

Alert | White Collar Defense & Special Investigations



July 2020

Highlights from the DOJ and SEC's Updated FCPA Resource Guide

On July 3, 2020, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) released the second edition of their joint Resource Guide to the U.S. Foreign Corrupt Practices Act (the Guide). The second edition does not break new ground. The revisions consist primarily of incorporating new DOJ guidance into the Guide, an expanded discussion of successor liability, new sections on forfeitures and coordinated resolutions, and guidance related to new case law, all of which are addressed in this alert.

Incorporating New DOJ Guidance

The second version of the Guide incorporates discussion of policies that the DOJ has issued since the Guide was last updated. Specifically, it provides a summary of the policies and how they have been applied by the DOJ.

For example, the Guide now includes a section on the DOJ's FCPA Corporate Enforcement Policy (CEP). The CEP provides that when companies voluntarily self-disclose misconduct, fully cooperate with the investigation, and institute timely and appropriate remedial measures, the DOJ will have a presumption of declining prosecution or, depending on the circumstances, will provide a recommended reduction in penalties. The Guide also provides three recent examples of CEP declinations.

Similarly, the Guide now includes a summary of the DOJ's Memorandum on the Selection of Monitors in Criminal Division Matters. This policy provides guidance regarding whether the DOJ will impose a monitor as part of a corporate resolution, which broadly includes weighing (1) the potential benefits of a monitor for the company and the public and (2) the cost and impact of the monitor on the company.

Discussion of Successor Liability

The Guide includes revised commentary regarding corporate successor liability. The Guide recognizes that in the mergers and acquisitions context, “robust pre-acquisition due diligence” may not always be possible. Under the revised guidance, a path to declination remains open. In those cases, the DOJ and SEC will consider whether the post-acquisition due diligence is thorough, whether an effective compliance program has been implemented, and whether the conduct was voluntarily disclosed in a timely manner. This new section also includes updated examples of enforcement cases involving successor liability.

New Sections on Penalties

DOJ and SEC added two new sections to the “FCPA Penalties, Sanctions and Remedies” chapter of the Guide. The first addresses forfeitures and disgorgements. It briefly notes that the purpose of disgorgement is not punishment, but an equitable remedy to prevent the perpetrator from profiting by its own misconduct. The new section cites the U.S. Supreme Court case *SEC v. Liu* for the proposition that disgorgement is permissible when the amount does not exceed net profits. It also notes the Supreme Court's decision in *Kokesh v. SEC* indicating that the five-year statute of limitations under 28 U.S.C. § 2462 applies to the civil disgorgement remedy.

The second addition describes the U.S. regulators' policy of avoiding duplicative penalties for the same conduct in cases where foreign authorities are resolving cases with the same company. It outlines the factors that determine whether and how much credit should be given for penalties imposed in a coordinated resolution. These include the egregiousness of the company's misconduct, statutory mandates, risk of delay of final resolution, and the adequacy and timeliness of the company's disclosure and cooperation with DOJ.

New Case Law

The Guide adds analysis of two cases: *Esquenazi* and *Hoskins*. The FCPA broadly defines foreign officials to include officers or employees of a “department, agency, or **instrumentality** of a foreign government.” The Guide's inclusion of the Eleventh Circuit *Esquenazi* factors to determine if an entity is an “instrumentality” is significant because the FCPA does not define “instrumentality.” In the absence of a controlling definition, *Esquenazi* provided a “non-exhaustive list” of factors to determine whether the government controls an entity and whether the entity performs a function the government treats as its own. The Guide carefully notes that numerous courts, including the court in *Hoskins*, have approved final jury instructions providing a similar non-exclusive list of factors to be considered.

The Guide also uses *Hoskins* to demonstrate the government's broad view of jurisdiction over agents. Specifically, the Guide includes the ruling from the Second Circuit in *Hoskins* which concluded that those not directly covered by the FCPA could not be held liable for aiding and abetting or conspiring to violate the FCPA anti-bribery provisions. The Guide also points out that there is at least one conflicting ruling which rejected the reasoning in *Hoskins*, and that *Hoskins* speaks only to the anti-bribery provisions and not the accounting provisions of the FCPA which apply to “any person.”

Authors

This GT Alert was prepared by:

- **Cuneyt A. Akay** | +1 303.572.6576 | akayc@gtlaw.com
- **Sandra D. Gonzalez** | +1 512.320.7234 | gonzalezsd@gtlaw.com
- **Michael X. Marinelli*** | +1 512.320.7236 | marinellimx@gtlaw.com
- **Adelaida Vasquez Mihi** | +1 713.374.3635 | mihua@gtlaw.com
- **Tyler D. Coombe** | +1 303.572.6558 | coombet@gtlaw.com

*Admitted in the District of Columbia. Not admitted in Texas.

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.~ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.ª Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¢Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*