

## DOJ and SEC Issue Long-Awaited Update to FCPA Resource Guide

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The US Department of Justice Criminal Division and the US Securities and Exchange Commission on July 3 published the Second Edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, the consolidated manual that practitioners rely on heavily in navigating the Foreign Corrupt Practices Act.

*A Resource Guide to the U.S. Foreign Corrupt Practices Act* (Resource Guide), which the US Department of Justice (DOJ) and US Securities and Exchange Commission (SEC) originally published in 2012, was revised only once before—in 2015—with primarily nonsubstantive changes that were released in a similarly below-the-radar fashion. While the core of the Resource Guide remains the same, the Second Edition, which the DOJ and SEC released over the July 4 holiday weekend, offers updated guidance on the definition of a “foreign official,” the jurisdictional reach of the Foreign Corrupt Practices Act (FCPA), the mens rea required for criminal violations of books and records and internal controls provisions, and the limitations period for violations of the accounting provisions.

The greater willingness of defendants to challenge FCPA prosecutions has led to an expansion of the body of case law interpreting the FCPA. The Second Edition incorporates these developments, including recent court decisions in *United States v. Hoskins* and *SEC v. Liu*.

Notably, the Second Edition incorporates the FCPA Corporate Enforcement Policy, among other policies, for the first time. As before, the updated guidance continues to provide a detailed

compilation of information about the FCPA, its provisions, and DOJ and SEC enforcement.

### Notable Updates

Importantly, the Second Edition provides additional clarity on the hallmarks of an effective compliance program, policies regarding mergers and acquisitions (M&A) issues, and more comprehensive examples of declinations.

The newest guidance makes the following notable updates:

- Providing additional focus on M&A and corporate successor liability: The Second Edition speaks in greater depth to the principles of corporate successor liability under the FCPA, including a detailed discussion of successor liability in the M&A context. It provides recent examples of DOJ enforcement actions in connection with (M&A) and offers practical advice to companies with respect to due diligence and disclosure.
- Clarifying the FCPA’s application to weaknesses in issuers’ internal *accounting* controls systems: The Second Edition clarifies the Resource Guide’s earlier language relating to the FCPA’s “internal controls” provisions to make clear that those provisions apply to a company’s system of internal *accounting* controls by adding the word “accounting” to the earlier text. Importantly, the Second Edition also makes clear that “a company’s internal accounting controls are not synonymous with a company’s compliance program,” and further explains how, in the view of the DOJ and SEC, effective compliance programs “contain[] a number of components that may overlap with a critical component of an issuer’s internal accounting controls.”

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- **Supplementing compliance guidance:** The Second Edition builds on the previous Resource Guide’s compliance program guidance and discussion of effective compliance programs. It clarifies the DOJ’s position that “the truest measure of an effective compliance program is how it responds to misconduct” and includes additional compliance program resources and guides.
  - **Incorporating new DOJ and SEC policies:** The Second Edition summarizes new policies applicable to the FCPA that have been announced in the DOJ’s and SEC’s continuing efforts to provide increased transparency, including the DOJ’s FCPA Corporate Enforcement Policy, Selection of Monitors in Criminal Division Matters, Coordination of Corporate Resolution Penalties (or the anti-piling-on policy), and the Criminal Division’s Evaluation of Corporate Compliance Programs.
  - **Providing additional examples:** Critically, the Second Edition provides additional examples, including replacing some of the prior enforcement examples with what appears to be more recent case examples. Practitioners and companies rely heavily on these examples for guidance and insight. The Second Edition includes new examples concerning, among other things, FCPA jurisdiction, the standard for “intent,” travel and entertainment violations, hiring relatives of foreign officials, hospitality, charitable donations, third-party/partner violations, local law exceptions, internal controls, and books and records violations.
  - **Explaining guiding enforcement principles:** The Second Edition includes a dedicated chapter, Guiding Principles of Enforcement, which explains the DOJ principles of federal prosecution. It also provides additional examples of cases where the DOJ has issued declinations, bringing additional transparency to enforcement decisions.
  - **Providing updated guidance on the definition of “agent” for liability purposes under the FCPA:** In *United States v. Hoskins*, the US Court of Appeals for the Second Circuit ruled that individuals not directly covered by the FCPA antibribery provisions could not be found guilty of conspiring to violate the FCPA unless the DOJ could prove that the individual acted unlawfully as an agent of a domestic concern. The Second Edition explains *Hoskins* and contrary authority, asserting the DOJ’s position that the question is “unsettled.” The Second Edition also clarifies the DOJ’s position that “[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.”
  - **Clarifying the definition of “instrumentality”:** The FCPA defines “foreign official” as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.” Just a few years after the original Resource Guide was published, the US Court of Appeals for the Eleventh Circuit ruled that that “instrumentality” meant “an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own.” The Second Edition addresses this intervening development in case law and adopts this definition, asserting that the term is “broad” and making a determination requires a fact-specific inquiry. It also endorses the Eleventh Circuit’s list of factors for conducting this fact-based inquiry and advises companies to “consider these factors” when evaluating compliance programs and assessing risk.
  - **Clarifying DOJ’s position on the limitations period for FCPA violations:** For substantive violations of the FCPA antibribery provisions, the five-year limitations period set forth in 18 USC § 3282 applies. For violations of the FCPA accounting provisions, which are defined as “securities fraud offense[s]” under 18 USC § 3301, there is a limitation period of six years.

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- Incorporating court rulings on disgorgement: In *Kokesh v. SEC* and *SEC v. Liu*, the US Supreme Court clarified that the civil disgorgement remedy is subject to a five-year statute of limitations and that disgorgement is permissible equitable relief when it does not exceed a wrongdoer's net profits and is awarded for victims. The Second Edition includes a brief discussion of these recent decisions but does not provide a fulsome analysis.
  - Correcting the mens rea standard for criminal liability for books and records and internal controls violations: The Second Edition revises the original Resource Guide's language regarding the standard for criminal liability under the FCPA's books and records and

internal controls provisions. The updated text makes clear that a criminal violation requires a "knowing and willful" failure to maintain accurate books and records or implement an adequate system of internal accounting controls.

As with the prior version, the Second Edition remains "non-binding, informal, and summary in nature." And, many FCPA provisions remain open to interpretation notwithstanding this updated guidance. However, despite the increased number of challenges to FCPA prosecutions, there remains a dearth of case law interpreting the FCPA's provisions, and the Resource Guide will continue to serve as a key resource in advocating to the DOJ and SEC.