

Cuneyt Akay ([00:16](#)):

[inaudible] welcome to the GT ABC podcasts.

Cuneyt Akay ([00:19](#)):

I'm your host, Cuneyt Akay here. The GT stands for Greenberg Traurig and the ABC stands for anti-bribery and corruption. In this episode, we're going to turn our attention to the U S department of justice and the securities and exchange commissions. Second edition of a resource guide to the U S foreign corrupt practices act, which I'll just refer to as the resource guide or simply the guide. First, we will discuss the background and history of the guide. Second, we'll discuss some important updates that the DOJ and SEC provided in this guide. And third we'll end with some key takeaways for compliance professionals based on the revisions to the latest version of the guide. Let's start with the background and purpose of the guide. And the best place to start is with a little history of the guide itself in November, 2011, it was first announced that the DOJ and sec were considering putting together some sort of guidance regarding the FCPA.

Cuneyt Akay ([01:20](#)):

Well, why was that needed? Well, the primary reason for this is that there was very limited authority or guidance that existed at that stage on the then nearly 35 year old statute. And the primary reason for that is that there are very few actual cases that have been litigated. So there is very little case law to provide guidance to companies, FCPA practitioners, and compliance professionals. Well, if we're being honest, that case still exists today because there's still very few cases that actually get litigated that provide some sort of meaningful guidance to FCPA practitioners and to companies at the time, the only guidance that really existed came from a few different sources. First, it came from the DOJ when the DOJ would release what they refer to as the DOJ opinions. And at the time there are around 40 of those. And as you can imagine, when I say dude, DOJ opinions, that's exactly what they were.

Cuneyt Akay ([02:18](#)):

They were simply opinions. They offered some guidance, but they certainly weren't binding and didn't really have any effect other than presenting a certain fact base scenario and answering questions based on that exact scenario. The other type of guidance that existed at the time was when DOJ and sec officials would give speeches at conferences or in public forums. And at the time the most important guidance really came from DOJ and sec complaints and settlements. And as we know, since those are not issued by judges and they're not rulings or opinions, those really only give us a small sample or a small idea of what the DOJ and sec may be thinking about when comes to FCPA enforcement. So at the time there was really no centralized guidance. There's not a large enough body of case law, and there was no real meaningful direction regarding FCPA enforcement clients.

Cuneyt Akay ([03:13](#)):

So the guide was originally first issued on November 14th, 2012. And that was interesting timing because one, it came on the heels of a U S presidential election and two, it came on the Eve of the largest FCPA conference that happens on a yearly basis. In fact, I very clearly remember being on the plane on my way to the conference in DC. When my phone started blowing up with news that the DOJ guidance, the DOJ and sec guidance had been released. And I remember reading on my very small phone on the plane, the hundred and 30, some odd pages of the guidance as I was about to go to this conference. And if I was to make a prediction at the time, I knew that this guidance was going to be heavily talked about during this conference. Of course, none of the official agenda at the conference

really involved the DOJ guidance itself because no one knew exactly when it was going to be released, but it certainly was the talk of everyone around the water cooler during that FCPA conference.

Cuneyt Akay ([04:17](#)):

So what is the purpose and usefulness of the guide? Well, initial version of the guide was quite helpful as is this version, but at the time it was also quite unique. So the resource guide offered statutory analysis, centralized existing guidance that already existed and offered insights into how the DOJ and sec would interpret the FCPA, particularly by highlighting interesting hypothetical situations in the guide. And the guide itself addressed a wide variety of topics, including who and what is covered by the FCPA anti-bribery and accounting provisions. It gave guidance regarding the definition of foreign official. It discussed the jurisdictional reach of the FCPA types of proper and improper payments, applications of successor liability in the mergers and acquisitions context. And it gave different types of civil and criminal resolution examples available in the FCPA context for us compliance professionals. The most useful part of the guide was and still is the hallmarks of effective compliance program discussion that existed both in the initial version of the guide and is largely unchanged in the second version.

Cuneyt Akay ([05:30](#)):

Now, overall, the guide was pretty unique because as far as I'm aware, there's no other area of the law where the DOJ and SEC have provided the public with so much information on their enforcement approach or their priority. Of course, the guide is not without limitation first and foremost, the guide is not law. And second, as the guide says, right at the beginning, it's not binding guidance, that's being offered by the DOJ or SEC what it simply is, is the DOJ and SEC giving their interpretations of the FCPA, which of course is still very important because as we know, well, over 90% of cases are settled in negotiations with those agencies and are not resolved by U S judges or by U S courts. The second edition, which was released somewhat quietly on the Eve of the July 4th holiday this year does provide some interesting insights. Now, the second addition doesn't break any new ground, but it does provide updates from the last eight years of FCPA cases.

Cuneyt Akay ([06:33](#)):

And there have been somewhere around the neighborhood of a hundred new settlements since the first guide was issued and it provides the developments and other related areas of the law. And finally it updates the guide with government issued guidance and policies. Next we'll cover what has changed in the second edition of the guide. As I mentioned earlier, there's nothing groundbreaking, but we will cover five areas where the guide has provided some updates and potential clarity on FCPA enforcement and compliance as well as some insights in how the DOJ and sec are approaching certain issues. The first key revision or update we'll discuss is regarding the definition of foreign official. The second edition of the guide addresses changes in case law regarding the definition of foreign official. And this is important because the FCPA anti-bribery provisions apply to CRA payments made to among other people, foreign officials, the FCPA defines foreign official to include among other things, officers or employees of an instrumentality of a foreign government.

Cuneyt Akay ([07:39](#)):

Now the guide's inclusion of the 11th circuit courts Esquenazi factors to determine if an entity is an instrumentality is significant because the FCPA does not define instrumentality. And in the absence of a controlling definition, the Esquenazi case provided a non-exhaustive list of factors to determine whether the government controls an entity and whether the entity performs a function that the government

treats as its own. In other words, the second edition of the guide provides a fuller, broader definition of foreign official based on case law developments that occurred between the second edition and the first edition. Now, the second edition of the guide carefully notes that numerous courts have approved final jury instructions, providing a similar non-exclusive list of factors to be considered. So what that really means is the Esquenazi factors from the Esquenazi case really do give us good guidance as to when courts are going to consider an entity to be an instrumentality of a foreign government.

Cuneyt Akay ([08:46](#)):

And therefore the officers and employees of that entity would then be foreign officials under the FCPA, the second or update we'll talk about concerns. The government's broad view of its FCPA jurisdiction, and particularly here over agents or foreign agents and the guide, or the second edition of the guide does this in a somewhat backward way. The second version of the guide highlights the second circuit court's decision recently in the Hoskins case, which was a case involving a foreign agent. And here the second circuit limited, the FCPA has jurisdictional reach regarding conspiracy and accomplice liability theories. However, the guide points out that this decision hasn't been applied outside the second circuit and calls the law unsettled. The guide had also seemingly ignores that Hoskins FCP charges were subsequently dismissed. So what the guide really seems to be doing is sending a signal that the DOJ will continue to advance expansive theories of FCPA jurisdiction.

Cuneyt Akay ([09:51](#)):

And as we have discussed on previous episodes of this podcast, one of the enforcement trends that we're keeping an eye on is whether individual defendants based on this Hoskins case and perhaps corporate defendants will pursue jurisdictional challenges and future enforcement cases. The third key revision and update we'll talk about is regarding internal controls. And here the second edition of the guide provide some clarity on internal controls. Recently there've been numerous sec actions involving internal controls deficiencies. The FCPA is internal accounting controls provision requires a company to provide reasonable assurances regarding the reliability of financial reporting in the preparation of financial statements, the updated language in the guide acknowledges a reality that many practitioners and compliance professionals already understand, which is that quote, although company's internal accounting controls are not synonymous with a company's compliance program, an effective compliance program contains a number of components that may overlap with a critical component of the company's internal controls.

Cuneyt Akay ([11:05](#)):

So what does that really mean? Well, the guide stating that internal controls must take into account the operational realities and risks attendant to a company's business, such as the nature of its products or services, how those products or services get to the market, the nature of its workforce, the degree to which that company is regulated, the extent of it, of that company's government interaction. And finally, the degree to which that company has operations in countries with a high risk of corruption. In other words, a high corruption, reputational risk, but to a certain extent here, the guide is really overstepping its bounds. The FCPA does not require internal controls that take into account operational risks and realities attendant to a company's business close quote. The law simply States the companies provide reasonable assurances regarding the reliability of their financial reporting and their financial statements.

Cuneyt Akay ([12:04](#)):

So here, the guide is Really stating that given the reality of FCPA enforcement and the expanded number of internal controls cases that have come out in recent years, the guidance seems to indicate and give some guidance to some of best practices regarding internal controls for compliance professionals and lays out a series of factors. Companies should at least consider when designing their internal controls program. The next key revision and update comes in the context of successor liability. The updates to the guide recognize that in the mergers and acquisition acquisitions context, robust pre-acquisition due diligence and not always be possible. And for corporate attorneys and compliance professionals, this is a welcome acknowledgement by the DOJ and sec, because as we know at times, it is very difficult to conduct real robust pre acquisition pre acquisition due diligence on a company before a deal is closed and under the revised guidance with the DOJ and sec state is that they will consider whether one post acquisition due diligence is thorough to whether an effective compliance program has been implemented.

Cuneyt Akay ([13:18](#)):

And third, whether the conduct was voluntarily disclosed in a timely manner when the DOJ and FTC consider whether to take action against a successor company for violations identified at the predecessor company, the updated language also includes updated examples of enforcement cases involving successor liability. So these revisions to the guide are particularly important for compliance professionals and corporate attorneys, because the DOJ is signaling that they understand that robust pre-acquisition due diligence is not always something that can be done, but with the DOJ and sec are telling companies, is that in these situations, the DOJ and sec will certainly look at the thoroughness of the post acquisition due diligence and how a company has really roped in the predecessor company into the existing compliance program that the acquiring company has put together. And certainly the DOJ and sec are tying, uh, companies that if you do learn of misconduct, that happened at the acquired company that voluntary disclosure in a timely manner also will help a successor company avoid liability. The last revision and update we'll talk about involves some of the policy changes that have occurred since the first edition of the guide came out back in 2012,

Speaker 3 ([14:42](#)):

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Cuneyt Akay ([14:43](#)):

Resource guide incorporates a discussion of particularly two new policies that the DOJ has issued over the last couple of years. And the two we'll cover are the DOJ FCPA corporate enforcement policy, and the memorandum on selection of monitors in the criminal division. Man matters. First, let's discuss the DOJ's FCPA corporate enforcement policy. This policy started as a pilot program in 2016, and the policy was issued as a policy by the DOJ in 2017, and has been amended as recently as last year. The corporate enforcement policy provides that when companies voluntarily self-disclose misconduct to the government fully cooperate with investigations and Institute timeline, appropriate remedial measures that the DOJ will have a presumption of declining prosecution, or depending on the circumstances, we'll provide a recommended reduction and penalties for misconduct. The resource guide also provides three recent examples of situations where companies receive declination of prosecutions pursuant to the corporate enforcement policy.

Cuneyt Akay ([15:52](#)):

Now, this policy is important because it lays out a strategy for companies to follow when corruption related misconduct has taken place and offers a chance for companies to either receive a declination of prosecution or a reduction in DS. The second policy that's referenced in the resource guide is the DOJ memorandum on the selection of monitors in criminal division matters. And this policy provides guidance on whether the DOJ will impose a monitor as part of the corporate resolution. So in this situation, the company has already been, it was already settled with the DOJ and the decision about whether to appoint a monitor is being made. And of course, as many of us know in this space, the appointment of a corporate monitor is not only expensive, but can be very intrusive for a company's operations. So this memorandum discusses two factors that the DOJ will look at.

Cuneyt Akay ([16:45](#)):

One is weighing the potential benefits of a monitor for the company and to the public and to, and this is a breath of fresh air for all of us. The DOJ will also look at the cost and impact of the monitor on the company. Now, there are certainly other revisions and updates that have come about in the second edition of the FCPA guide. But as I stated earlier, these five that we talked about are really the key revisions and key updates that should at least provide some guidance into what the DOJ and SEC are thinking about when they're looking at FCP enforcement and also signal some areas where companies and compliance professionals can focus their efforts to either help mitigate the risk of an FCPA enforcement action occurring, or potentially to handle situations where misconduct has occurred and hopefully get a declination of prosecution or a reduction in penalties. So what are the key takeaways from the second version of the game?

Cuneyt Akay ([17:44](#)):

Well, number one, there's nothing groundbreaking in this edition of the guide. The second edition is largely an update on the original. The majority of the changes involve references to new case settlements that have occurred over the last eight years, new updates to related laws and new DOJ policies, particularly the DOJ has policy on the corporate enforcement policy and the DOJ's new policy on monitorships. Second, a few of the changes do provide clarity for companies and compliance professionals. The second edition of the guide incorporates more recent case law regarding the term instrumentality for the purposes of identifying foreign officials under the FCPA. The second edition of the guide signals, the DOJ and SEC will continue to have a broad view of their FCPA jurisdiction. The second edition of the guide provides some guidance on good practices and factors to consider in developing internal accounting controls. And the second version of the guide acknowledges that robust pre-acquisition due diligence may not always be possible, but provides recommendations for successor companies post acquisition. And my third and final takeaway is the resource guide remains a very useful and helpful resource for companies and practitioners. It really is a one-stop shop for companies and practitioners to understand the perspective of the two government agencies responsible for enforcing the FCPA. I would certainly encourage anyone that wants to have a better understanding of the FCPA and its enforcement to read the second edition of the resource guide. Thank you for listening to this episode of the GT ABC podcast.

Cuneyt Akay ([19:48](#)):

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