, etc.) would qualify as officials, the FCPA's definition of a foreign official extends to any officer or employee of an "instrumentality" of a foreign government. Given that in some areas of the world it is more common for government entities to be engaged in business activities that, in the US, would normally be reserved for private enterprise, it has historically been more challenging to determine who qualified as such an "instrumentality" of a foreign government. DOJ has historically taken a broad view of who is a government official. By way of example, in its 2015 case against Alstom S.A., DOJ asserted that an employee of a US entity (Bechtel) who managed a joint venture between Bechtel and a state-owned Egyptian power company was a foreign official under the FCPA.

Courts have addressed this question since the Guide was first published, and in the revised Guide, DOJ incorporates a detailed list of factors for determining whether a particular entity or person constitutes an "instrumentality" of a foreign government under the FCPA. DOJ follows the Eleventh Circuit's decision in *United States v. Esquenazi*, which determined that an "instrumentality" means "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" and adopted a fact specific analysis of an entity's ownership, control, status, and function to determine whether an entity is an instrumentality of a foreign government.

### 2. Conspiracy and aiding and abetting laws in FCPA cases in light of *US v. Hoskins*

As reflected in the Guide's original text, DOJ has historically taken an expansive view of the reach of conspiracy and aiding and abetting laws in FCPA cases. In the Second Edition, it goes so far as to say that, "under normal principles of conspiracy liability, individuals and companies, including foreign nationals and companies, may also be liable for conspiring to violate the FCPA – ie, for agreeing to commit an FCPA violation – even if they are not, or could not be, independently charged with a substantive FCPA violation." However, the revised Guide acknowledges, as it must, that the Second Circuit has significantly narrowed the application of these laws in the context of the FCPA. Specifically, in *United States v. Hoskins*, the Second Circuit determined that individuals not directly covered by the FCPA's anti-bribery provisions ( eg, the employee of an affiliate of the issuer) could not be convicted of conspiring to violate those provisions of the FCPA (see our prior alerts about the *Hoskins* case here and here). The Revised Guide tries to cabin this ruling, suggesting the state of the law is unsettled – emphasizing that the ruling in *Hoskins* applies only in the Second Circuit and citing a contrary lower court ruling from the Northern District of Illinois – which suggests that DOJ will look for opportunities to challenge the limitations on FCPA conspiracy reached in the *Hoskins* decision.

## II. Emphasis on criminal accounting violations

Looking at the revised Guide as a whole, there are several reflections of DOJ's emerging focus on pursuing criminal violations of the FCPA's accounting provisions. While it has not been uncommon for DOJ to pursue enforcement actions based on accounting violations in settled matters, historically DOJ focused more on alleged violations of the FCPA's anti-bribery provisions, which are often perceived as being more egregious, while deferring to the SEC to enforce the accounting provisions. However, the revised Guide highlights some advantages that DOJ seems to believe exist in pursuing criminal violations of the accounting provisions. First, in contrast to *Hoskins*' restrictive ruling on conspiracy liability, in the revised Guide, DOJ has highlighted that a broader standard for conspiracy and aiding and abetting offense

might apply for violations of the accounting provisions. According to the revised Guide, “[u]nlike the FCPA anti-bribery provisions, the accounting provisions apply to ‘any person,’ and thus are not subject to the reasoning in the Second Circuit’s decision in *United States v. Hoskins* limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions.” For further evidence of DOJ’s present enforcement focus, one need look no further than the past few weeks wherein DOJ brought actions against Alcon and Novartis Hellas based on alleged conspiracy to violate the books and records provisions of the FCPA.

Second, the revised Guide contains a significant change from the original version concerning the statute of limitations for cases involving criminal accounting violations by issuers. Previously, the Guide set out a five-year limitation period for all FCPA offenses (even though the Dodd-Frank Act, which supplies the six-year limitation period, was enacted in 2010 before the Guide was published), whereas the revised Guide states that the six-year limitation period for criminal violations of the FCPA’s accounting provisions will apply to criminal violations of the accounting provisions. See 18 U.S.C. 3301. Until now, most guidance, including the Resource Guide and DOJ’s investigations practices, previously focused on the five-year limitation period for all offenses. Since many – if not most – investigations of issuers could involve possible accounting allegations (either involving internal controls or recordkeeping issues), applying a six-year statute of limitations will likely have a significant impact on how companies approach document retention (consider six-year holds), how DOJ investigates its cases (consider six-year requests), and how liability and damages are measured (consider six years of conduct). The revised Guide notes that a five-year statute of limitations period applies to violations of the FCPA anti-bribery provisions, citing 18 U.S.C. § 3282.

Finally, DOJ clarified that the FCPA’s “internal controls” section applies to a company’s internal accounting controls, notably by adding the word “accounting” to the section. The revised Guide explains that “a company’s internal accounting controls are not synonymous with a company’s compliance program.” DOJ emphasized that while effective internal accounting controls may overlap with a compliance program, the FCPA mandates accounting controls maintain “reasonable assurances” regarding the entering and booking of transactions.

### III. New DOJ FCPA-related policies

Since 2012, when the Guide was first published, DOJ has enacted a series of FCPA-related policies, with an emphasis on voluntary corporate disclosures and compliance programs. Signaling that this set of policies are not likely to change, at least for the foreseeable future, the revised Guide places significant emphasis on these various policies, which include the Corporate Enforcement Policy, DOJ Criminal Division’s Evaluation of Corporate Compliance Programs, the Coordination of Corporate Resolution Penalties (or Anti-Piling On Policy), and DOJ’s Selection of Monitors in Criminal Division Matters.

#### 1. Corporate enforcement policy declinations

DOJ provided additional guidance on its longstanding goal of increased voluntary corporate reporting of FCPA violations of fraud. The FCPA Corporate Enforcement Policy (CEP), contained in the Justice Manual, provides that where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates it, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances. Even where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several recent cases. DOJ’s comments clarify that a CEP declination is intended for cases that otherwise warrant prosecution and makes clear that DOJ will publicly announce the details of these CEP declinations, as has been DOJ’s practice since instituting the policy. The revised Guide provides specific examples of cases where DOJ has issued declinations.

#### 2. Corporate compliance programs

The revised Guide provides additional guidance on corporate compliance programs and states that “the truest measure of an effective compliance program is how it responds to misconduct.” DOJ further emphasizes that a compliance program requires a “well-functioning and appropriately funded mechanism” for investigating corporate wrongdoing as well as adequate documentation processes and staff training.

### IV. Conclusion

While some of the revisions to the Guide may appear minor, the explication of the six-year limitation period for criminal accounting violations, along with the effort to update the guide generally, demonstrates that DOJ and the SEC remain committed to aggressive FCPA enforcement. Moreover, with both regulators and defendants becoming increasingly

emboldened to contest FCPA disputes in court, companies and compliance teams need access to FCPA experience now more than ever.

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