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## Analysis and Takeaways from the DOJ's and SEC's Recently Released Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

The Criminal Division of the U.S. Department of Justice (DOJ) and the Enforcement Division of the U.S. Securities and Exchange Commission (SEC) released the Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (FCPA) on 3 July 2020 (the “2020 Resource Guide”), updating the first edition released in November 2012 (the “2012 Resource Guide”).<sup>1</sup> The 2020 Resource Guide does not make fundamental changes to the structure and general guidance provided by its predecessor, but serves as a repository of developments in case law and guidance issued since 2012, including the DOJ FCPA Corporate Enforcement Policy (“CEP”), 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.

Below we have summarized some of the most notable changes and their impact.

### Jurisdiction, Scope, and Liability

*The 2020 Resource Guide somewhat narrows the categories of persons and entities covered by the FCPA’s anti-bribery provisions.*

The 2020 Resource Guide replaces “shareholders” of issuers and domestic concerns with “stockholders acting on behalf” of an issuer or domestic concern, implying that sufficient control to establish an agency relationship must exist before liability can be imputed.<sup>2</sup> This change may limit potential liability for passive investors who otherwise do not represent or act on behalf of an organization otherwise subject to the FCPA.

The 2020 Resource Guide also discusses *United States v. Hoskins*, in which the Second Circuit determined that an individual may be criminally prosecuted for conspiracy to violate the FCPA’s anti-bribery provisions, or aiding and abetting such violations, only if the individual falls under one of the three categories of persons specifically enumerated in the anti-bribery provisions, now defined as (1) “issuers” and their officers, directors, employees, agents, and stockholders acting on behalf of an issuer; (2) “domestic concerns” and their officers, directors, employees, agents, and stockholders acting on behalf of a domestic concern; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.<sup>3</sup> The 2020 Resource Guide makes corresponding changes on this point throughout, including in its jurisdiction, hypothetical. However, while the 2020 Resource Guide heavily references the *Hoskins* decision, the SEC and DOJ are careful to indicate this is an area of jurisprudence still in development, noting there are competing decisions from district courts of other circuits, such as *United States v. Firtash*.<sup>4</sup> While this does not impact organizations generally, it could potentially limit the scope of FCPA enforcement on individuals.

*The 2020 Resource Guide provides additional clarifications on scope of parent-subsidary liability.*

On parent-subsidary liability, the 2020 Resource Guide clarifies that, in addition to there being an agency relationship between the parent and its subsidiary, the subsidiary must also be “acting within the scope of authority conferred by the parent” for its actions to be imputed to the parent.<sup>5</sup> While consistent with past guidance, the inclusion of this language further underscores the 2020 Resource Guide’s emphasis on control and agency.

*The 2020 Resource Guide also clarifies the six-year statute of limitations for the accounting provisions.*

The 2020 Resource Guide states that criminal violations of the accounting provisions are securities fraud offenses subject to a six-year statute of limitations.<sup>6</sup> Organizations should re-consider corporate policies and guidelines to account for this clarification if current practices do not reflect this time period.

*The 2020 Resource Guide further refines the definition of “instrumentality.”*

The 2020 Resource Guide discusses the Eleventh Circuit’s conclusion in *United States v. Esquenazi* 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.”<sup>7</sup> The 2020 Resource Guide also cites to the list of non-exhaustive factors the Eleventh Circuit uses to determine whether the government “controls” an entity, as well as the list of non-exhaustive factors the Eleventh Circuit uses to determine whether the controlling government treats a function as its own.<sup>8</sup> The factors promulgated by the Eleventh Circuit do not significantly deviate from those provided in the 2012 Resource Guide as a non-exclusive list used by “[a] number of courts.”<sup>9</sup> As such, we do not anticipate significant changes to the instrumentality analysis.

### Successor Liability and Due Diligence

Notably, DOJ and SEC highlight the compliance benefits of acquisitions while underscoring the importance of due diligence and establishment of robust compliance programs. The 2020 Resource Guide acknowledges the “potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity.”<sup>10</sup> This language indicates that DOJ and SEC do not intend for potential FCPA exposure to disincentivize acquisitions and investments, while serving as a reminder that DOJ and SEC expect acquirers to ensure that acquired entities implement robust compliance programs.

The 2020 Resource Guide further emphasizes points made in last month’s update to DOJ’s guidance on Evaluation of Corporate Compliance Programs by stressing the importance of due diligence. In particular, DOJ and SEC acknowledge that due diligence may be subject to certain obstacles or limitations pre-acquisition, but note that where robust pre-acquisition due diligence is not possible, they will consider the “timeliness and thoroughness of the acquiring company’s post-acquisition due diligence and compliance integration efforts.”<sup>11</sup> In addition, the 2020 Resource Guide states that an acquiring company that voluntarily discloses misconduct may be eligible for a declination, “even if aggravating circumstances existed as to the acquired entity.”<sup>12</sup>

These points are reiterated in the 2020 Resource Guide’s discussions on the DOJ FCPA Corporate Enforcement Policy (see below), further underscoring DOJ’s commitment to the regime.

### Compliance Programs

*The 2020 Resource Guide updates guidance relating to compliance programs.*

The 2020 Resource Guide updates the three basic questions DOJ and SEC focus on in evaluating corporate compliance programs to: (1) “Is the company’s compliance program well designed?”; (2) “Is it being applied in good faith? In other words, is the program adequately resourced and empowered to function effectively?”; and (3) “Does it work in practice?”<sup>13</sup> The clarifying question in prong two and the words “in practice” at the end of prong three were added.<sup>14</sup> These updates reveal a growing emphasis on effective compliance programs that address the unique risks and requirements of each organization, eschewing a check-the-box approach.

*The 2020 Resource Guide also provides further detail on the role of monitors to assess the effectiveness of compliance programs.*

The 2020 Resource Guide expands the section on corporate monitorships, summarizing guidance issued under the Selection of Monitors in Criminal Division Matters, and points to the DOJ’s Evaluation of Corporate Compliance Programs for guidance in determining the effectiveness of a corporate compliance program.<sup>15</sup>

Furthermore, the 2020 Resource Guide incorporates additional guidance on internal investigations, analysis, and remediation of misconduct.

The 2020 Resource Guide notes that “[t]he truest measure of an effective compliance program is how it responds to misconduct” and emphasizes the importance of “well-functioning and appropriately funded mechanism(s) for the timely and thorough investigations of any allegations or suspicions of misconduct.”<sup>16</sup> The investigation function should be supported by proper documentation of any disciplinary or remediation measures taken in response.<sup>17</sup> Lessons learned from any misconduct should be integrated into the company’s trainings, policies, and controls, and remediation should focus on the “root causes” of the misconduct.<sup>18</sup>

### Additional Guidance and Clarifications

The 2020 Resource Guide references the DOJ FCPA Corporate Enforcement Policy (“CEP”), *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 throughout*.

In particular, the 2020 Resource Guide introduces a new section on the CEP, arguably the longest and most substantial addition, underscoring DOJ and SEC’s emphasis on voluntary self-disclosure, cooperation, and remediation. The section further summarizes applicable sentencing reductions under the CEP.

Notably, the 2020 Resource Guide establishes that there will be a presumption of declination in cases where an acquiring company “uncovers misconduct by the merged or acquired entity through thorough and timely due diligence or, in appropriate instances (such as where robust pre-acquisition due diligence is not possible), through post-acquisition audits or compliance integration efforts, and voluntarily self-discloses the misconduct and otherwise takes action consistent with the CEP.”<sup>19</sup>

The 2020 Resource Guide also includes three examples of declinations. Apart from self-disclosure, cooperation, and remediation, the three examples highlight other considerations the DOJ takes into account in determining if a declination is appropriate:

- *Anti-Piling On Policy*: In the example of the UK seismic event detection equipment company, DOJ noted that the company was subject to a parallel investigation by the UK’s Serious Fraud Office (SFO) for the same conduct and committed to accepting responsibility with the SFO.<sup>20</sup>
- *Personal Liability*: In the example of the Barbados insurance company, DOJ stressed that, with the company’s cooperation, it had been able to identify and charge the culpable individuals, which supports the growing trend of increased personal liability.<sup>21</sup>
- *Lack of Historical Violations*: In the case of the publicly traded technology services company (while not mentioned by name, the case likely refers to U.S.-based Cognizant Technology Solutions Corporation), DOJ flagged the company’s lack of prior criminal history and the effectiveness of the company’s pre-existing compliance program (as well as enhancements made to it) as mitigating factors.<sup>22</sup> DOJ further pointed to the company’s resolution with SEC, as well as the fact that, with the company’s cooperation, DOJ was able to conduct an independent investigation and identify individuals responsible for the misconduct, again underscoring personal liability.<sup>23</sup>

### A More International Outlook

The 2020 Resource Guide acknowledges the growing international effort to combat corruption, noting the “significant efforts” of international organizations such as the OECD Working Group on Bribery.<sup>24</sup> The 2020 Resource Guide cites to the adoption of *Sapin II* by France in December 2016 as an example of increased global enforcement efforts.<sup>25</sup>

Furthermore, the 2020 Resource Guide’s emphasis on anti-piling on efforts underscores international cooperation, citing the international coordination between DOJ, SEC, Brazilian authorities, and Swiss authorities in the Braskem matter.<sup>26</sup>

## Conclusion

While the 2020 Resource Guide includes some notable updates and clarifications, it does not deviate significantly from the 2012 version. However, it is clear from the 2020 Resource Guide that DOJ and SEC continue to focus on the development of appropriate, effective, risk-based compliance frameworks, as outlined in the CEP, DOJ’s guidance on the Selection of Monitors in Criminal Division Matters, and DOJ’s guidance on the Evaluation of Corporate Compliance Programs. Notably, the emphasis on “root cause” analysis as an important factor for remediation and prevention of future misconduct speaks to the growing emphasis on establishing a compliance culture and the incorporation of data analytics and technology as monitoring tools, as set out in DOJ’s June 2020 guidance on the Evaluation of Corporate Compliance Programs.

1. A copy of the 2020 Resource Guide is available on DOJ’s website and can be accessed through the following [link](#). A copy of the 2012 Resource Guide can be accessed through the following [link](#).
2. *Compare* 2020 Resource Guide, at 9, *with* 2012 Resource Guide, at 10.
3. 2020 Resource Guide, at 36. Subsequent to the Second Circuit’s decision, in February 2020, federal Judge Janet Bond Arterton overturned a jury’s conviction of Lawrence Hoskins, a UK national, on seven counts of FCPA violations, including one count of conspiracy to violate the FCPA. Ruling on Defendant’s Rule 29(C) and Rule 33 Motions, *U.S. v. Hoskins*, case number 3:12-cr-00238, in the U.S. District Court for the District of Connecticut. Hoskins was a former executive of Alstom S.A., a French power and transportation services company. He helped bribe Indonesian government officials to secure a \$118 million government contract for Alstom’s U.S. subsidiary. However, Judge Arterton found that prosecutors failed to establish there was sufficient control over Mr. Hoskins’s actions by the U.S. subsidiary to demonstrate agency. *Id.*
4. 2020 Resource Guide, at 36.
5. *Id.* at 28.
6. *Id.* at 36; *see* 18 U.S.C. § 3301(a) (“[T]he term ‘securities fraud offense’ means a violation of, or a conspiracy or an attempt to violate . . . section 32(a) of the Securities Exchange Act of 1934”; 18 U.S.C. § 3301(b) (“No person shall be prosecuted, tried, or punished for a securities fraud offense, unless the indictment is found or the information is instituted within 6 years after the commission of the offense.”).
7. *Id.* at 20.
8. *Id.*
9. 2012 Resource Guide, at 20.
10. 2020 Resource Guide, at 29.
11. *Id.*
12. *Id.* at 32.
13. *Id.* at 57.
14. *See* 2012 Guide, at 56.
15. 2020 Resource Guide, at 73-74.
16. *Id.* at 67.
17. *Id.*
18. *Id.*
19. *Id.* at 52.
20. *Id.* at 52-53.
21. *Id.* at 53.
22. *Id.* at 53-54.
23. *Id.*
24. *Id.* at 7.
25. *Id.* According to the 2020 Resource Guide, *Sapin II* significantly strengthened France’s existing foreign bribery legislation and enforcement regime.
26. *Id.* at 71. Braskem is a publicly-traded Brazilian petrochemical company.